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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES**

**ONE HUNDRED AND FOURTH REPORT**

**ANNUAL REPORT 1995-96**

**JUNE 1997**

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**SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES**

**MEMBERS OF THE COMMITTEE**

Senator Bill O'Chee (Chairman)  
Senator Mal Colston (Deputy Chairman)  
Senator John Hogg  
Senator Sue Mackay  
Senator Kay Patterson  
Senator Marise Payne

## **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 Bill O'Chee (Chairman)<sup>1</sup>  
Senator Mal Colston (Deputy Chairman)<sup>2</sup>  
Senator Eric Abetz<sup>3</sup>  
Senator Kim Carr<sup>4</sup>  
Senator Jacinta Collins<sup>5</sup>  
Senator Sue Mackay<sup>6</sup>  
Senator Nick Minchin<sup>7</sup>  
Senator Kay Patterson<sup>8</sup>  
Senator John Tierney<sup>9</sup>  
Senator Tom Wheelwright<sup>10</sup>

## 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.

<sup>1</sup> Senator O'Chee was reappointed on 8 May 1996 and elected as Chairman on 23 May 1996. Senator O'Chee was a former Deputy Chairman from 30 September 1993 to 29 April 1996.

<sup>2</sup> Senator Colston was reappointed on 2 May 1996 and appointed as Deputy Chairman on 23 May 1996. Senator Colston was a former Chairman from 14 May 1990 to 18 October 1990 and from 30 September 1993 to 29 April 1996.

<sup>3</sup> Senator Abetz was a member of the Committee from 24 February 1994 to 29 April 1996.

<sup>4</sup> Senator Carr commenced as a member of the Committee on 2 May 1996.

<sup>5</sup> Senator Collins was a member of the Committee from 30 March 1995 to 29 April 1996.

<sup>6</sup> Senator Mackay commenced as a member of the Committee on 2 May 1996.

<sup>7</sup> Senator Minchin was a member of the Committee from 18 August 1993 to 29 April 1996.

<sup>8</sup> Senator Patterson commenced as a member of the Committee on 8 May 1996.

<sup>9</sup> Senator Tierney commenced as a member of the Committee on 8 May 1996.

<sup>10</sup> Senator Wheelwright was as a member of the Committee from 30 May 1995 to 29 April 1996.

## Statistics

1.8 During the year the Committee scrutinised 1,900 instruments, which, as a result of the federal election in 1996, was less than the previous year. The following table sets out the numbers and broad categories of these instruments.

### Instruments examined by the Committee 1995 – 96

Civil aviation orders	609
Statutory rules	398
Veterans' entitlements instruments	271
Public service and defence determinations	241
Health and family services instruments	74
Radiocommunications instruments	48
Customs and excise instruments	27
Remuneration Tribunal determinations	22
Insurance and Superannuation Commissioner's rules	22
Primary industries and energy instruments	21
Education instruments	20
Miscellaneous instruments, details of which are in Appendix 1	147
	<hr/>
	1,900

## 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:

One Hundred and Second Report, *Annual Report 1994–95*, tabled on 30 November 1995.

One Hundred and Third Report, *Scrutiny by the Committee of the Export Inspection and Meat Charges Collection Regulations*, tabled on 25 June 1996.

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

On 23 August 1995 Senator Colston, on behalf of the Committee, made a statement to the Senate on the Fifth Australasian and Pacific Conference on Delegated Legislation and Second Australasian and Pacific Conference on the Scrutiny of Bills.

On 19 September 1995 Senator Colston, on behalf of the Committee, made a statement to the Senate on Scrutiny by the Committee of Regulations Implementing a National Uniform Legislative Scheme.

On 21 November 1995 Senator Colston, on behalf of the Committee, made a statement on Government amendments of the Legislative Instruments Bill 1994.

On 23 November 1995 Senator Colston, on behalf of the Committee, made a statement on Remuneration Tribunal Determination No 12 of 1995.

On 30 November 1995 Senator Colston, on behalf of the Committee, made a statement to the Senate on the Approved Occupational Clothing Guidelines made under the *Income Tax Assessment Act 1936*.

On 30 November 1995 Senator Colston, on behalf of the Committee, made a statement to the Senate on the work of the Committee.

On 23 May 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on the first meeting of the Committee since the 1996 federal election.

On 25 June 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on the 103rd Report – *Scrutiny by the Committee of the Export Inspection and Meat Charges Collection Regulations*.

On 25 June 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on delegated legislation affecting civil aviation.

On 26 June 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on the work of the Committee.

On 27 June 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on native title instruments.

## 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, 30 November 1995, Senate Hansard, p. 4361**

#### Overview

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

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

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

2.5 During the sittings the Committee scrutinised 879 instruments, which is an historically high number. Of these, 199 were statutory rules, which are generally better drafted and presented than other series of delegated legislation. The other 680 instruments were the usual heterogeneous collection of different series.

2.6 Each of the 879 instruments was scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 96 prima facie defects or matters worthy of comment in those 879 instruments. The defects are described below under each of the four principles.

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

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

2.8 Under s.48(2) of the *Acts Interpretation Act 1901* an instrument to which that provision applies is void if it prejudicially affects any person retrospectively apart from the Commonwealth or a Commonwealth authority. The Explanatory Statement for one instrument advised that it operated retrospectively to 1 July 1995 to provide continuity for agreements in respect of gambling activities which expired on 30 June 1995. The Committee asked whether any person was disadvantaged by this, whether any activities were conducted without legal authority after 30 June, whether there was a legal hiatus after that date, and whether any person could have avoided a contract after that date. Another instrument, which was made on 26 September 1995, purported to forbid specified activities from 1 January 1995. The Explanatory Statement for another instrument advised that it did not operate retrospectively. This would have been the case if s.48(2) applied from the date of making an instrument, but it applies from the date of gazettal, which was 14 days later. Two other instruments did not notify the date of gazettal, although both provided for this to be done. On the other hand, the Explanatory Statement for another instrument advised that its retrospectivity was not prejudicial, although no retrospectivity was evident on its face, while another instrument was made on a date later than it was gazetted.

2.9 Under s.49A of the *Acts Interpretation Act* an instrument to which that provision applies may incorporate provisions of an Act or delegated legislation in force from time to time, but may only incorporate other material as in force when the instrument takes effect. The Committee ascertains that such incorporations are valid. One instrument incorporated an instrument made under a specified provision of an Act, with no indication of date of making, heading, or any other identifying reference. Another instrument incorporated a Schedule published by the Department, again with no reference to a date. Another incorporated a government strategy and other packages and initiatives, with no indication of the effect of changes to those programs. Another provided for a list of superannuation schemes and incorporated any future changes to the names of the schemes.

2.10 The Committee raised other aspects of validity. For instance, subdelegation of legislative power without express statutory authority is generally invalid. Two instruments subdelegated authority to determine conditions of service. It was not clear whether provisions in another instrument were intended to be legislative, in which case they would have been invalid, or administrative. Another instrument may not have

complied with mandatory conditions required by the enabling Act. Another was made under the wrong provision, with the Explanatory Statement also advising that it was made under the same wrong provision.

2.11 Drafting of delegated legislation should be of the same standard as that of Acts. The Committee raised a number of apparent drafting defects. One instrument included obsolete expressions such as laundryman and kitchenman. Another may have been unnecessarily complex. Another provided for an offence but did not provide for a penalty. Another was numbered incorrectly. Another provided for the continuation of a provision which was a legal nullity. An Explanatory Statement included wrong references to legislative requirements.

2.12 Other instruments may have affected parliamentary propriety. One provided for the Minister to act in a dual capacity as Minister and as the Lotteries Commission, a number of provisions giving the Minister power to approve his or her own decisions. In another case there was an apparent delay of some years in a statutory requirement to make an instrument as soon as practicable. Another instrument did not provide criteria for the appointment of members of an authority which had considerable powers. Another instrument, made to correct an inadvertent error which affected members of the public, took 10 months to make. Another instrument provided for the Minister to delegate important powers to any person at all. Another instrument did not provide for any delegation, even although this appeared necessary. Numbers of instruments did not include a system of numbering or citation, which may be confusing to users.

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

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

2.14 Provisions of delegated legislation should not operate harshly or unfairly. One instrument provided for an application affecting business operations to be received within three days of the date upon which the instrument was made. Another provided for certain Commonwealth employees to elect to "contract out" of new beneficial leave rights in some areas in order to avoid new detrimental leave provisions in another area. In this case the Committee asked for how long the elections would operate and when it was intended that employees should come under the new beneficial provisions. Another instrument provided for people to comply with an October 1995 publication of the Department from 1 December 1995. In this case the Committee asked what notice and publicity the new publication had received.

2.15 Offence provisions should be reasonable. One instrument provided for a number of offences punishable by fines of \$50,000 to be heard by a court of summary jurisdiction. Some of those offences, punishable by such large fines, were strict liability offences. Some of these strict liability offences were inconsistent with similar offences which did not involve strict liability. For instance, some offences were committed if a

person did not comply with an issued notice while others were guilty only if they did not comply with an issued notice which was actually received. Another provision reversed the usual onus of proof in relation to various statements in the complaint relating to an offence.

2.16 Fees and charges set by delegated legislation should be reasonable and their basis explained by the Explanatory Statement. One instrument doubled virtually all fees without explanation, in one case to \$20,000. Another set a new licence fee at \$2,600, again without explanation.

2.17 Retrospective provisions, even if valid, should not be unusual or unexpected. One instrument provided for retrospective operation from 1992 of aspects of a public sector superannuation scheme.

2.18 The Committee also protects personal privacy. One instrument provided for the mandatory inclusion of the date of birth of certain employees on a list, although this did not appear to be necessary for the purposes of the list.

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

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

2.20 The Committee scrutinies closely instruments which provide for discretions which could adversely affect business activities. The Explanatory Statement for one instrument advised that certain companies would be required to report regularly to a government agency to demonstrate compliance with a standard. The instrument itself did not, however, appear to provide for this, or for review of an adverse decision by the agency. Another instrument provided for review of a decision by a surveyor employed by a government agency. The Committee noted that the Minister had statutory authority to give directions to the agency and suggested that AAT review, at least of the surveyor's decision, may be appropriate. Another instrument provided for AAT review of a decision not to grant or to revoke a permit, but not of a decision to impose conditions on a permit. One instrument provided for a discretion to refund fees where it appeared that the legislative intent was to give a refund in all relevant cases. Another provided a discretion to refund although the Explanatory Statement advised that a policy decision to return money on an agreed basis had been agreed with industry representatives. The Explanatory Statement for another advised that the effect of a discretion was amelioratory, but the instrument itself did not provide for review of an adverse decision.

2.21 Other discretions affecting business which may not have provided for merits review included decisions to suspend a subsidy payment, to decide whether something was outside a person's control and to grant a licence.

2.22 Internal review of the merits of administrative decisions is usually not as satisfactory as external review by an independent body. One instrument provided only for review by the Minister. Even if the Minister could not delegate this power it may not have been satisfactory for the Minister to review decisions of the Department which he or she administers or of authorities within the Minister's portfolio. Another instrument provided not only for the Minister to review decisions which could affect business, but also provided for the Minister to delegate this power of review to any person at all.

2.23 The Committee also scrutinies closely instruments which provide for apparently unreviewable discretions which may affect personal rights. One such instrument provided for a discretion to decide whether a person was financially disadvantaged and another for a discretion to alter individual accrued superannuation benefits. Another provided for decisions relating to programs for the long term unemployed, whether a person was affected by a decision not to release a forest coupe, whether a person had unreasonably delayed taking certain action and whether a person had taken reasonable steps.

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

2.24 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.

#### **Other developments**

2.25 Members, the Legal Adviser, Acting Secretary and staff attended the Fifth Australasian and Pacific Conference of Delegated Legislation Committees and Scrutiny of Bills Committees, held in Darwin from 5-7 July 1995. The Chairman, Senator Colston, presented a paper on legislation by incorporation. Senator Colston reported to the Senate on the Conference on 23 August 1995.

2.26 The Chairman circulated a discussion paper, Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles, in July 1995.

2.27 On 19 September 1995 the Chairman made a statement to the Senate on the Committee's scrutiny of regulations made under the *Road Transport Reform (Vehicles and Traffic) Act 1993*.

2.28 On 27 September 1995 Members of the Committee, the Legal Adviser, Secretary and staff met with Members of the Scrutiny of Legislation Committee of the Queensland Parliament.

2.29 On 21 November 1995 the Chairman made a statement to the Senate on the Committee's scrutiny of proposed government amendments of the Legislative Instruments Bill 1994.

2.30 The Committee agreed that it would table a Report on its scrutiny of Export Inspection and Meat Charges Collection Regulations and related instruments.

2.31 On 30 November 1995 the Chairman made a statement to the Senate on the Committee's scrutiny of the Approved Occupational Clothing Guidelines made under the *Income Tax Assessment Act 1936*.

2.32 On 30 November 1995 the Chairman tabled the Committee's *One Hundred and Second Report: Annual Report 1994-95*.

2.33 The Committee arranged to act as joint hosts, with the Standing Committees for the Scrutiny of Bills and for Legal and Constitutional Affairs, of a dinner with the Administrative Review Council on 30 November 1995.

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

**Senator O'Chee, 26 June 1996, Senate Hansard, p. 2175**

#### **Overview**

2.35 During the present sittings the Committee maintained its non-partisan scrutiny of the continuing large number of disallowable instruments of delegated legislation tabled in the Senate. In the course of the sittings the Committee scrutinised 1021 such instruments. Only 199 of these were in the Statutory Rules series, which are generally better drafted and presented than other series. This is a trend that has been evident for some years. The other 822 instruments were the usual heterogeneous collection of different series.

2.36 The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure compliance with its four principles, which cover all aspects of personal rights and parliamentary propriety. If the Committee detects any breach of these principles it writes to the Minister or other law maker in respect of the apparent defect, asking that the instrument be amended or an explanation provided. If the breach appears serious then the Chairman of the Committee gives a notice of motion of disallowance in respect of the instrument. This allows the Senate, if it wishes, to disallow the instrument. This ultimate step is rarely necessary, however, as Ministers almost invariably take action which satisfies the Committee.

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

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

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

2.39 Technical validity, however, is an important aspect of the Committee's work. For instance, in the absence of express authority in the enabling or another Act, delegated legislation may not itself delegate the power to legislate. This was a problem with four separate instruments, relating to purported authority to make rules, determinate dates and set the conditions of performance pay. Also, unless authorised by an Act, instruments which operate with prejudicial retrospectivity are void. Three instruments appeared to operate in this way, all of which affected people engaged in commercial operations. Unless authorised by an Act, instruments may not incorporate material as amended from time to time, other than an Act or regulations. One instrument, also affecting commercial operations, purported to incorporate not only Acts as amended but also Acts as replaced.

2.40 Any provisions relating to making instruments which are specific to a particular Act must be observed, as must the general law relating to such making. One instrument purported to be made under two provisions although it appeared that it could only be made under one or the other. One instrument could only be made by an authority, but it purported to be made by the Chairman of the authority. Another instrument gave no indication that lengthy and detailed mandatory requirements for making had been followed. Another instrument which the Act required to be made as soon as possible was made eight years later. An instrument required to be tabled as soon as possible after making was tabled more than six months after that date. Two Acts required a series of delegated legislation to be numbered consecutively in the order in which instruments were made, which was not done. One instrument purported to be made by one officer but was signed by another. Another instrument purported to amend an earlier instrument which had ceased to have effect because it was not tabled. Another purported to impose conditions on a process although there was no power to do so. The Explanatory Statement for another instrument advised that Australian law was unclear on whether a particular levy was a tax or a contractual payment. One instrument inadvertently advantaged some people. The Explanatory Statement for an amending instrument which corrected the errors advised that in the meantime the inadvertent provisions were administered as they were intended to provide, not as they actually provided.

2.41 The Committee had concerns about aspects of other instruments. One instrument created an offence, but did not provide a monetary penalty. Another instrument set a maximum liability for specified torts, but did not determine whether this was for one or more tortious acts or whether the limit was for one or more claimants. One set of regulations repealed certain Australian international sanctions, while another related set suspended them. One instrument provided for blanket procedures, when specific procedures appeared to be more appropriate, while another provided for blanket procedures although two weeks earlier an instrument in the same series provided for a specific case. One instrument provided for a Commonwealth-State agreement but did not mention mainland

territories. Another instrument provided for commencement merely from March 1996 without a specific day in March.

2.42 Many instruments provide for aspects of taxes and charges. These are scrutinised by the Committee to ensure that they comply with parliamentary propriety. The Explanatory Statements for a number of instruments did not advise of the basis for increases in taxes or, in one case, of a large and unexpected increase in fees. Another instrument provided for a certificate to cost \$13.65 and a replacement certificate \$270. The Committee also questioned a quarantine charge of \$875,000 for any consignment of any animals for one year. One instrument increased a number of allowances by 35%, but increased a similar allowance by only 12%.

2.43 The Committee scrutinises the technical drafting and presentation of delegated legislation, with the object of ensuring that its quality is not less than that of Acts. One instrument used permissive rather than mandatory expressions when providing for an intended benefit. Another included the same numbers twice in a table. One instrument included two identifier numbers, which have previously resulted in tabling under one number in the House of Representatives and under another in the Senate. Other instruments had no numbering. Some instruments were made after an apparent delay; one was made to address issues which arose nine months earlier, one was made one year after the events to which it refers, while another was made after such delay that relevant allowances were increased by one third. One instrument appeared to fail to effect its legislative intent. Other instruments included drafting errors and inaccurate references. One provided for an unusually wide power of delegation. Another included obsolete expressions such as fireman, lineman and laundryman. Others included vague and subjective expressions. The Explanatory Statements for several instruments did not advise that they were made to implement undertakings given to the Committee. The Explanatory Statement for another did not advise why a sunset provision was being extended.

**Principle (b): Does delegated legislation trespass unduly on personal rights and liabilities?**

2.44 The Committee interprets this principle widely, to cover every aspect of personal rights. For instance, the Committee ensures that prescribed processes are as open as possible. Concerns during the present sittings included one provision which provided for time limits within which some decisions, but not others, had to be made. Another provision provided for reasons for some decisions, but not others, to be given. One instrument provided for reasons to be given in a notice unless this was not in the public interest, but did not include a provision to inform the recipient in relevant cases why reasons were not given. Another provided for notification of some decisions, but not others. Another provision required some decisions, but not others, to be made personally by the Minister. One instrument provided for refund of a dispute notification fee while another did not. Another instrument did not provide an opportunity for a person to respond to adverse material. Another provision did not provide a show cause process for a detrimental decision. Another instrument provided that a licence suspension ceased to have effect after 28 days but that the licence could then be suspended again.

2.45 The Committee also questions any apparent breaches of privacy. One instrument provided that certain privacy protections did not apply to information divulged to a Minister, thus diluting existing provisions. Another instrument required company officers to disclose their date and place of birth and, in other provisions, to disclose only their date of birth. In respect of another instrument, the Committee asked whether the Privacy Commissioner had been consulted on amendments of the spent conviction scheme.

2.46 The Committee questions any provisions which may be harsh or unreasonable. A form of summons to witnesses made no reference to witnesses' expenses. Another instrument provided for a disparity in the level of allowances to witnesses, with the maximum and minimum amounts payable to those called because of their scientific skills and knowledge being greater than for those called for other reasons. One instrument granted qualified privilege to supervisors performing duties under business rules, with no indication of what constituted those rules. Another instrument provided only six days for employees to elect to change from one superannuation scheme to another. Another instrument, made on 26 February 1996, required a person to obtain an annotated certificate from authorities in Europe by 31 March 1996. One instrument gave public officials power to 'discuss procedures' with employees, with a penalty of up to \$5000 for people who did not permit this. Another instrument made inadequate provision for identification of public officials who could exercise wide powers. These inadequate provisions included only vague reference to identity documents, with no requirement for photographic identification. One series of instruments appeared to make inadequate provision for overtime allowances for Commonwealth employees.

2.47 The Committee ensures that individuals are not charged for costs which should be the responsibility of the Commonwealth. One instrument was unclear as to who should bear the costs of destructions of certain goods. Another was unclear about the costs of an agreement with the Commonwealth.

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

2.48 Delegated legislation often provides for Ministers and other public officials to exercise discretions. Such discretions should be as narrow as possible, include objective criteria to limit the exercise of the discretion, and provide for appropriate review of the merits of a decision to an external, independent tribunal, which would normally be the Administrative Appeals Tribunal.

2.49 Two instruments included a double discretion. One granted a public official a discretion both to decide on the amount of an overpayment and then to decide on whether to repay it. The other granted the Minister, or in practice the Minister's delegate, a discretion both to decide on whether an activity is for certain purposes and then to decide whether to refund a fee. The Committee suggested that in both these instruments the first discretion should be subject to AAT review and the second discretion removed. Similarly, another instrument provided a discretion for a public official to waive certain payments if these

were due to mistakes by officials. The Committee considered that in this case as well the discretion should be removed.

2.50 One instrument provided for a discretion which would have an effect on superannuation payments. No criteria were provided to limit and guide the exercise of the discretion. The Explanatory Statement, however, advised that the discretion would only be exercised favourably if this was clearly justified in the particular circumstances. The Committee believes that such criteria should be included in the body of the instrument and, given the nature of both the discretion and the criteria in this case, that AAT review be provided. Another instrument provided for a public authority to revoke a licence 'at any time and for any reason'. Here also the Committee considered that a discretion drafted in such a way should be subject to external review.

2.51 Some discretions had a particular effect on individuals. One instrument granted a discretion in relation to travel costs for training courses in respect of nursing homes. Another granted a discretion in respect of accreditation or withdrawal of accreditation to carry on a profession. Other instruments provided for discretions affecting the operation of businesses. One granted a discretion to decide on refunds, remissions or rebates of duty on fuel oil. Another granted a discretion to exempt an operator from an international air cargo security program, with no apparent AAT review, although AAT review was expressly available for other discretions provided for in the instrument. Another instrument also provided for reconsideration or review of some decisions, but not others, affecting woodchip licences. One instrument provided for decisions regarding storage of seized goods. Another discretion was to approve payments by means other than by EFT. Another related to overhaul of civil aviation equipment.

**Principle (d): Does delegated legislation contain matter more appropriate for Parliamentary enactment?**

2.52 This principle is not often raised by the Committee. Nevertheless, it is an important safeguard affecting parliamentary propriety. One set of regulations provided for the modest penalty of \$1000 for fishing boats which operated without a Tori Pole, which helps prevent sea birds, particularly the Wandering Albatross, from being caught on baited hooks. This penalty, although light, was the highest that could be imposed under the enabling provisions for the regulations. The Committee asked the Minister whether the offence could be provided for under the Act, which included penalties of \$50,000.

**Other developments**

2.53 In addition to its core activity of scrutinising legislative instruments, the Committee was active in other ways during the sittings.

2.54 New members were appointed to the Committee on 2 and 8 May 1996 following the commencement of a new Parliament on 30 April 1996. At its first meeting on 23 May 1996, the Committee elected Senator Bill O'Chee as Chairman. The Chairman then appointed Senator Mal Colston as the Deputy Chairman.

2.55 On 23 May 1996 the Chairman made a special statement to the Senate on the first meeting of the Committee during the new Parliament.

2.56 On 25 June 1996 the Chairman tabled its 103rd Report, *Scrutiny by the Committee of the Export Inspection and Meat Charges Collection Regulations*. The Report describes how the Committee formally resolved to recommend that the Senate disallow a regulation unless the Minister undertook that day to amend the regulations to meet its concerns. The Report advises that the Minister did this.

2.57 On 25 June 1996 the Chairman made a special statement to the Senate on scrutiny by the Committee of delegated legislation affecting civil aviation.

2.58 The Chairman, Senator O'Chee, and the Deputy Chairman, Senator Colston, attended a meeting of Chairs of Commonwealth, State and Territory legislative scrutiny committees to discuss scrutiny of national uniform legislative schemes.

2.59 On 19 and 20 June 1996 the Committee hosted a visit by the Chairman and staff of the Scrutiny of Legislation Committee of the Queensland Parliament.

2.60 On 13 June 1996 the Committee Secretary met with a visiting Professor from Queens University, Ontario, Canada.

2.61 The Committee staff prepared the 1995 *Delegated Legislation Monitor*, a definitive reference for details of all disallowable legislative instruments tabled in the Senate in 1995. The staff also prepared weekly Monitors for delegated legislation tabled in 1996.

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

## CHAPTER 3

### GUIDELINES ON THE APPLICATION OF THE PRINCIPLES OF THE COMMITTEE

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

#### Principle (a)

**Is delegated legislation in accordance with the statute?**

#### Technical validity and effect

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

#### (i) Invalid subdelegation

3.3 Delegated legislation is void if it purports to subdelegate legislative power without the authority of an Act. The **Locally Engaged Staff Determination 1995/24** provided for employees to be enrolled in a Medical Aid Scheme for benefits up to maximum sums that the relevant secretary considered reasonable, having regard to specified criteria. The Committee asked about this apparent subdelegation of legislative power. The Minister advised that the provision was void and that an appropriate new Determination would be made. The **Remuneration Tribunal Determination No 12 of 1995** provided that the salary of the Director of the Civil Aviation Safety Authority was to be reduced by the amount of superannuation contributions payable by CASA in accordance with arrangements approved by the Minister for Finance; and that additional performance pay, subject to a ceiling, was to be assessed by the Board of CASA under guidelines advised from time to time by the Remuneration Tribunal. The Committee asked about these apparent subdelegations of legislative power. The Minister advised that, while it was arguable that the first power was an invalid subdelegation, the provision was consistent with the power to determine remuneration even though it includes the exercise of discretions by CASA and the Minister for Finance. The Minister advised that the second power was void and that future provisions in relation to performance pay would have valid effect. The **Remuneration Tribunal Determination No 24 of 1995** provided for the Deputy Chairperson of Airservices Australia, subject to the approval of the Chairperson, to receive an extra \$500 per day for work



performed in addition to his or her normal duties. The Committee asked the Minister for advice, pointing out that the Determination gave the Chairperson unfettered discretion, unlimited by criteria, to decide whether extra work should be remunerated either wholly, partly or not at all. The Minister advised that, on the one hand, the Determination did raise the issue of validity. On the other hand, however, it was possible to interpret the Determination to avoid the possibility of invalidity. The Minister further advised that the Remuneration Tribunal had been asked to seek appropriate advice to avoid the doubts about validity expressed by the Committee.

#### (ii) Incorporation of material as in force from time to time

3.4 Section 49A of the Acts Interpretation Act provides generally that delegated legislation may incorporate or adopt the provisions of an Act or 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.

3.5 The **Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1995 No 240**, listed public sector superannuation schemes which were except from certain provisions of the Act. The Regulations also provided that if a scheme was renamed then the reference to that scheme included the scheme as renamed. Some of the schemes were established under Commonwealth Acts, others under State or Territory Acts, others under trust deeds and others by other means. The Committee asked for advice on whether these automatic changes from time to time were valid under s.49A. The Parliamentary Secretary advised the Committee that the effect of s.49A had been considered during the drafting process. However, because the provision relating to renaming did not refer to the scheme from which a changed name derives, but refers instead to the fact of a change being made, s.49A was not infringed.

3.6 The **Accounting Standards AASB 1029 and 1030** incorporated other Standards as subsequently replaced or amended by another Standard. The Committee accepted that the other Standards, as disallowable instruments, could be incorporated as in force from time to time, but was concerned at the purported incorporation of replacement instruments. The Minister advised the Committee that s.49A was wide enough to apply to replacement instruments. The **Public Service Determination 1995/82** twice referred to a Code of Practice, without the usual provision that the reference was to the Code as in force at a particular date or at the date upon which the Determination came into effect. The Minister confirmed that there was no intention to incorporate the Code as in force from time to time.

#### (iii) Compliance with procedural requirements of the enabling Act

3.7 Delegated legislation must comply with specific requirements of the enabling legislation. The **Declaration of Aboriginal Land made under s.9A of the Aboriginal Land Grant (Jervis Bay Territory) Act 1986** was made on 11 October 1995 under a provision of the enabling Act which commenced on 29 September 1995. That provision required the Minister, if he or she proposed to make a declaration, to publish a notice of intention in the *Gazette* before the declaration was made. Neither the Declaration nor the Explanatory Statement advised that this had been done. The Minister advised the Committee that the

notice of intention and the Declaration were made on the same day and that the Committee could therefore rest assured that the requirements of the Act had been followed.

#### (iv) Prejudicial retrospectivity

3.8 Subsection 48(2) of the Acts Interpretation Act provides generally that prejudicially retrospective delegated legislation taking effect before gazettal and affecting anyone except the Commonwealth is void. The **Petroleum Products Freight Subsidy Scheme Amendment No 95/03 made under the States Grants (Petroleum Products) Act 1965**, was made on 16 May 1995 and expressed to take effect on 18 May 1995. Neither the instrument itself nor the Explanatory Statement advised of the date of gazettal, which was 31 May 1995. The Minister advised that the Committee's concern about detrimental retrospectivity was well taken. At first instance, the Minister advised, the amendment might be said to be prejudicial because it excluded bulk delivery of eligible fuel from subsidy, but the practical effect may not have this result. Also, the enabling Act in this case technically permits prejudicial retrospectivity. However, administrative action would be taken to ensure that future instruments did not operate before gazettal. The **Marine Orders Part 15, Ship Fire Protection, Fire Detection and Fire Extinction, Issue 2 (Amendment), Marine Orders No 14 of 1994**, required specified ships to comply with certain provisions by a date two months earlier than the date of the Orders. The Minister advised that while the Orders were technically retrospective, the new provisions only applied to one ship in Australia, which met the requirements when it entered service earlier than the retrospective date of effect. Therefore the Orders formally recorded what had already happened in practice and no person was prejudiced. Nevertheless, the Minister had asked the Australian Maritime Safety Authority to be particularly vigilant when preparing Orders.

3.9 The **Determination HS/1/95 made under s.3C(1) of the Health Insurance Act 1973** added a health service to the general medical services table, thus enabling the payment of medical benefits for that service. The Committee wrote to the Minister about the instrument, which operated with seven months retrospectivity. The Minister advised that the effect of the instrument was that health funds were exempted from paying "gap" benefits for services during those seven months and that no financial liability was imposed on any person other than the Commonwealth. The Committee noted the advice but wrote again to the Minister, asking about the effect on people who were members of health funds whether such people who would otherwise have been entitled to "gap" benefits were deprived of them retrospectively by the instrument. The Minister advised that the instrument was a reasonable compromise, because patients were entitled to reclaim 75 per cent of the specified fee. If the instrument provided for retrospective payment of "gap" benefits the funds and would be prejudiced. Without the instrument patients would be denied any benefits at all for the seven months.

3.10 The **Determination of Technical Standard Notice TN2 of 1995 made under s.246 of the Telecommunications Act 1991**, which determined standards relating to customer equipment and customer cabling connected to a telecommunications network, was signed on 29 March 1995, made by gazettal on 26 April 1995 and stated to be effective from 5 April 1995. The Minister advised that he had received advice that while the instrument was *prima facie* retrospective, in practical terms it had been inoperative since its determination and

would remain so for some months to come. The standards in the instrument would be met by fitting a device, yet to be manufactured, incorporating the specifications set out in the standard. The device is on order and delivery would take place 12 months after the date of order. The businesses affected had requested a binding specification before orders were placed. The Committee wrote again to the Minister, advising that this did not necessarily exclude the operation of s.48(2), which was included in the Act in 1990 replacing an earlier provision which was less restrictive, and asking for a copy of the advice to which the Minister referred in his letter. The Minister provided internal legal advice which, among other things, advised that it would be desirable to ensure that such instruments are gazetted on or before their date of effect.

3.11 The Notice No K1 of 1995 made under s.16(6) of the *Safety, Rehabilitation and Compensation Act 1988* specified a rate per kilometre for persons who used their own motor vehicle for the purposes of the enabling Act, with retrospective effect of two and a half years. The Minister advised the Committee that the retrospective provisions were consistent with Comcare practices at the time and therefore prejudiced only the Commonwealth. The Committee also wrote to the Minister about up to two years retrospectivity in making the *Income Tax Regulations (Amendment), Statutory Rules 1995 No 356*, which provided rebates and exemptions from income tax for Australian Federal Police and Australian Defence Force personnel who served in Cyprus, Mozambique, Cambodia and Somalia. The Explanatory Statement advised that retrospectively for service in Cyprus and Mozambique was not prejudicial, but gave no such assurances for Cambodia or Somalia. The Minister advised that the retrospectivity for service in those two countries was prejudicial but that the enabling Act provided for this.

3.12 The two Ordinances both cited as the *Applied Laws (Implementation) Ordinance 1995, Ordinance No 1 of 1995*, for the Territory of Christmas Island and for the Territory of Cocos (Keeling) Islands, retrospectively provided for a matter which had earlier been inadvertently omitted from the Ordinances. The Minister advised that in effect the amendments meant that financial institutions duty were now payable retrospectively. However, administrative arrangements to collect the duty was not in place during that time and no duty was actually collected. The Committee wrote again to the Minister, noting that the enabling legislation may not include the same safeguards about prejudicial retrospectivity as the Acts Interpretation Act and suggesting that it may be appropriate to review the two Acts to achieve this object. The Minister undertook to do this.

3.13 The *Lotteries Commission Act 1990 (W.A.)(C.I.)(Amendment) Ordinance 1995, Territory of Christmas Island Ordinance No 4 of 1995*, operated retrospectively for three months from 1 July 1995 to continue certain agreements which had expired. Although the enabling Act did not expressly prohibit prejudicial retrospectivity the Committee still raised the matter. The Minister advised that drafting instructions for the instrument were issued on 30 May 1995 but pressure of work meant that the Ordinance could not come into force on time by 30 June 1995. There was a further delay because the Executive Council secretariat did not clear the instrument documents until it received advice on the retrospectivity. Without the retrospectivity lotteries would have operated outside the legislation and the promoters could have suffered commercial loss. Also, the expectation of Territory residents was that they would be able to continue to take part in lotteries.

3.14 The Committee asked the Minister about apparent prejudicial retrospectivity provided for by a number of *Civil Aviation Orders*. Several Orders provided for compliance within a specified number of flying hours after a retrospective date, while others included original compliance dates in amendments, thereby effectively providing for retrospectivity. The Minister advised the Committee that these matters would be addressed by drafting changes. The *Family Law (Child Abduction Convention) Regulations (Amendment), Statutory Rules 1995 No 334*, provided for specified countries to be included in the Schedule of convention countries, with dates of effect earlier than the date of gazettal of the instrument. The Committee was advised that the legislation provided that a country is a Convention country if it is a country in respect of which the Convention has entered into force for Australia. The provisions therefore did not have retrospective effect but recognised an existing position. The *Meat and Live-stock Order No MQ64/95 made under s.68 of the Meat and Live-Stock Act 1995*, which was made on 26 September 1995 and which come into effect on gazettal, provided that an exporter must not export quota meat to the European Union for entry from 1 January 1995 to 31 December 1995. The Minister attached advice from the Attorney-General's Department that the instrument was not intended to operate retrospectively.

3.15 The *Sales Tax Assessment Regulations (Amendment) and the Sales Tax Procedure (Old Laws) Regulations (Amendment), Statutory Rules 1995 Nos 86 and 87*, both made similar retrospective amendments to the principal Regulations. The Explanatory Statements advised that the 12 months retrospectivity was to correct an earlier provision which prescribed the information to be included in an evidentiary certificate used against a person to recover unpaid sales tax, because that earlier provision was inconsistent with the enabling Act. The Explanatory Statements included advice that the retrospectivity was not prejudicial, but this was expressed in a more cautious way than the usual form of words. The Committee was concerned not only about the retrospectivity, but also about whether the earlier provision was actually inconsistent with the Act, and asked whether there was any need at all to amend the Regulations. The Minister advised that the earlier provision could cause confusion among taxpayers, courts and tribunals, and that the amendments were necessary to remove the possibility of such confusion. In reply to the Committee's express query the Minister advised that the Commissioner had issued six evidentiary certificates during the period of retrospectivity, none of which complied with the regulations in force at the time, and that the Australian Government Solicitor, who acts for the Australian Taxation Office in these matters, had advised that the legislation was disregarded because of uncertainty about what it meant and the perceived inconsistency.

3.16 On 30 November 1995 the Chairman made a statement on prejudicial retrospectivity and the *Approved Occupational Clothing Guidelines made under the Income Tax Assessment Act 1936*. This statement is reproduced in Chapter 6 of this Report.

#### **Possible breaches of parliamentary propriety**

3.17 The Committee ensures that delegated legislation does not breach parliamentary propriety. The *Heard Island Wilderness Reserve Management Plan made under s.8 of the Environment Protection and Management Ordinance 1987* was made on 11 September 1995. The enabling legislation for the Plan, however, provided that a Plan must

be made as soon as practicable after the commencement of the Ordinance, which was gazetted on 11 January 1988. The Committee asked the Minister about the length of time taken to comply with the legislation, which might have been so long as to be a breach of parliamentary propriety. The Minister advised that finalisation of the Plan had taken longer than he would have preferred, requiring extensive, protracted and difficult consultation with interest groups. Also, the Territory is seldom visited and the absence of a Plan did not place the conservation of the Territory at risk. The Explanatory Statement for the **Australian Pork Corporation Regulations (Amendment), Statutory Rules 1995 No 305**, advised that the purpose of the Regulations was to provide a legal basis for the payment of pay-roll tax by the APC, which had been paying this tax since 1987 although under no legal obligation to do so. The Committee was concerned at a situation where a Commonwealth statutory authority had for years mistakenly paid these State and Territory taxes, on what was legally a voluntary basis, because of a failure to make the necessary delegated legislation. The Committee asked the Minister about the amount of money involved and whether the APC was entitled to a refund or credit. The Committee also asked about other primary industry corporations, in respect of which the Explanatory Statement for the **Primary Industries and Energy Research and Development Corporations (Liability to Pay-roll Tax) Regulations, Statutory Rules 1995 No 306**, advised that there might be similar problems. The Committee was advised that in nine years the APC had paid \$354,000 and may be eligible for a refund, which was being pursued with the respective State and Territory revenue offices. The other corporations had not in fact paid any tax because they were under the threshold for payment.

3.18 The Explanatory Statement for the **Fisheries Research and Development Corporation Regulations (Amendment), Statutory Rules 1995 No 414**, advised that the amendment referred to two Acts as alternative sources of power for the collection of a levy. It further advised that the levy, which is a payment by a foreign government to the Commonwealth as part of an agreement for access to the Australian fishing zone, was of an unusual nature; the Attorney-General's Department had advised that Australian law was not definitive on whether the levy should be categorised as a tax or as a contractual payment. If a tax, the levy would be taken to have been collected under one Act; if an access fee, it would be collected under the other Act. The Committee wrote to the Minister, advising that it was concerned at the implications of this advice, which was that the government was collecting money but did not know under which Act it was doing so. The Committee suggested that it may be a breach of parliamentary propriety if regulations, made under the authority of an Act, refer to a levy which is collected under one Act, or, in the alternative, under another Act. The Minister advised the Committee that the relevant Act would vary depending on the particular circumstances that applied to the amount being collected. If, in the circumstances, the levy is a tax then one Act is the appropriate collection Act and if the levy is not a tax then the other Act is the appropriate vehicle. It was necessary to impose the same obligations under the two Acts.

3.19 The **Family Law (Child Abduction Convention) Regulations (Amendment), Statutory Rules 1995 No 296**, provided that the Family Court may refuse to make an order in respect of a child if this would not be permitted by "the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms". The Committee asked the Minister for advice about these principles, which were not defined in the legislation, and about which Parliament may not have been consulted. The Minister advised that the

expression was included, but apparently not defined, in the Hague Convention on the Civil Aspects of International Child Abduction. The expression had been considered by the Full Court of the Family Court although there had been no case in which the Court has relied on the expression to refuse to make an order in respect of a child. The Explanatory Statement for the **Lotteries Commission Act 1990 (W.A.)(C.I.) (Amendment) Ordinance 1995, Territory of Christmas Island Ordinance No 4 of 1995**, advised that under the Ordinance the Minister acts in his or her capacity of Lotteries Commission when entering into an agreement with a lotteries promoter or the appropriate State or Territory Minister. The amendments, however, provided for the Minister to act both as Minister and as Commission. For instance, two provisions provided for the Commission (the Minister), with the approval of the Minister, to make certain agreements and arrangements. Another provision provided 'that the Commission (the Minister) must not authorise specified lotteries unless the Minister has made a certain agreement. The Minister advised the Committee that in this case, where it may not be appropriate for the Minister to retain and exercise two levels of power, the powers of the Commission would be delegated to the Administrator.

3.20 The **Federal Court Rules (Amendment), Statutory Rules 1996 No 29**, extended the sunset provision for a native title rule for 12 months, making the third such sunset extension. The Committee advised the Chief Justice that it supported sunset provisions because they give Parliament an opportunity to scrutinise any extension of such a provision. In this case, however, the Committee would appreciate advice on the reasons for the continuing extensions. The Chief Justice advised the Committee that, following a decision of the High Court, it was accepted that the *Native Title Act 1993* would need to be amended and that once the amendments were made the Rules would be finalised. The **National Health (Pharmaceutical Benefits) Regulations (Amendment), Statutory Rules 1994 No 348**, removed a number of forms from parliamentary scrutiny and substituted in each case a form approved in writing by the Secretary. The use of the new forms appeared to be mandatory. The Committee advised the Minister that if the forms were important enough that they alone must be used by the public, then they appeared to be important enough to continue to be subject to parliamentary scrutiny. The Parliamentary Secretary advised the Committee that it was desirable for the forms to be altered quickly as circumstances require. The only information sought on the forms was that which was required to enable the assessment of an application for approval to supply pharmaceutical benefits. The Committee wrote again to the Parliamentary Secretary, advising that it was not clear how parliamentary scrutiny could result in any delay in the process of amendment. The Minister advised that he did not mean to imply that parliamentary scrutiny caused delay, but that the time needed for drafting, together with the dates of Executive Council meetings, meant that the commencement dates could be delayed for months. The Committee's concerns would be taken into account when the Regulations were next reviewed.

#### Appropriate levels of penalties

3.21 The Committee writes to the Minister about penalties which may not be appropriate in the particular circumstances. The **Air Navigation Regulations (Amendment), Statutory Rules 1995 No 342**, provided that a regulated agent who intentionally or recklessly contravened a direction of the Secretary about measures and resources to be used by the agent in responding to a threat of unlawful interference with aviation is guilty of an offence

punishable by a fine of \$5,000. Another provision, however, which provided that a regulated agent must not intentionally or recklessly contravene a direction of the Secretary to amend the international cargo security program, was not punishable at all. The Minister advised the Committee that the punishable offence was more serious and could be time critical, while the latter offence could be dealt with by administrative means. The **National Health (Pharmaceutical Benefits) Regulations (Amendment), Statutory Rules 1994 No 348**, provided for a number of offences by medical or dental practitioners, pharmacists or hospital authorities, to be punishable by a fine of \$20. The Committee asked whether this modest level of penalty was intended. The Parliamentary Secretary advised that the penalties were intended to operate from the earliest possible time and would be reviewed.

#### Drafting defects

3.22 The Committee considers that the standard of drafting of delegated legislation should not be less than that for Acts. The **Meat and Live-stock Order No M73/95 made under section 68 of the Meat and Live-stock Industry Act 1995** provided that the Australian Meat and Live-stock Corporation may, at any time as required by law, vary the quantity of goods recorded in an exporter's name. The Committee suggested that if the change was required by law then the provision should be mandatory and not discretionary. The Minister advised the Committee that the expression was inappropriate and that the Order would be amended. The **Public Service Determination 1995/87** included numbers of expressions such as foreman, kitchenman, crewman and laundrymen. The Committee accepted that these terms were taken from an industrial award, but noted that it had previously been assured that such expressions would be progressively removed. The Minister advised the Committee that the classifications would be discontinued as soon as possible and that the vast majority should be dispensed with by the end of 1995. The **Telecommunications (Service Providers Class Licence) Direction No 1 of 1995 made under section 204 of the Telecommunications Act 1991** included a number of vague and imprecise expressions, such as "a person who is disadvantaged on financial or health grounds", "significant influence on the business activities of the person" and "the recipient is not creditworthy". The Minister advised the Committee that most of the expressions have not in practice caused administrative difficulties, but some do represent new concepts and AUSTEL would assist the industry to develop an understanding of how they should be applied. The **Charter of the United Nations (Sanctions - Republic of Bosnia and Herzegovina) Regulations (Amendment), Statutory Rules 1996 No 30** provided that, if the U.N. Security Council resolution imposing sanctions on Bosnia was suspended, then the operation of the principal Regulations was also suspended. The Committee asked why the Regulations were not simply repealed, as was done by **Statutory Rules 1996 Nos 31 and 32** in respect of provisions of the **Customs (Prohibited Imports) Regulations** and **Customs (Prohibited Exports) Regulations** which similarly imposed sanctions on Bosnia. The Committee noted that the form of drafting of the present Regulations, in contrast to the drafting of the two customs sanctions, meant that legislation remained which may never again come into operation, or, alternatively, which may come into effect automatically on the actions of a body other than the Commonwealth. The Minister advised the Committee that as soon as the first free and fair elections were held in Bosnia then Australia would be obliged under international law to repeal the Regulations. The Committee advised the Minister that if the Explanatory Statement had included this advice then it would not have been necessary for the Committee to raise the matter.

3.23 The Committee ensures that references in delegated legislation to provisions of that or other legislation are accurate. The **Determination No T7 of 1995 made under section 15 of the Higher Education Funding Act 1988** included a number of discrepancies between the names of institutions in the Act and in the Determination. The Minister advised the Committee that the Department was aware of the discrepancies and that steps had been taken to amend the Act. Because of the heavy legislation program, however, the relevant Bill had not yet been introduced. The Committee's letter had highlighted the need to resolve the discrepancies quickly. The **AUSTUDY Regulations (Amendment), Statutory Rules 1994 No 409**, omitted a Note which advised of a right of review of decisions and included reference errors in the numbering of provisions. The Minister advised the Committee that there did not seem to be any reason why the Note was omitted and that the references would be corrected. The **National Health (Pharmaceutical Benefits) Regulations (Amendment), Statutory Rules 1994 No 348**, included reference errors which the Committee was told would be corrected. The Minister acknowledged drafting oversights in the **Locally Engaged Staff Determination 1995/27** and the **Determination of Technical Standard Notice TNS of 1995 made under section 244 of the Telecommunications Act 1991**. The Committee informed the Minister of drafting oversights in the **Plant Breeder's Regulations (Amendment), Statutory Rules 1995 No 290**.

3.24 The Committee also ensures that delegated legislation does not include any unusual or unexpected provisions relating to dates of effect. The **Exemption 37/FRS/49/1995 made under regulation 207 of the Civil Aviation Regulations**, which was gazetted on 21 June 1995, purported to be made on 7 July 1995. The Minister advised the Committee that the Exemption was actually made on 7 June 1995 and that both references to July, one to making and the other to the date of commencement, were errors and that the Exemption was valid. The Committee then advised that if this was the case then the Exemption had ceased to have effect, because it was not tabled in the Senate within 15 sitting days of making on 7 June 1995. The **Civil Aviation Order Part 105 AD/HS-125/152** provided for a compliance date of 31 June 1995. The Minister advised the Committee that the Order would be amended. The **Notice K1 of 1995 made under subsection 16(6) of the Safety, Rehabilitation and Compensation Act 1988** specified a rate per kilometre payable to claimants who use their own motor vehicles for travel to obtain medical treatment more than two years after amendments of the enabling Act required that a rate be specified. The Minister advised the Committee that the delay was regretted. The **Income Tax Regulations (Amendment), Statutory Rules 1995 No 356**, provided tax exemptions for members of the Australian Federal Police and the Australian Defence Force serving in specified foreign countries, with retrospective effect of up to two years. The Committee was advised that the delay was due to late notification of information to the Australian Tax Office. The **Customs Regulations (Amendment), Statutory Rules 1995 No 244**, corrected an inadvertent effect of regulations made 10 months earlier. The Minister advised the Committee that the delay was because the inadvertent effect was not noticed for two months, and extensive consultation and precision and care in drafting were needed for the amendments. On the other hand, **Civil Aviation Orders Part 105 AD/B747/147 and AD/B747/148**, made respectively on 6 April and 13 April 1995 and which provided technical requirements for the Boeing 747 jumbo jet, provided for compliance by 6 April 1998 and by 25 May 1999 or before 20,000 flights, whichever occurs later. The Parliamentary Secretary advised the Committee that the dates were specified in the relevant United States Federal Aviation Administration Directive.

3.25 **The Defence Determinations 1996/6 and 1996/11**, made respectively on 27 February and 12 March 1996, were virtually identical, except that the former dealt with a limited group of Australian Defence Force members and the latter with all ADF members. The Committee asked why it was necessary to make two instruments only two weeks apart. The Minister advised that an opportunity had been taken to codify entitlements in a new generic Determination which would avoid the need to make a continuing series of Determinations. The **Public Service Determination 1995/58** did not provide a specific date of effect for a provision although it appeared from advice in the Explanatory Statement that this would have been appropriate. The Minister confirmed that this was the case.

#### Numbering and citation

3.26 Due to the efforts of the Committee it is now accepted that every instrument of delegated legislation should provide a clear system of numbering and citation. Without such a system delegated legislation may be imprecise and confusing. In respect of the **Declaration made under s.7(2) of the Occupational Health and Safety (Commonwealth Employment) Act 1991** the Minister advised the Committee that there was an obvious need for instruments to be readily identifiable and that future instruments would be provided with numbering and a citation. In respect of the **Transitional Provisions for the Valuation of Policy Liabilities, Solvency and Capital Adequacy Standards and Calculation of paid up Value and Surrender Values**; and the **Transitional Provisions for the Calculation of the Cost of Investment Performance Guarantees**, both made under the **Life Insurance Act 1995**, the Parliamentary Secretary advised the Committee that it was appreciated that difficulties could arise without numbering and that the Committee's comments would receive due consideration. In respect of the **Notice of Declaration made under s.4(1) of the Safety, Rehabilitation and Compensation Act 1988**, the Minister advised the Committee that the lack of numbering was an administrative oversight and that all future instruments would be numbered. In respect of the **Specification of a rate for the purposes of the Seafarers Rehabilitation and Compensation Act 1922** and the **Guidelines under section 42 of the Export Market Development Act 1994** the respective Ministers advised the Committee that future instruments would be numbered. The **Petroleum Products Freight Subsidy Scheme Amendment No 95/03 made under section 4 of the States Grants (Petroleum Products) Act 1965** numbered the amendment but not the principal instrument. The Minister advised that a unique identifier would be provided. The **Determination No ADPCA 10F 2/1995 made under section 10F of the Aged or Disabled Persons Care Act 1954** corrected numbering errors in **Determination No ADPCA 10F 1/1995**. The resulting instrument was, however, complex and difficult to understand. The Minister advised the Committee that a consolidated reprint would be provided.

#### Inappropriate levels of delegation

3.27 Many instruments of delegated legislation provide for a decision maker to delegate his or her powers. The Committee ensures that such delegation is restricted to persons of suitable seniority and experience. The **Occupational Health and Safety (Asbestos) Ordinance 1995, Territory of Cocos (Keeling) Islands Ordinance No 3 of 1995** and **Territory of Christmas Island Ordinance No 5 of 1995**, provided that the Minister may delegate his or her extensive powers under the Ordinances to any person at all. The

Committee accepted that the two jurisdictions were small but asked the Minister for the reasons for the wide power to delegate. The Minister advised that the power, with two exceptions, had been delegated to the Administrator. The exercise of a delegated power is deemed to have been exercised by the Minister, so it is in the Minister's interests to delegate only to suitable persons. The **Employment Services (Terminating Events) Determination No 2 of 1995 made under s.26 of the Employment Services Act 1994** provided for the Employment Secretary to exercise important powers. The Committee asked whether there was legislative authority for those powers to be delegated and, if so, to whom. The Minister advised that the enabling Act provided for delegation of decisions made by the Employment Secretary under the Act, but that the Determination did not provide expressly for delegation. However, under general law principles the Employment Secretary would not be expected to exercise the power personally in every case and may appoint others to act for him or her.

#### Principle (b)

##### Does delegated legislation trespass unduly on personal rights and liberties?

#### Absence or abridgment of rights

3.28 The Committee writes to the Minister about any instrument which may breach personal rights. The **Weapons of Mass Destruction Regulations, Statutory Rules 1995 No 373**, provided that a notice given by the Minister prohibiting the supply or export of goods or the provision of services that may assist a weapons of mass destruction program must include a statement of reasons, except to the extent that disclosure is not in the national interest. The provision did not, however, require the notice to state expressly that there are national interest reasons for non-disclosure of information, if such a situation existed. The Minister advised the Committee that the Regulations would be amended to provide for this. The **Corporations Regulations (Amendment), Statutory Rules 1995 No 398**, conferred qualified privilege on supervisors performing duties under the business rules of a management company. The Committee asked the Minister about the reasons for this provision, which abridged the rights of others. The Minister advised that the persons to whom qualified privilege was extended were not liable, in the absence of malice, to a defamation action. The enabling Act also extended qualified privilege in certain situations. The policy intent behind the qualified privilege was to ensure that a supervisor will be fearless in performing his or her duties under relevant business rules or when notifying the Australian Securities Commission of a contravention of the rules and will not be constrained by concern about defamation proceedings.

3.29 **The Air Navigation Regulations (Amendment), Statutory Rules 1995 No 342**, gave wide powers of entry and inspection to authorised officers, who when exercising these powers were required to produce a suitably endorsed photographic identity card. The Regulations also gave powers to security officers, who could be members of a uniformed security force or persons employed by the airport operator for security purposes, who were required to produce identification when exercising these powers. The Regulations did not, however, require this identification to be photographic. The Regulations also provided that an authorised officer had power to "discuss" operating procedures with specified employees. The Committee asked the Minister how far this power extended, noting that the provision did not include the usual requirement that people must answer questions, subject to safeguards

against self-incrimination. What was the obligation of employees to take part in these discussions? Might an employee decline to discuss procedures? The Committee noted that there was a penalty of \$5,000 if an authorised officer was not permitted to exercise the power. The Minister advised the Committee that the Regulations would be amended to require security officers to produce photographic identity cards not more than five years old. The Minister further advised that the purpose of the discussion and related powers was to ensure that aviation security audits were not impeded by an employer, who could otherwise eject authorised officers from the premises for trespass. An employee could decline to answer questions put by an authorised officer, as the provision was intended only to permit a discussion.

3.30 The **Locally Engaged Staff Determination 1995/27** provided new conditions for recreation leave, sick leave, maternity leave and special leave for LES in Switzerland. Existing employees could elect to stay under the previous provisions or to come under the new provisions. The Explanatory Statement advised that although the new provisions were generally beneficial, the new sick leave provisions were detrimental for a few employees. The Committee asked the Minister whether it was usual departmental policy for employees to be able to "contract out" of new beneficial rights in some areas in order to avoid new detrimental provisions in another area. The Committee also asked for how long an election would operate. When was it intended that employees who elect to avoid the detrimental new sick leave provisions should be able to come under the new beneficial provisions for other forms of leave? The Committee received a reply which did not appear to address its concerns and wrote again to the Minister, who advised that a labour market survey by the United States embassy had revealed that condition for LES employed at the Australian embassy were significantly out of step with those offered by other embassies and large private sector companies. It would not have been appropriate for LES to continue to benefit from the more generous sick leave provisions while at the same time benefiting from the other leave provisions, so the LES at the Australian embassy were given the opportunity to elect to remain entirely within the old system or to move to the new. All LES employees elected to accept the new leave plan. If any LES had elected to remain under the old provisions they would have done so until a survey could show that these provisions had been overtaken by changes in the Swiss labour market.

3.31 The **Instrument No 126 of 1995 made under s.196B(2) of the Veterans' Entitlements Act 1986** amended **Instrument No 99 of 1995** by replacing the word "acute" with the word "chronic" to reflect the correct determination of the Repatriation Medical Authority. Such instruments affect the rights of veterans to benefits and the Committee sought and received an assurance from the Minister that no veteran was prejudiced by the change. The **Occupational Health and Safety (Asbestos) Ordinance 1995, Territory of Cocos (Keeling) Islands Ordinance No 3 of 1995** and **Territory of Christmas Island Ordinance No 5 of 1995**, included many offence provisions with penalties of up to \$50,000. The Ordinances, however, also provided that any proceedings may be heard in a court of summary jurisdiction. The Committee asked why such apparently serious offences could be determined summarily. The Minister advised that both Territories are isolated and only a Magistrates Court sits. If the offences had to be heard in the District Court or the Supreme Court, then they would have to be heard in Perth, at considerable expense.

3.32 The **Determination No 2 of 1995 made under s.356 of the Student and Youth Assistance Act 1973** revoked **Determination No 1 of 1995**, which provided guidelines for the disclosure of confidential personal information held by the Department. The enabling Act provided for penalties of \$12,000 or two years imprisonment or both for unauthorised disclosure of this information. The Committee staff had no record of **Determination No 1 of 1995** and ascertained that it had never been tabled and had therefore ceased to have effect 15 sitting days after making. The Explanatory Statement for **Determination No 2 of 1995** advised that the Department had operated under the earlier Determination until it had been revoked. The Committee asked the Minister about the rights of people whose personal information was released. The Minister advised that the failure to table was regrettable and was due to a breakdown in procedures. It should not happen again. The Minister also advised that although the enabling Act provided that the release of information must be in accordance with Determination guidelines, if there is no valid Determination then the information may still be validly released. The Committee does not necessarily agree with this advice.

3.33 The **Family Law (Child Abduction Convention) Regulations (Amendment), Statutory Rules 1995 No 296**, provided that in proceedings under the Regulations in a court the affidavit of a witness that is filed in the proceedings is admissible evidence despite his or her non-attendance for cross-examination. The Committee was concerned at the effective removal of a right, pointing out to the Minister that the provision applied to all witnesses, not simply to overseas witnesses. The Committee was advised that the Regulations would be amended to refer only to overseas witnesses.

3.34 The **Health Insurance Commission Regulations (Amendment), Statutory Rules 1995 No 286**, provided that applications for a program for general practitioners lodged after 30 November 1995 must comply with criteria published in October 1995. The Committee asked about notice given to those affected that the criteria were being changed and about the publicity given to the new criteria. The Minister advised that the revised criteria were discussed extensively with bodies representing general practitioners and that the Department sent an information brochure about the proposed changes to all general practitioners in September 1995. The **Superannuation (CSS) Period Determination No 12 made under s.238 of the Superannuation Act 1976** provided that CSS members employed at a specified factory were given one week to elect to transfer to the Superannuation Trust of Australia. The Committee asked why such a short period was determined, noting that other CSS members were being given the opportunity, for the second time, to transfer to the PSS scheme during a six month period. The Minister advised that the Department had expressed concern about the limited transfer period, which resulted from arrangements for the sale of the factory by the Commonwealth. The five CSS members involved had all received financial counselling before the commencement of the period. The **Meat and Live-Stock Order No MQ 64/95 made under s. 68 of the Meat and Live-Stock Act 1995**, which was made on 26 September 1995, referred several times to applications received by 29 September 1995. The Committee suggested that this short time limit appeared unfair. The Minister advised the Committee that in the circumstances the limit was acceptable.



### Strict liability offences and reversal of the onus of proof

3.35 The Committee asks the Minister for an explanation of strict liability offences or provisions which reverse the usual onus of proof. The **Road Transport Reform (Heavy Vehicle Standards) Regulations, Statutory Rules 1995 No 55**, which would commence on a day specified in the *Gazette*, provided for strict liability for the owner, as well as the driver, of any motor vehicle towing a trailer, or which formed part of a combination, which did not comply with the Regulations. Among other things, this meant that the owner of a stolen vehicle which was used to tow a non-complying trailer would be guilty of an offence. The Parliamentary Secretary advised the Committee that the present enforcement provisions were only rudimentary and that much more sophisticated and targeted provisions would be eventually incorporated. In the meantime the present Regulations would be subject to the usual prosecutorial and judicial discretions, which would ameliorate what would otherwise be harsh effects in particular cases. The Committee wrote again to the Parliamentary Secretary, asking for further advice on the time during which the present arrangements would be in force and if the strict liability provisions could be addressed during the currency of the interim arrangements. The Parliamentary Secretary advised the Committee that the Regulations would be submitted expeditiously for amendment by the Ministerial Council for Road Transport and that the Regulations would not commence until the amendments were made. The Chairman of the National Road Transport Commission also wrote directly to the Committee. The Committee wrote again to the Parliamentary Secretary, asking for and receiving assurances that a progress report would be sent to the Committee in three months and that the Minister acknowledged the undertaking to amend.

3.36 The **Occupational Health and Safety (Asbestos) Ordinance 1995, Territory of Cocos (Keeling) Islands Ordinance No 3 of 1995 and Territory of Christmas Island Ordinance No 5 of 1995**, provided for 10 strict liability offences, with penalties of up to \$50,000. Two of these provided that a person in respect of whom a notice is issued must comply with it, apparently even if the person had not received it. In contrast, two other offence provisions included a requirement that a notice be received. Another provision reversed the onus of proof. The Minister advised the Committee that seven of the 10 strict liability offences provisions, including the two in respect of notices, would be amended to provide a mental element. The Minister further advised that the reversal of the onus of proof was acceptable to Commonwealth criminal law policy. Such a reversal was not uncommon and facilitated the legal process to the extent only of setting the *prima facie* environment of the offences, which remain, at that stage, merely alleged. Any proof to the contrary will serve to displace the *prima facie* presumption.

### Privacy

3.37 The Committee ensures that delegated legislation protects the basic right of privacy. More than a dozen provisions of the **Corporations Regulations (Amendment), Statutory Rules 1995 No 345**, required directors, secretaries and licensees to provide their date and place of birth. The Committee asked the Minister about the relevancy of this information, which may be a breach of privacy. In this context the Committee noted that two other provisions required the date but not the place of birth to be provided. The Committee was advised that the Australian Securities Commission uses the date and place of birth to ensure

the correct identification of names on its database. This nationwide database is used by people who deal with companies. It also enables the ASC to supervise the activities of company directors, particularly in the case of "phoenix companies", where the directors of a failing company transfer that company's assets to another company to avoid paying the creditors of the failing company. In order to do this it is very important that directors are correctly identified. The omission of the two requirements to give the place of birth was a mistake and the Regulations would be amended.

3.38 The **Occupational Health and Safety (Asbestos) Ordinance 1995, Territory of Cocos (Keeling) Islands Ordinance No 3 of 1995 and Territory of Christmas Island Ordinance No 5 of 1995**, required asbestos removal licence holders to inform the Minister of the name, address and date of birth of persons employed to carry out asbestos removal. The Committee asked about the requirement to provide the date of birth, which appeared to be a breach of privacy. The Minister advised the Committee that the purpose of the provision was to have a record of employees for health purposes. The equivalent Western Australian legislation required records to be kept for at least 40 years in the event that employees develop asbestos related illnesses. It is necessary to have the date of birth of persons who have worked with asbestos to facilitate tracing them if required. The **Determination No 2 of 1995 made under s.356 of the Student and Youth Assistance Act 1973** provided for the release of sensitive private information. Although the Explanatory Statement advised that the disclosure of personal information was aligned with parts of Information Privacy Principle 11 in the *Privacy Act 1991* the Committee sought and obtained an assurance that the Privacy Commissioner was consulted before the Determination was made.

### Fees, charges, taxes and allowances

3.39 The Committee questions any unusual or unexpected levels of fees and charges. The **Quarantine Determination No 1 of 1996 made under s.86E of the Quarantine Act 1908** set fees for the use of the quarantine station on the Cocos (Keeling) Islands for each contingent of animals of \$25,000 per week or part of a week or \$875,000 for a full year, plus feed, veterinary supplies, freight and special husbandry requirements at cost. The Committee asked the Minister for advice about the apparently high fees. The Minister advised that the fees reflected the actual costs of operating a high security facility for the quarantine of animals and birds from high risk countries. The weekly fee was adjusted for periods during which the facility was not used because it was being cleaned. The **Agricultural and Veterinary Chemicals Code Regulations (Amendment), Statutory Rules 1995 No 137**, doubled scores of fees charged for assessing chemicals for registration by the National Registration Authority for Agricultural and Veterinary Chemicals. The Explanatory Statement gave no reasons for the increases. The Minister advised that the increases related to phased full cost recovery and a reduction in cross-subsidy from other sources of income. The Minister also provided copies of reports on the finances of the NRAAVC. The **Occupational Health and Safety (Asbestos) Ordinance 1995, Territory of Cocos (Keeling) Islands Ordinance No 3 of 1995 and Territory of Christmas Island Ordinance No 5 of 1995**, provided for an application fee of \$2,500 for an application to the Minister for an asbestos removal licence. The Explanatory Statement did not advise of the reasons for the level of the fee. The Minister advised that the fee was the same as that in Western Australian

regulations which were currently suspended. However, if an asbestos removalist was already licensed in Western Australia then the fee is not required to be paid in the Territories.

3.40 The Explanatory Statement for the **Health Insurance (1995-96 Pathology Services Table) Regulations (Amendment), Statutory Rules 1995 No 301**, advised that the amendments allocated an amount equal to an overall increase of 1.8 per cent in pathology schedule fees to 40 specific items, to improve relativities. The increases were, however, all much greater than 1.8 per cent. The Minister advised that the Pathology Services Table included some 200 items and that the 40 items were intended to provide a total increase in fees of that percentage. For instance, the previous fees for some labour intensive tests did not reflect adequately their costs in comparison with automated tests. The **Export Control (Fees) Orders (Amendment), Export Control Orders No 1 of 1996**, provided that the fee payable for a health certificate for the export of meat was \$13.65, but that the fee payable for a replacement certificate was \$270. The Minister advised that operational procedures under which the health certificates were issued gave exporters five days in which to correct details on certificates, during which no fee was payable. Some overseas authorities had criticised the poor performance of Australian meat exporters as evidenced by errors on certificates. The fee of \$270 was set on the basis of interaction between Australian officials in Canberra, regional areas and overseas, overseas meat import clearance authorities, and international courier costs. The fee for a replacement certificate in New Zealand was \$NZ1,000.

3.41 The **Prawn Export Promotion Levies and Charges Regulations, Statutory Rules 1995 No 245**, provided for the owner of a prawn boat to pay the costs of determining any dispute over the length of the boat, upon which the amount of levy was based, even if the dispute was determined in the owner's favour. The Minister advised the Committee that the Regulations provided for the Australian Maritime Safety Authority to determine disputes because that body was a Commonwealth agency with the function of providing services to the maritime industry on a commercial basis. In any event AMSA would have to confirm the credentials of any other surveyor who carried out the task. AMSA operates on cost recovery and any other body would also charge for its services. Payment by the boat owner is consistent with the "user pays" principle. The **Radiocommunications (Transmitter Licence Tax) Determination No 2 of 1995 (Amendment No 6)** set the amount of tax for some licences and changed the amount of tax for other licences. The Explanatory Statement did not indicate, however, whether the taxes were based on cost recovery, revenue raising or some other basis. The Committee was provided with a detailed explanation.

3.42 The **Public Service Determination 1995/146** increased assistance for education expenses for officers on long-term posting in the United States. The Explanatory Statement advised that the Determination adjusted the previous limits by a recent movement in the tuition and other school fees component of the United States consumer price index. The Committee noted, however, that nine of the ten increases were 35.25 per cent while one was 12.3 per cent. The Committee asked the Minister why the increases were so large, why they were different, when were the rates previously adjusted and whether Australian officers had been disadvantaged by the apparent delay. The Committee was advised that the nine rates with larger increases had not been adjusted since June 1991 and that the tenth rate was last adjusted in December 1993. One Australian officer had been disadvantaged. In future the rates would be adjusted annually.

### 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

3.43 Delegated legislation often provides for discretions which affect business operations. In such cases, the Committee considers 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 Administrative Appeals Tribunal. Instances of instruments where the Committee has written to the Minister about review are set out below.

#### (i) Primary industry

3.44 The **Plant Breeder's Rights Regulations (Amendment), Statutory Rules 1995 No 290**, provided that the Secretary of the Department may authorise an establishment to conduct test growing. The Regulations also provided that the Secretary may refund or remit fees in specified circumstances although it appeared that the intention was that the Secretary must refund or remit fees in those circumstances. The Committee noted that the first discretion appeared to be a case where AAT review should be provided and that the second power, if intended to be discretionary, should also be subject to AAT review. The Minister advised the Committee that the Regulations would be amended to provide for AAT review of both discretions. The **Prawn Export Promotion Levies and Charges Regulations, Statutory Rules 1995 No 245**, provided for an amount of levy based on the length of a prawn boat. They also provided that if a dispute arose about the length, then the length may be determined by a surveyor employed by the Australian Maritime Safety Authority. The Committee asked the Minister whether the appearance of independence would be enhanced if this review, or an appeal from the review, was undertaken by the AAT, instead of the paid employee of a statutory authority. The Committee also noted that the enabling Act for the AMSA provided that the Minister administering that Act may give general directions to the AMSA. The Minister advised that the review procedure was intended to be simple and that it was unlikely that the Minister would give any directions affecting review. However, the *Shipping Registration Act 1981*, which is the primary point of reference for the measurement of ships, provides for AAT review and such review would be provided when the Regulations were next amended.

3.45 The **Export Control (Fees) Orders (Amendment), Export Control Orders No 1 of 1996**, provided that the fee payable for an Australian Quarantine Inspection Service replacement certificate was \$270. No fee at all was payable, however, in four specified circumstances, three of which related to mistakes by public officials. The fourth was where the Secretary of the Department, for a reason which the Secretary thinks sufficient, waives the fee. There were no criteria for the exercise of this discretion. The Minister advised that the Secretary would only waive the fee where an official made a mistake, not where an exporter made an error. The Minister further advised that previous correspondence with the Committee indicated that the exclusion of review by the AAT in relation to AQIS fees was not within the Administrative Review Council guidelines and that as a result of this correspondence AQIS charging legislation was being amended to provide for AAT review.



The **Meat and Live-stock Order No MQ 65/95** provided for AAT review of a number of discretions exercised under the Order. The Order also included, however, a discretion to withdraw an approval to export which did not appear to be subject to review. The Committee suggested to the Minister that it may be appropriate to amend the Order to provide for AAT review. The Minister advised the Committee that the omission of review was not intended and that future orders would provide for AAT review.

3.46 The scrutiny by the Committee of the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1995 No 257**, was the subject of its One Hundred and Third Report, tabled in the Senate on 25 June 1996. The Report advises that the Committee resolved formally to recommend that the Senate disallow the Regulations unless the Minister gave an undertaking on that day to amend the Regulations to provide for AAT review. The Committee received such an assurance.

#### (ii) Communications industry

3.47 The Explanatory Statement for the **Telecommunications (Service Providers Class Licence) Direction No 1 of 1995 made under s.204 of the Telecommunications Act 1991**, advised that the government had a strong expectation that the industry in general and carrier associates in particular would cooperate with AUSTEL in the implementation of the Direction and the administration of relevant licences. The Direction, however, also provided that associates were exempt from certain provisions if AUSTEL decided that the connection of a service or facility was not technically feasible. The Committee asked the Minister about review of an adverse decision by AUSTEL, which could be of considerable commercial value. The Minister advised that AUSTEL would initially decide any disputes. If AUSTEL then subsequently declared a service to be unlicensed the enabling Act provided for internal reconsideration and for AAT review. The Explanatory Statement for the **Determination of Technical Standard, Notice TN5 of 1995, made under s.244 of the Telecommunications Act 1991**, advised that carriers would be required to report regularly to AUSTEL to demonstrate compliance with the Standard. In reply to the Committee's request for detailed advice on review of an adverse decision, the Minister advised that there was no AAT review of an AUSTEL direction to a carrier to remedy a breach of a licence condition, to declare a supplier to be unlicensed (although the enabling Act provides for reconsideration of such a declaration), or to direct carriers and suppliers to disconnect or not to connect a service which is the subject of a declaration. The Minister confirmed, however, that the enabling Act provided for AAT review of an AUSTEL declaration that a service was unlicensed.

3.48 The **Radiocommunications (Multipoint Distribution Station Licences - Regional Licences) Guidelines No 1 of 1995, Statutory Rules 1995 No 74**, provided that the Spectrum Management Authority may impose or vary conditions of a licence without regard to most of the other provisions of the Guidelines. However, the SMA could only do this with the consent of licence holders who, in the opinion of the SMA, would be affected. The Committee asked whether a decision to exclude a licence holder was subject to AAT review, because the relevant review provisions of the enabling *Radiocommunications Act 1992* did not appear to apply. The Minister advised the Committee that the provisions in question were broad enough to cover review of any SMA decision affecting a licence holder. The Explanatory Statements for the **Radiocommunications (Accreditation-Frequency**

**Assignment and Interference Impact Certificates) Determination No 1 of 1996** and the **Radiocommunications (Frequency Assignment Certificates) Determination No 1 of 1996**, made respectively under s.266 and s.266A of the *Radiocommunications Act 1992*, advised that both Determinations were made for the purposes of an accreditation scheme to be established under the Act. Both Determinations would have an effect on the qualifications required to carry on business. The Committee asked the Minister for express confirmation that the Act provided for AAT review of decisions to accredit and to withdraw accreditation. The Minister gave this assurance.

#### (iii) Transport industry

3.49 The **Air Navigation (Aircraft Engine Emission) Regulations, Statutory Rules 1995 No 277**, provided that the Secretary of the Department or an authorised officer may exempt aircraft from provisions of an international treaty. The Regulations provided for AAT review of this discretion but not for review of related discretions imposing conditions and limits on an exemption. The Minister advised the Committee that the Regulations would be amended. The **Air Navigation Regulations (Amendment), Statutory Rules 1995 No 342**, provided that the Secretary may exempt an agent from a requirement to give effect to an international air cargo security program. The Regulations did not provide for AAT review of this discretion, although they expressly provided for review of five other new discretions. The Minister advised the Committee that the agent could, in practice, if faced with a refusal by the Secretary to agree to an exemption, apply for an amendment of its program, refusal of which was subject to AAT review.

3.50 The then Chairman of the Committee, Senator Mal Colston, reported in detail to the Senate on 19 September 1995 on scrutiny by the Committee of the **Road Transport Reform (Heavy Vehicle Standards) Regulations, Statutory Rules 1995 No 55**, and the **Road Transport Reform (Oversize and Overmass Vehicles) Regulations, Statutory Rules 1995 No 123**. Senator Colston's statement, included in Chapter 6 of this Report, advised that the Parliamentary Secretary, on behalf of the Minister, undertook to amend the Regulations to provide for review of administrative decisions.

#### (iv) Health industry

3.51 The **Occupational Health and Safety (Asbestos) Ordinance 1995, Territory of Cocos (Keeling) Islands Ordinance No 3 of 1995** and **Territory of Christmas Island Ordinance No 5 of 1995** provided for a number of discretions relating to the removal of asbestos. The Minister could require testing for asbestos and the removal of asbestos if any was found. The Minister could also grant, suspend or cancel licences to remove asbestos. An inspector could issue improvement or prohibition notices. The only review of these discretions was an internal review by the Minister of a decision of an inspector. The Minister advised the Committee that because of the isolation of the Territories it has not been the practice to provide for AAT review. Instead, the Magistrates Court reviews the merits of administrative decisions where this is necessary. If the Minister's power to require the removal of asbestos was not based so closely on the corresponding Western Australian regulations it would not have been drafted as a discretion. Also, the powers of inspectors related to health and safety and internal review was sufficient. However, the Ordinances

would be amended to include review by the Magistrate's Court of the Minister's decisions relating to licences. In respect of the **Determination No PB12 of 1995 made under s.98AAA of the National Health Act 1953** the Minister confirmed that the enabling Act provided for AAT review of a decision by the Managing Director of the Health Insurance Commission concerning payments to suppliers under the pharmaceutical benefits scheme.

#### (v) Other industries

3.52 The **Weapons of Mass Destruction Regulations, Statutory Rules 1995 No 373**, which implemented administration of the enabling *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*, provided that the Minister may approve places as suitable for the storage of seized goods and for the destruction of condemned goods. The Committee noted that these discretions could have a commercial effect. The Minister advised that in practice any approved places would be under the control of the Commonwealth and that no private premises would be approved. However, the Regulations would be amended to recognise explicitly the interests of the owners of stored goods. The **Casino Control (Amendment) Ordinance 1995, Territory of Christmas Island Ordinance No 2 of 1995**, provided that the Minister may exempt the casino operator from the banking requirements of the principal Ordinance. The Committee noted that this discretion may be of considerable significance to the operator and asked for advice about review. The Minister advised that Committee that the Minister's decision was not reviewable by the Magistrates Court, which under the principal Ordinance was responsible for merits review of administrative decisions, but must be tabled in both Houses. The Committee wrote again to the Minister, advising that the Committee would prefer that the decisions be reviewable and asking for the reasons why this was not done. In this context the Committee noted that some 20 other decisions provided for in the Ordinance are reviewable and that some of these appeared to be of less consequence than the present discretion. Also, the exercise of a discretion to cancel an exemption could have significant adverse consequences. The Minister advised that the question of review was overlooked when drafting instructions for the present provisions were issued. The Ordinance would be amended to provide for review. The **Customs Regulations (Amendment), Statutory Rules 1995 No 424**, and the **Excise Regulations (Amendment), Statutory Rules 1995 No 425**, provided for the remission, rebate or refund of duty on fuel oil. The Committee noted that these provisions were based on a permission under the enabling Acts and asked whether these were discretionary and, if so, whether AAT review is available for an adverse decision. The Minister advised that permission was discretionary and that the *Customs Act 1901* provided for AAT review. The *Excise Act 1901* inadvertently did not provide for such review and would be amended.

#### Review of decisions affecting personal rights

3.53 The Committee also ensures that delegated legislation provides appropriate criteria and review rights for discretions which directly affect individuals. The **Employment Services (Participants) Determination, No 2 of 1995**, and the **Employment Services (Terminating Events) Determination, No 2 of 1995**, made under sections 25 and 26 respectively of the *Employment Services Act 1994*, both provided for eligibility requirements for registered jobseekers to participate in the case management system and both included a number of discretions. These included an assessment by an officer of the CES of a person

being at high risk of becoming long term unemployed, an assessment by a panel of a person's capacity to work fewer hours and decisions by the Employment Secretary that a person has unreasonably delayed entering into a case management agreement or has not taken reasonable steps to comply with such an agreement. The exercise of these decisions could determine whether a person was entitled to the benefits of the case management system. The Minister advised the Committee that the enabling Act provided for review of the discretions by the Social Security Appeals Tribunal.

3.54 The **Family Law (Child Abduction Convention) Regulations (Amendment), Statutory Rules 1995 No 296**, provided for Australian obligations under the Hague Convention on the Civil Aspects of International Child Abduction. One regulation provided that the Secretary of the Department may refuse to accept an application for the return of a child abducted to Australia if satisfied that the application is not in accordance with the Convention, another provided for a similar discretion to refuse applications for access to a child in Convention countries, while another provided a discretion for the Secretary to apply to a court to secure access to a child in Australia. The Regulations did not appear to provide for a right or review of these decisions. The Committee was advised that an applicant who disagrees with a decision could apply directly to the Family Court for a relevant order rather than incur the delay and expense of a review by another court or tribunal.

3.55 The **Superannuation (Resolution of Complaints) Regulations (Amendment), Statutory Rules 1995 No 318**, provided that complaints may not be made to the Superannuation Complaints Tribunal where more than one year has elapsed since the fund trustee has made an adverse decision or where the person making the complaint has not lodged a relevant claim within one year. The Explanatory Statement advised that the purpose of the Regulations was to ensure that the Tribunal does not get bogged down with old complaints where the trail of medical evidence has gone cold and to ensure that the Tribunal's new jurisdiction over medical evidence complaints is as prospective as possible. The Committee sought the Minister's advice on the provisions, noting that the Act did not appear to provide that complaints should be prospective and that, while it may be appropriate for the regulations to provide for a reasonable period after which claims may not be made, in many cases the trail of medical evidence would not be cold after one year. The Minister advised that the time limits balanced a number of important policy considerations, which included the desirability of low cost access to justice for fund members, a quick and effective alternative dispute resolution and the avoidance of complaints which were many years old. The previous provisions included a discretion for the Tribunal to exclude complaints more than 12 months old, but this was very time consuming and resource intensive to administer. The specific provisions are broadly prospective from the date of the original announcement that medical evidence complaints would be included in the jurisdiction of the Tribunal. The one year limit provides reasonable time for a member to focus on the trustee's decision while ensuring that medical evidence is relatively fresh. Also, members continue to have the right to seek justice through the court system. The Minister further advised that if the administration of the new provisions proved to be unfair or unbalanced in a significant number of cases, then the Regulations could be amended.

**Principle (d)**

**Does delegated legislation contain matter more appropriate for parliamentary enactment?**

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

**CHAPTER 4**

**MINISTERIAL UNDERTAKINGS IMPLEMENTED**

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

**Accounting Standard AASB 1029: Half Year Accounts and Consolidated Accounts**  
**Accounting Standard AASB 1030: Application of Accounting Standards to Financial**  
**Year Accounts and Consolidated Accounts of Disclosing Entities other than Companies**  
**made under s.32 of the Corporations Act 1989**

4.2 On 7 July 1995 the Attorney General, the Hon Michael Lavarch MP, undertook to include the date of gazettal in future accounting standards. This undertaking was implemented by **Accounting Standard AASB 1010: Accounting for the Revaluation of Non-Current Assets**, of 26 June 1996.

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

4.3 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 to simplify procedures. On 23 January 1996, the Minister for Primary Industries and Energy, Senator the Hon Bob Collins advised that the regulations were no longer operative following repeal on 12 April 1995 of provisions of the *Australian Horticultural Corporation Act 1987* relating to Annual General Meetings of product boards.

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

4.4 On 2 October 1992 the Attorney-General, the Hon Michael Duffy MP, undertook to amend the Regulations to correct a drafting oversight. This undertaking was implemented by the **Financial Transaction Reports Regulations (Amendment), Statutory Rules 1992 No 423**, of 17 December 1992.

#### **Civil Aviation Orders, Part 105 AD/HS-125/152**

4.5 On 24 August 1995 the Parliamentary Secretary Transport, the Hon Neil O'Keefe MP, advised the Committee that amendments had been made to address its concerns about drafting by **Civil Aviation Orders, Part 105 Amendment List 7/95**, of 26 June 1995.

#### **Civil Aviation Orders, Part 105 AD/PUMA/30 Amdt 1**

4.6 On 24 August 1995 the Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, advised the Committee that amendments had been made to address its concerns about an incorrect compliance date by **Civil Aviation Orders, Part 105 AD/PUMA/30 Amdt 2**, of 25 July 1995.

#### **Determination No.ADPCA 10F 2/1995 made under s.10F of the Aged or Disabled Persons Care Act 1954**

4.7 On 21 August 1995 the Minister for Human Services and Health, the Hon Carmen Lawrence MP, undertook to correct drafting errors. This undertaking was implemented by the **Determination No.ADPCA 10F 3/1995 made under s.10F of the Aged or Disabled Persons Care Act 1954**, of 3 October 1995.

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

4.8 On 3 November 1994 the Minister for Human Services and Health, the Hon Carmen Lawrence MP, advised the Committee that fresh Determinations had been made to address its concerns that the Determinations were invalid because of prejudicial retrospectivity. The new instruments were **Determination HIT 8/1994**, of 19 July 1994, **Determination HIT 10/1994**, of 5 September 1994, and **Determination HIT 11/1994**, of 18 October 1994, respectively.

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

4.9 On 8 December 1993 the Minister for Health, Senator the Hon Graham Richardson, advised the Committee that a fresh instrument had been made to address its concerns about legislative effect. This undertaking was implemented by the **Determination INS 23/1993 made under s.4(1)(dd) of the National Health Act 1953**, of 22 November 1993.

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

4.10 On 22 August 1991 the Minister for Arts, Tourism and Territories, the Hon David Simmons MP, undertook to amend the Ordinance to require public officials to carry and produce identity cards. The Ordinance was repealed on 1 July 1992 by the **Territories Law Reform Act 1992**. Electricity supply matters are now regulated by applied Western Australian laws.

#### **Export Inspection and Meat Charges Collection Regulations (Amendment) Statutory Rules 1994 No.369**

4.11 On 22 March 1995 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Regulations to correct a drafting error. This undertaking was implemented by the **Export Inspection and Meat Charges Collection Regulations (Amendment)**, Statutory Rules 1995 No.257, of 22 August 1995.

#### **Family Law (Child Abduction Convention) Regulations (Amendment) Statutory Rules 1995 No 296**

4.12 On 16 February 1996 the Attorney-General's Department undertook to amend the Regulations to provide a safeguard for the admissibility of evidence. This undertaking was implemented by the **Family Law (Child Abduction Convention) Regulations (Amendment)**, Statutory Rules 1996 No 74, of 29 May 1996.

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

4.13 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. On 23 January 1996 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, advised that the Regulations were no longer operative as this Fishery was now managed under State and Northern Territory law.

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

4.14 On 21 June 1995 the Minister for Industry, Science and Technology, Senator the Hon Peter Cook, advised the Committee that its concerns about validity were being addressed in amendments of the Act. This undertaking was implemented by the **Industry Research and Development Amendment Act 1995**, assented to on 1 July 1995.

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

4.15 On 23 February 1994 the Minister for Housing, Local Government and Human Services, the Hon Brian Howe MP, undertook to amend forms to include a reference to the availability of review. This undertaking was implemented by **Instrument 1419 (9409) made under s.40AA(6)(ce) of the National Health Act 1953**, of 23 November 1994.

#### **Locally Engaged Staff Determination 1995/24**

4.16 On 1 November 1995 the Assistant Minister for Industrial Relations, the Hon Gary Johns MP, undertook to amend the Determination to remove an invalid subdelegation of legislative power. This undertaking was implemented by **Locally Engaged Staff Determination 1995/33**, of 14 November 1995.

**Migration (1993) Regulations  
Statutory Rules 1992 No.367**

4.17 On 29 September 1993 the Minister for Immigration and Ethnic Affairs, Senator the Hon Nick Bolkus, undertook to provide safeguards for arrest warrants. This undertaking was implemented by the **Migration Regulations (Amendment), Statutory Rules 1995 No.268**, of 5 September 1995.

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

4.18 On 29 December 1994 the Parliamentary Secretary to the Minister for Human Services and Health, the Hon Dr Andrew Theophanous MP, undertook to amend a drafting error. This undertaking was implemented by the **National Health (Pharmaceutical Benefits) Regulations (Amendment), Statutory Rules 1996 No 70**, of 29 May 1996.

**Petroleum Products Freight Subsidy Scheme Amendment No.95/03 under s.4 of the States Grants (Petroleum Products) Act 1965**

4.19 On 1 September 1995 the Minister for Small Business, Customs and Construction, Senator the Hon Chris Schacht, undertook to gazette instruments before date of effect. This undertaking was implemented by the **Petroleum Products Freight Subsidy Scheme Amendment No.95/05 under s.4 of the States Grants (Petroleum Products) Act 1965**, of 22 September 1995.

**Remuneration Tribunal Determination No 12 of 1995**

4.20 On 8 December 1995 the Minister for Industrial Relations, the Hon Laurie Brereton MP, undertook to ensure that the Tribunal's determinations in relation to performance pay were valid. This undertaking was implemented by the **Remuneration Tribunal Determination No 3 of 1996**, of 30 May 1996.

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

4.21 On 7 November 1994 the Parliamentary Secretary to the Treasurer, the Hon Paul Elliott MP, undertook to amend the Regulations to correct an invalid subdelegation. This undertaking was implemented by the **Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1995 No.158**, of 27 June 1995.

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

4.22 On 10 August 1993 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to improve drafting. On 23 January 1996 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, advised that the regulations were no longer operative as a result of amendments made to the Act by the *Wool Legislation (Repeals and Consequential Provisions) Act 1993*.

## 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 1996, 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.

**Air Navigation (Aircraft Engine Emissions) Regulations (Amendment)  
Statutory Rules 1995 No 277**

5.3. On 13 June 1996 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to amend the Regulations to provide for AAT review.

**Air Navigation Regulations (Amendment)  
Statutory Rules 1995 No 342**

5.4. On 23 May 1996 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to amend the Regulations to provide for security officers to carry identification cards with a photograph no more than five years old.

**Applied Laws (Implementation) Ordinance 1995  
Territory of Christmas Island Ordinance No 1 of 1995**

5.5. On 21 November 1995 the Parliamentary Secretary to the Minister for the Environment, Sport and Territories, the Hon Warren Snowdon MP, undertook to review the *Christmas Island Act 1958* to include safeguards about prejudicial retrospectivity.

**Applied Laws (Implementation) Ordinance 1995  
Territory of Cocos (Keeling) Islands Ordinance No 1 of 1995**

5.6. On 21 November 1995 the Parliamentary Secretary to the Minister for the Environment, Sport and Territories, the Hon Warren Snowdon MP, undertook to review the *Cocos (Keeling) Islands Act 1955* to include safeguards about prejudicial retrospectivity.

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

5.7. 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**

5.8. 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 provide powers for authorised officers.

**AUSTUDY Regulations (Amendment)  
Statutory Rules 1994 No 409**

5.9. On 29 March 1995 the Minister for Schools, Vocational Education and Training, the Hon Ross Free MP, undertook to correct drafting errors.

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

5.10. 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.

**Casino Control (Amendment) Ordinance 1995  
Territory of Christmas Island Ordinance No.2 of 1995**

5.11. On 19 September 1995 the Parliamentary Secretary to the Minister for the Environment, Sport and Territories, the Hon Warren Snowdon MP, undertook to amend the Regulations to provide for review of decisions.

**Charter of the United Nations (Sanctions - Republic of Bosnia and Herzegovina)  
Regulations (Amendment)  
Statutory Rules 1996 No 30**

5.12. On 24 May 1996 the Minister for Foreign Affairs, the Hon Alexander Downer MP, undertook to repeal the Regulations as soon as the first free and fair elections were held in Bosnia.

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

5.13. 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. The Minister subsequently advised on 29 January 1996 that the ALRC recommended that review should be provided and that the Department was looking at the best way to implement this recommendation.

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

5.14. On 8 November 1994 the Minister for Family Services, Senator the Hon Rosemary Crowley, undertook to amend the Determination to correct a reference. The Minister subsequently advised on 29 January 1996 that the error did not affect the validity of the instrument and would be corrected when the instrument was next amended.

**Determination No T7 of 1995 made under s.15 of the *Higher Education Funding Act 1988***

5.15. On 14 July 1995 the Minister for Employment, Education and Training, the Hon Simon Crean MP, undertook to amend the enabling Act to correct references to higher education institutions.

**Excise Regulations (Amendment)  
Statutory Rules 1995 No 425**

5.16. On 16 May 1996 the Minister for Small Business and Consumer Affairs, the Hon Geoff Prosser MP, undertook to amend the *Excise Act 1901* to provide for AAT review of decisions.

**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 Control (Fees) Orders (Amendment)  
Export Control Orders No 1 of 1996**

5.18. On 6 May 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook to amend AQIS charging legislation to provide for AAT review.

**Export Inspection and Meat Charges Collection Regulations (Amendment)  
Statutory Rules 1995 No.257**

5.19. On 30 November 1995, the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Regulations to provide for merits review.

**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 this 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.

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

5.24. 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**

5.25. 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*.

**Meat and Live-stock Order No MQ64/95 under s.68 of the *Meat and Live-stock Industry Act 1995***

5.26. On 18 June 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook that future Orders would avoid any suggestion of prejudicial retrospectivity.

**Meat and Live-stock Order No MQ65/95 made under s.68 of the *Meat and Live-stock Industry Act 1995***

5.27. On 18 June 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook that review provisions would be included in future Orders.

**Meat and Live-stock Order No M73/95 made under s.68 of the *Meat and Live-stock Industry Act 1995***

5.28. On 18 June 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook that the Order would be amended to protect personal rights.

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

5.29. 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**

5.30. 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.

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

5.31. On 3 March 1995 the Parliamentary Secretary to the Prime Minister, the Hon Andrew Theophanous MP, undertook to review penalty levels.

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

5.32. 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) Fishery Management Plan (Plan SBT01)**

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

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

5.34. 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.

**Occupational Health and Safety (Asbestos) Ordinance 1995  
Territory of Christmas Island Ordinance No 5 of 1995  
Occupational Health and Safety (Asbestos) Ordinance 1995  
Territory of Cocos (Keeling) Islands Ordinance No 3 of 1995**

5.35. On 28 February 1996 the Minister for Sport, Territories and Local Government, the Hon Warwick Smith MP, undertook to amend the Ordinances to provide for review of discretions; to include mental elements in offence provisions; and to include a penalty.

**Plant Breeder's Rights Regulations (Amendment)  
Statutory Rules 1995 No 290**

5.36. On 20 December 1995 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Regulations to provide for AAT review of discretions and to improve drafting.

**Prawn Export Promotion Levies and Charges Regulations  
Statutory Rules 1995 No.245**

5.37. On 10 November 1995 the Minister for Resources, the Hon David Beddall MP, undertook to include a right of appeal to the AAT when the Regulations were next amended.

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

5.38. 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 remove an invalid legislative power.

**Public Service Determination 1995/87**

5.39. On 7 November 1995 the Assistant Minister for Industrial Relations, the Hon Gary Johns MP, undertook that inappropriate expressions would be removed as soon as possible.

**Public Service Determination 1995/146**

5.40. On 22 February 1996 the Industrial Relations Department undertook to increase annually the USA education assistance rates.

**Radiocommunications Regulations  
Statutory Rules 1993 No.177**

5.41. 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**

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

● **Remuneration Tribunal Determinations**

5.43. On 17 March 1995 the Minister for Industrial Relations, the Hon Laurie Brereton MP, undertook to amend the *Remuneration Tribunal Act 1973* to impose a time limit for the transmittal of determinations to the responsible Minister.

**Road Transport Reform (Heavy Vehicle Standards) Regulations  
Statutory Rules 1995 No.55**

5.44. On 29 August 1995 the Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, undertook to provide for AAT review of discretions; to remove a strict liability provision; and that the regulations would not commence prior to the agreement by the Ministerial Council of replacement regulations.

**Road Transport Reform (Oversize and Overmass Vehicles) Regulations  
Statutory Rules 1995 No.123**

5.45. On 29 August 1995 the Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, undertook to provide for AAT review of discretions; and that the regulations would not commence prior to the agreement by the Ministerial Council of replacement regulations.

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

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

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

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

**Weapons of Mass Destruction Regulations  
Statutory Rules 1995 No 373**

5.48. On 2 April 1996 the Minister for Defence, the Hon Ian McLachlan MP, undertook to amend the Regulations to provide for notification of rights and for the recognition of property rights.

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

5.49. 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**

**SPECIAL STATEMENTS**

6.1 During 1995-96 the Chairman made the following special statements to the Senate.

**FIFTH AUSTRALASIAN AND PACIFIC CONFERENCE ON DELEGATED LEGISLATION AND  
SECOND AUSTRALASIAN AND PACIFIC CONFERENCE ON THE SCRUTINY OF BILLS  
Senator Colston, 23 August 1995, Senate Hansard, p. 140**

6.2 During the winter recess, in my capacity as Chair of the Standing Committee on Regulations and Ordinances, I attended the Fifth Australasian and Pacific Conference on Delegated Legislation. This conference is held biennially and its venue is shared amongst the participating jurisdictions. This year it was held in Darwin on 5 to 7 July. I was accompanied by Senator Jacinta Collins, Emeritus Professor Douglas Whalan AM, the committee's legal adviser, and members of the committee's secretariat. Senator Minchin was to attend, but was prevented from doing so by the sudden onset of appendicitis.

6.3 At the outset, I express my appreciation to the hosts of the conference. In particular, I thank Mr Rick Setter MLA, Chair of the Northern Territory Parliament's Subordinate Legislation and Tabled Papers Committee, and the secretary of that committee, Mrs Helen Allmich, who is also Serjeant-at-Arms of the Northern Territory Parliament. Their hospitality set the atmosphere for a successful conference. I am certain that I also speak on behalf of Senator Jacinta Collins and committee staff when I congratulate Mr Rick Setter and Mrs Allmich on their hard work in organising the event. It was apparent from the comments of other participants at the conference that these two convenors' generosity of spirit had been extended to each and every person who attended.

6.4 The conference was officially opened by His Honour the Administrator of the Northern Territory, the Hon. Austin Asche AC, QC, who spoke on the importance of properly drafted delegated legislation and the role of delegated legislation. His Honour stated that 'delegated legislation is the what, why, when, how, where and who of legislation'.

6.5 The aim of the conference is to bring together the committees, organisations and individuals involved in the scrutiny of legislation throughout jurisdictions in Australasia. This year, the conference was attended by about 70 delegates from the Commonwealth, states and territories. Delegates from New Zealand also attended. It was unfortunate that representatives from the Hong Kong Parliament had to cancel at the last moment. I look forward to their attendance at the next conference. Understandably, delegates from the

Queensland committee had to withdraw due to the state election campaign, but they were ably represented by the committee staff members.

6.6 The conference serves as an ideal forum for committee members and staff to exchange information and expertise. Papers are formally presented on matters of interest or on scrutiny issues requiring special attention. The papers presented at this year's conference were of high quality and, with the concurrence of the Senate, I propose to seek leave to table the bound volume containing those papers when they become available. I will mention the papers' contents briefly.

6.7 The Hon. Bruce Donaldson MLC, Chairman of the Joint Standing Committee on Delegated Legislation in Western Australia, presented a paper entitled 'Subordinate legislation in Western Australia: investigation and proposals for reform'. The general theme of the paper was to summarise the observations of the committee in relation to the scrutiny procedures in certain foreign jurisdictions. The committee had visited Washington, London and Paris in a bid to acquire 'a better understanding of the nature of subordinate legislation and systems of scrutiny'.

6.8 Mr Richard Northey, the Chairman of the New Zealand Regulations Review Committee, presented an informative discourse on the apparent increase in use of Henry VIII provisions in New Zealand subordinate legislation. He suggested the increase is attributable to the complex reforms of the past decade. He concluded with a statement of commitment to vigilance in scrutinising Henry VIII clauses in relation to transitional provisions and to require officials to appear before the committee to justify the need for such provisions in legislation.

6.9 The Hon. Robert Lawson QC, MLC, Chairman of the Legislative Review Committee in South Australia, spoke about a code of conduct for members of parliament. He prefaced his paper with humorous comments about the perceived level of trustworthiness of politicians. The results of a survey he referred to claimed that politicians ranked second last in the public's perception as to the trustworthiness of various professions. Politicians, he told the conference, came in just ahead of ministers. In a light vein, he queried, if the survey's findings were valid, why so many members of parliament aspired to become ministers. Mr Lawson proceeded to deliver an overview of recent proposals in relation to codes of conduct for members of parliament and to examine some of the arguments for and against the introduction of such codes.

6.10 Other papers relevant to the scrutiny of delegated legislation were presented by or on behalf of the Victorian, Queensland and New South Wales committees. Mr Murray Thompson MP from the Scrutiny of Acts and Regulations Committee in Victoria presented a paper, the philosophical considerations of which were reflected in the title, 'Introducing the new act: the more things change, the more they stay the same'.

6.11 Ms Jill Hall MLA, the Chair of the Regulations Review Committee in New South Wales, had prepared a paper entitled 'New regulatory reform horizons for New South Wales-but some problems still remain'. It was extremely unfortunate that Ms Hall suffered from severe laryngitis for the whole of the conference-a most disturbing affliction for a

member of parliament. Her paper was presented by Mr Bob Harrison, also an MLA from New South Wales.

6.12 In the absence of the ebullient Mr Jon Sullivan, the Chair of the Joint Standing Committee on Delegated Legislation in Queensland, Ms Louisa Pink, that committee's research director, outlined developments in relation to the legislation making and scrutiny process in the post-Fitzgerald era. Brian Davison, an MHA from Tasmania and a member of the Tasmanian Parliament's Standing Committee on Subordinate Legislation, presented a report summarising that state's regulatory review program.

6.13 On behalf of the Standing Committee on Regulations and Ordinances, I presented a paper on legislation by incorporation. This involved an examination of section 49A of the *Acts Interpretation Act 1901*. The paper focused on the history of the section, its relevance to scrutiny and its role in safeguarding democratic rights and freedoms.

6.14 Other papers presented were of more relevance to the scrutiny of primary legislation. Mr Victor Perton MP, Chairman of the Scrutiny of Acts and Regulations Committee in Victoria, argued the case against 'no compensation' clauses. Mr Perton made other considerable contributions to the conference, including formal replies to two of the papers presented by other members of the conference.

6.15 Two papers were presented by senators who are members of the Standing Committee for the Scrutiny of Bills. Senator Troeth, the Chair of that committee, whose paper was provocatively entitled 'Don't come the raw prawn', expounded the efforts of the committee to uncover 'attempts by executive governments to encroach on the legislative function of parliaments'. Senator Ellison presented a well-prepared and thought provoking examination of the abrogation of privilege against self-incrimination.

6.16 Other matters were formally raised at the conference. Mr David Kinley, a senior lecturer in law at the Australian National University, addressed the conference in relation to a perceived need for increased vigilance towards the scrutiny of legislation for matters affecting human rights. Mr Rick Setter MLA discussed the passage of the legislation which made history recently in the Northern Territory-namely, the Rights of the Terminally Ill Act 1995. This paper was confined to a discussion of the parliamentary procedures which guided the passage of the bill and did not in any way attempt to debate the subject matter of the bill.

6.17 Professor Dennis Pearce and Mr Stephen Argument informed the conference of their intention to produce a second edition of Professor Pearce's book, the well-known and respected text, *Delegated legislation in Australia and New Zealand*. Ms Jean Baker of the Office of Legislative Drafting of the Attorney-General's Department addressed the conference in relation to the provisions of the Legislative Instruments Bill 1994, which, hopefully, will one day be before the Senate for debate.

6.18 The conference also marked the official launching of a discussion paper entitled 'The scrutiny of national scheme legislation and the desirability of uniform scrutiny principles'. This paper was prepared by a working party comprised of the chairs of all scrutiny

committees in Australia. The paper promotes informed discussion and invites comments from interested persons and organisations.

6.19 At its conclusion, the conference resolved to congratulate Professor Pearce and Mr Stephen Argument for their proposed revision of the text on delegated legislation. It also formally resolved to note matters which had been discussed, and recorded that the discussion had been beneficial and of great value to the participants at the conference. The next conference is scheduled to be held two years hence in Adelaide.

6.20 I cannot conclude this report without giving special mention to the guest speaker at the formal dinner, Her Honour Justice Sally Thomas of the Supreme Court of the Northern Territory. Justice Thomas recounted some of her experiences in hearing evidence given by Aboriginals and explained some of the difficulties confronting Aboriginals in participating in the judicial system in terms of cultural differences. She concluded her inspiring speech with an entertaining poem she had composed about legislation and the place of scrutiny in the democratic process. The poem reads:

I speak tonight of legislation, subordinate and delegated,  
The parliament may legislate, prorogate and delegate,  
The executive administers, officiates and agitates,  
The judiciary contemplates and then . . . invalidates.  
Through these three arms of government, we live our daily lives,  
For the betterment of all mankind our laws will seek to strive,  
Spare a thought for those who serve on committees far and wide,  
Who examine every bill and act to ensure our rights are not denied.  
Delegated legislation and parliamentary bills,  
Are scrutinised most carefully to avoid autocratic ills.  
In an age of legislative proliferation and complex regulations,  
We need to recognise the role of such committees cogitations.  
So I salute you one and all for your care and dedication,  
To my ultimate independence as a citizen of this nation.

6.21 Justice Thomas's poem was most appropriate for the occasion and a fitting end to my report on the conference.

#### SCRUTINY BY THE COMMITTEE OF REGULATIONS IMPLEMENTING A NATIONAL UNIFORM LEGISLATIVE SCHEME

Senator Colston, 19 September 1995, Senate Hansard, p 976

6.22 Among the instruments of delegated legislation scrutinised by the Committee to ensure compliance with personal rights and parliamentary propriety are instruments made as part of intergovernmental schemes, including those intended to implement national uniform legislation in a particular area.

6.23 Such legislation presents special challenges for legislative scrutiny committees. These challenges were recognised in the key Report by the Administrative Review Council on Rule Making by Commonwealth Agencies, in the establishment by the Western Australian Parliament of the Standing Committee on Uniform Legislation and Intergovernmental Agreements Committee and in the circulation earlier this year by the Chairs of scrutiny of legislation committees throughout Australia of a discussion paper on Scrutiny of National Scheme Legislation.

6.24 Recently the Standing Committee on Regulations and Ordinances scrutinised regulations which were made as part of such a uniform national scheme. The scheme in question was given effect at the Commonwealth level by the *National Road Transport Commission Act 1991*, which included as a schedule an agreement between the Commonwealth, all States and the Australian Capital Territory. The agreement recited that there should be improvements to road safety, efficiency and administrative costs; and that this necessitates uniform or consistent legislation throughout Australia, to be achieved by a cooperative legislative scheme. The agreement further recited that the essential element of the scheme was that the Commonwealth would make law for the ACT which would be the model for legislation by the States and Northern Territory, which in turn would enact laws consistent with the model. The agreement also established a Ministerial Council, the approval of which was necessary before the model law could be made. The approval of the Ministerial Council is also necessary for the amendment of the model law.

6.25 The first Commonwealth legislation as part of the scheme was the *Road Transport Reform (Vehicles and Traffic) Act 1993*, which expressly provided that it forms part of the national scheme envisaged by the National Road Transport Commission Act. It further provided that its purpose was to empower the making of laws for the Australian Capital Territory which are intended to be adopted by the States and the Northern Territory. The Act did not itself include any substantive provisions dealing with vehicles or traffic, instead providing that regulations may be made in respect of these matters. It was these regulations which are the legislative basis of the scheme as it affects users and which came before the Committee in the same way as other Commonwealth regulations.

6.26 The first module of the uniform scheme included the **Road Transport Reform (Heavy Vehicle Standards) Regulations** and the **Road Transport Reform (Oversize and Overmass Vehicles) Regulations**. The heavy vehicle regulations include seven pages of what might be termed substantive legislation and one hundred pages of technical engineering standards. The oversize and overmass vehicles regulations include nine pages of substantive legislation and forty seven pages of engineering standards. Both sets of regulations apply to the Australian Capital Territory and the Jervis Bay Territory only, but each expressly provides that their purpose is to provide a set of standards uniform or consistent throughout Australia. Both Explanatory Statements advise that the regulations will be incorporated into the law of each of the States and the Northern Territory.

6.27 The Committee scrutinised these regulations in the usual way and found that several provisions were cause for concern. The most important of these were provisions under which vehicles may be exempted from the prescribed standards. Such exemptions, which may apply to individual vehicles, could have commercial benefit for operators. There

appeared to be, however, no provision for independent review of decisions adverse to vehicle owners or operators. The Committee normally would consider that review of administrative discretions which may confer a commercial advantage is essential. In addition, one of the sets of regulations provided for strict liability offences, for which the Committee usually seeks an explanation. The Committee raised these matters formally with the Minister.

6.28 The Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, responded to the Committee's concerns on 6 June 1995, attaching detailed advice from the National Road Transport Commission. The Committee considered the reply and requested further advice on the issues of concern. The Parliamentary Secretary replied on 29 August 1995, advising that appropriate review provisions would be included in proposed new regulations to replace the present provisions and that the strict liability provisions would be amended to meet the Committee's concerns. The proposed amendments would be submitted expeditiously to the Ministerial Council. In the meantime, the present regulations would not be commenced until the Ministerial Council agreed to the new regulations. The Parliamentary Secretary also arranged for additional material from the National Road Transport Commission to be sent to the Committee.

6.29 Normally the Committee would regard this reply as entirely satisfactory and the Committee congratulates the Parliamentary Secretary on his commitment to ensuring that delegated legislation provides the highest possible safeguards for personal rights. In this case, however, the Committee wrote again to Mr O'Keefe. The reason for this is that while the Committee accepts undertakings from Ministers, who are answerable in Parliament for their actions, the Ministerial Council, which under the uniform national scheme must approve the amendments, is not directly answerable in this way. The Committee therefore asked the Parliamentary Secretary if he could arrange for the Minister for Transport to give similar assurances, both sets of regulations providing for commencement upon a date notified in the *Gazette* by the Commonwealth Minister. The Committee also requested a report in three months on progress with the new regulations. In addition, the Committee wrote to the Chairs of State and Territory legislative scrutiny committees describing its actions in this matter.

6.30 The Parliamentary Secretary then replied to the Committee, confirming that he had the authority to act on behalf of the Minister in this matter and that neither set of regulations would commence before the Ministerial Council agreed to the replacement regulations. The Committee accepted this reply but agreed to keep the matter under review, the present sets of regulations being only the first module of a number of successive modules to implement the entire national scheme.

6.31 I have reported to the Senate in some detail on this matter because of the unusual procedures mandated by the national uniform legislative scheme under which these regulations were made. These procedures, required by an agreement between the executives of the Commonwealth, States and mainland Territories, in effect oblige the Commonwealth to make delegated legislation under a Commonwealth Act only with the approval of a Ministerial Council and not to amend that legislation without similar approval. The Committee agreed that the agreement would not constrain its usual scrutiny of the

regulations and, with the helpful cooperation of the Parliamentary Secretary, Neil O'Keefe, I am pleased to report to the Senate that undertakings have been given in respect of the regulations which ensure that the high standards of the Committee are maintained.

**GOVERNMENT AMENDMENTS TO THE LEGISLATIVE INSTRUMENTS BILL 1994**  
**Senator Colston, 21 November 1995, Senate Hansard, p 3410**

6.32 On 17 October 1994 the Standing Committee on Regulations and Ordinances reported to the Senate on its inquiry into the Legislative Instruments Bill 1994, referred to it by the Selection of Bills Committee. The committee endorsed the principles of the bill and supported its main principles. Nevertheless, the committee made 14 recommendations and suggestions which it considered would improve either the conceptual basis or the intended effect of the bill. The committee is pleased to recall that the government has now accepted 13 of the 14 suggestions, with the 14th to be subject to future review.

6.33 The government has now circulated proposed amendments of the bill, which is at present in committee stage in the Senate, to give effect to its acceptance of the committee's recommendations, to the government's response to the report on the bill of the House of Representatives Standing Committee on Legal and Constitutional Affairs and to additional government initiatives. The committee has noted these amendments and wishes to draw to the attention of the Senate some aspects of the additional initiatives.

6.34 The present subclause 48(4) of the bill, which has no equivalent in *the Acts Interpretation Act 1901*, but which was included in the bill introduced into the Senate on 30 June 1994, provides for the House to defer disallowance of a legislative instrument for a period of up to six months to enable the instrument to be remade or amended to achieve a specified objective. The new proposed subclause 48(5), with new subclauses 48(6) and (7), is a consequent government initiative foreshadowed for the first time on 16 October 1995. I seek leave to incorporate the amendments in *Hansard* [amendments not reproduced here].

6.35 The Clerk of the Senate subsequently wrote to the committee on 31 October 1995 expressing concern about subclause 48(5). The main concerns of the Clerk were, firstly, that there was no useful purpose to statutory provisions, such as these, which sought to recognise a parliamentary procedure which other statutory provisions and its own practices already allow. The Clerk also suggested that the drafting of the amendments was vague and uncertain and, in any event, attempted to deal with concepts which could not be enacted satisfactorily. For instance, the government amendments provided for a rule-maker to hold discussions with a house, which is not possible. Also, the amendments could be used to prevent a senator from raising an issue. Debate on a motion could be avoided, which would be a dangerous precedent. Finally, the amendments do not advance parliamentary control over delegated legislation, because it is still the Senate which is the ultimate arbiter of whether an instrument is disallowed. I seek leave to incorporate the Clerk's letter in *Hansard*.

31 October 1995

Senator M Colston  
Chair  
Regulations and Ordinances Committee  
Parliament House  
CANBERRA ACT 2600

Dear Senator Colston

LEGISLATIVE INSTRUMENTS BILL 1994 REVISED SUBSTITUTE GOVERNMENT  
AMENDMENTS

Last week a set of government amendments to the Legislative Instruments Bill 1994, designated as revised substitute amendments, were circulated. One of the provisions in these amendments is of concern and I wish to draw it to the attention of the committee.

Amendment no. 78 would insert into clause 48 of the bill a new subclause (5). The Senate Department was asked to comment on this provision before the amendments were circulated, but subject to a very severe deadline for the printing and circulation of the amendments. In the short time available I suggested a change of wording to the new subclause 48(5), but was not able to undertake a proper analysis of the proposed provision. I indicated that I could see problems with it.

The proposed new subclause (5) provides that, if a disallowance motion is deferred by a House and a new instrument is made amending, repealing or replacing the instrument which is the subject of the disallowance motion, the House may discharge the disallowance motion.

The supplementary explanatory memorandum accompanying the amendments does not explain the rationale of this proposed provision, but merely restates its terms, as is usual with explanatory memoranda in recent times. It does not appear to arise from the recommendations of the committee or any previous consideration of the bill. Remarks made during the brief consultation to which I have referred suggested that the purpose of the proposed provision is to formalise the practice whereby a disallowance motion in the Senate is withdrawn when an amending instrument is made which overcomes the objection to the original instrument which was the subject of the disallowance motion.

There are several difficulties with the proposed provision.

In the first place, there would appear to be no particular reason for formalising the practice whereby disallowance motions are disposed of when a satisfactory amending instrument is made. The proposed provision merely indicates that the Senate may do that which other statutory provisions and its own practices already allow. Unless there is some useful purpose to be served by enacting statutory provisions which merely recognise parliamentary procedures, they should be avoided because they may unintentionally restrict those procedures.

Secondly, in attempting to give statutory expression to the practice which is particularly associated with the Regulations and Ordinances Committee, a practice which cannot be statutory codified, the proposed provision creates vagueness and uncertainty. It refers to the making of a new instrument after discussion with a House. It is not indicated how a rule-maker can discuss anything with a House; discussions can be held with the chair of the Regulations and Ordinances Committee when the committee has come to a view about an instrument, but discussions cannot be held with the

Senate, particularly as the Senate may not have any agreed view about an instrument. The proposed provision does not say that the new instrument is to overcome the objections to the original instrument which are the basis of the disallowance motion, obviously because this concept cannot be statutory enacted, but the concept is absolutely central to the practice which the provision attempts to codify. Under that practice, disallowance motions are not withdrawn unless a new instrument or an undertaking overcomes the objections to the original instrument of the Regulations and Ordinances Committee or of the senator who has given the notice. The proposed subclause (5), in conjunction with proposed new subclause (6), would give a special status to an instrument which is not required by the terms of the provision to achieve the goal of overcoming the objection to the original instrument.

Thirdly, the proposed provision refers to a House discharging a motion to disallow the original instrument. The draft provision as originally shown to me provided for a House to "move a motion to rescind the motion to disallow". I pointed out that Houses do not move motions, that moving a motion is not the same as passing a motion, and that it is impossible to rescind a motion, as only a resolution, that is, a motion which has been passed, can be rescinded. I suggested the wording which now appears in the proposed subclause, but indicated that there was still a serious problem with it. The procedures of the Senate follow the principle that a notice of motion, before it has been moved and has become the property of the Senate, is entirely in the control of the senator who has given the notice. It is for that senator to determine whether the notice will be proceeded with. This is an important principle because, if the Senate could dispose of a senator's notice of motion before it is actually moved, this would open up enormous scope for a majority to interfere with a senator's right to initiate business; such a process could be used to prevent matters even being raised. The proposed provision would thus introduce a dangerous procedural novelty, a resolution by the Senate to discharge a notice of motion. If the subclause were enacted there would be a statutory provision for a procedure in relation to disallowance motions which is alien to the procedure applying to all other motions.

Fourthly, by attempting in this inadequate way to codify a parliamentary practice, the proposed subclause would open up an avenue for possible abuse. If a government thought that it had the support of a majority of the Senate to dispose of an embarrassing disallowance motion without being forced to debate or vote on it, a new instrument could be made without overcoming the objection to the original instrument which is the subject of a deferred disallowance motion, and a motion could then be moved to discharge the disallowance motion, thereby preventing the senator concerned from moving the motion, and avoiding the necessity of debating the motion and voting against it directly.

Fifthly, having unnecessarily created these difficulties, the proposed provision would not advance parliamentary control over delegated legislation in the slightest degree. If a notice of motion for disallowance has reached the time for determination, whether or not it is deferred under the proposed provisions of clause 48, the Senate must decide whether to proceed with the disallowance of the instrument, either by agreeing to the motion or by allowing the statutory period to expire, or to allow the withdrawal of the notice of motion. In making that decision the Senate may have regard to either ministerial undertakings in relation to the instrument in question or a new instrument which may have been made. In making its decision and in having regard to those matters, the Senate would not be assisted in any way by the proposed new subclause (5).

I therefore suggest that the proposed new subclause should not be agreed to.

If the committee so wishes I would be pleased to elaborate on or clarify this submission.

Yours sincerely

(Harry Evans)

6.36 On receipt of this letter the chairman convened a special meeting of the committee for the next sitting day, 13 November 1995. The Clerk of the Senate, Mr Richard Morgan and Ms Helen Towney, both from the Civil Law Division of the Attorney-General's Department, also attended the meeting. The committee is grateful for their assistance.

6.37 The committee concluded that, while it would not oppose the amendments, it was desirable for them to be amended in light of the difficulties noted by the Clerk and discussed at the special meeting. This would involve deletion of all references to a house in proposed new subclause 48(5), which would instead merely refer to the existing practice, most often associated with the committee, where a notice of disallowance has been given in respect of an instrument and where a new instrument is made to overcome parliamentary concerns about the original instrument.

6.38 The committee also concluded that drafting changes were necessary to proposed new subclauses 48(6) and (7), which provide that a rule-maker is not required to enter into further consultation about a new instrument although, with several exceptions, the new instrument will be subject to the other provisions of the bill. Here also the committee concluded that an inappropriate reference to a house should be removed, while more safeguards for the public should be included. These safeguards were to make it clear that, while further consultation was not mandatory for new instruments, it was to be encouraged where appropriate that the explanatory statement should indicate whether such consultation had taken place and, if so, the nature of the consultation.

6.39 The result of the suggested changes to the government amendments is that consultation procedures for instruments made to overcome parliamentary concerns about earlier instruments will be less restrictive than the far from onerous consultation requirements for other instruments. These new consultation procedures would, however, include appropriate safeguards for the public which are lacking in the present government amendments.

6.40 Accordingly, in the absence of similar government amendments when the bill comes before the Senate, I will, on behalf of the committee, move amendments to the bill to this effect. I seek leave to incorporate in *Hansard* the proposed amendments suggested by the committee [amendments not reproduced here].

6.41 The Legislative Instruments Bill will make probably the most important changes since Federation to the law affecting delegated legislation, which is Commonwealth law no less than are acts. The committee is confident that its initiative in this area will improve the operation of the recent government amendments.

**REMUNERATION TRIBUNAL DETERMINATION NO 12 OF 1995**  
**Senator Colston, 23 November 1995, Senate Hansard, p 3850**

6.42 This Determination, made on 19 July 1995, provided for the remuneration and allowances for the Director of the Civil Aviation Safety Authority.

6.43 Clause 1 provided for salary of \$122,400 per annum, to be reduced by the amount of any additional superannuation contributions payable by the CASA in accordance with superannuation arrangements approved by the Minister for Finance.

6.44 Clause 2 provided for performance based remuneration of up to \$20,000 payable annually, assessed by the Board of the CASA in accordance with Guidelines advised by the Remuneration Tribunal from time to time.

6.45 Clause 3 provided for additional remuneration of \$50,000 per annum, clause 4 for travelling allowance and clause 5 for annual leave loading.

6.46 The Committee was concerned that the subdelegations in clauses 1 and 2 may have been subdelegations of legislative rather than administrative power and therefore invalid in the absence of express enabling authority in the parent Act or some other Act. On 1 September 1995 the Committee accordingly wrote to the Hon Laurie Brereton MP, Minister for Industrial Relations. On 18 October 1995 the Minister advised that the discretion given to the CASA in clause 1 could be characterised as a valid delegation of administrative power and that it was a matter of judgement whether the guidelines in clause 2 could be categorised in the same way. The Minister advised that the Department had sought legal advice from the Attorney-General's Department and that if necessary the Minister would take up with the Remuneration Tribunal appropriate amendment of the Determination.

6.47 The Committee has now been provided with the Attorney-General's Department advice. In respect of clause 1, the advice was that, while it was arguable that the subdelegation was invalid, the provision was not inconsistent with the power of the Tribunal to determine remuneration. Clause 2, however, purported to allow CASA to determine the level of remuneration of the Director and that clause was therefore invalid in its entirety.

6.48 Remuneration Tribunal Determination No 12 of 1995 was made under the *Remuneration Tribunal Act 1973*, which includes a number of possibly unique provisions relating to parliamentary scrutiny of delegated legislation. One such provision is s.7(7), which provides that a Determination must be tabled within 15 sitting days of being received by the Minister from the Tribunal and not, as is usual, within 15 sitting days of being made. The Minister has, however, undertaken 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. The Committee is grateful for this helpful undertaking. Another possibly unique provision is s.7(8), which provides that Determinations may be disallowed only within 15 sitting days of tabling, instead of the more usual 15 sitting days



of a notice given within that period. On behalf of the Committee I will write to the Minister suggesting that this provision could also be amended, again subject to the Legislative Instruments Bill.

**APPROVED OCCUPATIONAL CLOTHING GUIDELINES MADE UNDER THE INCOME TAX ASSESSMENT ACT 1936**

**Senator Colston, 30 November 1995, Senate Hansard, p 4364**

6.49 The Committee wishes to report briefly to the Senate on its scrutiny of the Approved Occupational Clothing Guidelines, which provide for employee income tax deductibility of such clothing. The Guidelines, which affect great numbers of Australian wage and salary employees and which also have an effect on the national revenue, were not of the quality which the Senate would expect from legislation made by the executive under the authority of an Act of Parliament.

6.50 The Guidelines were made under section 51AL of the *Income Tax Assessment Act 1936* which provides that expenditure incurred by an employee in relation to a non-compulsory uniform or wardrobe is not tax deductible unless the clothing was entered on a Register kept by the Textiles, Clothing and Footwear Development Authority. The section also required the Minister to formulate Guidelines setting out criteria for the entry of clothes on the Register. The first set of Guidelines came into effect on 1 September 1993.

6.51 The present set of Guidelines amended the old Guidelines in respect of a number of matters. The new Guidelines were made by the Minister on 7 June 1995 with no express commencement date, although the Explanatory Statement did advise that transitional provisions then in force expired on 30 June 1995. The Guidelines consisted of 57 consecutively numbered clauses, some of which were in italics, some not in italics and some in both italics and non-italics. Some of the clauses were also partly in bold. A Note at the start of the Guidelines stated that the material in italics was explanatory only and did not form part of the Guidelines. Nevertheless, clause 3, in italics, provided:

*These Guidelines supersede those of 1 September 1993 and are effective as of 7 June 1995. The changes in these Guidelines are not retrospective.*

6.52 The Guidelines were, however, subject to s.48(2) of the *Acts Interpretation Act 1901*, under which an instrument has no effect if, before gazettal, the instrument purports to affect rights or impose liabilities on any person other than the Commonwealth. The Committee ascertained that the Guidelines had not been gazetted until 21 June 1995, so it appeared that the Guidelines may have been void for prejudicial retrospectivity. There was also the advice in the Explanatory Statement which appeared to state that the old Guidelines were in force up to 30 June 1995. The Committee raised these concerns with the Minister. The Committee also gave a protective notice of disallowance of the Guidelines, in order to preserve its options.

6.53 The Minister advised that the new Guidelines were made to take account of concerns from employers and uniform suppliers that the original Guidelines were difficult to apply. The new Guidelines would make it easier for genuine corporate uniforms or wardrobes to be admitted to the Register and so gain tax deductibility. For instance, the maximum number of colours and shades that could be used in a design was increased from five to eight, the minimum size of corporate identifiers on accessories was reduced and there was greater flexibility for differing uniforms where the employer maintains separate public identities. Another clause which provided that single items of occupational clothing, other than full body garments, would not be admitted to the Register, merely stated in another way the equivalent clauses in the original Guidelines.

6.54 The Minister further advised, however, that there was one minor area where the new Guidelines were more strict than the original ones. Corporate identifiers must now be permanently affixed in a different way. The Minister advised that this difference had not, in practice, affected adversely the rights of any applicant seeking admission to the Register. This is because the Textiles, Clothing and Footwear Development Authority, which administers the Guidelines, did not reject any applications dated between 7 June and 21 June 1995 which would have satisfied the original Guidelines but not the new ones. Also, any applications approved between those two dates which would have satisfied the new Guidelines but not the old, would be eligible for tax deductibility.

6.55 The Minister then advised that the Guidelines had actually commenced on gazettal on 21 June 1995. This was because the paragraph in the published text of the Guidelines which stated that they commenced on 7 June 1995, was expressed to be explanatory only and was thus not part of the Guidelines proper. The Minister therefore advised that both from a technical legal viewpoint and in practice the old Guidelines continued to operate until 21 June 1995, and that the difference between the date on which the new Guidelines were expressed to take effect and the date of notification in the *Gazette* had no prejudicial impact upon the rights or liabilities of any person.

6.56 The Committee agreed to accept the Minister's advice and to remove its notice of motion of disallowance. The Committee agreed, however, that the situation was far from satisfactory. The Minister expressly advised that the published commencement date for the operation of tax deductibility for occupational clothing was wrong, which is an undesirable outcome for such an important document ultimately affecting large numbers of working Australians. The Committee also noted the Minister's advice that no person was actually disadvantaged, but observed that this appeared to be because for two weeks in the last month of the financial year the TCFDA apparently administered both the old and new Guidelines simultaneously, albeit applying only the relevant beneficial provisions of both sets of Guidelines. The Committee noted that this generosity was not universal in taxation matters.

6.57 The Committee's scrutiny of the Guidelines illustrates how the Committee operates to carry out the mandate of the Senate to ensure that delegated legislation is of high quality. In the present case the Guidelines, while valid, left something to be desired from the viewpoint of sound public administration. The Committee makes a special statement whenever it considers



that there is an aspect of its scrutiny on which the Senate should be more closely informed and the Approved Occupation Clothing Guidelines are such a matter.

**FIRST MEETING OF THE COMMITTEE FOR THE NEW PARLIAMENT  
Senator O'Chee, 23 May 1996, Senate Hansard, p. 973**

6.58 As the new Chairman of the Standing Committee on Regulations and Ordinances, I would like to report very briefly on the first meeting of the committee for the new parliament and to also pay tribute to the previous Chairman, Senator Colston. As honourable senators are aware, the committee scrutinises each disallowable legislative instrument tabled in the Senate, of which there were more than 2,200 last year, to ensure compliance with high standards of parliamentary propriety and personal rights.

6.59 The committee takes this task very seriously. At its last meeting during the previous parliament, it resolved to recommend to the Senate that it disallow the whole of a particular regulation if the minister did not undertake on that same day to amend it. Fortunately, the minister did this, and I will shortly present a formal written report on the committee's actions in this matter.

6.60 For the present, however, I will outline the matters dealt with by the committee at its meeting this morning. The agenda of the committee included consideration of some 43 letters from ministers of the previous and new governments and, because of the caretaker period before the recent election, from departmental officers. These replies illustrate the extent of the committee's interest and influence. In them ministers confirm that five acts had been or would be amended to meet our concerns, including one retrospectively; that another act had been applied to a territory and another enabling act had been repealed. In respect of the legislative instruments, ministers advised that provisions of two were void; that in respect of a third, in delightful Sir Humphrey style, that on the one hand the instrument could be considered void, while on the other hand it could be treated as valid; and in respect of a fourth, advice that an instrument that was not void was couched in such terms that the committee resolved to approach the minister again. Two more instruments, the committee was told, were inoperative--whatever that means. Ministers also undertook to amend at least 21 separate instruments to meet our concerns. I say 'at least' because one undertaking was to provide AAT review for all portfolio charging decisions. A number of these 21 instruments will be amended in respect of multiple defects; in the case of one ordinance, nine separate sections will be amended. These 21 undertakings to amend include only substantive improvements and not undertakings merely, for instance, to avoid invalidity or to improve citation and numbering.

6.61 The replies also included explanations of the apparent administrative or legal defects raised by the committee. One reply gave reasons for an eight-year delay in complying with a mandatory legislative duty, while another advised that a statutory authority had mistakenly paid \$350,000 in payroll tax. The committee was not satisfied with six of the replies and resolved to ask ministers for further information.

6.62 I will further elaborate on the work of the committee in the annual report, in special reports, in our regular end of sittings statements, in special statements and when incorporating in *Hansard* our correspondence relating to instruments in respect of which the

committee gives a notice of intention to disallow. On behalf of the committee, I will also write to the Prime Minister (Mr Howard) and all other ministers asking for cooperation in ensuring that Commonwealth delegated legislation is of high quality. I will point out that such quality is one of the hallmarks of good government. In conclusion, I believe that the Standing Committee on Regulations and Ordinances will continue to justify the confidence of the Senate, which it has enjoyed in the past 65 years of its operations.

**103RD REPORT - SCRUTINY BY THE COMMITTEE OF THE EXPORT INSPECTION AND  
MEAT CHARGES COLLECTION REGULATIONS  
Senator O'Chee, 25 June 1996, Senate Hansard, p 2132**

6.63 It is with a considerable sense of achievement that I table this report, which describes one of the most important actions of the committee in 1995. The committee's actions in this case were noteworthy because it formally resolved to recommend that the Senate disallow a set of regulations unless the minister gave an undertaking that day to amend the regulations to meet its concerns. The committee's concerns related to lack of external review of the merits of decisions made by a public official to refund or remit charges. The committee had referred the question of review of these discretions to the Administrative Review Council, a statutory body whose functions include advising government on whether administrative decisions should be subject to review.

6.64 The ARC agreed with the committee that the present decision should be reviewable by the Administrative Appeals Tribunal. The committee decided that, in these circumstances, it should insist that an undertaking be given to amend the regulations. Fortunately the minister gave such an undertaking, so there was no need to recommend disallowance. The report describes scrutiny by the committee of the eleven sets of regulations which comprise the principal regulations, illustrating the types of matter which concern the committee and the method of its operation. The report illustrates that the committee is not a mere rubber stamp under which a minister's explanations are acceptable as a matter of course, regardless of whether they are convincing. The committee will, where appropriate, recommend that an instrument be disallowed. It goes without saying that the committee's actions were non-partisan and the decision to recommend disallowance was unanimous.

6.65 The report also illustrates the tenacity of the committee. The regulations in question at first included no provision at all for refund of charges, then provided a discretion for a refund to be made, then removed the discretion but retained the refund, then removed the refund, then provided again for a discretion to refund, then provided for the discretion to be delegated, then amended the discretion and then amended it again. The committee scrutinised this entire public administration kaleidoscope, raising with the minister not only the question of external merits review but also breaches of personal rights, breadth of delegated powers and drafting oversights.

6.66 The committee, as usual, kept the Senate informed of its activities by incorporating its correspondence in *Hansard* whenever it withdrew a notice of disallowance in respect of one of the sets of the regulations and by the then chairman, Senator Mal Colston, several

times advising the Senate that the committee may be taking unusual action. Finally, the report illustrates the thoroughness of the committee, which wrote or received 22 letters in the course of its scrutiny.

6.67 On behalf of the Senate Standing Committee on Regulations and Ordinances, I am pleased to table this report as an instance of how it carries out its mandate from the Senate to ensure that delegated legislation is of the highest possible quality.

**DELEGATED LEGISLATION AFFECTING CIVIL AVIATION**  
**Senator O'Chee, 25 June 1996, Senate Hansard, p 2133**

6.68 The recent report by the New South Wales Coroner on the tragic Monarch Airlines crash at Young which resulted in seven deaths, including three schoolchildren, brought into focus a number of issues affecting civil aviation safety. The sad crash of the Defence Force Blackhawks near Townsville, although not a civil aviation matter, also highlighted air safety generally. As Chairman of the Standing Committee on Regulations and Ordinances I would like to report briefly to the Senate on scrutiny by the Committee of delegated legislation regulating civil aviation.

6.69 During 1995 there were 810 disallowable instruments made directly under Acts affecting civil aviation or under delegated legislation authorised by those Acts. Of these the great majority, or 725, were Civil Aviation Orders, made in the form of Airworthiness Directives, which set technical standards for the service and maintenance of different types of aircraft, engines and equipment. There were a further 58 instruments which exempted individual aircraft or, in a smaller number of cases, specified aviation activity, from these basic requirements of the Civil Aviation Orders. The balance of the 810 instruments were Regulations, Determinations, Declarations, Directions, Permissions, By-laws and Instructions.

6.70 The basic scheme of the legislation is clear. Every Australian aircraft must either comply with the Civil Aviation Orders or be exempted from such compliance. Most exemptions relate to requirements to carry or operate specified aircraft equipment. It is understood that the aircraft involved in the crash at Young was not equipped to the standard required by the Orders and did not hold an appropriate exemption in relation to such equipment.

6.71 The Coroner found, in relation to the Young crash, that the Commonwealth Act and Regulations laid down what he described as 'strict rules' regarding aircraft safety. The Coroner, of course, used this description in an approving sense. I will mention later in this statement how the Committee has contributed to this standard of regulation of air safety. The Coroner found, however, that the legislation was not properly administered. An unannounced inspection of the Monarch aircraft prior to the crash revealed what the Coroner described as serious deficiencies and breaches of the Regulations, which do not appear to have been adequately addressed. The Coroner further found that there had been a

lenient approach to policing legislative requirements, with the senior echelons of the relevant agency loathe to prosecute for breaches of the Regulations.

6.72 The Young tragedy illustrates firstly the necessity for laws to be enforced. It is, of course, unsatisfactory for an elaborate system of legislation to provide for a matter as important as air safety if those provisions are not administered in a proper fashion. Secondly, the incident shows that the transparency provided by the existing requirement to table all exemptions must be maintained. The safety of the travelling public is such that these exemptions, which dilute the usual safety standards, should be granted by a process which, if necessary, includes the most rigorous scrutiny and oversight. Tabling in Parliament, with the possibility of disallowance, provides such oversight.

6.73 The Standing Committee on Regulations and Ordinances, on behalf of the Senate, scrutinises this mass of Civil Aviation Orders and Exemptions to ensure that they conform to its high standards of parliamentary propriety and personal rights. In December 1994 the Committee's Legal Adviser and the Secretary met in Parliament House with officials of the then Civil Aviation Authority to discuss a major review of legislative instruments affecting civil aviation. This review was prompted largely by the Committee's concerns at some aspects of this legislation, a number of instruments being invalid for incorporation of documents contrary to the Act, for prejudicial retrospectivity, for lack of enabling powers and for lack of procedural requirements. Deficiencies in a recent Exemption from the Orders resulted in an aircraft holding a purported exemption in fact operating illegally. Honourable Senators may ponder the consequences had this aircraft met with misadventure. Some By-laws made by the Federal Airports Corporation were also void. There were other concerns apart from invalidity, such as strict liability offences, breaches of privacy, failure to effect legislative intent, failure to provide for review of administrative decisions, wide powers of delegation and drafting defects, one instrument, for instance, providing for a compliance date of 31 June. At the suggestion of the then Chairman of the Committee, Senator Mal Colston, the Minister agreed to provide the Committee with a six-monthly Report of the review of the legislation. After receiving the first Report the Committee's staff met again with officials of the Authority to discuss what the Minister described as the Committee's requirements.

6.74 At its first meeting this year the Committee received and considered the second six-monthly Report, to 31 December 1995, prepared by officials of the Civil Aviation Safety Authority. Honourable Senators should note that the Report advised that the review team needed to correct the defects in the civil aviation delegated legislation, picked up largely by the Committee's actions, included four technical specialists who prepare drafting instructions, three in-house legislative drafters and two part-time drafting consultants. The Report further advised that all drafting instructions had been completed, with some drafts available for cross-checking and review. Although it was unlikely that new legislation would come into operation before the end of 1996, this was within the original timeframe.

6.75 Scrutiny and action by the Regulations and Ordinances Committee has ensured an outcome which should result in delegated legislation affecting civil aviation being of a high technical standard. It is this delegated legislation which is used to administer the day to day operations of civil aviation in Australia and which has the greatest practical effect on the

companies and individuals involved in the industry. Of course, as the coroner's report has illustrated, the best legislation is useless if it is badly administered and it was this aspect that the Coroner criticised. It is the responsibility of the executive and its agencies to administer legislation properly. In the meantime, however, on behalf of the Standing Committee, I can report to the Senate on the generally satisfactory result of scrutiny by the Committee of delegated legislation affecting civil aviation.

#### NATIVE TITLE INSTRUMENTS

Senator O'Chee, 27 June 1996, Senate Hansard, p 2319

6.76 On Tuesday in the House of Representatives the Prime Minister (Mr Howard), in answer to a question, advised that an instrument made under the *Native Title Act 1993* on 24 December 1993, which was the very day that the act received assent, was never tabled. The Prime Minister advised that the effect of the failure to table could well cast a legal doubt over a large number of acts affecting the Aboriginal community, the pastoral industry and the mining industry. The Prime Minister further advised that a fresh determination would be tabled later in the week. The states and other affected bodies would be consulted on remedial matters need to, as the Prime Minister expressed it, patch up the legislation.

6.77 Both the original and the amending determinations are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*, which requires the determinations to be tabled in both houses within 15 sitting days of making, failing which they cease to have effect. This was the position with the original determination. Then, more than two years later, the original determination was amended. Although the amending determination was validly tabled, its practical effect would be little or none, because its only substantive provisions purport to amend the invalid earlier determination. It is ironic that the explanatory statement for the second determination advises that its purpose is to address what it terms 'problems', 'uncertainty', 'difficulties' and an 'unintentional result' in the original.

6.78 This omission was in fact first detected by the staff of the Standing Committee on Regulations and Ordinances who at once alerted the Department of the Prime Minister and Cabinet, who up until then were unaware of the failure to table.

6.79 Yesterday, 26 June 1996, a fresh determination was tabled with the object of correcting the situation. This determination was made, gazetted and tabled on the same day, which showed an alacrity not usually noticeable in the actions of the executive relating to delegated legislation. The committee will scrutinise this instrument in the usual way and take any appropriate action. In the meantime, however, it is disappointing that the explanatory statement for the new determination does not acknowledge the actions of the committee, without which this matter would never have come to light.

6.80 This example illustrates the need for administrators to be aware of, and to apply, the requirements relating to delegated legislation. In the present case this committee was able to detect the damage only after it had been done. In this context, agencies should familiarise themselves with the annual reports and special reports of the Standing Committee on Regulations and Ordinances, which should enable pitfalls such as the present one to be avoided. I thank the Senate.

Bill O'Chee  
Chairman

## APPENDIX 1

### CLASSIFICATION OF LEGISLATIVE INSTRUMENTS UNDER THE HEADING 'MISCELLANEOUS' IN PARAGRAPH 1.8

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## APPENDIX 2

### DISALLOWABLE INSTRUMENTS TABLED IN THE SENATE 1995-96

During the year 1995-96 there were 1,900 disallowable legislative instruments considered by the Committee. Of these, 398 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 1,502 instruments are generally less accessible, possessing less advantages than 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 statements, s. 122A
<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>	declarations, s.9A
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<i>Air Services Act 1995</i>	directions, s.16
<i>Australian Capital Territory (Planning and Management) Act 1988</i>	territory plans, s.21
<i>Bounty (Computer) Act 1984</i>	declarations, s.5
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<i>Broadcasting Services Act 1992</i>	notices, s.31
<i>Child Care Act 1972</i>	guidelines, s.12A
<i>Child Care Rebate Act 1993</i>	determinations, s.15

*Christmas Island Act 1958* approvals, s.103 Casino Control Ordinance 1988 list of Acts of Western Australian Parliament, s.8B ordinances, s.10 regulations, s.23

*Civil Aviation Act 1988* orders, s.98(5) amendments, r.252 exemptions, r.308

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*Currency Act 1965* determinations, s.13A

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*Customs Administration Act 1985* directions, s.4

*Defence Act 1903* determinations, ss.52,58B

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*Horticultural Research and Development Corporation Act 1987* orders, s.4

*Income Tax Assessment Act 1936* determinations, ss.78,82CE,159UF guidelines, ss.51AL,78

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*Military Superannuation and Benefits Act 1991* instruments, s.5

*Motor Vehicle Standards Act 1989* determinations, s.7

*National Health Act 1953* declarations, s.85 determinations, ss.4,47,54,98,99 guidelines, s.135AA notices, s.40AA,40AH principles, ss.39,40AA,48,52,58CD, 58GA,73F

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