THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

One Hundred and Sixth Report

Annual Report 1997-98

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Members of the Committee

Senator Bill O'Chee (Chairman)
Senator Andrew Bartlett
Senator Brenda Gibbs
Senator Steve Hutchins
Senator Julian McGauran
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.

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)[1]
Senator Mal Colston (Deputy Chairman)[2]
Senator George Campbell[3]
Senator Helen Coonan[4]
Senator Trish Crossin[5]
Senator Kay Patterson[6]
Senator Marise Payne[7]
Senator John Quirke[8]
Senator the Hon Nick Sherry[9]

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 1 October 1997 the independent legal adviser has been Professor Jim Davis 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.

1 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.
2 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.
3 Senator Campbell was a member of the Committee from 23 September 1997 to 23 June 1998.
4 Senator Coonan was a member of the Committee from 22 September 1997 to 27 January 1998.
5 Senator Crossin commenced as a member of the Committee on 23 June 1998.
6 Senator Patterson commenced as a member of the Committee on 8 May 1996. Senator Patterson was discharged from the Committee for the period 6 December 1996 to 4 February 1997. Senator Patterson recommenced as a member of the Committee on 5 February 1997. Senator Patterson was discharged from the Committee for the period 22 September 1997 to 27 January 1998. Senator Patterson recommenced as a member of the Committee on 28 January 1998.
7 Senator Payne commenced as a member of the Committee on 7 May 1997.
8 Senator Quirke was a member of the Committee from 23 September 1997 to 3 March 1998.
9 Senator Sherry commenced as a member of the Committee on 3 March 1998.

Statistics

1.8 During the year the Committee scrutinised 1888 instruments, a marginal increase on the previous financial year. The following table sets out the numbers and broad categories of these instruments.

Instruments examined by the Committee 1997-98	Quantity
Civil aviation orders	522
Statutory Rules	454
Public service and defence determinations	314
Health and family services instruments	102
Veterans' entitlements instruments	90
Telecommunications determinations	81
Customs orders	41
Remuneration Tribunal determinations	30
Higher education instruments	28
Primary industries and energy instruments	27
Territory instruments	22
Marine orders	21
Radiocommunications instruments	20
Miscellaneous instruments, details of which are in Appendix 1	136
Total	**1888**

Ministerial Undertakings

1.9 During the year Ministers and other law-makers undertook to amend or review 25 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 Chapter 4.

Other Committee Activities

1.10 The Committee tabled the following reports:

One Hundred and Fifth Report, *Annual Report 1996-97*, tabled on 24 June 1998.

1.11 Other significant matters, which are reported in Chapters 2, 5 and 6 are as follows:

Statement/Paper presented to the Senate	Date/Senate Hansard page
Scrutiny by the Committee of regulations providing for the leasing of Commonwealth airports (a paper presented to the Sixth Australian and Pacific Conference on Delegated Legislation and the Scrutiny of Bills, Adelaide, 16-18 July 1997)	4 September 1997 p. 6406
A breach of the Committee's principles (Trade Practices Regulations)	22 October 1997 p. 7860
The impact of the Regulations and Ordinances Committee on Administrative Law and Ethics (a paper presented by Senator O'Chee at the Administrative Law and Ethics Conference, Canberra, 24 November 1997)	27 November 1997 p. 9679
End of sittings statement on the work of the Committee, Spring Sittings 1997	27 November 1997 p. 9676
Scrutiny of National Uniform Legislative Schemes	12 March 1998 p. 892
Disallowable Instruments and Parliamentary Propriety (Comcare Directions and Federal Court Rules 1997)	7 April 1998 p. 2189
The accountability of the executive and the judiciary to Parliament; the role of the Senate Standing Committee on Regulations and Ordinances (a paper presented by Senator Patterson at the 1998 National Administrative Law Forum, Melbourne, 18-19 June 1998)	24 June 1998 p. 3989
Provisions in legislative instruments which may have been more appropriate for inclusion in an Act (Therapeutic Goods and Public Service Regulations)	30 June 1998 p. 4438
Scrutiny of Great Barrier Reef Zoning Plans	30 June 1998 p. 4440
End of sittings statement on the work of the Committee, Autumn and Winter Sittings 1998	1 July 1998 p. 4625

Scrutiny of national scheme legislation

1.12 During the year, the Chairman met with the Chairs of the other Australian legislative scrutiny committees to discuss the Committee's proposal for the scrutiny of national scheme delegated legislation. The Committee also considered a proposal from the New South Wales Regulation Review Committee to study the strengths and weaknesses of employing cost benefit and sunset requirements to scrutinise Acts and regulations in the various jurisdictions around Australia.

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 O'Chee, Senate Hansard, 27 November 1997, p. 9676

Legal Adviser

2.2 At the outset, let me say that the Committee and the Senate were saddened by the death on 10 October 1997 of the Committee's Legal Adviser, Emeritus Professor Douglas Whalan AM. Professor Whalan had resigned from the position of Legal Adviser from 31 August 1997 due to ill health, following which the President gave a farewell dinner for Douglas and his wife Elizabeth, to commemorate his 15 years of service as Legal Adviser. Professor Whalan was the subject of a condolence motion in the Senate on 22 October 1997.

2.3 After Professor Whalan's resignation the Deputy Clerk of the Senate, Miss Anne Lynch, acted as Legal Adviser until a replacement could be found. The Committee was most appreciative of the Deputy Clerk's comprehensive and detailed reports.

2.4 Professor Jim Davis of the Law Faculty of the Australian National University was appointed as Legal Adviser to the Committee from 1 October 1997. Professor Davis is well known to the Senate, having been Legal Adviser to the Standing Committee for the Scrutiny of Bills since September 1983.

Overview

2.5 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 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.

2.6 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.

2.7 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.

2.8 During the sittings the Committee scrutinised 860 instruments, which is an historically high number. Of these, 196 were statutory rules, which are generally better drafted and presented than other series of delegated legislation. The other 664 instruments were the usual heterogeneous collection of different series.

2.9 Each of the 860 instruments was scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 169 prima facie defects or matters worthy of comment in those 860 instruments. The defects are described below under each of the four principles.

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

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

2.11 Technical validity is, however, an important aspect of the work of the Committee. For instance, legislative instruments generally may incorporate provisions of an Act or other legislative instrument in force from time to time, but may only incorporate other material in force at a particular date. A number of instruments purported to incorporate material from time to time as in force and the Committee raised concerns about aspects of these. One instrument incorporated a statutory instrument which was not disallowable. Other instruments incorporated material which was prepared by international bodies.

2.12 A provision of a legislative instrument which purports to subdelegate legislative power is void unless expressly authorised by the enabling Act. One instrument provided for directions which appeared to be legislative, another purported to confer legislative power on an agency and two others provided for effect until a specified date or until an earlier date determined in one case by the Minister and in another by an agency. Another could be terminated by Gazette notice. One determination purported to confer upon the Minister power to make rules which may have been legislative for travelling allowance for parliamentarians.

2.13 Legislative instruments which provide for prejudicial retrospectivity are generally void. In one case the Committee suggested that the Act be amended to correct what appeared to be continuing problems of prejudicial retrospectivity affecting health funds and people who have medical "gap" insurance. Another important determination which was made on 1 July 1997 to come into effect on the same day was void because it was not gazetted until six weeks later. This also raised interesting questions of revocation and revival of earlier instruments. Another instrument reduced some fees retrospectively, which was valid, but also imposed new fees, which was void. The Explanatory Statement sought to justify this by advising that the industry did not object to the new fees.

2.14 Legislative instruments must comply with requirements of the enabling Act and the general law. One instrument appeared to be invalid because it had no making words, while others were not tabled within the required period and subsequently ceased to have effect. Another purported to provide that the instrument could be amended otherwise than by an amending instrument. The making words for important guidelines relating to Commonwealth procurement advised that they were in respect of an earlier set of guidelines. One instrument appeared to be of no effect because it included wholly uncertain conditions. Other conditions were beyond power. One instrument could legally be made only after an investigation and report, which did not appear to have occurred.

2.15 The Committee ensures that legislative instruments do not breach parliamentary propriety. One Remuneration Tribunal Determination removed significant powers relating to travelling allowances from the President and the Speaker and gave them to the Minister, without any suitable explanation for this in the Explanatory Statement. One month later another Determination gave the same powers back to the presiding officers, again with no explanation.

2.16 The Explanatory Statement for one instrument which revoked an earlier instrument advised that the matters for which the earlier instrument provided would be dealt with administratively, even though the Act provided for the matters to be addressed by legislative instrument. This appeared to breach parliamentary propriety. One instrument did not provide for appropriate gazettal of a document. The Federal Court Rules relating to native title lapsed with a gap of four months before new ones were made. One principal instrument was amended two days after it was first made.

2.17 Delay in making an instrument when one should be made may breach parliamentary propriety. A Commonwealth and States agreement provided for regulations to be made as a matter of priority, but the regulations were not made for five years. One instrument amended an allowance 10 years after the last review. Another amended leave provisions after three years. A group of instruments repealed other instruments up to five years after it was appropriate to do so. Two companies were granted tax advantages with retrospectivity of 25 and 16 months. One instrument provided for prejudicial retrospectivity, authorised by the enabling Act, of three years.

2.18 The drafting and presentation of legislative instruments should be equal in quality to that of Acts. The Committee as usual noted numbers of drafting defects, including the wrong enabling provisions, no numbering or citation, misleading and incomplete notes, the wrong making words, wrong cross-references, an uncertain commencement date, inconsistencies in style even in similar instruments, imprecise drafting for an offence provision, opaque and otiose provisions, no pagination of a 28 page instrument and a disallowable instrument repealing a non-disallowable instrument. Other problems included omission of provision for notices and directions to be in writing, for officials to consider any relevant matters and not any matter and for criteria and standards to be objective rather than subjective.

2.19 Every legislative instrument should be accompanied by an appropriate Explanatory Statement or other explanatory material. As usual, the Committee noted the absence of this material, the wrong material, material which conflicted with the instrument and material which did not explain important provisions.

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

2.20 The Committee interprets this principle broadly, to include every aspect of personal rights. During the sittings the Committee noted the following possible defects in the legislative instruments which it scrutinised.

2.21 The Committee questions offence provisions which may be unreasonable. Three instruments provided for strict liability offences, including one which provided for 68 such offences. Another provided for the vicarious liability of the owner, agent and master of a vessel. Another provided that prosecution action may be initiated before a mandatory notice to explain has been given or before an explanation has been received.

2.22 Legislative instruments should provide for suitable safeguards for official actions which may affect members of the public. One instrument provided for notice to be given to produce a maintenance manual, with a penalty of $5,000 for failure to comply, but did not provide for the notice to be in writing. One provision of an instrument provided that an official "must" give notice before taking adverse action while another provision only provided that notice "may" be given. Another instrument did not provide for an official to provide a statement of reasons for adverse action. Another instrument merely provided for notice of action to be given in a newspaper, which meant that notice could be given in any newspaper at all.

2.23 The Committee questions unusual or unexplained changes in fees and charges. One instrument abolished the right to a refund of a fee in certain cases. Another instrument provided that successful applicants who paid large fees received a refund while those who paid a small fee did not. Another instrument provided for one fee to be increased by 150% while nine others were reduced by 10%.

2.24 The Committee protects personal privacy. One instrument required applicants to give their date of birth and residential address although these details may not have been necessary for the purposes of the instrument. Another instrument did not appear to provide for full confidentiality of details of a ballot. Another instrument, dealing with renewal of a licence, provided for date of birth to be given even though the agency already had this information which, by its nature, could not change. Another instrument provided for the use of individual details in a child immunisation program. One instrument advised that the Privacy Commissioner was consulted before the instrument was made, but the Committee still asked about privacy aspects of information received by case managers about job seekers.

2.25 Legislative instruments which affect a person's livelihood or ability to carry on a business should be fair. One instrument provided that all commercial leases under its provision must be to an individual, which seemed most odd. Another provided for business operators to pay on a possibly unfair basis for officials to visit their premises. Another instrument may have arbitrarily excluded some businesses from beneficial provisions. Another required business operators to forward the original of an insurance policy to the Minister although it appeared that a copy would be sufficient. Another instrument was deficient in respect of notification of successful completion of an occupational training course. The Explanatory Statement for another instrument affecting business advised that it

was only temporary, but did not advise how long the temporary period was, or how the instrument would be replaced.

2.26 Legislative instruments should not be harsh or unfair. One instrument appeared to restrict the right of patients to receive "gap" insurance payments for certain medical procedures. As noted earlier, this instrument presented problems with respect to prejudicial retrospectivity, but it also appeared to breach personal rights. The Committee suggested that the Act be amended to correct this problem as well. Another instrument provided for the Minister peremptorily to remove people from advisory boards even though these people had been nominated for the boards by state and territory governments, medical colleges and deans of medical schools. Another instrument proved that locally engaged staff at a particular Australian embassy overseas could claim benefits only for six children.

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

2.27 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.

2.28 The Committee noted the following general deficiencies with respect to discretions and review. A number of instruments provided for discretions where it may have been more appropriate to provide for officials to take mandatory action or not to give officials any power at all. Another instrument tightened the criteria for decision makers but did not provide for external merits review. A number of instruments were inconsistent in providing for AAT review. Two instruments provided for identical discretions but only one provided for review. Another instrument provided for similar discretions but only one was reviewable. One instrument did not provide for review although the enabling Act provided for AAT review of similar decisions. One instrument provided for officials of the AAT to exercise a discretion with respect to fees but did not provide for review. The Committee is pleased to report that this was one of the many provisions which Ministers agreed to amend.

2.29 The Committee scrutinises closely instruments which provide for unreviewable discretions which could adversely affect business. One such instrument provided for a discretion which could affect foreign ownership of airport operators. A related instrument granted a discretion to State liquor licensing authorities. One instrument provided that the approval of the Minister was necessary for a commercial activity. Another required the Minister's consent for indemnity insurance necessary to carry on business. One instrument provided for a discretion to impose a late fee on commercial applications. Another provided for discretions to extend the time for payment of an unpaid fee or a late penalty fee or to allow fees and penalties to be paid by instalment. One instrument provided for AAT review of a decision to close a business, but also effectively required the business to stop trading until the review was decided.

2.30 Some discretions have a particular effect on individuals. One instrument provided for discretions in respect of ballots for primary industries boards. A number of instruments

provided for discretions affecting personal superannuation. One instrument provided for a discretion affecting overseas qualifications. None of these discretions appeared to be subject to external merits review.

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

2.31 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

2.32 The Legal Adviser and staff attended the Sixth Australia and Pacific Conference on Delegated Legislation and the Scrutiny of Bills held at Adelaide on 16-18 July 1997. On 4 September 1997 the Chairman incorporated in Hansard a paper given at the conference on scrutiny by the Committee of regulations providing for the leasing of Commonwealth airports.

2.33 On 25 September 1997 the Senate passed the Legislative Instruments Bill 1996 with amendments which, among other things, met all of the concerns of the Committee detailed in statements incorporated in Hansard on 21 November 1996 and 23 June 1997. On 17 November 1997 the House accepted some Senate amendments but rejected the substantive bulk of them, including the amendments which reflected the concerns of the Committee.

2.34 On 22 October 1997 the Chairman incorporated in Hansard a statement on a breach of the Committee's principles in relation to the Trade Practices Regulations.

2.35 On 27 November 1997 the Chairman incorporated in Hansard a paper on the impact of the Committee on administrative law and ethics, which he gave to the Fifth Annual AIC Conference held in Canberra on 24-26 November 1997.

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

Senator O'Chee, Senate Hansard, 1 July 1998, p. 4625

Overview

2.37 During the present sittings the Committee scrutinised the usual large number of disallowable legislative instruments tabled in the Senate, made under the authority of scores of enabling 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 enabling Acts which authorise such delegated legislation.

2.38 The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure that they conform to the same high standards of parliamentary propriety and personal

rights which the Senate applies to Acts. If the Committee detects any breach of these standards it writes to the Minister or other law-maker in respect of the apparent defect, asking that the instrument be amended or an explanation provided. If the breach appears serious then the Chairman of the Committee gives notice of a motion of disallowance in respect of the instrument. This allows the Senate, if it wishes, to disallow the instrument. This ultimate step is rarely necessary, however, as Ministers almost invariably take action which satisfies the Committee.

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

2.40 During the sittings the Committee scrutinised 1,028 instruments. Of these, 258 were statutory rules, which are generally better drafted and presented than other series of delegated legislation. The other 770 instruments were the usual heterogeneous collection of different series.

2.41 Each of the 1,028 instruments was scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 144 prima facie defects or matters worthy of comment in those 1,028 instruments. The defects are described below under each of the four principles.

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

2.42 The Committee interprets this principle broadly. Together with the Committee's fourth principle, it covers not only technical validity, but also every other aspect of parliamentary propriety. The Committee noted that there may have been problems with instruments for the following reasons.

Validity

2.43 Legislative instruments are generally void if they subdelegate legislative power without the express authority of the enabling Act. During the sittings there were numbers of instances of apparently invalid subdelegation. One instrument purported to give the Minister power to extend its effect. Others provided for agencies to issue guidelines and determinations. Another delegated powers to other agencies. One provided for an agency to exempt itself from its own rules.

2.44 Subsection 48(2) of the *Acts Interpretation Act 1901* provides that prejudicial retrospectivity affecting anyone apart from the Commonwealth is of no effect. The Explanatory Statement for several instruments did not advise that retrospectivity was beneficial, although it was by no means clear that this was so. Another instrument provided that it commenced from the date of making, with the result that it was invalid, because it was not gazetted until later. The Explanatory Statement for another instrument advised that it did not adversely affect anyone, although this did not appear to be the case.

2.45 Legislative instruments must comply with provisions of the enabling Act and any other relevant legislation, such as the Acts Interpretation Act. Several instruments were made on the assumption that the Legislative Instruments Bill 1996 had passed through the Parliament.

2.46 There appeared to be no connection between another instrument and its putative enabling provisions. Another instrument appeared to be inconsistent with its enabling provisions. The enabling provisions for another instrument appeared to be unnecessarily complex.

2.47 Legislative instruments must comply with the constitutional requirements for legislation providing for taxation. One instrument appeared to impose a tax in breach of those requirements.

Parliamentary propriety

2.48 Numbers of instruments appeared to offend parliamentary propriety. One instrument provided for a mandatory report to Parliament but did not specify a time limit within which this must be done. Several instruments provided only for documents to be gazetted although it appeared that they should be tabled as well. Payments were received from January 1998 in respect of one instrument which was not made until May 1998. One instrument provided for the Minister to appoint board members for up to three years and another to appoint board members for an unlimited duration, which may give too much discretion to the Minister and reduce the independence of the board. Several instruments provided for the Minister to appoint people to senior positions without criteria for qualifications and experience, to guide and control the Minister. One instrument included safeguards in respect of propriety for some operations of a board, but not others. One instrument repealed the existing provisions of a principal instrument and immediately made them again, with no explanation. One instrument was made with a deficiency which the Minister had previously undertaken to avoid.

2.49 Excessive delay or duplication in making legislative instruments may breach parliamentary propriety. One agency delayed making an appropriate instrument for a year, relying instead on administrative instructions. Apparent delay in making another instrument resulted in a seven week gap in important legislation. One instrument removed provisions which had been obsolete for more than 10 years. Another instrument corrected provisions which were in conflict for four years, during which time administrators apparently did not enforce some of the provisions. One instrument took what appeared to be an excessive time to correct drafting errors. There were other instances of delay. Four sets of regulations amending the same principal regulations were made on the same day.

Drafting

2.50 The Committee considers that the standard of drafting of legislative instruments should not be less than that for Acts. A number of instruments did not appear to meet this standard. One instrument provided for a benefit from a time when it appeared that entitlement had lapsed. Another instrument provided for remuneration without specifying whether it was an annual allowance or a special payment. The legislative intention of another

was not effected. One instrument referred to a matter for which there was no definition, although one appeared necessary. A number of instruments included unclear provisions. One provided for an appeal period with an uncertain commencement. Another included conflicting provisions. One included gender specific expressions.

2.51 One instrument was not dated, while another included an uncertain commencement date. Several instruments included reference errors. Several provided for mandatory provisions with no sanctions. Another was unclear in relation to material incorporated. Several instruments were reproduced so poorly that they could not be read. Others were reproduced with parts missing.

Inadequate explanatory statements

2.52 Due to the earlier efforts of the Committee it is now accepted that every legislative instrument should be accompanied by a proper Explanatory Statement. One instrument did not have an Explanatory Statement while others were deficient in quality. The advice in the Explanatory Statement for one instrument conflicted with the provisions of the instrument itself. The Explanatory Statement for another advised that most of its provisions were minor, which mean that some were not minor, but did not explain which these were.

Numbering

2.53 Due to the earlier efforts of the Committee it is now accepted that every legislative instrument should have a unique citation or number. During the sittings several instruments were not numbered and two were given the same number.

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

2.54 The Committee also interprets this provision broadly, to include every aspect of personal rights. The Committee noted possible breaches of personal rights for the following reasons.

Protection of the rights of individuals

2.55 During the present sittings a number of instruments may have breached the rights of individuals. One instrument provided for a presumption of receipt of documents sent by public servants to members of the public, but there was no corresponding presumption for documents sent by members of the public. One instrument provided that an agency could summons witnesses, with a penalty of six months imprisonment for failure to obey without a reasonable excuse, but the summons gave no notice of these consequences or of what was a reasonable excuse. Another instrument provided for property found on Commonwealth premises to be sold, with all rights in the property extinguished and any money raised given to the owner, which protected the owner but not a lessee or bailee of the property. One instrument provided an unreasonably short time for people to do things. One instrument provided that a review board may only accept the original evidence, rather than the usual appeal process under which new evidence may be considered. Another provided that presumably aged and frail veterans must keep travel records for six months. Another

provided that people must keep certain records for five years, when a shorter time may have been adequate. One instrument did not provide that migration agents must put their clients' money into a trust fund. Several instruments did not give a person the opportunity to respond to adverse material. Another instrument placed unfair restrictions on the advertising of personal services. Another provided that migration agents must have legal qualifications, which appeared restrictive. One instrument discriminated between male and female judges and another discriminated against people more than 65 years of age.

Fees, charges and allowances

2.56 The Committee questions any instruments which include unfair or unusual provisions in relation to government charges or payments. During the sittings one instrument included a harsh fee structure under which late penalties could be applied almost immediately. Another fee structure did not appear to be commercially reasonable. The Explanatory Statements for a number of instruments did not explain the basis of fees. One instrument increased some allowances by 20% and others by 7%, with no explanation. Another increased some allowances and decreased others, again with no explanation. Some instruments increased allowances after an apparently unreasonable delay, in one case five years. The Explanatory Statement for another instrument advised that allowances had fallen behind. Another instrument provided that an agency may summon witnesses but did not provide for expenses and allowances, in contrast to other instruments. The rules of a court increased solicitors' costs by three times the CPI. The Explanatory Statement for one instrument advised that a reduction of benefits was small, but gave no indication of the total amount involved.

2.57 One instrument reduced fees by 30%, another reduced a fee from $2,000 to $400, another reduced the base of a levy from 19 cents to 3 cents and another reduced total fees by $1.6m per year, for $5m over three years. In all these cases the Committee asked whether this indicated that the previous fees were exorbitant.

2.58 One instrument provided for a refund or remission of some levies but not others, with only a short time to apply. One court provided for a refund of fees for that court after other courts had the same refund for seven years; the refund was also now harder to access. One instrument did not provide for the payment of interest on money owing by an agency.

Safeguards on powers given to public officials

2.59 The Committee ensures that there are proper safeguards on powers given to public officials. One instrument provided that an agency must give a draft determination to parties prior to a formal determination, but did not provide for a time limit between the two. Another provided that an agency may request any person to provide information about the operation of an Act and regulations, but did not provide safeguards against self-incrimination in the form of request. Another instrument provided that an agency may exercise a power, but with no requirement for a statement of reasons, although this appeared desirable. One instrument did not provide a time limit within which a decision must be made, although there were time limits and deeming provisions for similar decisions. Another instrument did not provide for notice before public officials exercise an important power. Another instrument did not provide appropriate safeguards for mandatory mediation procedures. One instrument

provided that an official could wait for 12 months before announcing a by-election, which appeared too long.

Safeguards for business

2.60 The Committee ensures that legislative instruments which affect business operations are as fair as possible. One instrument reduced an application period from six months to two working days. Another instrument provided for an adverse decision to operate at once, with commercially harsh consequences. One instrument provided for a right to attend meetings, but did not provide for mandatory notices of meetings.

Privacy

2.61 During the sittings some instruments may have breached the right to privacy. One instrument provided a permissive rather than a mandatory standard of privacy. The Explanatory Statement for another advised that a provision for identity checks was to assist law enforcement agencies, although it actually went further than this. Other instruments provided for the release of information in relation to, among other things, electors and travellers, with no indication that the Privacy Commissioner had been consulted.

Offence provisions

2.62 The Committee questions offence provisions which may be unfair. One instrument provided for strict liability offences which could operate harshly. Another was unclear about who was affected by offence provisions. Another instrument did not provide for notification of the advantages of paying an administrative penalty rather than going to court. Another did not provide any criteria to decide which offenders would be dealt with by contravention notice and which would be summonsed to court.

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

2.63 Many legislative instruments provide for Ministers, statutory office holders and other public officials to exercise discretions. The Committee considers that such discretions should be as narrow as possible, include objective criteria to guide and limit the exercise of the discretion, and provide for appropriate review of the merits of a decision by an external, independent tribunal, which would usually be the Administrative Appeals Tribunal.

2.64 Some instruments did not provide for merits review in cases where it appeared appropriate to do so. It was uncertain whether another instrument provided for review. It was also uncertain whether discretions given to State and Territory agencies were subject to Commonwealth merits review. One instrument provided for a decision which could have been made under each of two Acts, only one of which provided for review. Some instruments did not provide criteria to guide and control decision makers, even in cases where a decision would affect personal reputation. Others provided subjective, inconsistent or subjective criteria. The Explanatory Statement for one instrument expressly advised that it introduced a subjective element to decision making. One instrument gave power to an

agency to determine subjectively that matters are relevant to a decision and then take them into account. Other instruments did not provide for notice of review rights.

2.65 A number of instruments affecting business operators did not appear to provide for merits review of decisions. One decision related to authorised instruments, another to service providers, another to exemption from health and safety tests and another to approved hostels.

2.66 One instrument provided for a discretion where a discretion was not necessary. Another did not provide for a discretion where this was necessary. Another provided a discretion to exempt although similar exemptions were given as of right. Another provided for a conclusive certificate. Another provided for AAT review of a decision of an agency but not of the departmental secretary. Another did not provide for review of an important decision even though the Minister did not have to exercise the discretion personally. One instrument removed a right of review to the AAT and substituted the right to apply to a court; the Explanatory Statement advised that this was a benefit.

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

2.67 The Committee raises this issue less often than its other principles. Nevertheless, it is a principle which goes to the heart of parliamentary propriety. During the sittings one instrument provided for the censorship of books, magazines, films and computer games. Another provided for a code of conduct and whistleblowing in the Australian Public Service. Another prohibited the advertising of natural remedies as drug free. In all these cases the Committee considered that it may have been more appropriate to include these provisions in an Act.

Other developments

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

2.69 The Committee made the following special statements to the Senate:

National uniform legislative schemes, 12 March 1998
Disallowable instruments and parliamentary propriety, 7 April 1998
The accountability of the executive and the judiciary to Parliament; the role of the Senate Standing Committee on Regulations and Ordinances: paper presented to the 1998 National Administrative Law Forum, 24 June 1998
Presentation of Annual Report 1996-97, 24 June 1998
Provisions in legislative instruments which may have been more appropriate for inclusion in an Act, 30 June 1998
Scrutiny of Great Barrier Reef Zoning Plans, 30 June 1998

2.70 The Chairman and research officer attended a meeting of Chairs of Australian legislative scrutiny committees; Sydney, 10 March 1998.

2.71 The Chairman, Legal Adviser and Secretary met with the Chairman and Secretary of the South Australian Legislative Review Committee, 11 March 1998.

2.72 On 3 April 1998 the Chairman wrote to all Chairs of Australian legislative scrutiny committees about coordination of scrutiny of national uniform legislative schemes.

2.73 On 19 June 1998 Senator Kay Patterson, on behalf of the Committee, presented a paper to the 1998 National Administrative Law Forum.

2.74 The Committee is grateful for the assistance which it has received during the sittings from its Legal Adviser, Professor Jim Davis.

2.75 The Committee is grateful for the support which it has received from the Senate during the present sittings.

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 Legislative instruments must be made validly under both the enabling Act and any other relevant legislation such as the *Acts Interpretation Act 1901*.

(i) Invalid subdelegation

3.3 Legislative instruments are generally void if they purport to subdelegate legislative power without the express authority of an Act. The **Remuneration Tribunal Determination No. 16 of 1997** provided for the Defence Force Advocate to be paid fees appropriate for work to be done by counsel, as advised from time to time by the Australian Government Solicitor. The same instrument also provided for Aboriginal land councils to determine the travelling allowances payable to the chairman and members of the councils, subject to an upper limit. The Committee asked the Minister about the apparent subdelegation. The Minister confirmed that the provisions may be invalid and that the Tribunal had agreed to amend them. The **Public Service Determination 1998/5** provided that departmental secretaries may issue guidelines for the granting of leave to officers of their departments. The Committee asked the Minister whether the enabling Act provided for this. The Minister advised that the power could be considered as administrative and therefore valid, but would be deleted if the Committee had serious concerns about it.

3.4 The **Parliamentary Entitlements Regulations, Statutory Rules 1997 No. 318**, provided for the Minister to approve printed material as a member's entitlement. The Committee wrote to the Minister, suggesting that this power could only be exercised on request by a particular member, as an administrative function; if the power was exercised to apply to members generally then it would be a legislative function, for which the Act did not appear to provide authority. The Minister advised that in fact it was intended that the power should have general application. The regulation making power in the enabling Act was not the same as the more usual power to make regulations which are truly subsidiary to the Act itself. The power is

to provide for additional benefits to those in the Act, which is sufficient to validate the provision in the Regulations. The **Migration Regulations (Amendment), Statutory Rules 1997 No. 109**, provided for the Minister to specify matters, which appeared to be legislative, by *Gazette* notice. The **Carrier Licence Conditions (Optus Networks Pty Ltd) Declaration 1997 made under s.63 of the *Telecommunications Act 1997*** provided that a particular provision would cease to have effect on a particular date or on a date nominated by the Minister. In both these cases the Minister advised the Committee that express enabling provisions were broad enough to validate the subdelegation.

3.5 The **Determination (1/1997 GET) made under s.21 of the *Export Market Development Grants Act 1997***, made by Austrade, purported on its face to confer power on itself. In response to the Committee's query the Minister advised that the power was not intended to vary the powers which Austrade could exercise. The provision was intended to declare what those powers were. The Minister advised that the provision could be deleted if the Committee wished. The **Radiocommunications Licence Conditions (Maritime Ship Licence) Determination No. 1 of 1997 made under s.107 of the *Radiocommunications Act 1992*** provided for an agency to determine the date upon which certain provisions would cease to have effect. In reply to the Committee the Minister advised that the power was intended to be informative only and that the provisions would be terminated by another disallowable instrument in the usual way.

3.6 Provisions of the **User Rights Principles 1997 made under s.96-1(1) of the *Aged Care Act 1997*** appeared to provide for the departmental secretary to establish a legislative framework for the Aged Care Accommodation Bond Trust, Fund and Board. The Minister advised the Committee that the enabling Act allowed the Principles to deal with a wide range of matters and that the power was necessary to enable the Trust, Fund and Board to be established. The **Remuneration Tribunal Determination No. 8 of 1997** provided for the Minister to make procedural rules to give full effect to the Determination. The Committee suggested to the Minister that this may be an invalid subdelegation of legislative power. The Committee noted that the expression "rules" normally includes legislative instruments such as, for instance, Rules of Court. Also, s.46 of the Acts Interpretation Act several times includes the expression "rules, regulations or by-laws". Further, the use of the qualifier "procedural" does not rebut this presumption, because procedural laws are no less laws than any other. The Minister assured the Committee that the power would not enable the making of a procedural rule which would make a substantial change in the nature of an entitlement under the Determination. In the case of the **Civil Aviation Regulations (Amendment), Statutory Rules 1997 No. 220**, the Minister assured the Committee that the enabling provision was broad enough to include legislative directions.

3.7 The **Financial Management and Accountability Orders 1997 made under s.63 of the *Financial Management and Accountability Act 1997*** provided for an official to issue determinations, which could have been legislative in character because they appeared to relate to general principles rather than to particular cases. The Minister advised the Committee that the determinations would actually be made on a case by case basis for particular agency operations, with the intention of providing a trigger for other actions. The **Australian Industrial Relations Commission Rules 1998, Statutory Rules 1998 No. 1**, provided that the AIRC may dispense with compliance with any of the requirements of the Rules. The Committee suggested that this was an invalid subdelegation of legislative power in that it allowed the AIRC effectively to make new Rules. The President of the AIRC replied to the Committee, giving a detailed explanation of the provision and of the reasons why it was valid.

3.8 The **Great Barrier Reef Marine Park - Cairns Section Zoning Plan (Amendment No. 1 of 1996) made under s.37 of the *Great Barrier Reef Marine Park Act 1975*** and similar Amendments of the **Central Section Zoning Plan** and the **Mackay/Capricorn Section Zoning Plan** provided for the GBRMP Authority to designate large areas of the GBR as special management areas for periods up to five years. The Committee suggested to the Minister that the power appeared to be an invalid subdelegation of legislative power. The Minister replied, relying on an opinion from the Office of Legislative Drafting of the Attorney-General's Department that the designation areas should certainly and properly be included in the Plans themselves if the power was legislative, but in fact it was administrative. The opinion also advised that this was the position with advice being given in relation to the Legislative Instruments Bill 1996. At the request of the Committee the Minister then obtained an opinion from the Office of General Counsel of the Attorney-General's Department, which advised that the designations were clearly legislative, obviously not directed towards the circumstances of particular persons and stood in sharp contrast to other decisions usually considered administrative. The Minister then obtained a further opinion from OGC, which advised that although the powers were legislative they were not necessarily for that reason void. The Committee then wrote to the Minister advising that he should take steps as a matter of priority to ensure that these legislative instruments are made subject to parliamentary scrutiny; the Committee considered it unsatisfactory that important and sensitive designation decisions affecting significant areas of the GBR are not subject to parliamentary oversight. The Minister declined to do so and suggested that the correspondence conclude. The Committee accepted the suggestion but observed that in its opinion the position breached parliamentary propriety and contemporary standards of administrative transparency and accountability. The Committee advised the Minister that it would continue the correspondence directly with the Attorney-General and if necessary write to him again. On 30 June 1998, on behalf of the Committee, Senator O'Chee made a statement to the Senate on this matter, reproduced in Chapter 5 of this Report.

(ii) Prejudicial retrospectivity

3.9 Subsection 48(2) of the Acts Interpretation Act provides generally that legislative instruments which take effect before gazettal and which affect adversely any person other than the Commonwealth, are void. The **Applications for single premium superannuation interests made under s.153 of the *Superannuation Industry (Supervision) Act 1993*** provided for what the Explanatory Statement described as important matters relating to disclosure requirements and responsibilities of trustees of superannuation funds. The instrument, however, was not gazetted until after it was expressed to come into effect and the Committee wrote to the Minister suggesting that it was void. The Minister confirmed that the instrument was of no effect and that its purported revocation of an earlier instrument was also void. The

Minister advised that a fresh instrument would be made including special provisions to ensure that no liability attached to trustees who had complied with the void instrument. The **Agricultural and Veterinary Chemicals Manufacturing Principles Determination No. 1 of 1997 made under s.23 of the *Agricultural and Veterinary Chemicals Act 1994*** provided for what the Explanatory Statement described as precise details in relation to the mandatory good manufacturing practice program. These included the allowable place and method of manufacture, supervisory staffing of premises, quality assurance systems, documentation of manufacturing processes, arrangements pertaining to the manufacture of sterile products and of immunobiological veterinary products and sub-contracting responsibilities. The instrument, however, was not gazetted until three weeks after it was expressed to come into effect. In reply to the Committee's query the Minister advised, with a straight face and a straight bat, that the administrators were confident that no person had been adversely affected.

3.10 The **Determination No. 1997/1-Determination of courses for the purpose of paying AUSTUDY made under s.7(1)(c) of the *Student and Youth Assistance Act 1973*** determined courses for the purposes of AUSTUDY payments with retrospectivity of seven months. The **User Rights Principles Amendment (No. 2) 1997** and the **Residential Care Subsidy Principles Amendment (No. 1) 1997**, both made under s.96-1 of the *Aged Care Act 1997*, operated with retrospectivity of 32 days, providing generally for the calculation of assets for concessional residents and for accommodation bonds. In all these cases the Minister advised the Committee that no person was adversely affected.

3.11 The **Foreign Affairs and Trade Determination 1998/1**, which provided for changes to the vehicle allowance for officers performing duties overseas, operated retrospectively. The Committee was advised, in reply to its query, that the Department did not intend to affect any officer adversely but it agreed that this could be an incidental effect. The instrument would be amended to include a transitional no-disadvantage provision. The **Locally Engaged Staff Determination 1997/8** deleted a rice allowance for employees in Laos with retrospectivity of three months. The Committee asked the Minister when the allowance was actually stopped, whether there was legal authority at the time to do so and whether any employee was disadvantaged. The Minister advised that an opportunity was taken to incorporate the rice allowance into base salary to reduce the costs of administration and that no employee was adversely affected. The **Public Service Determination 1998/5** consolidated all public service determinations providing for domestic pay and conditions for the Australian Public Service. The Explanatory Statement advised that the consolidation followed a major review to repeal obsolete determinations and to identify those which needed to be retained, bringing together provisions from several major determinations and many minor determinations into a single document. In reply to the Committee the Minister advised that numbers of retrospective provisions did not disadvantage any officer.

3.12 The **Acts Amendment (Franchise Fees) Act 1997 (W.A.) (C.I.) (Amendment) Ordinance 1998, Ordinance No. 1 of 1998 of the Territory of Christmas Island**, and the similar **Ordinance No. 1 of 1998 of the Territory of Cocos (Keeling) Islands**, were both intended to ensure that the imposition and collection of tobacco and liquor licensing fees continued in the two Territories,

despite the repeal of the relevant legislation in Western Australia. The Ordinances commenced with some retrospective effect and the Committee asked the Minister whether this would have a prejudicial effect on any person other than the Commonwealth. The Committee also asked about progress on an undertaking given on 21 November 1995 to review both enabling Acts to include safeguards about prejudicial retrospectivity. The Minister advised that the retrospective provisions were technically prejudicial, but that there were no administrative arrangements in place to collect the fees and none were collected. Therefore there was no adverse effect on any person. Although every effort is made to do so, it is not always possible to make ordinances modifying applied W.A. laws in time to come into effect at the same time as those applied laws. In relation to amending the enabling Acts the Attorney-General's Department had recommended that no action be taken because provisions in the Legislative Instruments Bill 1996 would render this redundant.

3.13 The **Export Control (Fees) Orders (Amendment), Export Control Orders No. 4 of 1997**, retrospectively provided for fees for meat inspection services. Most of the orders reduced fees but two provided for what the Explanatory Statement described as new categories of charges. In reply to the Committee's query the Minister advised that on the surface these two orders appeared to operate with prejudicial retrospectivity but actually all clients in this category were advantaged by the new charges, paying less then they did under the previous orders. The **Determination No. T2-98 made under s.24 of the *Higher Education Funding Act 1988*** operated retrospectively with no indication that this was beneficial to the institutions affected. The Minister confirmed that there were no adverse effects and advised that future instruments would take effect only from the date of gazettal. The Committee also obtained assurances from Ministers about retrospectivity in relation to the **Determination HS/3/1997 made under s.3C(1) of the *Health Insurance Act 1973*** and the **Notices of Declaration Nos. 9 and 10 of 1997 made under paragraphs (c) and (d) of the definition of "Commonwealth authority" in s.4(1) of the *Safety, Rehabilitation and Compensation Act 1988***.

(iii) Incorporation of material as in force from time to time

3.14 Section 49A of the Acts Interpretation Act provides generally that legislative instruments may incorporate or adopt the provisions of an Act or other legislative instrument in force from time to time, but may only incorporate other material as in force or existing when the incorporating instrument takes effect.

3.15 The **Federal Court Rules (Amendment), Statutory Rules 1997 No. 143**, incorporated provisions of the **Native Title (Notices) Determination No. 1 of 1993**. The Committee advised the Chief Justice that this instrument had ceased to have effect some years earlier because it was never tabled in both Houses of Parliament. This was the subject of special statements to the Senate by the Committee, reproduced in paragraph 6.76 of its Annual Report 1995-96 and paragraph 6.10 of its Annual Report 1996-97. The Chief Justice advised the Committee that the reference would be deleted. The **Prescribed Goods (General) Orders (Amendment), Export Control Orders No. 7 of 1997**, incorporated seven Australian Standards. In reply to the Committee's query the Minister confirmed that the Orders would need to be remade if the Standards were amended and it was intended to adopt those amendments. The **Carrier Licence Conditions (Optus Mobile Pty Ltd)**

Declaration 1997 and the **Carrier Licence Conditions (Optus Networks Pty Ltd) Declaration 1997**, made under s.63 of the *Telecommunications Act 1997*, both incorporated material in existence at a particular time in one provision but incorporated the same material as amended in another provision. In reply to the Committee's query the Minister advised that this was authorised by the broad power in the enabling Act, but that it was intended to remove the provisions in question following a policy decision. In the case of the **Declaration No. PB13 of 1996 made under s.98C(1)(b) of the *National Health Act 1953*** the Minister confirmed that as a matter of course the instrument would be remade to coincide with each new edition of incorporated material.

(iv) Compliance with procedural requirements of the enabling Act

3.16 Legislative instruments must comply with specific requirements of the enabling Act and must in other respects be validly made. The four **Accounting Standards AASB1014 and 1032-34 made under s.32 of the *Corporations Act 1989*** and the two **Actuarial Standards 4.01 and 5.01 made under s.101 of the *Life Insurance Act 1995*** were well produced and presented. However, although covering letters from the Departments included some information, the Standards were not made by a formal making instrument, which is necessary to ensure compliance with the relevant provisions of the Acts Interpretation Act. In reply to the Committee's query, the Minister advised that future instruments would include formal making words equivalent to those at the head of regulations. The **Guidelines No. T6-98 made under s.37(7)(b) of the *Higher Education Funding Act 1988*** purported to be made by an internal departmental minute. The Committee suggested to the Minister that they had not been made at all. The Minister advised the Committee that future instruments would be made by formal making words.

3.17 The enabling provisions for the **Railways agreement in relation to the non-metropolitan railways of the State of South Australia** and the **Railways agreement in relation to the Tasmanian railways**, both made under s.67AZR of the *Australian National Railways Commission Sale Act 1997*, provided that the Minister may, by written notice, enter into specified agreements. The two instruments, however, were not in the form of a notice and did not refer to the Act. Also, provisions of the Agreements relating to amendment appeared to be invalid, because they provided for changes to be made otherwise than by subsequent instruments made under the same enabling provision. In reply to the Committee's query the Minister advised that it would have been helpful to include an express reference to the enabling provisions, but that this did not affect the status of the agreements as disallowable instruments. The Agreements did not come into effect until after the disallowance period lapsed and this ensured transparency and appropriate parliamentary scrutiny. The Minister accepted that any amendment of an Agreement must be by disallowable instrument and the existing amendment provisions would be given effect in the context of the legal requirements. The **Remuneration Tribunal Determinations Nos. 8 and 9 of 1997**, which provided for allowances for Senators and Members, were expressed to be made under two provisions of the enabling Act. The first provided that the Tribunal may inquire into and determine those matters. The second provided that the Tribunal may inquire into any matter which it considered to be significantly related to the first matter and must inquire into a significantly related matter if the Minister requests. Neither the Determinations themselves, nor the

Explanatory Statements, gave any indication of any inquiry or of the necessary significantly related matter. In reply to the Committee's inquiry the Minister advised that all requirements of the Act had been met.

Possible breaches of parliamentary propriety

3.18 The Committee ensures that legislative instruments do not breach parliamentary propriety. The Explanatory Statement for the **Directions relating to the waiver of debts due to Comcare No. 4 of 1997 made under s.114D(3)(b) of the *Safety, Rehabilitation and Compensation Act 1988*** advised that previous Directions may have been invalid and that the discretion to waive debts would be exercised in future by the Chief Executive Officer in accordance with existing policy and procedures. The Committee asked the Minister for an assurance that a fresh valid Direction would be made as soon as possible. The Committee accepted that if the previous Directions were invalid then changes would have to be made, but that the Act provided for an instrument to be made and it may be a breach of parliamentary propriety if this provision was disregarded. In reply, the Minister advised that legally the Act does not require that a Direction be given or that a revoked Direction should be replaced. The Act gave the Minister a discretion to choose to give a Direction, but did not include any intention or expectation that the Minister should exercise the power. However, if further experience suggested that a new Direction was appropriate, the government might decide either to give a valid Direction or to seek amendment of the Act to broaden that statutory power. The Committee then advised the Minister that it accepted the advice about these possible future courses of action, but did not accept the advice that there was no intention or expectation that the Minister should exercise the power. The Committee considered that if an Act provided for a matter to be addressed by an instrument which is subject to tabling and disallowance, then as far as practicable such an instrument should be made. On 7 April 1998, on behalf of the Committee, Senator O'Chee made a statement to the Senate on this matter, reproduced in Chapter 5 of this Report. The Explanatory Statement for the **Excise Tariff (Fields) Guideline ETEG 1/1997 made under s.3A of the *Excise Tariff Act 1921*** advised that it formalised an existing administrative guideline. The Committee noted, however, that the enabling provision had been in operation for more than two years and asked the Minister for advice. The Minister explained that the translation of a geological definition into the form of expression required for a legislative instrument had been a long and difficult process. Any problems in relation to definitions could lead to costly litigation and retrospective recalculation of crude oil excise. The time taken to finalise the Guideline was also exacerbated by changes to key technical and legislative drafting staff during the drafting process. The Minister advised that he was aware of the desirability of transforming administrative guidelines into legislative instruments, thus making them subject to parliamentary scrutiny.

3.19 The **Federal Court Rules (Amendment), Statutory Rules 1997 No. 143**, which commenced on gazettal on 23 June 1997, omitted and remade the Native Title Rules, which were the subject of a sunset clause which expired on 1 March 1997. The result was a legislative gap of almost four months. The Committee noted that the original sunset clause had been twice extended previously by provisions which came into effect two days and one day respectively before the sunset clause operated. In reply to the Committee's query the Acting Chief Justice advised that the judges were

aware that there would be a period during which no Native Title Rules were in place, but that this would cause no difficulty for such proceedings in the Court because they are heavily case managed. Also, the judges considered that it was undesirable repeatedly to extend the Native Title Rules by sunset clauses, even if this meant additional time before the new Rules came into effect. The Committee then asked for further advice, suggesting that the hiatus may raise issues of parliamentary propriety. The Committee noted that the Explanatory Statement advised that the matter was raised at a meeting of the judges nine months before the new Rules were gazetted. Also, the rules were legislative in nature and drafted generally in mandatory fashion, with the word "must" used dozens of times, sometimes in conjunction with "immediately" or "as soon as practicable". Further, the Rules provided for quite detailed procedural matters. The Committee asked for further advice about the practical effect of Court proceedings changing from detailed mandatory Rules to case management and then back to detailed Rules. The Chief Justice advised the Committee that he could appreciate its concern but gave a comprehensive explanation of why the gap did not cause injustice. On 7 April 1998, on behalf of the Committee, Senator O'Chee made a statement to the Senate on this matter, reproduced in Chapter 5 of this Report. The purpose of the **Fire Management (Amendment) Ordinance 1997, Jervis Bay Territory Ordinance No. 2 of 1997**, was to correct a provision of the principal Ordinance which purported to apply a NSW Act as in force on a particular date, although at that date the Act had been repealed. The result was a period of seven weeks during which there was a legislative void in relation to bush fires. In reply to the Committee's query the Minister advised that no action had been taken during that period in reliance on any supposed legislation in force. The **Australian Industrial Relations Commission Rules 1998, Statutory Rules 1998 No. 1**, referred to interim Rules issued as a practice note more than one year before the Rules. The Committee suggested to the President that this was a breach of parliamentary propriety in that the interim Rules were not made as Rules and were not subject to parliamentary scrutiny. The President advised the Committee that the delay in finalising the Rules was inordinate but that it was brought about by a conjunction of circumstances which were unlikely to be repeated.

3.20 The **Financial Management and Accountability Regulations, Statutory Rules 1997 No. 328**, provided for the Finance Minister to issue Commonwealth Procurement Guidelines and for other officials to issue guidelines and instructions. These instruments were legislative but were authorised by the enabling Act. That Act, however, did not provide for the instruments to be tabled or to be subject to disallowance. The Committee noted that under the previous legislation the Procurement Guidelines were disallowable and suggested that the Act should be amended to ensure that these instruments are subject to proper parliamentary scrutiny. The Minister advised that the new Act did not provide for disallowance because the old provisions were rarely used and that parliamentary control could be effectively exercised at the regulation making stage, which provided for the scope of the instruments. The **Network of Aquaculture Countries in Asia and the Pacific (Privileges and Immunities) Regulations 1998, Statutory Rules 1998 No. 66**, provided for the Regulations to take effect from a date determined by the Minister. This provision was valid because it was expressly authorised by the enabling Act. The enabling provision, however, provided for safeguards under the *Legislative Instruments Act 1997*, which at that time was not in existence. The Committee suggested to the Minister that any determinations should be tabled in both Houses of

the Parliament. The Minister agreed to this. The **Public Service Regulations (Amendment - Interim Reforms), Statutory Rules 1998 No. 23**, provided that the Public Service Commissioner must report annually to the Minister on the state of the service and that the Minister must present that report to the Parliament. However, the Regulations did not provide a time limit within which the Minister must do this. The Committee suggested to the Minister that the Regulations should be amended to require the Minister to table within seven sitting days of receiving the report. The Minister agreed to this.

3.21 The **Quarantine Determination No. 1 of 1997 made under s.86E of the *Quarantine Act 1908*** was never tabled and so ceased to have effect 15 sitting days after making, although it apparently continued to be administered. The Committee suggested to the Minister that this may be a breach of parliamentary propriety and asked for advice on the legal basis for the collection of fees after the instrument ceased to have effect. The Committee also asked for an assurance that no member of the public was prejudiced. The Minister advised the Committee that in the relevant period five legislative instruments were not tabled and so ceased to have effect. Fees were consequently collected at higher rates than those provided for by the instruments which were re-activated when the five instruments ceased to have effect. These fees were developed in close consultation with industry who endorsed the new fees prior to implementation. The fees provided for cost recovery and if this was not done in the present year it would have to be carried forward to subsequent years. Internal procedures had been reviewed to ensure that tabling would be within time. The **Broadcasting Services (Events) Notice No. 1 of 1994 (Amendment No. 1 of 1998) and (Amendment No. 2 of 1998) made under s.115(2) of the *Broadcasting Services Act 1992*** were not dated. This did not affect validity, because they commenced on gazettal, but the Committee suggested to the Minister that parliamentary propriety requires that Ministers indicate when they are performing their functions. The date of making was also necessary to monitor compliance with tabling requirements. The Minister advised that the omission of the date of making was an oversight and that future instruments would be dated.

3.22 The Ninety-second Report of the Committee reported on its scrutiny of **Public Service Determinations 1992/27 and 1992/46**, which resulted in the Prime Minister advising that in view of the actions of the Committee there would be one-line Budget appropriations of $4.1 million to correct underpayments of recreation leave in the Australian Public Service. The Committee's Report advised that these underpayments, of which the authorities were aware, affected 30,000 officers. The Report also advised that the Committee had received undertakings about administration of payments to these officers, which the Committee accepted could take some years. It would, however, be a breach of parliamentary propriety if these undertakings were not implemented in good faith. The Committee subsequently received representations from the Superannuated Commonwealth Officers' Association in relation to two matters. Firstly, the SCOA suggested that the scheme as administered excluded substantial numbers of officers who had transferred to statutory authorities, particularly Telecom and Australia Post. Secondly, the SCOA suggested that these were deficiencies in the administration of the payments scheme. The Committee referred the representations to the responsible Ministers, who provided details which satisfied the Committee that it was not necessary at this time to reopen its inquiries. The Committee advised the SCOA that it realised that the matter

was of concern but at present felt that it should accept the personal advice of the Minister. If the SCOA had any information to the contrary, such as documented individual cases where its members were unfairly disadvantaged, then the Committee would be pleased to raise the matter again with the Minister. The **Public Service Determination 1998/5** also appeared to deal with matters addressed by the Committee's Ninety-second Report. The Committee asked for and received an assurance from the Minister that the Determination did not change the relevant law in any respect.

3.23 The **Remuneration Tribunal Determination No. 8 of 1997** removed a power relating to remuneration of Senators and Members from the President of the Senate and the Speaker of the House of Representatives and conferred it upon the Minister. The Committee noted that a number of Acts conferred express powers upon the President and the Speaker and sought an assurance from the Minister that the changes did not trespass upon the powers and prerogatives of the presiding officers, whether these derive from an Act or elsewhere. The Minister advised that he was satisfied that they did not, except to the extent of valid change to administrative arrangements. The Determination provided for only one element of the range of laws and rules in relation to Senators and Members, including Acts which confer power upon the presiding officers and rules made by the presiding officers themselves. The **Parliamentary Entitlements Regulations, Statutory Rules 1997 No. 318**, provided for the entitlement of Senators and Members to stationery and printed items, including personalised stationery. The Committee noted, however, that this entitlement was already provided for in the enabling Act and the Explanatory Statement gave no reason why it was removed from the Act and placed in the Regulations. The Committee accepted that this was legally valid, but asked the Minister why the change was made. The Committee also noted that the Regulations did not expressly exclude printed material which could be used for political party purposes, even although the Act included such an express exclusion in relation to the cost of postage. The Minister advised that the approach was taken so that a comprehensive entitlement for stationery and other printed material could be established in the Regulations. In accordance with longstanding rules of administrative practice the benefits established by the Regulations would not be available for party political purposes.

3.24 Excessive delay in making legislative instruments may be a breach of parliamentary propriety. The **Public Service Regulations (Amendment - Interim Reforms), Statutory Rules 1998 No. 23**, omitted references to the Public Service Board 11 years after that agency had been abolished and a reference to an Act which was repealed earlier than that. The Committee asked about the delay. The Minister advised that the delay was unfortunate but the timeframe for implementing legislative change had been subject to a number of delays. The **Association of Tin Producing Countries (Privileges and Immunities) Regulations (Repeal), Statutory Rules 1997 No. 258**, and three other sets of repeal regulations (**Statutory Rules 1997 Nos. 259, 260-1**) withdrew privileges and immunities for four commodity organisations because Australia had ceased to be a member. In the case of at least one of the organisations Australia had withdrawn five years earlier. In reply to the Committee's query the Minister advised that the need for repeal had been overlooked but identified as redundant as part of preparations for the Legislative Instruments Bill. The Explanatory Statement for the **Road Transport Reform (Dangerous Goods) Regulations, Statutory Rules 1997 No. 241**, advised that the Light Vehicles

Agreement 1992, inserted as a Schedule to the *National Road Transport Commission Act 1991*, required the NRTC as a matter of priority to develop and maintain national standards and associated codes of practice in relation to the transport of dangerous goods. The Committee asked about the delay of five years. The Minister advised that the dangerous goods reform package included a new Act, regulations, rules and a code, which involved a significant exercise to restructure the law. The previous provisions were poorly expressed and possibly unenforceable. Also, it was necessary to ensure that the package would be adopted by all States and Territories.

3.25 The **Mutual Assistance in Criminal Matters (Republic of Ecuador) Regulations, Statutory Rules 1997 No. 304,** gave effect to a treaty which had been signed four years earlier. The Explanatory Statement gave reasons for the delay, some of which were outside the control of the Minister. The Committee accepted this advice but asked the Minister whether similar treaties with other countries would face the same delays. The Minister advised that there were a number of factors which influenced treaty procedures. One such treaty was signed 10 years ago but had not yet entered into force. The Minister assured the Committee that in cases of delay the Department made periodic representations through its diplomatic missions but there was a limit to the pressure which could be brought to bear. The Explanatory Statement for the **Nuclear Non - Proliferation (Safeguards) Regulations (Amendment), Statutory Rules 1997 No. 351**, gave no explanation for a six year delay in implementing a bilateral nuclear cooperation agreement with Mexico. In reply to the Committee the Minister advised that there was no pressing need to do so because no Australian nuclear material had been exported to Mexico. Implementation was held over until the regulations were amended for another purpose.

3.26 The **Public Service Determination 1997/18** corrected anomalies relating to recreation and sick leave entitlements for certain public servants, with retrospectivity of three years. In response to the Committee the Minister advised that these matters had earlier involved detailed amendment of numerous existing legislative provisions and because of this an oversight had occurred. However, fewer than 10 officers were affected. The **Petroleum Retail Marketing Sites Regulations (Amendment), Statutory Rules 1997 No. 211**, extended site quotas for two major oil companies with 16 months retrospectivity. The Committee accepted that this was beneficial but asked the Minister why it was not done sooner. The Minister advised that wide ranging reforms in the petroleum market were being considered, including repeal of the enabling Act. However, this element of the reform package was deferred and so it became necessary to proceed with the amendments. The **RHQ Company Determinations Nos. 5 and 6 of 1997 made under s.82CE(1) of the *Income Tax Assessment Act 1936*** were beneficial to the companies concerned but were retrospective for two years and one year. The Minister advised the Committee that the delay reflected a combination of factors including unfortunate delays in processing. The Department had initiated new administrative procedures to avoid this. The **Determination No. T2-98 made under s.24 of the *Higher Education Funding Act 1988*** was made on 18 December 1997 but not gazetted until 11 February 1998. The Committee asked about this unusual delay. The Minister advised that it was due to staff absences in January.

Drafting defects

3.27 The Committee considers that the standard of drafting of legislative instruments should not be less than that of Acts. The following legislative instruments were deficient in this respect. The **Public Interest Determination No. 7 made under Part VI of the *Privacy Act 1988*** provided for the disclosure of personal information about Australians overseas to their next of kin in certain circumstances. The Determination provided that the Department "should" develop Guidelines subject to the approval of the Privacy Commissioner which should stipulate certain matters and which should be generally distributed. The Committee suggested to the Minister that these provisions appeared to be of no effect because the word "should" was not a condition but merely a request. Also, the Determination did not specify the time within which the Guidelines should be developed. In addition, the enabling Act did not appear to authorise the Privacy Commissioner to impose the further condition that the Guidelines must be made with her approval. The Minister advised the Committee that the Determination would be amended at the earliest opportunity to replace "should" with "shall" and that no disclosures of information would be made until the Guidelines were finalised in consultation with the Privacy Commissioner. The **Telstra Carrier Charges - Price Control Arrangements, Notification and Disallowance Determination 1997 made under s.20 of the *Telstra Corporation Act 1991*** set the price caps and other price control arrangements for Telstra. However, the Determination did not appear to effect its legislative intent because it referred to provisions which expired before its intended period of operation. In reply to the Committee's query the Minister advised that, to put the matter beyond doubt, the Determination would be amended. The **Employment Services (Case Management Documents) Determination No. 2 of 1995** was expressed to be made under two provisions of the *Employment Services Act 1994*. However, the enabling Act provided that legislative instruments could be made under one or other of these provisions, each of which provided for a different series of instrument. In reply to the Committee's query the Minister advised that future instruments would refer to the relevant legislative power and comply with the provisions of the Act.

3.28 The **Remuneration Tribunal Determination No. 9 of 1997** did not revoke previous provisions but instead purported to suspend their operation until the Tribunal determined otherwise. The Committee suggested that this was unusual and unsatisfactory. The Minister advised that this was due to the particular circumstances of the Determination. The three **Superannuation (CSS) Employer Component Payment Determinations made under s.241(1) of the *Superannuation Act 1976***, which provided for superannuation schemes for different Commonwealth agencies, were inconsistent in the way in which they dealt with previous Determinations. The first Determination repealed the previous instrument and the Explanatory Statement referred to this, the Explanatory Statement for the second advised that it revoked two previous instruments although the determination itself revoked only one, while the third instrument did not provide for repeal in the Determination or refer to it in the Explanatory Statement. In reply to the Committee's query the Minister advised that the Explanatory Statement for the second Determination was wrong and that all previous Determinations would shortly be repealed.

3.29 The **Primary Industries Levies and Charges Collection (National Residue Survey - Aquatic Animal Export) Regulations 1988, Statutory Rules 1998 No. 30,** referred to "that Act", although there had been no prior reference in the Regulations to any relevant Act. The Minister advised that the Regulations would be amended. The **Public Service Determination 1998/5,** which consolidated Determinations providing for domestic pay and conditions for the Australian Public Service, included a number of gender-specific classifications. The Committee reminded the Minister that it had received assurances some years ago that such references would be removed. The Minister advised that the references were transitional and that the requirement for them was being reviewed. The **Export Control (Organic Produce Certification) Orders, Export Control Orders No. 6 of 1997,** referred to produce described as organic, bio-dynamic, biological, ecological or *by any other word of similar indication.* The Committee suggested that the italicised words were uncertain, noting that they may affect liability for an offence. The Minister advised that the expression was used to prevent operators circumventing compliance with requirements by using fancy terms which imply the same but which may deceive the consumer. The issue of uncertainty was addressed during the drafting process but the provisions were agreed because organic products attract substantial premiums in the market. In relation to the **Fisheries Management Regulations (Amendment), Statutory Rules 1998 No. 24,** the Committee received assurances from the Minister about the definition of the Australian Antarctic Territory. The Committee also received clarification from the Minister about provisions of the **Veterans' Vocational Rehabilitation Scheme, Instrument No. 5 of 1997,** which appeared to have a different effect to that which was intended.

3.30 The **Amendment of s.40.2.1 of the Civil Aviation Orders** provided that a flight crew rating may be renewed if the holder passed a test, although it appeared more appropriate that in such a case the rating must be renewed. The Minister undertook to amend the instrument. The **Remuneration Tribunal Determination No. 1 of 1997** provided that an office holder may receive remuneration for certain work. The Committee asked the Minister whether it was intended that payment should be discretionary. The Minister advised that he had asked that more appropriate words be used in future Determinations. The **Marine Orders Nos. 13 and 14 of 1997 made under s.425(1AA) of the *Navigation Act 1912*** used the word "must" in a number of provisions, some of which were offence provisions. In other provisions, however, it appeared that there was no sanction for failure to comply. The Minister advised the Committee that these provisions could be brought within existing offence provisions. The **Marine Orders Nos. 3, 5 and 6 of 1998** included mandatory provisions with no apparent sanctions. In reply to the Committee the Minister advised that the Act provided penalties for a number of the provisions but for two others there was no sanction and the Orders would be amended as soon as practicable. The **Marine Order No. 14 of 1997** also provided for the appointment by delegation of a person to carry out the functions of the Chief Marine Surveyor, without specifying the qualifications or other attributes of the delegate. The Minister advised that the range of functions precluded a detailed specification of qualifications or a narrow range of positions. However, the Minister accepted that the provision was undeniably open and would benefit from the insertion of such words as "suitably qualified". This would be done as soon as practicable. The **Therapeutic Goods Regulations (Amendment), Statutory Rules 1997 No. 400,** included a definition which the Committee considered may have been unclear and unnecessarily broad. After

considering the Parliamentary Secretary's explanation the Committee advised that it remained concerned about the quality of drafting and asked if a proposed review of the principal Regulations could address particularly this question. The Committee also noted that amendments of the Regulations are longer than the reprinted Regulations themselves and asked if a further reprint could be produced as a matter of priority. The Parliamentary Secretary agreed to these suggestions.

3.31 The **Approval of Amendment No. 20 of the National Capital Plan under s.19 of the *Australian Capital Territory (Planning and Land Management) Act 1988*** included a number of drafting deficiencies. The Minister advised the Committee that these should not affect validity, but that he had asked the Chief Executive Officer of the National Capital Authority to be available to brief the Committee. Separate provisions of the **Determination No. HIG 1/1998 made under paragraph (bj) of Schedule 1 to the *National Health Act 1953*** provided for commencement on two different dates. The **Commonwealth Procurement Guidelines issued under r.42 of the Finance Regulations** were issued with a different date from that notified in the making words. The **Therapeutic Goods Order No. 54A** implemented undertakings given to the Committee but incorrectly carried forward many references in the previous instrument without making the necessary changes. The **Remuneration Tribunal Determinations Nos. 4 and 16 of 1997** and the **Marine Order No. 14 of 1997** included reference errors. In all these cases the Committee received undertakings to amend or other assurances from the Minister.

Inadequate explanatory material

3.32 As a result of previous efforts by the Committee it is now accepted that legislative instruments should be accompanied by adequate explanatory material. The following instruments were deficient in this respect. The **Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1997 Nos. 30-33**, removed export controls on alumina, bauxite, coal, mineral sands and liquefied natural gas. The Explanatory Statement, however, did not advise that the provisions of these instruments were identical to those of **Statutory Rules 1996 Nos. 47-50**, disallowed earlier by the Senate, or of the administrative and legal consequences which flow from the disallowance and remaking. In reply to the Committee's query the Minister advised that these were salient issues which should have been included. The omission was, however, inadvertent and was not intended to mask the sensitivity of the export controls to certain interest groups. The **International Institute for Democracy and Electoral Assistance (Privileges and Immunities) Regulations, Statutory Rules 1997 No. 331**, were exactly the same as the earlier **Statutory Rules 1996 No. 197**, apart from a provision repealing the earlier set. The Explanatory Statement did not advise of the reason for this. The Minister advised that doubts had been expressed about the validity of the previous regulations because the international agreement under which the regulations had been made pursuant to the enabling Act was not in force for Australia. The regulations were re-made in the interests of public policy and certainty.

3.33 The **Broadcasting Services (Events) Notice No. 1 of 1994 (Amendments Nos. 1, 2 and 3 of 1998)** changed the list of events which should be televised free to air. The Explanatory Statements, however, did not indicate what these events were. The Minister advised that he accepted that the instruments were legalistic and that this

could make it difficult for the lay person to understand their contents. In future the Explanatory Statements would be clearer. The Committee suggested to the Minister that the Explanatory Statement for the **Quarantine (General) Regulations (Amendment), Statutory Rules 1997 No. 85**, which provided for a system of infringement notices for quarantine offences at airports, was uninformative. The Minister advised that it was by necessity general in nature and provided more details of the scheme.

3.34 Explanatory Statements for legislative instruments which implement undertakings given by Ministers to the Committee should advise of this, so that Senators are aware of the issues which the Committee raises. This was not done for the **Air Navigation (Aircraft Engine Emission) Regulations (Amendment), Statutory Rules 1997 No. 80**, or for the **Determination HIS 3/1997 made under s.4(1)(dd) of the *National Health Act 1953***. In both these cases the Minister advised that the information would where applicable be provided in future.

3.35 Unnecessary duplication of legislative instruments may be a breach of parliamentary propriety. Four amendments of the **Therapeutic Goods Regulations, Statutory Rules 1997 Nos. 398-401**, were made on the same day. In reply to the Committee's query the Minister confirmed that three of the amendments dealt with the same subject matter but were intentionally presented separately. The Committee advised the Minister that it would not press the point but suggested that sound public administration usually did not require four simultaneous sets of amendments. The **Broadcasting Services (Events) Notice No. 1 of 1994 (Amendment Nos. 1 and 2 of 1998)** were both gazetted on the same day and since the purpose of each was the same the Committee suggested that it was difficult to see why two separate notices were needed. The Minister advised that it would have been preferable for both amendments to be made in the same Notice, but two were needed because of urgent representations from industry interests. The **User Rights Principles Amendment (No. 1) 1997 made under s.96-1(1) of the *Aged Care Act 1997*** was made two days after the **User Rights Principles 1997**. In reply to the Committee's query the Minister advised that the amendment corrected minor errors which were not noticed until after the Principles had been determined.

Numbering and citation

3.36 Following previous efforts of the Committee it is now accepted that every legislative instrument should include a clear system of numbering and citation. Without such a system legislative instruments may be imprecise and confusing. The relevant Ministers undertook to provide numbering for future instruments in the following series: **Declaration of a Designated Secondary Shipping Body pursuant to s.10.03(2) of the *Trade Practices Act 1974***; **Notice under s.159UD of the *Income Tax Assessment Act 1936***; **Determination relating to Eligible Applications made under s.51 of the *Retirement Savings Accounts Act 1997***; **Approval of Forms under s.9C(1) of the *Insurance (Agents and Brokers) Act 1984***; and the **Determination to establish components of the Reserve Money Fund made under s.20(2) of the *Financial Management and Accountability Act 1997***.

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

Protection of the rights of individuals

3.37 The Committee asks Ministers about legislative instruments which may affect the rights of individuals. The **Health Insurance Determination HS/2/1997 made under s.3C(1) of the *Health Insurance Act 1973*** corrected an error in providing for certain medical services recognised for the payment of Medicare benefits, thus enabling increased benefits to apply retrospectively. However, in order not to place a retrospective financial responsibility on health funds, the instrument also exempted funds from paying "gap" benefits for that period. This meant that privately insured patients were not eligible to claim these "gap" benefits. The Committee advised the Minister that it was disturbed at this situation, which appeared to breach the rights of those patients. The position was particularly inequitable because it was due to a departmental oversight. The Committee noted that there had been several previous problems of this type and suggested that it may be appropriate to review the enabling Act with a view to appropriate amendment. The Minister agreed that the position appeared to be inequitable and that the legislation would be reviewed. The **Veterans' Entitlements Regulations (Amendment), Statutory Rules 1997 No. 372**, were intended to simplify the administration of travelling expenses for veterans. One provision, however, allowed the Repatriation Commission to question and to seek written evidence for travel claims up to six months after completion of the travel. The Committee suggested that this was a long period in which to ask a veteran to keep detailed records and also a long period within which the Commission may decide to audit a travel claim and then raise queries about it. The Minister advised that six months may be a long period where an application was lodged immediately after travel, but applications could be made up to three months after the travel and this would not be uncommon. Also, the Commission would accept statutory declarations if records were not kept. The **Civil Aviation Regulations (Amendment), Statutory Rules 1997 No. 139**, set out the qualifications for a restricted flight engineer licence, which included a proficiency check. The regulations provided, however, that a person is not taken to have satisfactorily completed such a check unless the operator has given the Civil Aviation Safety Authority written notice that the person has done so. The Committee asked the Minister why the provision did not require the operator to give written notice after satisfactory completion. As drafted, the person affected did not appear to have any remedy if an operator neglects or delays to give written notice to CASA. The Minister advised that operators had a strong economic incentive to inform CASA of completion of a proficiency check because on long haul flights they can reduce costs by carrying second officers who hold a restricted flight engineer licence in addition to an air transport pilot licence. It was therefore not necessary to provide expressly for notification.

3.38 The **National Crime Authority Regulations (Amendment), Statutory Rules 1996 No. 286**, provided under one provision of the enabling Act for a search warrant which authorised the use of such force as may be reasonably necessary in carrying out the warrant, while a second warrant under another provision did not include this protective safeguard. In reply to the Committee's query the Minister advised that the first enabling provision in the Act referred expressly to necessary force while the second did not. Therefore there was no legislative basis for its inclusion. The

Committee wrote back to the Minister, suggesting that if this was the case then it may be appropriate to amend the enabling Act. The Minister agreed to consider such a proposal. The **Trade Practices Regulations (Amendment), Statutory Rules 1997 No. 322**, provided for a form of summons for a witness to attend an arbitration hearing. The Committee noted that the enabling Act provided for imprisonment or a fine for failure to attend, but that a witness may decline to appear if he or she could furnish a reasonable excuse. The form, however, did not include this information. In reply to the Committee's query the Minister advised that he had asked the two administering Departments whether the form and another similar form should be amended as suggested by the Committee.

3.39 The **Telecommunications (Service Provider Determinations) Regulations, Statutory Rules 1997 No. 377**, provided for the Australian Communications Authority to make a determination about a service provider denying a person the use of a public number for a pre-paid carriage service if, among other things, the service provider had been asked in writing by a senior officer of a criminal law-enforcement agency not to allow the person to use the number because the officer has a reasonable suspicion that the person has used, or is likely to use, the service to engage in serious criminal conduct. The Committee asked the Minister about the lack of a provision requiring an affected person to be informed of the reasons why the ACA proposed to do so and to be given an opportunity to respond. The Minister advised that all persons buying these services were informed about the effect of provisions which could lead to a service not being made available. In practice this meant that the likelihood of being denied a public number is greatly reduced. There have been no cases of a public number being denied and the ACA proposed to conduct a consumer education campaign to reduce further this possibility.

Unreasonable burdens on business

3.40 The Committee writes to the Minister about any legislative instrument which may affect business operations, particularly small business. The **Customs Regulations (Amendment), Statutory Rules 1997 No. 284**, exempted existing customs depots that are within 40 kilometres of a customs office from paying the travelling expenses of a customs officer visiting the depot. The Explanatory Statement for the instrument advised that the previous provisions exempted only depots that were within 20 kilometres, but that six months later the Department discovered that some existing depots were located outside the 20 kilometres range. The Committee asked the Minister about the delay in identifying these depots and whether any depot owner was disadvantaged during this period. The Minister advised that the changes were made following representations from industry and that there is now a more appropriate balance in the matter. The **Customs Regulations (Amendment), Statutory Rules 1997 No. 89**, prescribed a particular computer system to process application forms for refunds of duty. The Committee asked the Minister about the selection process used to choose the system and whether users could be affected adversely by this system being prescribed. The Minister gave a detailed explanation of the position, advising that the great majority of brokers and importers used the system. The **Exemption Order made under s.8G of the *Christmas Island Act 1958*** exempted two named companies from the need to comply with the *Travel Agents Act 1985* (W.A) as it applies to the Territory. However, the Explanatory Statement did not indicate whether these were the only travel agents

operating on the Island and, if not, whether the other agents were excluded from the benefits of the Order. The instrument also required the two companies to take out a professional indemnity insurance policy and to give the policy to the Minister. The Committee suggested that this could cause difficulties if a subsequent claim was made on a policy and that delivery of a copy should be sufficient. The Order also provided that it remained in force until revoked, but the Committee suggested that this was superfluous because the Order must necessarily remain in force until revoked. Finally, the Explanatory Statement advised that the Order is a temporary measure only but did not indicate how long the Order would be needed. The Minister advised that the two travel agents were the only ones operating in the Territory and were exempted to facilitate international travel to Christmas Island. Copies of insurance policies would be accepted. The Order was not intended to provide for permanent arrangements but it was not possible to estimate how long the present provisions should remain in force, which explained the references to revocation and to the temporary nature of the measures. The **Wool International Regulations (Amendment), Statutory Rules 1997 No. 356**, provided for the establishment of an Unclaimed Money Fund in which money is held for recipients who cannot be found when Wool International is distributing funds to wool-tax payers. The regulations, however, expressly precluded the payment of interest on such money when the person is subsequently found. The Committee suggested to the Minister that this may be unfair. The Minister gave a detailed explanation of the circumstances, which satisfied the Committee that the procedures in question were reasonable.

3.41 The **Australian Wool Research and Promotion Organisation (Postal Ballots) Regulations, Statutory Rules 1997 No. 217**, provided for an independent person to count the votes cast by wool-tax payers in ballots and for another independent person to inspect the counting. However, neither the regulations nor the Explanatory Statement gave any indication of who these people would be. Also, the regulations provided that the Organisation must publicise a ballot by publishing a notice in a newspaper circulating in Australia, which the Committee noted could be any newspaper at all. The Minister advised that the independent persons would be private firms, both of which were consultants to Wool International. The Minister agreed that the literal provision of the regulations could refer to a single newspaper, but advised that it would be difficult to be more prescriptive and that it was appropriate to leave the question of publicity to the discretion of AWRPO. The **Exemption Order made under s.8G of the *Christmas Island Act 1958*** was published only in the *Territory Gazette*. The Committee suggested that it may have been appropriate to publish it in the Commonwealth Gazette as well. The Minister advised that the *Territory Gazette* was readily available to Christmas Island residents, who were the main clients of the travel agents to which the Order referred.

3.42 The **Airports Regulations (Amendment), Statutory Rules 1997 No. 104**, provided for the Minister to give notice to an airport operator to adjust its structure to comply with the 49 per cent foreign ownership requirements. The regulations also provided that the Minister may include certain specified matters in the notice. The Committee considered that the provision would be fairer if it was a mandatory requirement to include these matters. The regulations also provided, quite reasonably, that a notice did not affect an operator's obligation to take all reasonable steps to ensure that the foreign ownership limits were not breached. The Committee noted, however, that the regulations provided expressly for prosecution of an operator

whether or not the Minister has given notice and even if the time allowed in the notice has not expired. In this context the Explanatory Statement advised that the reason for the notices was to recognise the difficulties faced by listed companies in complying with strict limits. The Committee asked the Minister whether the prosecution provisions reduced safeguards for affected operators. The Minister advised that potential bidders for the airports had asked, and Cabinet agreed, that the regulations should provide explicitly for a period during which an operator could adjust its foreign ownership level. Any provision requiring the Minister to delay other action until this period had lapsed would fetter his or her discretion. The regulations were intended merely to provide a formal reassurance to companies which may exceed the foreign ownership level despite having made all reasonable efforts to comply. The ***Airports* Regulations (Amendment), Statutory Rules 1997 No. 177**, excluded companies from being sublessees or licensees of a single site retail business. The Committee suggested to the Minister that this was at odds with contemporary business practice. The Minister advised that this was not the intention and the need to amend the regulations would be examined. The **Trade Marks Regulations (Amendment), Statutory Rules 1997 No. 346**, reduced the period to claim priority for a trade mark that has been registered overseas and for which registration is sought in Australia, from six months to two working days. The Committee suggested to the Minister that this appeared to be a substantial reduction in the rights of trade mark owners. The Minister advised that there was prior consultation with representative bodies who advised that the additional time is rarely needed. Also, due to improved work practices within the Trade Marks Office there has been a reduction in the time between filing an application and its initial examination. The **Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Regulations, Statutory Rules 1997 No. 371**, provided that documents sent by the Commissioner of Taxation were assumed to have been received, but there was no corresponding assumption for documents sent to the Commissioner. In reply to the Committee's query the Minister advised that the need to prove receipt of documents by the Commissioner does not usually arise and is not an issue. The **Financial Management and Accountability Regulations, Statutory Rules 1997 No. 328**, provided for the disposal of property found on Commonwealth premises, following which the prior owner is paid the amount received on the sale of the property and any rights held in the property by any person are extinguished. The Committee suggested to the Minister that this was an acceptable safeguard for the owner, but it appeared to affect adversely any person who held a right other than ownership, such as a lessee or bailee. The Minister advised that this would probably require legal advice on a case by case basis and there may be other remedies available.

3.43 The **Civil Aviation Regulations (Amendment), Statutory Rules 1997 No. 111**, provided that the Civil Aviation Safety Authority may direct an operator to amend a maintenance control manual. However, because this was an offence provision with a penalty of $5,000, the Committee suggested that the direction should be in writing. The Minister agreed to amend the regulations. The **Allocation Principles 1997** and the **Approved Provider Principles 1997**, both made under s.96-1(1) of the *Aged Care Act 1997*, provided for the receipt of subsidies for providing aged care. Both provided, however, for the Secretary to consider open-ended subjective matters. The Committee suggested to the Minister that this should be restricted to objective relevant matters. The Minister agreed to amend the

instruments. The **Telecommunications (Arbitration) Regulations, Statutory Rules 1997 No. 350**, required the Australian Competition and Consumer Commission to provide the parties to a dispute with a draft determination, prior to making a formal determination. However, the regulations did not provide for a minimum time between the draft and the formal determination. The Committee suggested that this negated the safeguard. The regulations also provided the ACCC with bases for terminating an arbitration. The Committee suggested that it may be appropriate for the ACCC to provide for a preliminary finding or draft conclusion prior to an adverse decision. The Minister advised that he accepted that the absence of a time period weakened the safeguard provided by a draft determination, but also noted the benefits of a fast and effective dispute resolution process. He had asked the relevant Departments to consult with the ACCC on whether a time limit and preliminary findings should be included.

Fees, allowances and expenses

3.44 Many legislative instruments provide for fees, allowances and expenses. The Committee questions any aspect of these which appear unfair or unusual. The **Quarantine Determination No. 3 of 1997 made under s.86E of the *Quarantine Act 1908*** set fees for quarantine inspections and services. The Committee suggested to the Minister that some of these appeared to be unnecessarily harsh. The determination required certain fees to be paid on demand, apparently before the service was provided. Also there was a mandatory penalty fee of 20 per cent applicable immediately if a fee was not paid on the due date. The Committee noted that the penalty rate was much higher than present interest rates and asked whether it would not be more commercially reasonable to allow a limit of 28 days before the penalty fee was payable. The Minister advised that in practice the invoice date is after services are supplied and clients are given 28 days before penalties are applied, excluding clients with a long history of late or non-payment. The penalty was a deliberate incentive to clients to pay by the due date. Penalty rates were higher than interest rates because otherwise particular clients would benefit by accruing additional interest on their cash accounts. The penalty rate of 20 per cent is commensurate with the rates applied by a number of other government revenue organisations.

3.45 The **Primary Industries Levies and Charges Collection (National Residue Survey - Game Animals) Regulations (Amendment), Statutory Rules 1997 No. 359**, reduced the levy on game goats from 19 cents to three cents a carcase. The **Quarantine Determination No. 4 of 1997** reduced the fee for an examination of timber consignments from $1.62 per cubic metre to $1.10 per cubic metre, a reduction of 32 per cent. The Committee supported the reductions, but asked the Minister if this meant that the previous fees were excessive. The Minister advised that in both cases the fees reflected cost reductions from changes to practices which had been endorsed by relevant industry bodies. The **Navigation (Coasting Trade) Regulations (Amendment), Statutory Rules 1997 No. 420**, reduced the fees for engaging in the coasting trade, in one case from $2000 to $400. The **Marine Navigation Levy Regulations (Amendment), Statutory Rules 1998 No. 11**, reduced the levy by amounts equal to $1.66 million per year, or apparently $5 million since the regulations were last amended some three years earlier. The Committee advised the Minister that it supported the reductions, but asked whether they indicated that the previous fees had been too high. The Minister advised that the coasting trade reductions were a

result of streamlining administrative processes and some economies of scale. The navigation levy reductions were due to improved efficiency in the delivery of services. Also, there are significant fluctuations in the amount of levy collected, due to many factors. In the second half of 1997 levy income had exceeded the budgeted amount.

3.46 The **Telecommunications (Arbitration) Regulations, Statutory Rules 1997 No. 350**, provided for the presiding member of the ACCC at an arbitration to summon witnesses, with or without documents, but made no provision for such a witness to claim expenses. The Committee suggested to the Minister that, because a person summoned to appear before the Administrative Appeals Tribunal is entitled to be paid fees, and allowances for expenses, for attendance, the regulations should include a similar provision. The Minister advised that the provision was based on provisions of the *Trade Practices Act 1974*, which do not include expenses, but that he had asked the Departments to consult with the ACCC on whether the regulations and the **Trade Practices Regulations** should both be amended. The **Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment Collection Regulations, Statutory Rules 1997 No. 371**, provided that the expenses which a witness may claim if he or she is required to attend a hearing under the enabling Act are the same as those specified by the **High Court Rules**. The effect of these, however, is that a person who is remunerated by salary, wages or fees may recover the full amount of that remuneration which is lost by attendance, but a person who is remunerated in any other way, such as by commission, or out of the profits of a small business, may only claim $64.40 per day. The Committee suggested that this appeared to be unfair. The Minister advised that the **High Court Rules** set the benchmark and are used in most Commonwealth legislation to provide the amount to be paid under the various Acts for persons required to attend and give evidence.

3.47 The **Administrative Appeals Tribunal Regulations (Amendment), Statutory Rules 1997 No. 156**, provided for a standard application fee of $500 and a lower application fee of $50 for the Small Taxation Claims Tribunal. However, if the proceedings were terminated in a manner favourable to the applicant then the whole of the standard fee was refunded, whereas none of the lower fee was. In reply to the Committee's query the Minister advised that a non-refundable fee of $50 to cover administrative expenses had been recommended by the Joint Committee on Public Accounts (Report 326) and so the regulations provided that applicants who had paid only this amount were not entitled to a refund. The **Fishing Levy Regulations, Statutory Rules 1997 No. 312**, set an amount of levy and the time for its payment in relation to 16 fisheries. However, the regulations provided for a refund or remission of the levy only for two of the 16. The Explanatory Statement advised that the reason for this provision is to give operators the option of withdrawing from the fishery if they regarded the levy as too high, but there was no explanation for that option not being provided for operators in the other 14 fisheries. Also, even that option appeared to be more apparent than real for one of the two fisheries, because operators were only given one day from the date of gazettal to exercise it. In reply to the Committee's query the Minister advised that the refund and remission provisions had been provided to see whether they would attract broad industry response, but this had not been the result. Operators in the affected fisheries had been notified by newsletter one month before the regulations were gazetted that they would have to elect to surrender

their permits by the given date if they wanted to take advantage of these provisions. The surrender program was being reviewed.

3.48 The **Fisheries Levy (Torres Strait Prawn Fishery) Regulations, Statutory Rules 1998 No. 7**, provided for a levy of $730.30 plus $2.43 for each fishing day, but did not explain the basis of the levy or why it was set at such a precise amount. The **Industrial Chemicals (Notification and Assessment) Regulations (Amendment), Statutory Rules 1997 No. 203**, set two new fees and varied eight existing fees. The Explanatory Statement gave the reasons for one fee increase of 150%, but did not explain the other fees. The **Trade Practices Regulation (Amendment), Statutory Rules 1997 No. 322**, did not provide information on the basis of fees payable to the ACCC. The **Therapeutic Goods Regulations (Amendment), Statutory Rules 1997 Nos. 398 and 400**, did not explain the basis of fees. In reply to the Committee, Ministers provided detailed advice on the fee provisions in all these instruments.

The right to privacy

3.49 The Committee ensures that legislative instruments do not breach the basic right of privacy. The **Approval of Forms made under s.9C of the *Insurance (Agents and Brokers) Act 1984*** provided that applicants for registration or renewal of registration as an insurance agent or broker must give their date of birth. The Committee suggested to the Minister that this may be a breach of privacy, because if the reason for the request was to ensure that an applicant was over a certain age, then the form could provide for this. In the case of a renewal, the information about age cannot have changed since the original registration. The Minister advised that a new version of the forms would include an explanation of how the information is used and exclude the date of birth from renewal applications. The **Instrument of Approval No. 1 of 1997 made under ss.4A and 77H of the *Customs Act 1901***, which approved an application form for a customs depot licence, required the name, business and residential addresses and date of birth of everyone who participates in the management or control of the depot. The Committee suggested to the Minister that the collection of unnecessary personal details may be a breach of privacy. The Minister advised that the information was used for police checks in the context of a "fit and proper person" requirement in the enabling Act. Prior to the Committee's letter, however, a review of this provision had concluded that, without further clarification, it might raise concerns about the use of the information provided. Action was being taken to revoke the present form and to replace it with a new form which would include advice that the information would be used for a police records check for the purposes of the Act. Also, there were strict procedural guidelines to ensure the privacy of persons who have an adverse result from a police check. The **Veterans' Vocational Rehabilitation Scheme, Instrument No. 5 of 1997**, provided for service providers, who may be private individuals or companies, to obtain private information. The instrument, however, did not provide for privacy of the information. In reply to the Committee the Minister advised that any private service provider would be required to enter into a contract which would bind it to the privacy principles. The **Health Insurance Commission Regulations (Amendment), Statutory Rules 1998 No. 67**, provided for aspects of the general practitioner immunisation incentives scheme, which involves financial incentives to general practitioners who obtain high immunisation levels for children in their care. The Minister provided detailed advice in response to the Committee's letter about privacy

aspects of the scheme. The **Guidelines No. T6-98 made under s.37(7)(b) of the *Higher Education Funding Act 1988***, which provided for the merit-based equity scholarships scheme, provided merely that institutions administering the scholarships would be expected to apply the privacy principles. The Committee suggested to the Minister that this should be a mandatory requirement. The Minister advised that future instruments would provide for this.

3.50 Seven sets of regulations in relation to the insurance and superannuation industries, **Statutory Rules 1997 Nos. 235-239 and 242-243**, provided for the release of information which would otherwise be confidential. The Explanatory Statement for the **Telecommunications (Service Provider Determinations) Regulations, Statutory Rules 1997 No. 377**, advised that a provision requiring service providers to make identity checks of their customers is for the purpose of assisting law enforcement agencies, but the regulations were drafted more widely than that, appearing to intrude markedly on individual privacy. The **Health Insurance Commission Regulations (Amendment), Statutory Rules 1997 No. 332**, provided for the HIC to disclose to the Department a range of information about claims and payments relating to hearing services. The **Passports Regulations (Amendment), Statutory Rules 1998 No. 42**, provided for the Minister to give information contained in Australian issued travel documents to the New Zealand Customs Service. The **Employment Services (Case Management Documents) Determination No. 1 of 1997** provided for case managers to have access to Violence Indicator information, which included sensitive personal details. The **Australian Wool Research and Promotion Organisation (Postal Ballots) Regulations, Statutory Rules 1997 No. 217**, provided for ballot papers to be lodged by facsimile, but made no express provision for confidentiality. In all these cases the Committee asked for and received further information or assurances from the Minister.

Absence of appropriate safeguards for offence provisions

3.51 The Committee ensures that legislative instruments that include offence provisions should provide for appropriate safeguards. The **Quarantine (General) Regulations (Amendment), Statutory Rules 1997 No. 85**, provided for a system of administrative penalties for certain quarantine offences. The **Income Tax Regulations (Amendment), Statutory Rules 1998 No. 14**, provided for administrative penalties for contravention of reporting obligations for eligible termination payments. Neither of these instruments included the usual and desirable safeguard that infringement notices should advise that if the penalty is paid, then the liability for the contravention is discharged, no further proceedings may be taken and no conviction for the contravention is taken to have been recorded. In each case, in reply to the Committee's query, the Minister advised that infringement notices would include this information. The **Road Transport Reform (Dangerous Goods) Regulations, Statutory Rules 1997 No. 241**, provided for administrative penalties, but provided only that infringement notices must include the information that if a person pays the penalty then the person will not be prosecuted in court for the offence. The Committee suggested to the Minister that this did not go far enough and that the instrument should provide for this. The Minister undertook to amend the regulations as soon as practicable.

3.52 The **Civil Aviation Regulations (Amendment), Statutory Rules 1997 No. 111**, provided for strict liability for failure to amend a maintenance control manual or to make a manual available for inspection. The **Civil Aviation Regulations (Amendment), Statutory Rules 1997 No. 220**, provided for strict liability for failure to comply with instrument flight rules. In reply to the Committee the Minister advised that the provisions were necessary for aviation safety. Maintenance control manuals were important in relation to the larger aircraft used in regular public transport operations with fare paying passengers and the need for the provision had been highlighted by the Bureau of Air Safety Investigation. The instrument flight rules related only to the carriage of passengers on scheduled routes at night, in adverse weather conditions or in restricted visibility. The **Prescribed Goods (General) Orders (Amendment), Export Control Orders No. 7 of 1997**, appeared to provide for strict liability for making false statements about export exemptions. The Committee asked the Minister whether the relevant provision of the Criminal Code applied so that liability was imposed only on people who intentionally or recklessly made such representations. The Minister confirmed that strict liability was intended in order to maintain the high standards of integrity of export certification. The issue of the Criminal Code was not addressed in this one-off amendment as drafting the provision to state clearly that it was strict liability could have a harmful effect on interpretation of other instruments not yet drafted to reflect the Code. Prior to March 2000 offences under the enabling Act and its legislative instruments would be reviewed in their entirety to ensure their proper incorporation into the Code.

3.53 The **Road Transport Reform (Dangerous Goods) Regulations, Statutory Rules 1997 No. 241**, provided expressly for 68 strict liability offences. The Committee asked the Minister why these offences, which may breach personal rights, were needed, noting that it had received an undertaking to amend the related **Road Transport Reform (Heavy Vehicle Standards) Regulations, Statutory Rules 1995 No. 55**, in relation to strict liability. In reply to the Committee's query the Minister advised the Committee that the Commonwealth criminal law policy permitted non-regulatory strict liability offences with penalties of up to $55,000 where contravention could seriously compromise public safety or the environment. In the present case contravention could have far reaching and devastating consequences. Also the penalties did not exceed $3,000 and were regulatory offences which would not lessen the offender's reputation. The Committee accepted this advice in relation to 59 of the offences but asked for further advice on nine others, affecting owners, occupiers, transferors and drivers. Following further correspondence the Minister undertook to amend three of the offences. On 12 March 1998 Senator O'Chee on behalf of the Committee made a statement to the Senate on this matter, reproduced in Chapter 5 of this Report.

3.54 The **Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1997 No. 96**, provided penalties for the breach of provisions of the **Shoalwater Bay (Dugong) Plan of Management** but reversed the usual burden of proof. In reply to the Committee's query the Minister advised that this was never the intention and that the provision would be removed as soon as practicable. The **Marine Order No. 3 of 1997** provided for the vicarious liability of the owner of a ship, the agent of the owner and the master of a ship. The Explanatory Statement advised that the instrument removed criminal responsibility of agents where this was

inappropriate but did not explain the need for vicarious liability. In reply to the Committee's query the Minister advised that a ship owner was often beyond Australian jurisdiction with the master or an agent assuming the responsibilities of the owner.

Terms and conditions of public sector employment

3.55 The Committee ensures that the many legislative instruments which provide for public sector employment operate fairly. The **Locally Engaged Staff Determination 1997/31** provided for local employees in Kenya to enrol in a group medical scheme for themselves and their dependents, but provided a limit of six dependent children. The Committee suggested to the Minister that this improperly discriminated against those staff who had large families. The Minister advised that the limit would be removed. The **Locally Engaged Staff Determination 1997/7** provided for an insurance policy issued by a named local insurance company to cover medical assistance to employees and their dependents in Lebanon, with the Commonwealth paying 90% of the premium. The Committee wrote to the Minister, noting that presumably the employee paid the remaining 10% and asking whether there was a requirement for compulsory salary deductions and, if not, whether the policy would become void if the employee failed to pay the premium. The Minister confirmed that deductions were made from salary. The **Defence Determination 1997/16** provided for the reimbursement of costs of advertising a home for sale, but where more than one agent was engaged reimbursement was limited to the costs relating to the agent who actually sold the home. The Committee suggested to the Minister that this provision could operate unfairly where, for instance, an agent died or became bankrupt or lost his or her licence, and another agent had to be engaged. The Minister advised that attempts to cover the full range of eventualities need to be moderated with the benefits of keeping the rules simple and indirect administrative costs within bounds. There was also a general discretion which has been in existence for some years, but it was not entirely clear that it was flexible enough to meet the contingencies described by the Committee, so it would be amended. The Explanatory Statement for the **Defence Determination 1997/32**, which increased an allowance for members assisting Antarctic expeditions by 29% to $7,747, advised that the allowance had not been updated since 1986. The Committee asked the Minister whether any member was disadvantaged by this. The Minister advised that for a ten year period the allowance either did not justify adjustment or was part of a total productivity package. The present increase followed a recent review. Members serving on Antarctic expeditions had received appropriate entitlements. The **Income Tax Regulations (Amendment), Statutory Rules 1996 No. 274**, provided concessions for members of the Australian Federal Police who had commenced serving in Haiti more than two years previously. The Committee asked the Minister about the apparent delay. The Minister advised that the request to provide the concession was not made until some months after the return of the members. The **Judges' Pensions Regulations 1998, Statutory Rules 1998 No. 25**, which provided the notional surchargeable contribution factors to apply to the superannuation entitlements of federal judges, included different schedules of figures for male and female judges. The Committee asked the Minister about this apparent discrimination. The Minister advised that the *Sex Discrimination Act 1984* permitted the use of reasonable actuarial data based on a person's sex and that was the basis of the present provision.

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

3.56 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

3.57 The **Order No. MQ70/97 made under s.68 of the *Meat and Live-stock Industry Act 1995***, which provided for quotas to export high quality beef to the European Union, provided that the Australian Meat and Live-stock Corporation could withdraw an export approval at any time and for any reason. The instrument provided for review of other discretions but not this one. The Committee wrote to the Minister, noting that it had received an undertaking in relation to a similar discretion in **Order No. MQ65/95** that future decisions would be made reviewable. The Minister advised that a new Act presently being drafted would ensure that such decisions are subject to review. The Committee also raised similar concerns in relation to **Order No. MQ71/97**. The Minister replied with a detailed description of the red meat legislation reform package, advising that all relevant legislative instruments would be reviewed in detail and the Committee's concerns taken into account.

3.58 The **Export Meat Orders (Amendment), Export Meat Orders No. 1 of 1998**, provided that the Secretary may nominate persons to carry out inspections of meat export systems, but did not provide criteria as to qualifications and experience of the persons who will exercise these important discretions. The instrument also provided that the Secretary may issue notices requiring export approval holders to do certain things, but did not provide for any prior notice. Such decisions were reviewable by the AAT, but the Committee asked the Minister about the effect on the business while the review process was undertaken. The Committee also asked about one discretion which may only be subject to internal review and to another which may not have been subject to review at all. The Minister advised that it was not possible to specify detailed criteria for inspectors, but they would be experts in their field. All notices would be in relation to food safety, which required early action to avoid adverse implications for Australia's international trade. Businesses would not suffer severely during the appeal process because they would simply revert to the full inspection system. Both discretions about which the Committee asked were subject first to internal then AAT review. The **Export Control (Organic Produce Certification) Orders, Export Control Order No. 6 of 1997**, provided for AAT review of a decision to revoke an organic produce certificate. The Committee suggested to the Minister, however, that this right may be illusory, because the holder of such a certificate must surrender it within 14 days, which may not be long enough to organise a review. The Minister advised that immediate action was necessary to avoid compromising the overall export potential of the industry. The product could

still be sold pending an appeal provided any "organic" indications are removed. In relation to the **Prescribed Goods (General) Orders (Amendment), Export Control Orders No. 7 of 1997**, the Committee sought and obtained advice from the Minister that a discretion was subject to AAT review.

3.59 The **Primary Industries Levies and Charges Collection (National Residue Survey - Aquatic Animal Export) Regulations 1998, Statutory Rules 1998 No. 30**, provided for AAT review of two discretions, but only required a notice of review rights to be given for one of these. The Minister agreed with the Committee's suggestion that the regulations should be amended. The **Australian Wool Research and Promotion Organisation (Postal Ballot) Regulations, Statutory Rules 1997 No. 217**, provided for a wool-tax payer to give late notice of intention to take part in a postal ballot if the AWRPO considered that there was good reason to accept the notice. The Committee wrote to the Minister, noting that there was no AAT review of this wide discretion, although there was such review of other decisions. The Minister advised that the provision recognised tight timeframes, past experience with delays in rural mail services, the turnaround time for redirected mail and the far flung location of many in the industry. In practice there were also additional administrative safeguards.

(ii) Transport

3.60 The **Air Navigation Regulations (Amendment), Statutory Rules 1997 No. 413**, which implemented UN sanctions, gave the Secretary a discretion to exempt Australian aircraft from a prohibition on flying to or from Angola. The Committee wrote to the Minister, noting that this discretion was given solely to the Secretary and not to the Minister, in contrast to other sanctions imposed by **Statutory Rules 1997 Nos. 402-404**. The Committee noted that it did not raise the question of merits review of these discretions because the Minister is answerable for his or her actions to Parliament. The situation was, however, different in relation to the Secretary and the Committee suggested that it may be appropriate to amend the regulations to provide either that the Minister exercise the discretion or that the discretion be made subject to AAT review. The Minister advised that he acknowledged the Committee's concern but provided details of why he considered that the present arrangements were the most appropriate. The **Civil Aviation Orders Amendment of s.40.1.5** provided for a flying operations inspector or check pilot to decide whether a licence holder had adequate knowledge of certain procedures. The Committee wrote to the Minister, noting that the adverse exercise of the discretion could have an effect on a person's livelihood and suggesting that AAT review of such a decision would be appropriate. The Minister advised that most tests were conducted by industry check pilots, who would generally be working for the same organisation as the pilot being tested. In practice, a pilot who failed a test with a check pilot could then be tested by an inspector and vice versa, which was a reasonable balance. The **Civil Aviation Regulations (Amendment), Statutory Rules 1997 No. 220**, provided for discretions which could affect the commercial viability of operators carrying fare paying passengers. In reply to the Committee the Minister confirmed that these decisions were subject to AAT review. The **Airports Regulations (Amendment), Statutory Rules 1997 No. 104**, provided for aspects of foreign ownership of airport operators. One provision required the Minister to give notice to a company to provide the Minister with evidence which establishes to his or her reasonable satisfaction that an

unacceptable level of foreign ownership does not exist in relation to a company. In reply to the Committee's inquiry about review, the Minister advised that suitable review was provided following the next step in the process, which was an application to the Federal Court for a remedial order.

3.61 The **Marine Order No. 14 of 1997** provided for a responsible person to postpone, or dispense with, periodic examination or testing, but did not provide for review. Another provision provided for exemption from requirements for cranes, where compliance would be unreasonable or impractical, but there was no means of determining whether that condition had been met. In reply to the Committee the Minister advised that a responsible person is one who is competent and qualified, but that such people are not officials but are employees of the owner or operator, so it would not be appropriate to provide for review. The crane exemption has been used only in a few cases, with consensus between the parties. In view of the rarity of its use, consideration would be given to deleting the provision. In relation to the **Marine Orders Nos. 5 and 6 of 1998**, which provided for the Chief Marine Surveyor to extend the validity of a certificate, the Committee obtained advice from the Minister that AAT review was available. The **Road Transport Reform (Dangerous Goods) Regulations, Statutory Rules 1997 No. 241**, provided generally for reconsideration and review of decisions. The Committee, however, asked the Minister for an assurance that all administrative decisions in the present regulations, no matter by whom they are made, were subject to review. The Committee noted that it had received assurances about review in related instruments. The Minister advised that all administrative decisions were reviewable apart from those made in the course of regulatory law enforcement activity, which are not usually subject to merits review.

(iii) Health and welfare

3.62 The **Hearing Services Rules of Conduct 1997 made under s.17(1) of the *Hearing Services Administration Act 1997*** provided for conditions for contracted service providers, including a number of discretions which could affect the livelihood of those providers. In reply to the Committee's query about review the Parliamentary Secretary advised that because of the Committee's concerns she had amended the instrument to provide for reconsideration and AAT review.

3.63 The Committee scrutinised a number of instruments made under s.96-1(1) of the *Aged Care Act 1997*, which provided for discretions relating to business operations. The **Residential Care Subsidy Principles 1997** provided that a decision may be made although it appeared to be the intention that a decision must be made. Also, one provision provided for the Secretary to have regard to any other matters which he or she considered relevant, in contrast to other provisions which provided objectively which matters were relevant. The **Community Care Grant Principles 1997**, the **Community Visitors Grant Principles 1997**, the **Flexible Care Subsidy Principles 1997** and the **User Rights Principles 1997** all provided for discretions without provision for review by the AAT. These were in contrast to the **Sanctions Principles 1997**, which expressly provided for AAT review. In reply to the Committee the Minister advised that the enabling Act used the word "may" in relation to the **Residential Care Subsidy Principle 1997** and that the use of "must" could lead to a legal challenge. The provision about relevant matters was left open to give additional powers to the decision maker, who was still constrained by the Act. The

intention is that decisions will be made initially on a case by case basis and then later it should be possible to amend the instrument. In relation to AAT review the Minister advised that discretions in two of the four instruments noted by the Committee related to allocation of a finite resource, for which merits review is unsuitable. A third was reviewable under the Act and the fourth would be amended to provide for AAT review. The Minister also confirmed to the Committee that decisions provided for by the **User Rights Principles Amendment (No. 5) 1997** were reviewable.

3.64 The **Therapeutic Goods Regulation (Amendment), Statutory Rules 1997 Nos. 399**, provided a discretion for the Secretary to approve an application to designate a drug as an orphan drug, with the decision reviewable by the AAT. However, there was no provision requiring the Secretary to exercise the discretion within a reasonable time. This was in contrast to time limits provided for in the Act and elsewhere in the regulations. The **Statutory Rules 1997 No. 400**, which amended the same principal regulations, provided for the Secretary to vary or withdraw an approval, with review by the Minister and then by the AAT. However, the regulations also provided that a request for review of a decision does not affect the operation of the decision, which could have unfair financial implications. The Committee asked the Parliamentary Secretary about these matters and also for an assurance that the present two sets of regulations, together with two other sets also made on the same day, would not affect adversely the conduct or the outcome of any case presently before the AAT by a person challenging a decision. In reply to the Committee the Parliamentary Secretary advised that the time taken to evaluate products seeking orphan status was not yet known, but the program would be reviewed by the end of 1998 with a view to providing appropriate time frames for evaluation. Two industry groups had agreed that it was inappropriate to allow a breach to continue pending an appeal, because public health may be harmed. There was only one relevant case before the AAT and the changes should not affect the outcome. The Committee wrote again to the Parliamentary Secretary, suggesting that her advice on the effect of decisions was acceptable only on the basis that if an AAT review was in favour of an applicant then the Department should compensate the applicant for any financial loss.

3.65 The **Determination No. PB13 of 1997 made under s.99L of the *National Health Act 1953*** provided for the Australian Community Pharmacy Authority to exercise discretions in relation to pharmacists, but it was not clear whether AAT review was available. The **Determination No. HIG 1/1998 made under paragraph (bj) of Schedule 1 to the *National Health Act 1953*** provided for discretions in relation to payments for overnight and day only hospital treatments, but did not refer to review by the Private Health Insurance Complaints Commissioner, although other provisions of the instrument did. The **Child Disability Assessment Determination 1998 made under s.952A of the *Social Security Act 1991*** provided for the Secretary to approve persons as treating health professionals and to be satisfied with the quality of their work, but did not provide any criteria to guide and control the exercise of these discretions or refer to review by either the Social Security Appeals Tribunal or the AAT. In all these cases the Committee obtained advice from the Minister that merits review was available. The **Veterans' Vocational Rehabilitation Scheme, Instrument No. 5 of 1997**, provided for service providers, which could apparently be commercial organisations. The Committee asked the Minister about review of decisions to reject applications to be service providers. Also, the instrument gave the

Secretary a discretion to decide whether or not a grant has been applied for a particular purpose. The Committee noted, however, that relevant review provisions referred only to decisions of the Repatriation Commission and that there was no review of decisions by the Secretary. The Explanatory Statement was misleading in this respect. The Minister advised that the Department deals with service providers on a normal commercial basis under ordinary tender and contractual arrangements. Decisions about the application of grants would be given to the Commission and accordingly would be reviewable. An amendment was being prepared as a matter of urgency.

(iv) Communications

3.66 The **Telecommunications (Arbitration) Regulations, Statutory Rules 1997 No. 350**, which provided for arbitration of disputes relating to the supply of services or access to a network, provided that the ACCC may decide subjectively whether any matters are relevant to an arbitration and then to take these into account. The Committee noted that this was in contrast to other provisions which provided for objective criteria. In reply to the Committee's query the Minister advised that the regulations would be amended. The four **Carrier Licence Conditions Declarations 1997 made under s.63 of the *Telecommunications Act 1997*** in relation to Telstra, two Optus companies and Vodaphone provided that the licensee must present an industry development plan within 90 days of the grant of a licence and obtain the Minister's approval of the plan. The Committee asked the Minister about merits review if approval was withheld. Following the Minister's advice about lack of review the Committee ascertained that the Minister approved the four plans. The **Carrier Licence Conditions (Access and Roaming) Declaration 1998** provided that Telstra must sell air-time on its Advanced Mobile Phone System in certain circumstances. The instrument also provided for an exemption from this requirement if there were reasonable grounds to believe that an eligible carrier would fail to carry out specified obligations. There was, however, no indications of who was to decide if reasonable grounds existed or whether there was merits review of an adverse decision. Also, there were some subjective as well as objective criteria. The Minister advised that the question of reasonable grounds would be dealt with in any Federal Court action against Telstra for contravention of a civil penalty provision. The objective criteria were intended to be a minimum set of considerations with the subjective criteria relating to other matters which may arise in particular cases.

3.67 The **Telstra Carrier Charges-Price Control Arrangements, Notification and Disallowance Determination 1997 made under s.20 of the *Telstra Corporation Act 1991***, which set price caps and other price control arrangements for Telstra for 1998, provided for the ACCC to exercise a number of discretions which could have significant commercial implications but which were not subject to review. The Committee noted that similar ACCC discretions provided in the *Trade Practices Act 1974* were subject to review. In reply to the Committee the Minister advised that AAT review was not considered suitable because of the technical aspects of calculating price movements, the expertise required to assess the effect of these, the confidential Telstra information which was examined and the extensive inquiry needed. Also, Telstra had never requested AAT review. The **Radiocommunications Licence Conditions (Maritime Ship Licence) Determination No. 1 of 1997 made under s.107 of the *Radiocommunications Act 1992*** provided that a maritime ship

licence must be operated by people holding specified qualifications, including those recognised by two Australian agencies. The Committee noted that these discretions could have an effect on a person's livelihood and asked the Minister about merits review of an adverse decision. The Minister advised that AAT review was available for one of the agencies and that the other would refer the matter to the first agency where this was possible. The cases which could not be referred involved only an examination of one hour.

(v) Other industries

3.68 The **Commissioner's Rules No. 29 made under s.252 of the *Life Insurance Act 1995*** provided for the Commissioner to approve different balance periods for life insurance companies, which could have considerable commercial significance. In reply to the Committee's query about merits review, the Minister advised that, because the discretion was based on individual applications, merits review was neither required nor justified. The Committee was surprised at this advice, which it referred to the Administrative Review Council. The ARC then contacted the Insurance and Superannuation Commission, following which the ARC advised the Committee that it understood that the ISC would recommend to the Minister that merits review should be made available. The **Exemption Order made under s.8G of the *Christmas Island Act 1958*** provided that travel agents must obtain a professional indemnity insurance policy satisfactory to the Minister. In reply to the Committee's query the Minister advised that the Order would be amended to provide for merits review in the local court, the usual method of merits review in the Territory. The **Financial Management and Accountability Regulations, Statutory Rules 1997 No. 328**, extended the definition of authorised investment on condition that the Minister is satisfied of certain specified matters. The Committee wrote to the Minister about review of this commercially significant discretion. The Minister advised that the matters were questions of fact so there was no compelling reason to amend the regulations. The **Income Tax Regulations (Amendment), Statutory Rules 1998 No. 14**, provided in effect that the Commissioner may deal with similar contraventions either by an administrative penalty, with considerable attendant benefits, or by serving a summons to appear in court. The Committee asked the Minister for advice on what basis the discretion would be exercised and whether merits review was available. The Minister advised that the Commissioner was committed to a fair and professional exercise of the discretion as required by the Taxpayers' Charter. The decisions were of a law enforcement nature and are a recognised class of exception to merits review. On 22 October 1997 Senator O'Chee, on behalf of the Committee, made a statement to the Senate, reproduced in Chapter 5 of this Report, on the Committee's lengthy scrutiny of the **Trade Practices Regulations (Amendment), Statutory Rules 1993 No. 21**. The discretions in question were to decide on a concessional fee, which in five cases reduced fees from $7,500 to $1,500 and in one case from $2,500 to $500. In the course of its scrutiny the Committee obtained advice from the President of the ARC and from the Attorney-General that merits review should be provided, but the Minister declined to do so. The Committee reported to the Senate that this was disappointing.

3.69 The **Customs Regulations (Amendment), Statutory Rules 1997 No. 52**, provided a discretion for the Collector to approve industrial purposes in relation to security for the payment of duty. The Committee wrote to the Minister about merits

review, noting that AAT review was available for other similar discretions. The Minister advised that the government was reviewing the general scheme under which the provision operated and would consider whether AAT review should be available. The **Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1997 No. 381**, provided that a decision to deny export permission to objectionable material was generally reviewable by the AAT. The regulations also provided, however, that the Attorney-General may issue a conclusive certificate denying that right if in his or her opinion it is in the public interest to do so. The Explanatory Statement did not give any reasons for this provision. In reply to the Committee the Minister advised that it was based on a recommendation of the ARC and was subject to the safeguards that the Minister must exercise the discretion personally, must give reasons and must table any certificates in each House of the Parliament. The **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1997 No. 386**, granted to the Minister or an authorised person the apparently unfettered discretion to allow the importation of certain marked fuel. In reply to the Committee the Minister advised that the absence of review was intentional, because importation would only be allowed if it was subject to the condition that the fuel be converted to clean fuel. The public interest required that no marked fuel should be capable of finding its way into the general commerce of the country. The **Patents Regulations (Amendment), Statutory Rules 1997 No. 192**, provided a discretion for the Commissioner to impose a late fee. In reply to the Committee's query about merits review the Minister advised that the government's view was that the late fee would be imposed in all cases, with no discretion exercised on a case by case basis. The provision was in response to the considerable time and effort spent pursuing unpaid fees.

3.70 The **Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No. 288**, provided for AAT review of decisions to refuse an exemption from the requirements of the regulations or to cancel an exemption. They did not provide, however, for review of a decision to impose a condition on an exemption. In reply to the Committee the Minister advised that the decisions were not reviewable because they had no substantial immediate consequences. The Committee referred the Minister's advice to the President of the ARC, who suggested that the nature of the decisions was such that they should be reviewable. The Minister then undertook to amend the regulations. The **Workplace Relations Regulations (Amendment), Statutory Rules 1997 No. 314**, provided that State and Territory training bodies may delegate their functions and powers to a variety of other bodies, which could be to the commercial advantage of those bodies. The regulations, however, did not provide for a company or individual who had applied to exercise these functions to request merits review of an adverse decision. In reply to the Committee the Minister advised that workplace relations matters were not generally subject to AAT review. The **Australian Industrial Relations Commission Rules 1988, Statutory Rules 1998 No. 1**, provided that an appeal from a Registrar must be made within 21 days after the date of the relevant act or decision. The Committee suggested to the President that the provision may act harshly against someone who, for good reason, is unaware of the making of a particular decision. The Committee suggested that the time should begin from when the person knew, or ought to have known, of the decision. Also, an appeal must be lodged within 21 days of the Registrar's refusal or failure to make a decision or do an act. The Committee advised the President that it may be difficult to

determine when the Registrar had simply failed, as distinct from refused, to make a decision, although the 21 days runs from that moment. The President advised the Committee of the circumstances in which the provision would operate, in particular assuring it that a failure to act is usually a continuing state of affairs and that an appeal may be brought as long as the failure continues.

Review of decisions affecting personal rights

3.71 The Committee also ensures that legislative instruments provide appropriate criteria and review rights for discretions which directly affect individuals. The **Veterans' Entitlements Regulations (Amendment), Statutory Rules 1997 No. 372**, provided that if the Repatriation Commission has reconsidered one of its decisions and has set aside the earlier finding, then it must make a fresh decision, but in making that fresh decision it may take into account only the evidence before it when it made the first decision. The Committee wrote to the Minister, suggesting that this requirement appeared to be at odds with the usual process of appeal, in which courts and tribunals generally take into account not only the initial evidence but also any new evidence which has come to light. The Minister advised that the regulations would be amended. The **Administrative Appeal Tribunal Regulations (Amendment), Statutory Rules 1997 No. 156**, provided for the Registrar to exercise two discretions in relation to fees, but only one was reviewable by the AAT itself. In reply to the Committee the Minister advised that the regulations would be amended. In relation to the **AUSTUDY Regulations (Amendment), Statutory Rules 1998 No. 33**, the Minister confirmed that merits review was available of a discretion by the Secretary to decide whether an illness or infirmity was likely to continue indefinitely.

3.72 The **Parliamentary Entitlements Regulations, Statutory Rules 1997 No. 318**, provided for the Minister to approve as an entitlement certain printed material for distribution to constituents. The Committee wrote to the Minister, advising that it assumed that the power would be exercised on application by a particular member, on the basis that the power was administrative. The Committee noted that there was no indication of how approval or rejection was to be communicated to a member, although the greater transparency claimed in the Explanatory Statement would appear to require written approval, which perhaps should be available to the public. Also there was no AAT review of a decision to reject a request, although greater transparency would appear to dictate review. The Minister advised that while it was legally possible for members to make individual requests, it was intended that approvals would have general application. It was not considered appropriate to provide for AAT review. The **Retirement Savings Accounts Regulations, Statutory Rules 1997 No. 116**, and amendments made by **Statutory Rules 1997 Nos. 150 and 308**, and the **Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1997 Nos. 117, 152 and 309** provided for discretions relating to severe financial hardship, compassionate grounds and cashing in benefits. The regulations also included discretions to refund to a holder or member costs which have been charged against benefits. The Committee asked the Minister about merits review of these discretions. In relation to the refund of costs it asked why there were no criteria and why there was even a discretion; if the costs to which the regulations referred had been properly charged there was no reason to refund them and if they were not properly a charge on the benefits there should be no discretion about a refund. The Minister advised that some of the discretions were reviewable by

the Superannuation Complaints Tribunal and others which were not came within exceptions in the ARC guidelines. Criteria for refunds would be unduly prescriptive. Also a recent decision by the full Federal Court held that provisions of the enabling Act purported to confer on the SCT the judicial power of the Commonwealth and are therefore invalid. The result was the SCT could not make determinations in relation to complaints and was limited to an inquiry and conciliation role. The government was, however, fully committed to ensuring that superannuation fund members had access to a low cost alternative dispute resolution mechanism and was urgently seeking legal advice on the options.

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

3.73 This is a principle not raised as often by the Committee as its other three principles. 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 included in a legislative instrument.

3.74 The **Therapeutic Goods Regulations (Amendment), Statutory Rules 1997 Nos. 398-401**, provided for important matters affecting the general administration of therapeutic goods. The Committee suggested to the Parliamentary Secretary that these appeared to be of sufficient importance that it may be more appropriate to address them through amendment of the enabling Act, so that the changes would be subject to full parliamentary debate. The Parliamentary Secretary advised that it would not be appropriate to amend the Act because these were amendments of existing regulations. The Committee wrote back, advising the Parliamentary Secretary that, with great respect, her advice lacked merit. The subject matter of **Statutory Rules 1997 No. 401** was contentious and the subject of considerable public concern. The Committee noted advice that the Parliamentary Secretary had established a committee of review to examine the issues raised by **No. 401** and that the results would be tabled in Parliament. The Committee would appreciate advice that following this review the material in **No. 401** would be included in a Bill, which would enable the Committee to remove its notice of disallowance. Subsequently on 31 March 1998 the Senate disallowed the regulations on policy grounds. The Parliamentary Secretary advised the Committee that the committee of review would still report and its findings would be tabled in Parliament. The **Public Service Regulations (Amendment - Interim Reforms), Statutory Rules 1998 No. 23**, which provided for aspects of the efficiency, effectiveness and ethics of the Australian Public Service, were made on 18 February 1998. The Public Service Bill 1997, which proposed far-reaching reforms to the APS, was reintroduced into the House of Representatives on 5 March 1998. The Committee wrote to the Minister suggesting that given the timing of the Bill that it may have been appropriate for the regulations to be delayed until the fate of the Bill was decided. It may also have been appropriate for some of the provisions of the regulations to be included in the Bill. The Minister advised that he agreed with the Committee that the preferable course would have been to include the substantive provisions of the regulations in an Act, but the House of Representatives had now rejected the amendments passed by the Senate to the Bill and it was essential that these important matters be addressed. In relation to the **Customs (Prohibited Exports) Regulations (Amendment), Statutory**

Rules 1997 No. 381, which prohibited subject to conditions the exportation of material which had been refused classification by the Classification Board because of its portrayal of drugs and violence, the Committee suggested to the Minister that this system of censorship of books, magazines, films and computer games might be better placed in primary legislation where it would be subject to full debate by Parliament.

3.75 On 28 May 1997 Senator Jeannie Ferris wrote to the Committee about regulation making powers in the Crimes Amendment (Forensic Procedures) Bill 1997. Senator Ferris was concerned about the qualifications of people to carry out intimate forensic procedures on suspects being provided by regulations rather than in the primary legislation. The Committee wrote to the Minister for advice on why such sensitive matters would be provided by regulations rather than by express provisions of the Bill. The Minister advised that regulations would provide greater certainty about qualifications, given changing forensic techniques and training. The Bill provided a number of safeguards for both the suspect and the person performing the forensic procedure, including the right to the presence of a medical practitioner or dentist of the suspect's choice.

4 Ministerial Undertakings to Amend Legislation

Each year the Committee receives undertakings from Ministers and Parliamentary Secretaries to amend legislation to meet its concerns. The table below shows those undertakings that have either been implemented or are still outstanding at 30 June 1998, the end of the reporting period.

Table: Ministerial Undertakings to Amend Legislation

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
AGRICULTURE, FISHERIES AND FORESTRY				
Agricultural and Veterinary Chemicals Code Regulations (Amendment), Statutory Rules 1996 No.111	The Hon John Anderson MP, Minister for Primary Industries and Energy	28 August 1996	To provide for AAT review of certain decisions with commercial consequences.	Agricultural and Veterinary Chemicals Code Regulations (Amendment), Statutory Rules 1997 No.264, of 17 September 1997
Agricultural and Veterinary Chemicals Code Regulations (Amendment), Statutory Rules 1996 No.162		17 October 1996	To amend the Regulations to provide safeguards for business operators.	As above
Australian Dried Fruits Board (AGM) Regulations, Statutory Rules 1993 No.144 Fisheries Levy (Northern Fish Trawl Fishery) Regulations (Amendment), Statutory Rules 1992 No.13 Wool Research and Development Corporation Regulations (Amendment), Statutory Rules 1992 No.443	The Hon John Anderson MP, Minister for Primary Industries and Energy	4 July 1996	To repeal inoperative Regulations.	Outstanding
Export Control (Fees) Orders (Amendment), Export Control Orders No.1 of 1996	The Hon John Anderson MP, Minister for Primary Industries and Energy	6 May 1996	To amend charging legislation to provide for AAT review.	Outstanding
Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1995 No.257	Senator the Hon Bob Collins, Minister for Primary Industries and Energy	30 November 1995	To amend the Regulations to provide for merits review.	Outstanding
Meat and Live-stock Orders Nos. MQ64/95 and MQ65/95 made under s.68 of the *Meat and Live-stock Industry Act 1995*	The Hon John Anderson MP, Minister for Primary Industries and Energy	18 June 1996	To avoid possible prejudicial retrospectivity and provide for review.	Meat and Live-stock Order No. MQ69/96 made under s.68 of the *Meat and Live-stock Industry Act 1995*, of 15 October 1996.

Table (continued)

Instrument	Minister	Date Undertaking Given
Meat and Live-stock Order No. M73/95 made under s.68 of the *Meat and Live-stock Industry Act 1995*	The Hon John Anderson MP, Minister for Primary Industries and Energy	18 June 1996
Meat and Live-stock Order No. MQ70/97 made under s.68 of the *Meat and Live-stock Industry Act 1995*	The Hon John Anderson MP, Minister for Primary Industries and Energy	12 August 1997
Plant Breeder's Rights Regulations (Amendment), Statutory Rules 1995 No.290	Senator the Hon Bob Collins, Minister for Primary Industries and Energy	20 December 1995
Prawn Export Promotion Levies and Charges Regulations, Statutory Rules 1995 No.245	The Hon David Beddall MP, Minister for Resources	10 November 1995
Primary Industries Levies and Charges Collection (National Residue Survey – Aquatic Animal Export) Regulations 1998, Statutory Rules 1998 No.30	The Hon John Anderson MP, Minister for Primary Industries and Energy	18 May 1998
Quarantine (General) Regulations (Amendment), Statutory Rules 1997 No.85	The Hon John Anderson MP, Minister for Primary Industries and Energy	25 August 1997

ATTORNEY-GENERAL'S DEPARTMENT

Administrative Appeals Tribunal Regulations (Amendment), Statutory Rules 1997 No.156	The Hon Daryl Williams MP, Attorney-General	14 October 1997
Bankruptcy Regulations (Amendment), Statutory Rules 1996 No.263	The Hon Daryl Williams MP, Attorney-General	26 March 1997

Undertaking	Implemented by
To correct a drafting defect.	Outstanding
To provide for review of administrative decisions in a proposed new Act.	*Australian Meat and Live-stock Industry Act 1997*
To amend the Regulations to provide for AAT review of discretions and to improve drafting.	Outstanding
To amend the Regulations to include a right of appeal to the AAT.	Outstanding
To correct drafting defects.	Outstanding
To amend the Regulations to provide safeguards for administrative penalties.	Outstanding

To amend the Regulations to provide for merits review of a fee payable to the Small Taxation Claims Tribunal.	Administrative Appeals Tribunal Regulations (Amendment), Statutory Rules 1997 No.348, of 8 December 1997
To correct a drafting oversight.	Bankruptcy Regulations (Amendment), Statutory Rules 1997 No.76, of 7 April 1997

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
Bankruptcy Rules (Amendment), Statutory Rules 1996 No.191	The Hon Daryl Williams MP, Attorney-General	21 November 1996	To provide for AAT review.	Review provisions now included in the *Bankruptcy Act 1966*.
Family Law Regulations (Amendment), Statutory Rules 1996 No.71	The Hon Daryl Williams MP, Attorney-General	10 September 1996	To amend the Regulations to provide for AAT review of discretions.	Outstanding
Instrument of Approval No.1 of 1997 made under ss.4A and 77H of the *Customs Act 1901*	Senator the Hon Christopher Ellison, Minister for Customs and Consumer Affairs	29 September 1997	To amend an application form to include safeguards in relation to personal information.	Instrument of Approval No.39 of 1997, of 18 December 1997
National Crime Authority Regulations (Amendment), Statutory Rules 1996 No.286	The Hon Daryl Williams MP, Attorney-General	24 July 1997	To amend the Act to include an appropriate safeguard.	Outstanding
Public Interest Determination No.7 made under Part VI of the *Privacy Act 1988*	The Hon Daryl Williams MP, Attorney-General	12 March 1998	To amend the Determination to improve privacy safeguards.	Outstanding
COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS				
Australian Postal Corporation Regulations, Statutory Rules 1996 No.72	Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts	21 October 1996	To amend the Regulations to make it clear that they are subject to the *Freedom of Information Act 1982*.	Outstanding
Carrier Licence Conditions (Optus Mobile Pty Ltd) Declaration 1997 Carrier Licence Conditions (Optus Networks Pty Ltd) Declaration 1997 Carrier Licence Conditions (Vodofone Pty Ltd) Declaration 1997	Senator the Hon Richard Alston,. Minister for Communications, Information Technology and the Arts	8 October 1997	To revoke provisions which appeared to provide invalidly for subdelegation of legislative power and for incorporation of material as amended from time to time.	Carrier Licence Conditions (Optus Mobile Pty Ltd) Declaration 1997 (Amendment No.1 of 1997) Carrier Licence Conditions (Optus Networks Pty Ltd) Declaration 1997 (Amendment No.1 of 1997) Carrier Licence Conditions (Vodofone Pty Ltd) Declaration 1997 (Amendment No.1 of 1997), of 9 December 1997.

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
Cultural Bequests Program Guidelines (No.1) made under s.78(6C) of the *Income Tax Assessment Act 1936*	Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts	30 May 1997	To amend the Guidelines to avoid invalid subdelegation, clarify costs and to provide for merits review of a discretion.	Cultural Bequests Program Guidelines Amendment (No.1) 1997, of 8 December 1997.
Maximum Amount Recoverable in Tort Determination made under s.121 of the *Telecommunications Act 1991*	The Hon Michael Lee, Minister for Communications and the Arts	9 October 1996	To revoke the invalid Determination.	Outstanding
National Gallery Regulations (Amendment), Statutory Rules 1996 No.92	Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts	6 November 1996	To amend the Regulations to remove unnecessary provisions and to correct a drafting error.	Outstanding
Telecommunications (Arbitration) Regulations, Statutory Rules 1997 No.350	Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts	7 April 1998	To amend the Regulations to provide for an objective standard for a decision and to review personal rights safeguards.	Outstanding
Television Licence Fees Regulations (Amendment), Statutory Rules 1992 No.448	The Hon David Beddall MP, Minister for Communications	19 August 1993	To amend the Regulations to correct a drafting error.	Television Licence Fees Regulations (Amendment), Statutory Rules 1996 No.323, of 20 December 1996.
EDUCATION, TRAINING AND YOUTH AFFAIRS				
AUSTUDY Regulations (Amendment), Statutory Rules 1994 No.409	The Hon Ross Free MP, Minister for Schools, Vocational Education and Training	29 March 1995	To amend the Regulations to correct drafting errors.	AUSTUDY Regulations (Amendment), Statutory Rules 1997 No.373, of 18 December 1997
Guidelines T6-98 made under the *Higher Education Funding Act 1988*	The Hon David Kemp MP, Minister for Employment, Education, Training and Youth Affairs	19 May 1998	To amend the Guidelines to ensure compliance with privacy principles	Outstanding
EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS				
Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No. 129	The Hon Peter Reith MP, Minister for Industrial Relations	23 August 1996	To amend the Regulations to remove one discretion and to provide for AAT review of another.	Outstanding

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No.288	The Hon Peter Reith MP, Minister for Workplace Relations and Small Business	27 October 1997	To amend the Regulations to provide for merits review of a decision.	Outstanding
Workplace Relations Regulations (Amendment), Statutory Rules 1996 No.328	The Hon Peter Reith MP, Minister for Industrial Relations	29 April 1997	To amend the Regulations to include a reasonability requirement.	Workplace Relations Regulations (Amendment), Statutory Rules 1997 No.424, of 18 December 1997.
ENVIRONMENT AND HERITAGE				
Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1993 No.206	The Hon Ross Kelly MP, Minister for the Environment, Sport and Territories	17 November 1993	To amend the Regulations to provide for review of certain discretions.	Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1997 No.326, of 26 November 1997.
Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1993 No.266		10 January 1994	To amend the Regulations to provide for review of certain discretions.	As above
Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1997 No.96	Senator the Hon Robert Hill, Minister for the Environment	28 August 1997	To amend the Regulations to remove a reversal of the usual onus of proof.	Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1997 No.326, of 26 November 1997.
Hazardous Waste (Regulation of Exports and Imports)(OECD Decision) Regulations, Statutory Rules 1996 No.283	Senator the Hon Robert Hill, Minister for the Environment	9 April 1997	To amend the Regulations to provide an opportunity to respond to adverse information.	Outstanding
Ozone Protection Regulations, Statutory Rules 1995 No.389	Senator the Hon Robert Hill, Minister for the Environment	21 June 1996	To amend the Regulations to provide for AAT review of a discretion.	Outstanding

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
FAMILY AND COMMUNITY SERVICES				
Childcare Assistance (Fee Relief) Guidelines (Variation), Instrument No.CCA/12A/97/1 made under s.12A(1) of the *Child Care Act 1972*	The Hon Judi Moylan MP, Minister for Family Services	9 May 1997	To provide for merits review of administrative decisions when new child care legislation is introduced.	*Child Care Payments Act 1997*
Child Care Centre Relief Eligibility Guidelines made under s.12A of the *Child Care Act 1972*	The Hon Peter Staples MP, Minister for the Aged, Family and Health Services	27 May 1992	To amend the Act and delegated legislation to provide for review of discretions following an Australian Law Reform Commission report.	*Child Care Payments Act 1997*
Determination No.ADPCA 10F 3/1995 made under s.10F of the *Aged or Disabled Persons Care Act 1954*	The Hon Judi Moylan MP, Minister for Family Services	10 October 1996	To provide for AAT review in future instruments.	*Child Care Payments Act 1997*
Exempt Nursing Homes Principles (Amendment No.1 of 1996) Exempt Nursing Homes Fees Redetermination Principles (Amendment No.1 of 1996)	The Hon Judi Moylan MP, Minister for Family Services	21 March 1997	To amend the Principles to remove a superfluous power and a discretion.	Outstanding
FINANCE AND ADMINISTRATION				
Remuneration Tribunal Determinations	The Hon Laurie Brereton MP, Minister for Industrial Relations	17 March 1995	To amend the *Remuneration Tribunal Act 1973* to impose a time limit within which the Tribunal must send determinations to the Minister.	The Committee was advised that this matter would be addressed by the Legislative Instruments Bill 1996.
Remuneration Tribunal Determination No.16 of 1997	The Hon John Fahey MP, Minister for Finance	6 May 1998	To amend the Determination to correct invalid provisions and reference errors.	Remuneration Tribunal Determination No.17 of 1998, of 30 June 1998.
Tenth Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons made under s.5 of the *Superannuation Act 1990*	The Hon John Fahey MP, Minister for Finance	7 August 1996	To amend the *Superannuation Act 1990* to validate administrative actions.	Outstanding

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
FOREIGN AFFAIRS AND TRADE				
Foreign Affairs and Trade Determination 1998/1	The Hon David Kemp, Minister Assisting the Prime Minister for the Public Service	15 April 1998	To amend the Determination in relation to possible adverse retrospectivity.	Foreign Affairs and Trade Determination 1998/3, of 20 April 1998
Grants Entry Test made under s.13K of the *Export Market Development Grants Act 1974*	The Hon Tim Fischer MP, Minister for Trade	16 October 1996	To amend the *Export Market Development Grants Act 1974* to provide for review of certain decisions.	*Export Market Development Grants Act 1997*
Locally Engaged Staff Determination 1997/31	The Hon Alexander Downer MP, Minister for Foreign Affairs	30 December 1997	To amend the Determination to remove discrimination against employees with large families.	Locally Engaged Staff Determination 1998/25, of 22 June 1998
HEALTH AND AGED CARE				
Allocation Principles 1997 made under s.96-1(1) of the *Aged Care Act 1997*	The Hon Warwick Smith MP, Minister for Family Services	16 December 1997	To amend the Principles to provide for an objective standard for a decision.	Allocation Principles Amendment (No.1) 1997, of 8 December 1997.
Approved Provider Principles 1997 made under s.96-1(1) of the *Aged Care Act 1997*	The Hon Warwick Smith MP, Minister for Family Services	16 December 1997	To amend the Principles to provide for an objective standard for a decision.	Approved Provider Principles Amendment (No.1) 1997, of 8 December 1997.
Formulation of Principles made under s.58CD of the *National Health Act 1953*	The Hon Brian Howe MP, Minister for Housing, Local Government and Community Services	22 November 1993	To validate provisions of the Principles.	This concern was addressed in the *Aged Care Act 1997.*
Hearing Services Regulations (Amendment), Statutory Rules 1996 No.149	Senator the Hon Bob Woods, Parliamentary Secretary to the Minister for Health and Family Services	21 October 1996	To review the Act to provide for refunds of charges.	Outstanding
Nursing Home Nasogastric Feeding Principles 1992 (NGP1/1992)	The Hon Peter Staples MP, Minister for Aged, Family and Health Services	1 October 1992	To amend the Principles to provide for review of discretions.	This concern was addressed in the *Aged Care Act 1997.*
Nursing Home Oxygen Treatment Principles 1992 (OTP1/1992)	The Hon Peter Staples MP, Minister for Aged, Family and Health Services	1 October 1992	To amend the Principles to provide for review of discretions.	This concern was addressed in the *Aged Care Act 1997.*

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
Principles NHP 2/1993 made under the *National Health Act 1953*	The Hon Andrew Theophanous MP, Parliamentary Secretary to the Minister for Housing, Local Government and Community Services	7 October 1993	To amend the Principles to remove an invalid legislative power.	This concern was addressed in the *Aged Care Act 1997*.
Therapeutic Goods Order No.54A made under s.10 of the *Therapeutic Goods Act 1989*	The Hon Trish Worth MP, Parliamentary Secretary to the Minister for Health and Family Services	6 January 1998	To amend the Order to correct cross-referencing errors.	Outstanding
INDUSTRY, SCIENCE AND RESOURCES				
Australian Sports Drug Agency Regulations (Amendment), Statutory Rules 1996 No.72	The Hon Warwick Smith MP, Minister for Sport, Territories and Local Government	12 December 1996	To amend the Regulations to protect the rights of intellectually disabled competitors, to provide for companies to apply to become a prescribed courier service and to provide for AAT review of decisions.	Outstanding
Petroleum (Submerged lands) (Management of Safety on Offshore Facilities) Regulations, Statutory Rules 1996 No.298	Senator the Hon Warwick Parer, Minister for Resources and Energy	26 March 1997	To amend the Regulations to remove a double jeopardy provision.	Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations (Amendment), Statutory Rules 1997 No.296, of 15 October 1997.
PRIME MINISTER AND CABINET				
Native Title (Notices) Determination No.1 of 1996 made under ss.23 and 252 of the *Native Title Act 1993*	Senator the Hon John Herron, Minister for Aboriginal and Torres Strait Islander Affairs	16 September 1996	To amend the *Native Title Act 1993* to validate actions taken during the two years from 1 January 1994.	Outstanding
Public Service Regulations (Amendment – Interim Reforms), Statutory Rules 1998 No.23	The Hon David Kemp MP, Minister Assisting the Prime Minister for the Public Service	15 April 1998	To amend the Regulations to require the Minister to table the State of the Service Report within seven sitting days of receiving it.	Outstanding
Zone Election Rules, Rules No.4 of 1990 made under the *Aboriginal and Torres Strait Islander Commission Act 1989*	Senator the Hon John Herron, Minister for Aboriginal and Torres Strait Islander Affairs	9 September 1996	To delete provisions relating to strict liability, vicarious liability and a reversal of the usual onus of proof.	Zone Election Rules (Amendment No.3) made under s.138 of the *Aboriginal and Torres Strait Islander Commission Act 1989*, of 7 November 1996.

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
TRANSPORT AND REGIONAL SERVICES				
Air Navigation Regulations (Amendment), Statutory Rules 1995 No.342	The Hon John Sharp MP, Minister for Transport and Regional Development	23 May 1996	To amend the Regulations to require security officers to carry photographic identification cards.	Outstanding
Airports Regulations (Amendment), Statutory Rules 1997 No.177	The Hon Mark Vaile MP, Minister for Transport and Regional Development	23 October 1997	To amend the Regulations to clarify legislative intent in relation to subleasing and licensing single site retail premises at affected airports.	Airports Regulations (Amendment), Statutory Rules 1998 No.97, of 20 May 1998.
Applied Laws (Implementation) Ordinance 1995, Territory of Christmas Island Ordinance No.1 of 1995	The Hon Warren Snowdon MP, Parliamentary Secretary to the Minister for Environment, Sport and Territories	21 November 1995	To review the *Christmas Island Act 1958* to include safeguards about prejudicial retrospectivity.	The Committee was advised that this matter would be addressed by the Legislative Instruments Bill 1996.
Applied Laws (Implementation) Ordinance 1995, Territory of Cocos (Keeling) Islands Ordinance No.1 of 1995	The Hon Warren Snowdon MP, Parliamentary Secretary to the Minister for Environment, Sport and Territories	21 November 1995	To review the *Cocos (Keeling) Islands Act 1955* to include safeguards about prejudicial retrospectivity.	The Committee was advised that this matter would be addressed by the Legislative Instruments Bill 1996.
Casino Control (Amendment) Ordinance 1996, Territory of Christmas Island Ordinance No.5 of 1996	The Hon Warwick Smith MP, Minister for Sport, Territories and Local Government	24 February 1997	To amend the Ordinance to narrow an unfair definition and provide for merits review of decisions.	Casino Control (Amendment) Ordinance 1998, Territory of Christmas Island Ordinance No.3 of 1998, of 30 June 1998.
Civil Aviation Orders, s.40.2.1	The Hon Michael Ronaldson MP, Parliamentary Secretary to the Minister for Transport and Regional Development	27 June 1997	To amend the Orders to provide for the mandatory renewal of a rating if requirements were met.	Civil Aviation Orders, s.40.2.1, of 16 June 1997.
Civil Aviation Regulations (Amendment), Statutory Rules 1997 No.111	The Hon John Sharp MP, Minister for Transport and Regional Development	30 September 1997	To amend the Regulations to provide that certain directions must be given in writing.	Outstanding
Exemption Order made under s.8G of the *Christmas Island Act 1958*	The Hon Alex Somlyay MP, Minister for Regional Development, Territories and Local Government	21 January 1998	To amend the Order to provide for merits review of a decision.	Variation of Order under s.8G of the *Christmas Island Act 1958*, of 21 January 1998.
Federal Airports (Amendment) By-Laws No.1 of 1997	The Hon John Sharp MP, Minister for Transport and Regional Development	23 April 1997	To amend the By-Laws to remove a reversal of proof provision.	Outstanding

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
Marine Orders Part 32 (Cargo Handling Equipment) Issue 2, Order No.14 of 1997	The Hon Peter Reith MP, Minister for Workplace Relations and Small Business	28 April 1998	To amend the Orders to correct a definition and a reference error.	Outstanding
Marine Orders Part 91 (Marine Pollution Prevention – Oil) Issue No.2, Order No.5 of 1998 Marine Orders Part 93 (Marine Pollution Prevention – Noxious Liquid Substances) Issue 2, Order No.6 of 1998	The Hon Peter Reith MP, Minister for Workplace Relations and Small Business	16 June 1998	To amend the Orders to provide for a sanction for failure to report certain accidents or defects.	Outstanding
Road Transport Reform (Dangerous Goods) Regulations, Statutory Rules 1997 No. 241	The Hon Mark Vaile MP, Minister for Transport and Regional Development	28 November 1997	To amend the Regulations to remove three strict liability provisions and to provide for safeguards for administrative penalties.	Outstanding
Road Transport Reform (Heavy Vehicle Standards) Regulations, Statutory Rules 1995 No.55	The Hon Neil O'Keefe MP, Parliamentary Secretary to the Minister for Transport	29 August 1995	To amend the Regulations to provide for AAT review of discretions and to remove a strict liability provision. The Parliamentary Secretary further advised that the Regulations would not commence before the Ministerial Council agreed to replacement regulations.	Outstanding
Road Transport Reform (Mass and Loading) Regulations (Amendment), Statutory Rules 1996 No.342	The Hon John Sharp MP, Minister for Transport and Regional Development	2 May 1997	To amend the Regulations to provide for independent review of discretions.	Outstanding
Road Transport Reform (Oversize and Overmass Vehicles) Regulations, Statutory Rules 1995 No.123	The Hon Neil O'Keefe MP, Parliamentary Secretary to the Minister for Transport	29 August 1995	To amend the Regulations to provide for AAT review of discretions. The Parliamentary Secretary further advised that the Regulations would not commence before the Ministerial Council agreed to replacement regulations.	Outstanding
TREASURY				
Approval of Forms under the *Insurance (Agents and Brokers) Act 1984*	Senator the Hon Rod Kemp, Assistant Treasurer	5 January 1998	To amend the Forms to include an explanation of how information will be used and to exclude a requirement to give a date of birth.	Approval of Form No.1 of 1998 made under ss.20 and 31C of the *Insurance (Agents and Brokers) Act 1984*, of 4 May 1998.
Excise Regulations (Amendment), Statutory Rules 1995 No.425	The Hon Geoff Prosser MP, Minister for Small Business and Consumer Affairs	16 May 1996	To amend the *Excise Act 1901* to provide for AAT review of decisions.	Outstanding

Table (continued)

Instrument	Minister	Date Undertaking Given	Undertaking	Implemented by
Income Tax Regulations (Amendment), Statutory Rules 1994 No.461	The Hon Paul Elliott MP, Parliamentary Secretary to the Treasurer	31 May 1995	To amend the Regulations to provide for merits review.	Outstanding
Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1995 No.430	Senator the Hon Brian Gibson, Parliamentary Secretary to the Treasurer	21 April 1997	To amend the Regulations to provide for merits review.	Outstanding
VETERANS' AFFAIRS				
Veterans' Entitlements Regulations (Amendment), Statutory Rules 1997 No.372	The Hon Bruce Scott MP, Minister for Veterans' Affairs	9 April 1998	To amend the Regulations to provide for appellants to provide new evidence.	Outstanding
Veterans' Vocational Rehabilitation Scheme	The Hon Bruce Scott MP, Minister for Veterans' Affairs	9 April 1998	To amend the Scheme to provide for AAT review of a discretion.	Outstanding

5 Special Statements

5.1 During 1997-98 the Chairman made the following special statements to the Senate.

A Breach of the Committee's Principles

Senator O'Chee, 22 October 1997, Senate Hansard, p. 7860

5.2 One of the terms of reference of the Standing Committee on Regulations and Ordinances is to ensure that delegated legislation does not 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. Administrative discretions have an immediate impact upon individuals and business firms and it is essential that these decisions made by Ministers and departmental bureaucrats should be subject to external review. Such review improves the quality of administration by concentrating the minds of decision makers on the fact that their actions are subject to review of their merits by an independent external body.

5.3 Every year the Committee raises with Ministers many instances where delegated legislation provides for administrative decisions with no apparent merits review provided for either in the enabling Act or in the legislative instrument itself. The Committee is gratified that it usually receives good cooperation from Ministers in this scrutiny. For instance, the last Annual Report of the Committee reported that Ministers had undertaken to amend one Act and 12 legislative instruments to provide for Administrative Appeals Tribunal review and to review the operations of another legislative instrument in the light of our concerns. The importance which the Committee attaches to external review of administrative decisions is illustrated by the same Report advising that the Committee had resolved formally to recommend disallowance of a regulation unless the Committee received on that day an undertaking to amend to provide for AAT review. The Committee then received such an undertaking.

5.4 Given the general high level of cooperation from Ministers it is disappointing for the Committee to have to report an instance where the Committee has not received a satisfactory response in respect of its concerns about external review.

5.5 This matter, which has had a long gestation period, originated in the Committee's scrutiny of the **Trade Practices Regulations (Amendment), Statutory Rules 1993 No.21**, which provided for fees payable for applications under the enabling Act for authorisation of agreements and covenants affecting competition, privacy and secondary boycotts, exclusive dealing conduct and mergers and for the notification of exclusive dealing conduct. The regulations also provided that the then Trade Practices Commission may decide that a concessional fee was payable in certain circumstances. Five of the fees were $7,500 reduced with a concession to $1,500 and one fee was $2,500 reduced with a concession to $500. There was no apparent AAT or other external review of this commercially valuable discretion and the Committee wrote to the Minister. In reply, the Assistant Treasurer advised the Committee that external review was inappropriate because the decision was a technical one, the Trade Practices Commission was the best body to determine those technical issues and

the costs and delay of independent review would outweigh any benefit. This was not a particularly satisfactory reply, because many technical decisions are subject to AAT or other independent external review. Indeed, technical decisions in many cases are particularly suited to review. Nevertheless the Committee accepted the advice but decided to include the matter in the Annual Report.

5.6 The President of the Administrative Review Council, quoting the Committee's Annual Report, then wrote to the Minister for Justice advising that, in the view of the ARC, the decisions relating to concessional fees should be subject to review. The Committee also wrote again to the Assistant Treasurer, referring to the ARC advice, asking that the regulations be amended to provide for external review. The Minister for Justice also wrote to the Assistant Treasurer suggesting merits review of the decisions by the Trade Practices Tribunal. The Assistant Treasurer replied to the Minister, with a copy to the Committee, advising that he did not favour merits review by either the AAT or the TPT.

5.7 By this time the 1996 Federal election had been held and the government had changed. Scrutiny of the regulations, however, continued. The Committee operates in a strictly non-partisan way and addresses only personal rights and parliamentary propriety, avoiding policy issues. For these reasons its work continues despite changes in governments. In the present case there were also major changes to the enabling legislation, with the Trade Practices Commission becoming the Australian Competition and Consumer Commission and the Trade Practices Tribunal replaced by the Australian Competition Tribunal. The Committee, however, continued to pursue the matter.

5.8 The Committee then wrote to the Attorney-General, with copies to the Assistant Treasurer and the President of the ARC, noting that the ARC is a statutory agency with the function, among other things, of making recommendations to the Minister on review of administrative decisions, and asking for confirmation that the Attorney-General accepted the present recommendation of the ARC. The Attorney-General replied that he favoured review by the ACT. The Committee then wrote again to the Assistant Treasurer asking that the regulations be amended to provide for review.

5.9 The Assistant Treasurer advised that, while he appreciated the importance of external merits review in improving the transparency and scrutiny of Commonwealth administrative decisions, merits review can increase the cost and complexity of regulation. These considerations need to be balanced against each other. The Assistant Treasurer further advised that in this case review would not be simple or trivial, with normally more than a week of hearings with decisions taking at least two months. Also, the right of review could provide an opportunity for applicants to use the fee decision in order to challenge the ACCC view on market definition for strategic purposes unrelated to the application in question. Further, external review involves costs to the government as well as to the applicant and the total costs would be greater than the differential between the concessional fee and the full fee. Finally, preparing an amendment of the regulations would be time consuming and involve significant resources.

5.10 The Committee then wrote to the Assistant Treasurer indicating that it was disappointed that he did not propose to amend the regulations. The Committee suggested that, given the unanimity of view between the Committee, the ARC and the Attorney-General, there was a strong case to provide for review. The Assistant Treasurer replied that he could assure the Committee that he had taken careful account of its concerns but remained

of the view that those particular decisions should not be subject to external merits review. The Assistant Treasurer further advised that, should circumstances change and a need for merits review arise, he would be happy to reconsider the matter. The Attorney-General also wrote to the Assistant Treasurer, noting that the matters which he raised in opposition to external review were individually and cumulatively matters of significance. However, the Attorney-General could not agree that these factors weighed heavily against external merits review. The Attorney-General advised that similar agreements could be advanced for avoiding external review of many other administrative decisions, including ones of greater economic or political significance. The Attorney-General advised that he regretted that the Assistant Treasurer had not accepted his advice on this occasion.

5.11 The matter must now stand for the time being. It is, as I say, disappointing that the regulations cannot be amended and that the Committee must report to the Senate that the regulations are deficient in respect of independent external merits review. Nevertheless, the Committee notes that its concerns were endorsed by the President of the Administrative Review Council and by the Attorney-General and the Committee is grateful for this. The Committee will continue to monitor any amendments of the principal Regulations with a view to correcting this breach of its principles.

Statement on Scrutiny of National Uniform Legislative Schemes

Senator O'Chee, 12 March 1998, Senate Hansard, p. 892

5.12 The Standing Committee on Regulations and Ordinances would like to report on developments in the past year on scrutiny of instruments made to implement national uniform legislative schemes. These schemes present particular challenges for scrutiny committees, because they usually deal with important matters and follow complex making procedures involving Commonwealth, State and Territory governments. These procedures are sometimes used as a reason to attempt to lessen or exclude parliamentary oversight. The Committee, however, does not accept this dilution of the role of Parliament and applies its usual strict standards to these instruments. The legislative scrutiny committees of the Commonwealth, States and Territories cooperate in their scrutiny of national legislative schemes, which are discussed at conferences and meetings of Chairs. During 1997 the Committee wrote twice to the Chairs of our sister Committees on this matter and then presented a paper to the conference of Australian legislative scrutiny committees. Following that conference and further correspondence most of the committees wrote advising that the Committee's suggestions could form the basis of a coordinated approach by all Commonwealth, State and Territory committees. The Chairman pursued this at a meeting of Chairs yesterday. Also, the Legislative Instruments Bill 1996 included a provision which would dilute the effect of the Bill in respect of parliamentary disallowance of instruments providing for uniform national legislative schemes. The Committee reported to the Senate on the Bill on 21 November 1996, 6 March 1997 and 23 June 1997.

5.13 In respect of the activities of the State and Territory committees, the Committee received a very encouraging letter from the Chair of the Queensland Committee on delegated legislation, Mr Tony Elliott MLA, describing its experiences in scrutinising the important Electricity-National Scheme (Queensland) Bill. Unfortunately 1997 also saw advice from the A.C.T. Attorney-General, Mr Gary Humphries MLA, a former Deputy Chairman of the A.C.T. Committee, that there seemed no prospect of advancing our views through the Standing Committee of Attorneys-General. This was disappointing but the Australian

legislative scrutiny committees will continue efforts to coordinate our activities and to give our usual close attention to individual instruments implementing national scheme legislation which are tabled in our separate legislatures. By dint of circumstance, however, a particular package of regulations made under a national scheme gave the committee the opportunity to demonstrate how co-ordinated national scrutiny could be achieved.

5.14 The **Road Transport Reform (Dangerous Goods) Regulations, Statutory Rules 1997 No.241**, were made under express provisions of the *Road Transport Reform (Dangerous Goods) Act 1995* to apply as laws of the Australian Capital Territory and the Jervis Bay Territory, with the intention that they will be incorporated into the law of the States and the Northern Territory by adopting legislation. As is often the case with regulations implementing a uniform legislative scheme, the Regulations are much longer than the enabling Act.

5.15 The Explanatory Statement for the Regulations advised that they provide for duties and obligations of participants in the transport of dangerous goods by road and for related administration and enforcement. These participants included prime contractors, consignors, drivers, loaders, packers, importers and manufacturers. The Regulations were developed by the National Road Transport Commission (NRTC) under two intergovernmental agreements, in close consultation with the Commonwealth and State and Territory authorities and major stakeholders. The Regulations were made publicly available for comment and approved unanimously by the Ministerial Council for Road Transport.

5.16 The Committee then scrutinised the Regulations in the light of its high standards of personal rights and parliamentary propriety and found a number of deficiencies which warranted an approach to the Minister. These deficiencies were as follows.

5.17 Firstly, the Committee noted that the Light Vehicles Agreement 1992 required the NRTC to develop and maintain national standards as a matter of priority. The present Regulations, however, were not made until five years later. This delay appeared to be a breach of parliamentary propriety.

5.18 Secondly, one single provision provided for 68 strict liability offences. The Explanatory Statement did not advise of the need for these offences. The Committee always questions unexplained strict liability offences, which may breach personal rights.

5.19 Thirdly, the Regulations provided for a system of administrative infringement notices for offences. The Committee has no objection to such systems provided that they include proper safeguards. In this case an official who serves an infringement notice was given the power to extend the time for payment, apparently forever, with no indication of when the discretion could be exercised, which the Committee noted could be at the time the notice was issued, within the time provided in the notice for payment, or at some later time.

5.20 Fourthly, the Regulations did not include the essential safeguard that infringement notices must notify persons affected of their rights. In particular, an infringement notice was not required to include the vital information that if a person pays the administrative penalty then any liability of the person for the offence is discharged, the person may not be prosecuted in court for the offence and the person is not taken to have been convicted of the offence. This appeared to be a clear breach of personal rights.

5.21 Fifthly, the Regulations provided for reconsideration and review of specified decisions. This was appropriate but the Committee felt that it should receive an assurance that all legislative instruments in the Regulations are subject to disallowance and all administrative decisions are subject to reconsideration and review. The Committee also wanted to be assured that previously existing approvals, determinations and exemptions which the Regulations continued in operation remained subject to any disallowance or review.

5.22 The Committee accordingly wrote to the Minister asking for comments on the apparent deficiencies and noting the helpful cooperation which it had received in respect of related instruments. The Minister replied in considerable detail.

5.23 With respect to the possible delay in making the Regulations the Minister advised that the previous law was poorly expressed and possibly unenforceable in a number of areas. The Regulations involved therefore a significant exercise to restructure the law and the necessary extensive consultation took time.

5.24 With respect to strict liability, the Minister advised that the offences related to matters where a contravention could give rise to serious injury to people, property or the environment. As such the offences conformed to Commonwealth criminal law policy. The Minister stated that each strict liability offence was carefully considered and was of a regulatory nature which would not result in a lessening of the offender's reputation. Strict liability would allow for easier enforcement, including the use of infringement notices. It was argued that persons who consign dangerous goods or are driving a vehicle transporting dangerous goods are strictly liable on the basis that the improper transport of such substances may have far reaching and devastating effects. It was stated that if one part of a process does not comply with the Regulations that dangerous situations could occur later.

5.25 The Minister advised that the discretion to extend the time for payment of a penalty could be exercised at any time up until a summons was served on the person for the offence. He undertook that the Regulations would be amended to provide that infringement notices must include the usual safeguards.

5.26 The Minister assured the Committee that all legislative instruments made under the Regulations were disallowable and that all administrative decisions are subject to reconsideration and review, except for those decisions which are not the ultimate decision affecting a person's rights and interests. No discretions were exercisable under the instruments continued in effect.

5.27 The Committee thanked the Minister for his advice, which in general met its concerns. The Committee, however, still had reservations about nine of the 68 strict liability offences and asked the Minister for further advice. Five of the nine offences involved drivers and the Committee was particularly concerned that strict liability might operate harshly against them. The Committee suggested that it may be more appropriate to provide that these offences must be knowingly or wilfully committed, especially given that parallel strict liability offences existed in respect of prime contractors. Two of the other four strict liability offences involved transferors, one an owner and one an occupier.

5.28 The Minister replied with a very detailed explanation of the offences, which met its concerns about five of the nine offences, but which still left the Committee with concerns

about the remaining four. By this stage however, the protective notice of disallowance in respect of the Regulations had almost expired and the matter had become urgent. Accordingly the Chairman had two separate meetings over two days with the Minister and his advisers, following which the Committee obtained an undertaking that three of the four strict liability offences would be amended in respect of strict liability for drivers. The Minister persuaded the Committee that the fourth offence was acceptable. The Committee therefore withdrew its notice of disallowance on what by then was the last day on which it was able to do so, giving notice pursuant to standing order 78 that it would be withdrawn at a later hour of the same day. The Committee is pleased to report to the Senate that the position with respect to these Regulations is now acceptable.

5.29 The Committee is particularly grateful for the personal attention which the Minister for Transport and Regional Development, the Hon Mark Vaile MP, gave to the Committee's concerns. The Minister's actions have ensured that the Regulations will comply with high standards of parliamentary propriety and personal rights.

5.30 As noted earlier, the Regulations form the central plank of the uniform national legislative scheme providing for the transport of dangerous goods. They are also an important part of the wider national scheme for regulation of road transport. The Committee will therefore inform the Standing Committee for the Scrutiny of Bills and the State and Territory legislative scrutiny committees of its actions, which are another instance of the capacity of legislative scrutiny committees to bring about desirable change.

Statement on Disallowable Instruments and Parliamentary Propriety

Senator O'Chee, 7 April 1998, Senate Hansard, p. 2189

5.31 The Annual Reports of the Standing Committee on Regulations and Ordinances give instances of breaches of parliamentary propriety in relation to delegated legislation. Some of these breaches include cases where administrators, for a variety of reasons, have failed to observe the valid provisions of legislative instruments in force or have substituted other requirements for those prescribed by legislative instrument.

5.32 The Committee would now like to report on a related aspect of parliamentary propriety. In two recent cases the Committee scrutinised instruments where administrators had not actively substituted their own rules, but had repealed instruments or let them lapse and then dealt with the matter by means over which the Parliament has no control and about which it may not even be aware. Parliament provides for delegated legislation in the expectation that the power to make legislative instruments will be exercised whenever it is possible to do so. It is not satisfactory for administrators to avoid using provisions under which their decisions will be subject to full parliamentary scrutiny including possible disallowance and instead to use administrative means to avoid such scrutiny. Where there is a choice between making and applying a legislative instrument or addressing the matter by administrative means parliamentary propriety dictates that the former method should be used. This does not mean that wherever an Act provides for a legislative instrument that the power should be exercised immediately. It does mean, however, that where Parliament provides for legislative instruments that there is an expectation where a set of circumstances arises which is within those contemplated by the enabling Act then a legislative instrument should be made and administered. The details of the two cases where this did not occur illustrate the point.

5.33 The *Safety, Rehabilitation and Compensation Act 1988* provides generally for workers' compensation and rehabilitation of Commonwealth employees. As part of its general scheme the Act provides for Comcare, which is the administering agency, to recover overpayments made to a client. The Act also provides for Comcare to waive the debt, but such waiver must be in accordance with directions given by the Minister. Such directions are, very properly, disallowable instruments.

5.34 The particular provision relating to the Minister's directions came into effect on 24 December 1992 and the Minister exercised the power on 28 April 1993. This Direction remained in force for more than four years until it was revoked by the Minister in the **Directions relating to the waiver of debts due to Comcare, No.4 of 1997**, which came into effect on gazettal on 8 August 1997. The Committee scrutinised this instrument and was surprised by advice in the Explanatory Statement that the revoked Determination would not be replaced. Instead, the Explanatory Statement advised, the discretion to waive debts would continue to be administered by Comcare in accordance with existing policy and procedures, including all the usual financial management requirements and accountability processes. The Explanatory Statement also advised that the decision to revoke the Direction was made taking into account advice from the Attorney-General's Department that its validity was questionable and if challenged may be found by a court to be not authorised by the enabling Act. The Explanatory Statement explained that the reason for this was a decision in a Federal Court case four years earlier about a similar enabling provision in a different Act.

5.35 The Committee was concerned at this advice and wrote to the Minister. The Committee advised that it accepted that if the previous Direction was invalid then changes should be made. The Committee would, however, welcome an assurance that a fresh valid Direction would be made as soon as possible. The Act provides for an instrument to be made and it may be a breach of parliamentary propriety if this provision of the Act was disregarded. The concern of the Committee was that the Act provided for Directions to be subject to tabling in both Houses and to possible disallowance. The present position, on the other hand, was that this matter was in future to be effectively removed from parliamentary scrutiny and dealt with by internal departmental procedures, without the oversight or even the knowledge of parliament. The Directions in question were not trivial, dealing with the rights of welfare recipients and with the protection of the public revenue.

5.36 The Minister replied to the Committee, confirming that there was no Direction at present in force. The Minister further advised that the enabling Act did not positively require that a Direction be made or that a revoked Direction be replaced. The Attorney-General's Department had advised that, because the Act gave the Minister a discretion to give a Direction, there was no parliamentary intention or expectation that the Minister should decide to exercise this power. The Minister explained that his legal advice was that the defects in the earlier Directions could not be remedied in any replacement instrument. The decision to revoke reflected the decision for the time being not to exercise the statutory power. If further experience suggested that it was appropriate then the Minister would give a Direction within the current statutory power or ask Parliament to broaden the power.

5.37 The Committee wrote back to the Minister, advising that it accepted his advice about the nature of the earlier instrument and that in future he might decide to give a new Direction or to seek amendment of the enabling Act. The Committee advised the Minister, however, that it did not accept the advice that a parliamentary enactment providing for a disallowable

instrument shows no intention or expectation that the Minister should decide to exercise the power. The Committee's position was that if an Act provides for a matter to be addressed by an instrument which is subject to tabling and disallowance, then as far as practicable this is what should be done.

5.38 The second case which illustrates this general point is the **Federal Court Rules (Amendment), Statutory Rules 1997 No.143**, virtually the sole purpose of which was to provide for rules dealing with Native Title Proceedings under the *Native Title Act 1973*. The Native Title Rules were first included in the Rules with effect from 21 March 1994 with a sunset clause which provided that they cease to be in force on 1 March 1995. One day before that expiry fresh Rules extended their effect for another 12 months and again one day before this expiry new Rules extended their operation for a further 12 months. This sunset clause, however, expired on 1 March 1997 and was not replaced until 23 June 1997. The Committee wrote to the Chief Justice of the Federal Court advising that there appeared to be a gap of almost four months during which there were no Rules addressing native title issues.

5.39 The Acting Chief Justice replied, advising that the judges were aware that there would be a period during which there would be no Native Title Rules in place. The judges had decided that this would cause no difficulty for proceedings in the Court because native title proceedings were heavily case managed, that is to say, their progress is the subject of the close attention and directions of a judge. The judges had decided at a meeting in September 1996 that repeated extensions of the Native Title Rules by sunset clause was undesirable and that it would be preferable to have a permanent form of rules, even if this meant a hiatus. The opinion of the judges were that this would cause no injustice or inconvenience.

5.40 The Committee wrote again to the Acting Chief Justice noting that the Act of Parliament which creates the Federal Court provides for Rules of Court and for parliamentary scrutiny of those Rules. The Committee advised that it was concerned about the gap of four months during which there were no Rules for this important and sensitive matter. The Committee noted that new Rules, which differed only in minor ways from the previous Rules, were not made until some nine months after the meeting of the judges which discussed this matter. The Committee advised that the hiatus may raise issues of parliamentary propriety. The Native Title Rules are legislative in nature and drafted generally in a mandatory fashion, with the word "must" used dozens of times, sometimes in conjunction with "as soon as practicable" or "immediately". Further, the Rules provide for quite detailed procedural matters. The Committee asked for further advice on the practical effect of changing from detailed mandatory Rules to case management and then back to detailed Rules.

5.41 The Chief Justice replied, advising that while he appreciated the Committee's concern he had made personal enquiries and could give an assurance that the gap between the Rules did not cause any problems or affect cases. The Committee accepted this advice about the practical effect of the gap.

5.42 These two cases, however, are instances of where there may have been a breach of parliamentary propriety. In the Comcare case the justification for revoking and not remaking the Directions was technical legal problems arising from a court case four years earlier. The apparently defective Direction was in fact made shortly before the court decision and had been administered in that state for those four years. The solution here should have been to make a fresh instrument as far as this was legally possible or to amend the enabling provision to put the matter beyond doubt. In the Native Title Rules case the Committee would have

preferred that the matter was dealt with continuously under the disallowable Rules of Court, rather than for three years under the Rules, then four months with no legislative instrument in force, than again under the Rules.

5.43 The Committee will continue to scrutinise legislative instruments to ensure not only that provisions in force are administered and are not disregarded, but also that legislative instruments are actually made where this is appropriate. The Committee is grateful for the assistance which it has received in its present scrutiny from the Minister for Workplace Relations and Small Business, the Hon Peter Reith MP, and from the Chief Justice of the Federal Court, the Hon Michael Black, and the Acting Chief Justice, the Hon Raymond Northrop.

Statement on provisions in legislative instruments which may have been more appropriate for inclusion in an Act

Senator O'Chee, 30 June 1998, Senate Hansard, p.4438

5.44 The Standing Committee on Regulations and Ordinances scrutinises all disallowable legislative instruments to ensure compliance with personal rights and parliamentary propriety. An important aspect of parliamentary propriety, and one recognised by standing order 23, which establishes the terms of reference of the Committee, is that legislative instruments should not contain matter more appropriate for parliamentary enactment. The Committee raises this issue less often than its other principles, but it is a fundamental part of Committee scrutiny.

5.45 During the present Autumn sittings the Committee has considered two cases where legislative instruments provided for material which may have been more suitable for inclusion in a Bill, which is subject to all the rigours of parliamentary passage.

5.46 Four sets of amendments of the **Therapeutic Goods Regulations, Statutory Rules 1997 Nos 398-401**, were all made on the same day. The Committee scrutinised these in the usual way and found numbers of defects. These included fees of up to $5,600, the basis of which was not explained; absence of a time limit within which a public official must make a decision; unclear drafting; strict liability offences; unfair provisions affecting business operators; and duplication in making the four sets of regulations on the same day. The Committee had considerable and detailed correspondence with the Parliamentary Secretary responsible for the regulations and obtained explanations and a number of undertakings in relation to these problems, including an undertaking to amend before the end of this financial year.

5.47 This statement, however, will describe our correspondence about another possible deficiency raised by the Committee, which was that the amendments, or at least some of them, may have been more appropriate to be addressed through an amendment of the enabling Act, where the changes would be subject to full parliamentary debate. One reason for the Committee's concern was the number and intensity of representations which Senators were receiving about one set of regulations in particular, the sole purpose of which was to prohibit the advertising of natural remedies as "drug free".

5.48 The Committee wrote to the Parliamentary Secretary, who replied that this set of amendments had been intentionally separated out from the pre-existing provisions but that it

would not be appropriate to amend the enabling Act because these are amendments of existing regulations.

5.49 The Committee replied to the Parliamentary Secretary suggesting that, with great respect, the Committee did not share her view. For the purpose of the Committee's terms of reference it is irrelevant whether the regulations are principal or amending regulations. The Committee's mandate to ensure that legislative instruments do not contain matter more appropriate for an Act is an important safeguard for parliamentary propriety and one which the Committee is vigilant to enforce. The Committee pointed out that its very first Report in 1932 dealt with this aspect of its terms of reference and the Committee has received undertakings since that date from Ministers to include matters, initially included in legislative instruments, in Acts. These included amending instruments. The Committee further advised that the subject matter in the present regulations was contentious and the subject of considerable public disquiet. The Committee noted the advice of the Parliamentary Secretary that she had established a committee of review to examine the issues in this regulation and would table the results of the review in Parliament. The Committee would, however, appreciate advice that following this review the material in the regulation would be included in an Act. The Committee concluded its letter by advising that its actions in relation to the Therapeutic Goods Regulations, like its actions in respect of all legislative instruments, are directed to protect personal rights and parliamentary propriety. The Committee did not deal with policy and did not have a view on the policy aspects of the regulations. It aim was to protect the rights of Parliament.

5.50 The Senate disallowed Statutory Rules 1997 No.401 on 31 March 1998 on policy grounds.

5.51 The second case presented a somewhat different problem in relation to material included in a legislative instrument which may have been more appropriate for inclusion in an Act. The **Public Service Regulations (Amendment-Interim Reforms), Statutory Rules 1998 No.23**, made on 18 February 1998, provided for important matters affecting the Australian Public Service at a time when far-reaching reforms for the APS had already been put into legislative form, in the Public Service Bill 1997. That Bill was first introduced into the House of Representatives on 26 June 1997 and , after being passed in the Senate with amendments, was introduced into the House of Representatives again on 5 March 1998. The Committee wrote to the Minister suggesting that it may be appropriate for the Regulations to be delayed until the fate of the Bill has been determined and for the Bill alone to deal with some of the matters also included in the Regulations.

5.52 As an aside, to illustrate the breadth of matters which the Committee addresses, the Committee also wrote to the Minister about two other aspects of the Regulations. One regulation provided that the Public Service Commissioner must report to the Minister on the state of the service and that the Minister must present that report to the Parliament. There was, however, no provision specifying the time within which the Minister must present the report after it has been received. The Committee suggested that the Minister should be required to do this within seven sitting days of receipt. The Minister advised the Committee that the Regulations would be amended to include this requirement. Also, the Committee asked about apparent delay in bringing the regulations up to date, with some provisions obsolete for more than a decade. The Minister advised that the delay was unfortunate and should not occur again.

5.53 In relation to including the material in the Bill the Minister advised that he agreed with the Committee that the preferable course would have been to include in the Act the substantive parts of the Regulations in relation to APS values, the Code of Conduct, public interest whistleblowing, the state of the service report and mobility arrangements. However, the House of Representatives had now rejected the Senate amendments and resolved that the Bill be laid aside. The Minister advised that, in the absence of the Bill, it was essential that these important issues are dealt with, to improve the efficiency, effectiveness and ethics of the APS.

5.54 The Committee accepted this advice, but in the meantime, in order to protect its options, had given a notice of disallowance of the regulations. The Public Service and Merit Protection Commission, which administers the Regulations, then issued a circular to all Departments and agencies in the APS, advising that the notice had been given and of its effect. After the Committee withdrew the notice the PSMPC sent out a further circular. The Committee congratulates the Public Service Commissioner on this appropriate action, which represents an understanding of the role of the Committee and a commitment to parliamentary propriety.

5.55 The Committee is grateful for the cooperation which it has received in its scrutiny in these two cases from the Parliamentary Secretary to the Minister for Health and Family Services, the Hon Trish Worth MP, and from the Minister Assisting the Prime Minister for the Public Service, the Hon David Kemp MP.

Scrutiny of Great Barrier Reef Zoning Plans

Senator O'Chee, 30 June 1998, Senate Hansard, p.4440

5.56 In its scrutiny of legislative instruments to ensure that they comply with personal rights and parliamentary propriety the Standing Committee on Regulations and Ordinances looks carefully at any instruments which may not be legally valid. Every year the Committee finds instances of such instruments, including those which are void because they purport to subdelegate legislative power. Generally any such subdelegation must be expressly authorised by the enabling Act. Invalidity on this ground is now particularly important because of the provisions of the Legislative Instruments Bill 1996, which will subject a broader range of legislative instruments to the safeguards of parliamentary control. This statement will report to the Senate on its scrutiny of a group of legislative instruments which illustrate problems in these areas and which are of continuing concern.

5.57 The Great Barrier Reef Marine Park Authority made three Zoning Plan Amendments on 23 September 1996, each of which subdelegated back to itself the power to control entry into areas of the Park and activities conducted there. These powers were broad and if legislative in nature appeared to be void unless expressly authorised by the enabling Act. Also, they purported to deal with the conservation of the Great Barrier Reef, which the Committee regards as an important issue, by the use of instruments which will not even be tabled in Parliament, much less be subject to disallowance.

5.58 The Committee wrote to the Minister for advice about the validity of the Amendments and received an extremely brief reply which merely stated that the Attorney-General's Department (AGD) had assured the Minister that the subdelegations were administrative in nature and not legislative. The Committee wrote back to the Minister asking for a copy of the

opinion, which the Minister duly provided. The opinion, from the Office of Legislative Drafting (OLD) of the AGD, confirmed that if the powers were legislative then they "certainly" should be provided for in the Zoning Plans themselves and thus be subject to parliamentary scrutiny and possible disallowance. However, according to the OLD opinion, they were administrative, because on an analysis of the circumstances they only apply the law in particular cases.

5.59 The Committee was somewhat startled by this opinion, which on its analysis of the circumstances appeared to fly in the face of everything which the Committee understood about the difference between legislative and administrative powers. In any event, the Committee wrote back to the Minister advising that if the power was administrative then it should be subject to AAT review and asking for confirmation that this would be done and that the existence of AAT review would be fully publicised to all persons affected. The Committee also asked for advice on the number of times the powers had been exercised and of the nature of the exercise.

5.60 The Minister replied to the Committee's letter to the effect that AAT review of these putative administrative decisions would not be provided, giving reasons for this which were, in the Committee's view, inadequate. The Committee wrote back to the Minister, advising that the view of the Committee was that the powers were legislative or, if they were not, then they should be subject to AAT review as set out in the Guidelines of the Administrative Review Council (ARC). The Committee, after studying the actual powers exercised, which banned or permitted fishing in particular areas for up to five years, also asked the Minister for advice that the Office of General Counsel of the AGD supported the view of OLD that the powers were not legislative.

5.61 The Minister's reply attached an opinion from the Office of General Counsel that, at least in terms of the ARC guidelines, the powers were "clearly" of a legislative nature, "obviously" not directed towards the circumstances of particular persons, but applying generally to the community. They were in "sharp contrast" to decisions which would normally be directional as administrative. This opinion did not refer to the earlier opinion from OLD.

5.62 The Committee wrote back to the Minister advising that it accepted this opinion from the Office of the General Counsel. The result of the opinion was that the subdelegations of power appear to be void, with the powers exercised under them void and all actions in reliance on the powers also void. The view of the Committee was therefore that the amendments of the Zoning Plans should be remade as soon as possible. This would not redress the invalidity of the past 14 months but would at last ensure that future management of the Great Barrier Reef is on a valid basis. The Committee concluded by advising the Minister that the present position is that his own legal advice was that the Amendments are void or, on the best possible interpretation of his view, in breach of ARC guidelines. The Committee emphasised that action should be taken as soon as possible to correct this unsatisfactory position.

5.63 The Minister replied with another opinion from the Office of General Counsel that the powers were legislative but would be likely to survive a court challenge to their validity on the ground of subdelegation. This opinion did not mention either the first opinion from OLD or the previous advice from the General Counsel.

5.64 The Committee wrote back to the Minister noting that his own unambiguous legal advice was that the subdelegations were legislative for the purposes of the ARC guidelines and that under the guidelines they should therefore be subject to disallowance by either House of the Parliament. The Committee asked the Minister if he would confirm that this was the case. The Committee also asked the Minister for advice that he was taking steps as a matter of priority to ensure that the powers are subject to parliamentary scrutiny, suggesting that the present position was unacceptable not only from the position of the ARC guidelines, but also from principles of sound public administration and parliamentary propriety.

5.65 The Minister's reply was to the effect that the powers were of a legislative nature, but that he did not intend to make them subject to parliamentary scrutiny. The Minister suggested that we conclude our correspondence.

5.66 The Committee now reports to the Senate on what it regards as the present unsatisfactory position, in which legislative instruments affecting important areas of the Great Barrier Reef Marine Park for periods of up to five years are probably void and in any event are not subject to tabling or disallowance. The Committee was also disturbed by the various opinions from the AGD in its scrutiny of these instruments. In summary, one opinion from OLD advised that the powers should "certainly" be included in the disallowable Zoning Plans if they were legislative but in fact they were administrative. The next opinion, this time from the Office of General Counsel, advised that the powers were "clearly" legislative, at least for the purposes of the ARC guidelines. The third opinion, also from the Office of General Counsel, advised that the powers were legislative but valid.

5.67 The Committee notes that discussion of contemporary legal issues includes the concept of "jurisdiction shopping". It appears that within the AGD that jurisdiction shopping is a definite option.

5.68 There is another disturbing aspect of this matter. This is that the opinion from OLD advised that it was in accordance with advice being purposed in relation to the Legislative Instruments Bill 1996. Presumably this advice is that the powers are not legislative for the purposes of that Bill, which provides that the Attorney-General may issue conclusive certificates that an instrument is or is not legislative. These certificates may only be challenged on the grounds of procedural validity, not on their merits, and even that must be done by a Federal Court action which the Committee understands would cost a lot of money. If this is the case then that advice from OLD would have to be withdrawn in the light of the opinions from the Office of General Counsel that the powers in question are legislative and fresh advice given that the powers are legislative for the purposes of the Bill. The Committee will pursue this with the Attorney-General and if necessary report again to the Senate.

5.69 The Committee is grateful for the cooperation which it has received in it scrutiny of these instruments from the Minister for the Environment, Senator the Hon Robert Hill.

6 Papers Presented at Conferences

6.1 During the year the Chairman and Members of the Committee attended conferences concerning administrative law and parliamentary scrutiny. The following papers were presented at these conferences.

Scrutiny by the Committee of regulations providing for the leasing of Commonwealth airports (Paper presented to the Sixth Australian and Pacific Conference on Delegated Legislation and the Scrutiny of Bills, Adelaide, 16-18 July 1997)

Senator Colston, 4 September 1997, Senate Hansard, p. 6406

6.2 On 7 May 1997 the government announced the successful bidders for the long term leases of Melbourne, Brisbane and Perth airports. The announcement advised that the leases would maximise efficient airport operations and facilitate future airport developments on a commercial basis. Total consideration for the leases was $3.34 billion, with Brisbane airport bringing $1.39 billion, Melbourne $1.31 billion and Perth $640 million.

6.3 The government announcement further advised that, while sales proceeds were an important element in the sale, the evaluation methodology took into consideration a whole range of other criteria. For instance, the successful bidders were all high quality, committed operators with international experience, who would bring world best practice to the management and operation of these airports. Also, the private leases would introduce a level of innovation and competitiveness otherwise difficult to achieve within the previous management system. All the successful bidders had agreed to comply with the government's post privatisation pricing regime, which would result in substantial real reductions in aeronautical charges over the next five years.

6.4 The result of this process was so successful that on 12 June 1997 the government announced that it was offering a further fifteen Federal airports for simultaneous trade sale, including Adelaide, Hobart, Darwin and Canberra.

6.5 All this appears a satisfactory outcome of a process which commenced under the previous Federal government and which is now being completed under the present one. What may not be well known, however, is that the whole basis of the operation of leased airports was established largely by regulations. Indeed, the actual choice of Melbourne, Brisbane and Perth airports as the first to be privatised was prescribed by regulation. The broad framework of the scheme was provided for by the *Airports Act 1996*, the second reading speech for which advised that regulations would play an important part in the final supervisory framework. A quantitative indication of this importance is that the original Airports Act includes 236 references to "regulations" or to "prescribe", which in the context of Commonwealth legislative drafting means to make regulations. In addition, earlier this year an amendment of the Airports Act included fifty-five more references to "regulations". A more general indication of their importance is that the Minister circulated drafts of the regulations for information and comment, which is not usual Commonwealth practice.

6.6 The administrative scheme of the Airports Act was in fact implemented through no fewer than six different principal regulations, due to the amount of detail to be included in the regulatory regime. The Appendix to this paper sets out the full citations of these regulations. The first set of regulations, the Airports (Building Control) Regulations, provided for the approval and supervision of building works at leased airports. The Airports (Protection of Airspace) Regulations established a system to provide for the safety and efficiency of air transport around leased airports. The Airports (Ownership-Interest in Shares) Regulations provided for increased Australian investment in leased airports by establishing a system of exemptions for the foreign ownership provisions of the Act. The Airports Regulations, which were the key regulations, actually prescribed that Melbourne, Brisbane and Perth airports would be leased and provided for their leasing and management, for land use and planning, and for accounts and reports of airport-operator companies. The Airports (Environment Protection) Regulations, which were the longest regulations, provided for environmental strategies, duties of operators of undertakings at airports, monitoring and remedial action, and enforcement. Finally, the Airports (Control of On-Airport Activities) Regulations provided for the control of commercial activities and vehicles at leased airports, including the control of liquor, gambling and smoking.

6.7 The Committee scrutinised all these regulations with the assistance of its independent legal adviser, Emeritus Professor Douglas Whalan AM, to ensure that they complied with its high standards of personal rights and parliamentary propriety. The Committee detected a number of apparent deficiencies in four of the six sets of regulations and, as it does in these cases, wrote to the Minister seeking an explanation. I will now describe what the Committee regarded as deficiencies and the response of the Minister to the Committee's concerns.

6.8 One of the most important aspects of the work of the Committee is to ensure that legislative instruments are legally valid. Every year the Committee scrutinises legislation which is invalid for a number of reasons. In the case of the Airports (Environment Protection) Regulations the Committee questioned a provision which authorised the use of environmental testing methods approved by the United States Environment Protection Agency or by two other United States bodies. The Committee was concerned because s.49A of the *Acts Interpretation Act 1901* provides that legislative instruments may incorporate or adopt material, apart from Acts and regulations, only as in existence at a particular time, not as in existence from time to time. The reason for this provision is that incorporation of material which might be changed without the approval or even knowledge of Parliament would effectively delegate legislative power, a process which would be most undesirable. The Committee noted that, in contrast, four other provisions of the Regulations expressly incorporated Australian material, from both government and non-government bodies, that was in force at a particular date or at the date of commencement of the Regulations. In the case of the Airports (Environment Protection) Regulations the Minister agreed to meet our concern about validity and the Airports Act was amended to provide legal authority for the incorporation.

6.9 Another aspect of the Committee's work which is of crucial importance is the protection of personal rights, which the Committee interprets in a very broad fashion. Every year the Committee detects many provisions which appear to breach personal rights and raises these with the relevant Minister. The Committee was concerned at the following aspects of personal rights relating to the different regulations providing for the leasing of airports.

6.10 The Airports (Environment Protection) Regulations provide that airport lessee companies have the right of entry to a sub-lessee's premises and of access to any document under the control of the sub-lessee, with penalties for non-compliance. The Committee noted that these are very wide powers, which even the police do not have without a warrant. Also, the entry provisions did not include the usual safeguard under which those entering must produce photographic identity passes. As well, the people given power to enter did not appear to be employees of the Commonwealth or a Commonwealth agency and therefore may not be subject to the safeguards provided under, for instance, legislation relating to privacy or the Ombudsman. The Minister advised the Committee that the airport lessee company needed these powers to monitor environmental impacts and that entry must be at a reasonable time and after notice in writing. However, the Committee's concerns would be referred to the Attorney-General's Department for advice. Also, while some powers of entry would be exercised by a private entity, related powers to enter to perform remedial work would be exercised by a statutory office holder, who would be subject to the usual safeguards including privacy and the Ombudsman.

6.11 The Airports (Environment Protection) Regulations also provide for a system of penalties imposed by infringement notices. The Committee does not object to such provisions, which may be appropriate in the circumstances. In this case, however, the provisions did not include the usual and necessary safeguard that infringement notices should advise that, if the fine is paid, then payment not only discharges the liability and prevents any prosecution for the matter, but also the person affected is not to be regarded as having been convicted of an offence. The Minister advised the Committee that the Regulations would be amended to provide for this advice.

6.12 The final concern about personal rights which the Committee had in respect of the Airports (Environment Protection) Regulations was a provision that notices or directives from a government official to a member of the public could be given by a number of methods, including by pre-paid post. The Regulations, however, did not extend this concession to notices given to officials by the public, who were required to deliver notices to an office during business hours. The Minister advised the Committee that the Regulations would be amended.

6.13 The Airports (Control of On-Airport Activities) Regulations also included provisions which may have affected personal rights. Four provisions in those Regulations included the appropriate safeguard that action which would affect a person adversely could be taken only if reasonable. One provision, for instance, provided that a vehicle may be removed if the driver cannot be found within a reasonable time after reasonable inquiries. Two other provisions, however, did not include this reasonability safeguard although it may have been appropriate to do so. In this instance, however, the Minister persuaded the Committee that reasonability provisions were not necessary in these two cases.

6.14 The Airports (Building Control) Regulations included the appropriate safeguard that if the building controller does not make a decision on a building application within twenty-eight days then he or she is deemed to have rejected the application. In three other similar cases, however, there was no such effective time limit. These related to variations of approvals, certificates of fitness and variation of certificates of fitness, all of which could have important commercial consequences. The Minister advised the Committee that the Regulations would be amended.

6.15 The Airports Regulations provided that if an airport lease is terminated then the Minister may direct that the Commonwealth or a nominee of the Minister be substituted for the former lessee. The Committee advised the Minister that this appeared reasonable, but questioned a further provision that the substituted nominee would not be liable for any existing liabilities. The Committee asked whether this would prejudice the creditors of the terminated airport lessee company. The Minister assured the Committee that the provision would not affect the rights of creditors or their legal options in relation to any obligations owed to them.

6.16 Another aspect of the Committee's work is to ensure that legislative instruments provide for appropriate merits review of administrative decisions. At the Commonwealth level it is broadly accepted policy that persons who are adversely affected by the exercise of an administrative discretion should be able to have the merits of that decision reviewed by an independent external body, which would usually be the Administrative Appeals Tribunal. This general principle is a safeguard subject to only a few limited exceptions. In the case of the regulations providing for the leasing of airports each of the four sets of regulations about which the Committee was concerned in respect of validity and personal rights also did not appear to provide in all cases for administrative review.

6.17 The Airports (Environment Protection) Regulations provided for environment testing by accredited laboratories, but did not appear to provide for review for a laboratory refused accreditation. Also, although some decisions made under the Regulations were subject to full AAT review, numbers were subject only to internal review by the Secretary. The Committee suggested that it may be suitable to provide for ultimate AAT review, even if preliminary review by the Secretary was appropriate. Some other discretions, including commercially valuable decisions, did not appear to be subject to any review. The Minister advised the Committee that the accreditation body was the only suitable accrediting agency in Australia, but if this should change then it would certainly be appropriate to amend the Regulations. Laboratories are informed of any deficiencies and of how these may be remedied. Laboratories may then apply again for accreditation and request a different assessor. The Minister further advised that he had asked for a review of the other discretions and the Regulations would be amended to reflect that review's findings.

6.18 The Airports Regulations provided for commercially valuable discretions to exempt subleases from a general prohibition. The Minister advised the Committee that the Regulations would be amended to provide for AAT review. The Airports (Control of On-Airport Activities) Regulations provided for a number of discretions in relation to the control of the sale of liquor, with no apparent AAT review. The Minister advised that State liquor law would apply at leased airports and that the present provisions were intended to facilitate this application. AAT review was therefore not appropriate. The Airports (Building Control) Regulations provided for extensive AAT review of decisions by the building controller but the Committee noted a few gaps. The Minister advised that the Regulations would be amended.

6.19 The Committee considers that the quality of drafting of regulations should not be less than that of Acts. In the present case the four sets of regulations all included drafting errors and oversights which the Minister agreed to amend.

6.20 The Committee is grateful to the Minister for Transport and Regional Development, the Hon John Sharp MP, for his cooperation in this whole exercise. The Minister's actions demonstrate a commitment to personal rights and parliamentary propriety. These sets of regulations were among the most important dealt with by the Committee this year. They illustrate not only the importance of regulations in contemporary public administration but also the actions of the Committee in ensuring that regulations are of the highest quality.

Appendix

Airports (Building Control) Regulations, Statutory Rules 1996 No.292
Airports (Control of On-Airport Activities) Regulations, Statutory Rules 1997 No.57
Airports (Environment Protection) Regulations, Statutory Rules 1997 No.13
Airports (Ownership-Interests in Shares) Regulations, Statutory Rules 1996 No.341
Airports (Protection of Airspace) Regulations, Statutory Rules 1996 No.293
Airports Regulations, Statutory Rules 1997 No.8

The Impact of the Regulations and Ordinances Committee on Administrative Law and Ethics (Paper presented by Senator O'Chee at the Administrative Law and Ethics Conference, Canberra, 24 November 1997)

Senator O'Chee, 27 November 1997, Senate Hansard, p. 9679

6.21 The title of this conference is Administrative Law and Ethics. Dicey defined administrative law as the law relating to the organisation, powers and duties of administrative authorities. It has been defined further as the body of rules which govern the exercise of executive functions by the officers or public authorities to whom they are entrusted. The courts have always had a role in these rules governing the exercise of executive functions by their issue of prerogative writs, which restrained public officials from exceeding the proper limits of their authority or which compelled them to act properly.

6.22 In Australia, however, at the Commonwealth level, administrative law has come to mean the group of reforms, all made by Act of Parliament, which in the mid nineteen seventies and early nineteen eighties effected what has been described as a revolution in Commonwealth law establishing the relationship between officials and those citizens affected by their actions. These well known reforms include the Administrative Appeals Tribunal, the Ombudsman, the Administrative Review Council, the Freedom of Information Act and the Administrative Decisions Judicial Review Act. There have been further developments of these reforms, such as specialist merits review tribunals for such groups as, for instance, refugees, and, in an area with which I am familiar, the Legislative Instruments Bill.

6.23 It is conventional wisdom that these reforms were the first important changes in administrative law at the Commonwealth level and that what might be called the modern era of Commonwealth administrative law dates from their introduction. I would, however, like to challenge this conventional wisdom. If administrative law is the systematic and effective scrutiny and supervision of the actions of the executive with appropriate remedies for improper executive actions, then modern Commonwealth administrative law dates from the establishment of the Senate Standing Committee on Regulations and Ordinances in 1932. The Committee scrutinises all disallowable instruments for breaches of parliamentary

propriety or personal rights and obtains undertakings from Ministers to amend the offending instrument or a satisfactory explanation of the apparent deficiency. The Senate has never failed to accept a recommendation from the Committee that it disallow an instrument, although we don't do this too often. In fact, the last time the Committee resolved formally to recommend disallowance if the Minister did not undertake to amend was almost two years ago. This role of the Committee as both a premier and continuing central body in administrative law should be more widely known and acknowledged.

6.24 Of course the Committee does not have a comprehensive jurisdiction over all executive activities, but none of the other bodies more often associated with Commonwealth administrative law has this comprehensive authority either. Moreover, none of them has a direct legislative control over the actions of the executive government. For instance, the AAT has strong powers but a limited jurisdiction, the Ombudsman has wide coverage but limited powers, the Federal Court under the ADJR Act has wider coverage than the AAT but no power of merits review, while there are many exemptions under the Freedom of Information Act.

6.25 In contrast, the Regulations and Ordinances Committee scrutinises disallowable instruments, which form the basis of the detailed administration of almost all Commonwealth programs, with the power to recommend disallowance of any instrument or provision of an instrument. In its coverage and powers the Committee is in the mainstream of Commonwealth administrative law, and was in this position for up to half a century before other reforms which are more usually associated with such law.

6.26 The Senate has come to expect this rigorous application by the Committee of its principles, with a wide range of Senators both in and out of government supporting the rights and liberties of citizens against arbitrary decision making by the executive. It is no coincidence that successive Attorneys-General at the zenith of the development of administrative law were both Senators and had both been active and long-standing members of the Committee.

6.27 The Committee has, however, integrated the newer administrative law bodies into its operations. For instance, it insists that appropriate discretions should be reviewable by the AAT and that decision makers consult the Privacy Commissioner in suitable cases. This combination of the Committee and those other bodies provides additional safeguards in individual cases.

6.28 The development of administrative law by the Committee has also enhanced ethical behaviour by public officials. The Oxford dictionary defines ethics as the science of morals in human conduct. It defines moral as that which in concerned with goodness or badness of human behaviour, or with the distinction between right and wrong. In the context of this discussion, therefore, ethics really relates to public officials having a conscientous commitment to ensuring that laws and their administration are guided by morality and not merely by an apparent adherence to form or process. In short, the spirit of the law should be based on what is fair and right.

6.29 The best way to illustrate the impact of the Committee on administrative law and ethics is to outline a number of actual cases where the Committee raised issues which may have ethical implications. The Committee has reported to the Senate on each of these cases

and if conference delegates would like further details of any of them they should contact the Committee staff in Parliament House.

6.30 Although I have spoken so far about scrutiny of the activities of the executive the operations of the Committee include scrutiny of the Rules of Court made by the judges of each of the federal courts. These Rules are legislative in nature and disallowable by either House and the Committee subjects the rules to the same scrutiny as other delegated legislation. The Committee, through its scrutiny, has improved the quality of the Rules of the different courts. For instance, in one case, the Committee found that the judges of the High Court had made Rules which operated with prejudicial retrospectivity. The Chief Justice, Sir Harry Gibbs, then advised the Committee that the Rules would be amended. In another case the High Court advised the Committee that provisions for reversal of the usual onus of proof, about which the Committee had concerns, would be removed. In respect of another instrument the Chief Justice, Sir Anthony Mason, advised the Committee that its concerns about clarity of legislation would be met. The Committee has also written a number of times to the present Chief Justice of the High Court about deficiencies in the Rules.

Industrial Relations Court Rules

6.31 It is, however, the Industrial Relations Court Rules which I will use to illustrate some issues of ethics and the impact of the Committee. Those Rules, all 278 pages, were made by nine judges of that Court, including the Chief Justice. The Rules included numerous drafting errors, chiefly wrong cross-references, although there was one provision which subsequently everyone seemed to agree was void because it was not authorised by the enabling Act. The principal concern of the Committee, however, was that the Rules were made and expressed to come into operation on 30 March 1994, but were not gazetted until more than five weeks later. Under the relevant provision of the Acts Interpretation Act, the Rules were therefore void if they affected anyone adversely, apart from the Commonwealth or its authorities. After some correspondence and some hesitation the Acting Chief Justice then advised the Committee that the entire Rules would be repealed and remade, so that the Rules would operate with unambiguous validity. The Acting Chief Justice also advised that officers of the Attorney-General's Department had offered to assist the Court to do this. In due course this was done.

6.32 What are the implications for administrative law and ethics of this episode? The first point is that, in the view of the Committee, the administration of justice by the courts should be conducted in accordance with the highest ethical standards. In cases such as this the ethics of all concerned should be beyond reproach and the action of the Chief Justice and the other judges in repealing and remaking the Rules was of a high ethical standard, even if this was done after considerable arm twisting by the Committee. The problem remains, however, that the new valid Rules were not made until six months after the old defective Rules purported to come into effect and four months after the Committee drew attention to the problem. The Committee understands that during this time actions in the Court proceeded at full steam, during the first two months because the Court was unaware that there was problem and during the next four despite knowledge that there was a difficulty. In this time it appears that numerous individuals had action taken against them under the invalid Rules, presumably with threats of violence to their person and property for any recalcitrant behaviour. For instance, the Rules provided for arrest and committal. I think that the actions of the judges in respect of this period could be seen as not of the highest ethical standard.

6.33 What, then, should the judges have done in this case? The ethical response would have been to inform all persons adversely affected that the Rules may be void and that in the interests of justice the Court would order that all action taken under the Rules was consequently ineffective. This would certainly be the ethical position in respect of action taken under the Rules in the first five weeks during which they were not even gazetted. It is not acceptable for people to be subjected to prejudicial action under delegated legislation before there has been official notification that it has been made. The ethical position would also have been that those affected should have been paid compensation by the Commonwealth for any losses which they suffered. The impact of the Committee here was that it at least ensured that the Court accepted an ethical outcome, even if there was a gap of six months.

Crimes Regulations

6.34 There were similar ethical questions in relation to the next case which I will describe. The instrument in question was an amendment of the Crimes Regulations which was quite short and had only one purpose, to exempt the Australian Securities Commission from provisions of the Spent Convictions Scheme. That Scheme provides for important personal rights whereby, if a person was convicted of an offence more that 10 years ago and meets certain other criteria, then the conviction is spent and the person is legally able to claim, on oath or otherwise, that they were never convicted of the offence. Also, other people who are aware of the offence must generally not disclose the conviction without the consent of the person affected and must not take the conviction into account in any decision making process. The Act provides, however, for the Regulations to prescribe exemptions from the Scheme and the Regulations in question exempted the ASC in regard to all offences for the purposes of considering whether to prosecute, making submissions as to sentence, and assessing the suitability of a person to be employed by the ASC.

6.35 The Committee noted that the enabling Act for the Regulations provided for the Privacy Commissioner to receive applications for exemptions from the Scheme and to advise the Minister on whether an exemption should be granted. The Committee further noted that neither the making words of the Regulations nor the Explanatory Statement even referred to this requirement, much less that it had been observed, or to the substance of the Privacy Commissioner's advice, the obtaining of which was mandatory. The Committee assumed that this was because the matter was routine in nature, with no unusual or unexpected features. Nevertheless the Committee wrote to the Minister, in this case the Attorney-General, asking for confirmation that the Privacy Commissioner was consulted and, if so, of the result of those consultations.

6.36 The reply from the Attorney-General, dated three and a half months later, was quite a surprise. It advised that the Privacy Commissioner was indeed consulted, as required by the Act, but that the Attorney had declined to follow the Commissioner's advice that the exemption should not be granted. This reply was of considerable concern to the Committee. It meant that the sole provision of the Regulations was contrary to an express recommendation of the Privacy Commissioner in respect of a statutory duty to provide such advice. This concern was compounded by the fact that, as a result of the delay in replying and of the making words and the Explanatory Statement omitting any reference to the Privacy Commissioner, the Committee assumed that there was nothing untoward about the Regulations and did not give a protective notice of disallowance. Also, importantly, the

incomplete Explanatory Statement also meant that individual Senators with an interest in legislation affecting personal rights were not alerted to a matter of interest.

6.37 At this point I emphasise that the Committee did not draw any conclusions about the desirability or otherwise of the substance of excluding the ASC from the Scheme, which is a matter upon which well-informed and well-intentioned people may differ. The Committee was concerned, however, that the important issues which the Regulations raised were concealed, whether inadvertently or not, from the attention and scrutiny of the Senate. In this context I add that the Committee strictly avoids policy issues, but does attempt to ensure openness and accountability so that Senators may take informed action in respect of individual instruments.

6.38 After receiving this surprising advice the Committee wrote again to the Attorney-General, suggesting that the Regulations should be repealed and remade, with a complete Explanatory Statement. This would preserve the options of the Committee and the Senate but would not disrupt the existing arrangements pending informed parliamentary scrutiny. The Committee also wrote to the Privacy Commissioner, who advised that he appreciated the continued support of the Committee in seeking to promote a more open approach by agencies in relation to differences of view with his office, particularly where legislation was concerned.

6.39 The Attorney replied that he was not able to agree to repeal and remake the Regulations, or that the making words or Explanatory Statement for other instruments should include references to any statutory mandatory consultation before making and the result of that consultation. He was, however, prepared to adopt a practice under which the views of the Privacy Commissioner would be communicated to the Committee at the same time as any future Regulations were tabled. Unfortunately this suggestion was not satisfactory because the Explanatory Statement is produced for the benefit of all Senators, not just the Committee. Many notices of disallowance by individual Senators are given on policy grounds unrelated to the concerns of the Committee.

6.40 The Committee wrote again to the Attorney, advising that present Commonwealth drafting practice for legislative instruments appears to be to include sometimes lengthy recitals in the making words that statutory consultation requirements have been met. The Committee gave instances of such recitals. One particular instrument, drafted by officers of the Attorney-General's Department, actually recited that it was made after consultation with the Privacy Commissioner. The Committee advised the Attorney that it supported this practice and assumed that if the relevant consultations or advice led to results which were unusual or unexpected, such as a decision to reject the advice of the Privacy Commissioner, that this would be explained in the Explanatory Statement. The Committee suggested that the failure to do so in the present case was a breach of parliamentary propriety. The Committee also advised the Attorney that it would write to the Minister responsible for the Federal Executive Council Handbook, asking for the Handbook to be amended to reflect the views of the Committee.

6.41 I am pleased to report that the final result in this case was most satisfactory. In a further reply the Attorney advised the Committee that he now agreed that the relevant information should be included in the Explanatory Statement and that he would instruct the Department to adopt that practice in future. The Secretary of the Federal Executive Council

also advised that a circular which would have the effect of a revision of the Handbook would be sent to all agencies, advising of the Committee's requirements.

6.42 In this case also I think that there were questions about the ethical standards of the officers of the Attorney-General's Department who had carriage of this matter. Public administration should be both transparent and accountable and, in my opinion, the officers involved failed to meet these standards. As with many of the matters which the Committee raises, there were two levels of ethical deficiency here. The first was the initial problem perpetrated by the Department and the second was the continuing refusal to address the difficulty even after the Committee had drawn their attention to it. The ethical response to the Committee in this case would, as noted earlier, have been to repeal and remake the Regulations in question. It is a matter for regret that this was not done. The Department, of course, finally accepted the views of the Committee and this is to their credit. The Federal Executive Council secretariat, in contrast to the tardiness of the Attorney-General's Department, are to be commended for promptly recognising the problem and initiating action to remedy it. Their actions reflect a high ethical standard.

Native Title (Notices) Determination No.1 of 1993

6.43 The next case study raises different ethical questions. The *Native Title Act 1993* was assented to on Christmas Eve 1993 and on that same day the Minister for State made an important legislative Determination under the provisions of that Act. Unfortunately the Determination was never tabled in Parliament and consequently ceased to have effect 15 sitting days after it was made. The Committee picked this up more than two years later when the Minister for State made an amending Determination. The Committee noticed that there was no record of the original Determination and at once alerted the Department of the Prime Minister and Cabinet, who up until then were unaware of the failure to table. Shortly afterwards, in the House of Representatives, the Prime Minister in answer to a question advised that the effect of the failure could well cast a legal doubt over a large number of actions 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 needed, as the Prime Minister expressed it, to patch up the legislation.

6.44 As an aside, the amending Determination which caused the Committee to raise the issue was validly tabled. Its practical effect, however, was little or none, because its only substantive provisions purported to amend the earlier invalid Determination. It is ironic, and this is an ethical context, that the Explanatory Statement for the ineffective second Determination advised that its purpose was to address what it termed "problems", "uncertainty", "difficulties" and an "unintentional result" in the invalid original Determination.

6.45 As foreshadowed by the Prime Minister a fresh Determination was then made, gazetted and tabled all on the same day, which showed an alacrity not usually noticeable in the actions of the executive relating to delegated legislation. That fresh Determination, however, could operate legally only from that date and could not validate any action taken in putative reliance on the two earlier Determinations. Any such action taken during that two year period was, of course, totally void. The Committee therefore wrote to the Minister for Aboriginal Affairs about the practical effects of the invalidity and of the steps proposed to remedy the situation. The Committee noted in its letter to the Minister that the invalid

Determination provided for mandatory action in specified circumstances by the Commonwealth Minister, the Commonwealth itself, the States and Territories and the Native Title Registrar. One of these circumstances, for instance, was notification by governments of their intention to do a future act, such as grant a mining lease. In response to the Committee's inquiry the Minister advised that there may have been thousands of these actions, each of which was invalid. Another circumstance concerned applications for determinations of native title, in respect of which the Minister advised the Committee that there were hundreds of invalid actions. Another aspect of invalidity related to actions by State and Territory agencies, the Minister advising that there was little likelihood that the range and extent of these could easily, if ever, be ascertained.

6.46 The Minister further advised the Committee that, following consultations with the State and Territory governments, proposed amendments of the Native Title Act would include a provision to validate retrospectively all of these thousands of actions. The Committee in this case did not oppose such an amendment, if only because to do otherwise would result in the considerable financial expenditure of the last two years being wasted and because of the waste of time if the whole process had to start again. The Committee nevertheless normally has substantial reservations about Commonwealth legislation providing for prejudicial retrospectivity. The final outcome here is scarcely a flattering picture of Commonwealth public administration, with thousands of legally void actions being validated years later by prejudicially retrospectivity provisions of a Commonwealth Act. This is an unfortunate result but one which, as I say, could not be avoided without much time and money being wasted.

6.47 The ethical question here is to balance what might be termed the ethical high ground against the pragmatic approach. I think that the Committee got the balance right by drawing attention to the legal and administrative inadequacies and deploring them, but not opposing what seems to be the only practical solution to the problem. I note, however, that the Committee drew attention to the difficulty 17 months ago and that the amendments of the enabling Act to correct the original instrument which ceased to have effect more than three and a half years ago have, at the time of the preparation of this paper in early November, still not passed the Parliament.

Declaration of Aboriginal Land under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*

6.48 The next two cases concern parliamentary propriety. A Declaration of Aboriginal Land under the Aboriginal Land Grant (Jervis Bay Territory) Act 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. In this case the Committee noted that any notice could at the most be only 13 days before the Declaration itself and wrote to the Minister. In reply the Minister advised that the notice of intention and the Declaration were made on the same day with the Declaration coming into effect on gazettal on the next day. In the Minister's words, the Committee could therefore rest assured that the requirements of the Act had been followed.

6.49 In this case the Minister may have followed the letter of the Act, but there are some fundamental ethical questions. The Act clearly did not intend for mandatory notice of intention to make a grant of land to be gazetted minutes before, or even simultaneously with, the making of the grant itself. The Act must have contemplated that there would be a reasonable period between notice of intention and the grant. It is a sophism to argue otherwise, or to argue that there are no ethical issues here. It is ironic that the Committee was concerned that the period of notice may only have been 13 days.

Sales Tax Assessment Regulations
Sales Tax Procedure (Old Laws) Regulations

6.50 The next case involves retrospective amendments of the Sales Tax Assessment Regulations and the Sales Tax Procedure (Old Laws) Regulations. The Explanatory Statements for these 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 Committee was concerned at a number of aspects of the Regulations but in particular asked about the use of the evidentiary certificates during the period of retrospectivity. The Minister advised that six such certificates had been issued, 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.

6.51 This case raises a number of ethical issues. The first is that the taxation office disregarded express provisions of Regulations in relation to proceedings to recover money allegedly due. The reasons given by the Minister for these actions are that the tax officials could not understand the legislation and, in any event, thought that it was invalid. On one level this may have some ethical validity but it leads to the question of why action to correct the matter was not taken earlier.

Approved Occupational Clothing Guidelines

6.52 The last case which I will describe relates to the Approved Occupational Clothing Guidelines, made under everybody's favourite Act, the Income Tax Assessment Act. The Guidelines, which affect large numbers of Australian wage and salary earners and which also have an effect on the national revenue, were made under a provision of that Act which provided that expenditure incurred by an employee in relation to non-compulsory uniform or wardrobe was not tax deductible unless the clothing was entered on a Register. The provisions also required the Minister to formulate Guidelines setting out criteria for the entry of clothes on the Register. The Guidelines in question consisted of 57 consecutively numbered clauses, some of which were in italics and some not in italics and some in both italics and non-italics. Some of the clauses were also partly in bold and some partly underlined. A helpful note, however, advised that the material in italics was explanatory only and did not form part of the Guidelines.

6.53 The Committee was concerned, however, about possible invalid prejudicial retrospectivity. The Guidelines were made on 7 June 1995 and one of the clauses, admittedly in italics, advised that they superseded the previous Guidelines with effect from that date. If this was the case and the new Guidelines were prejudicial then they would be void under the

Acts Interpretation Act because the new ones were not gazetted until two weeks later, on 21 June 1995. The position was complicated further by advice in the Explanatory Statement which appeared to be that the old Guidelines were in force up until 30 June 1995.

6.54 The Committee wrote to the Minister who advised that most of the new Guidelines were more generous to taxpayers than the old ones, although there were some areas where they were more strict. The Minister further advised, however, that the officials who administered the Guidelines did not reject any applications dated between 7 and 21 June 1995 which would have satisfied the original Guidelines but not the new ones. Also, any application between those two dates which would have satisfied the new Guidelines but not the old would also be approved. The Committee noted that the result appeared to be that no person was actually disadvantaged because for two weeks in the last month of the financial year the authorities administered both the old and new Guidelines simultaneously, applying the relevant beneficial provisions of both Guidelines while ignoring the detrimental provisions.

6.55 This case presents interesting ethical questions, but the tax office probably got it right. There were clearly problems with the validity of the new Guidelines but to reactivate the old ones would have perpetuated old detrimental provisions without providing for the new exemptions. Also, the end of the financial year had gone and people were submitting their returns. There is still the ethical problem that the authorities did not administer the law as it existed but rather applied it in a creative way which seemed to be the fairest to them. In any event, the view of the Committee, with its tongue firmly in its cheek, is that any action by the tax office which expands available concessions, whether lawfully or not, is highly ethical.

6.56 I have outlined these few cases to illustrate aspects of the impact of the Committee on ethics and administrative law. In two of the cases the Committee had to struggle to impose ethical standards on the judges of the Industrial Relations Court and on officials of the Attorney-General's Department. On the other hand, in the case of the invalid native title Determination the Department of the Prime Minister and Cabinet accepted from the outset that there was a problem which had to be addressed, while the other cases did not of their nature require remedial action although they raised ethical issues. I would, however, emphasise that these are only instances of the hundreds of pieces of correspondence which the Committee sends and receives each year. All of these address some aspect of personal rights and parliamentary propriety and as such all include an ethical component, because delegated legislation which breaches either of these standards has ethical problems. The impact of the Committee on ethics and administrative law is not a series of isolated cases but is a continuing unified process by a body central to Commonwealth administrative law and which has engaged in scrutiny of official action for decades longer than other bodies more often identified with such law. The overriding concern is to meet the intrinsic moral obligations of our terms of reference, and we look forward to continuing to do this for many years to come.

"The Accountability of the Executive and the Judiciary to Parliament; the role of the Senate Standing Committee on Regulations and Ordinances"

(Paper presented by Senator Kay Patterson at the 1998 National Administrative Law Forum, Melbourne, 18-19 June 1998)

Senator Patterson, Senate Hansard, 24 June 1998, p. 3989

Abstract The paper discusses the accountability of the executive and the judiciary to Parliament, with an especial emphasis on scrutiny of legislative instruments by the Senate Standing Committee on Regulations and Ordinances. The theme of the paper is that there is a high level of such accountability, with case studies illustrating the types of concerns which the Committee raises with Ministers and Judges and the outcomes of the Committee's actions.

Introduction

6.57 The theme of this session is accountability and this paper will present a parliamentary perspective on the accountability of the executive and the judiciary to Parliament, with a particular emphasis on the role of the Senate Standing Committee on Regulations and Ordinances.

6.58 The accountability of the executive to Parliament is well known. The Commonwealth, the States and the mainland territories all have systems of responsible government, which is also called parliamentary government. This is in direct contrast to other countries which may have, for instance, a government system based on the separation of powers. Under responsible government members of the executive government must effectively be members of parliament and are responsible to Parliament. If the executive loses the confidence of Parliament then a new executive must be formed which does have that confidence or a fresh election held, to choose a Parliament out of which an executive will be appointed. This is the broad, overall aspect of accountability of the executive to Parliament. On a day to day basis, however, the Parliament scrutinises the actions of the executive by questions to Ministers, by debates on executive policies and actions and by inquiries by parliamentary committees, especially estimates committees. Of course the executive government will normally be able to count on majority support in the lower house of Parliament and therefore it falls to second chambers such as the Senate to balance ministerial control of the lower house.

Legislative scrutiny committees

6.59 The two legislative scrutiny committees of the Senate, the Standing Committees for the Scrutiny of Bills and on Regulations and Ordinances, are among the most important bodies through which the legislative branch exercises this control over the executive. This paper will deal only with the activities of the Regulations and Ordinances Committee, but it should be remembered that its sister Scrutiny of Bills Committee operates in parallel with it, but to scrutinise proposed primary legislation rather than delegated legislation which has already been made.

6.60 The Standing Committee on Regulations and Ordinances scrutinises every disallowable legislative instrument tabled in the Senate to ensure that these instruments comply with its high standards of personal rights and parliamentary propriety. This scrutiny is crucial, because the administrative details of almost every Commonwealth scheme are

implemented by regulations or by a host of other subsidiary legislative instruments. Every year the Committee, assisted by its legal adviser, Professor Jim Davis of the law faculty of the Australian National University, detects hundreds of apparent defects or other matters worthy of comment in the almost 2,000 legislative instruments which the Committee scrutinises each year. This scrutiny is generally effective, with Ministers undertaking to amend many of these instruments to meet the Committee's concerns or giving explanations which satisfy the Committee. Such executive accountability has operated since the establishment of the Committee in 1932, which predates by decades the other bodies or processes now associated with the systematic scrutiny and supervision of the executive branch such as the Administrative Appeals Tribunal, the Ombudsman, the Administrative Review Council, the *Freedom of Information Act 1982* and the *Administrative Decisions (Judicial Review) Act 1977*.

Parliamentary scrutiny of the judiciary

6.61 The judiciary is also accountable to Parliament, which exercises a number of controls over federal courts. The Constitution itself provides for Parliament to exercise an obviously important, even decisive, role in the operations of the High Court. There are 10 sections in Chapter III of the Constitution, which deal with the judicial power of the Commonwealth, and nine out of the 10 refer to the Parliament. For instance, Parliament decides how many justices the High Court will have, subject to a minimum of three, and may fix their remuneration. Parliament may decide that High Court judges should be removed for proved misbehaviour or incapacity. Parliament decides the exceptions and rules of the appellate jurisdiction of the High Court. Parliament may make laws about the right of appeal to the Privy Council and, of course, has done so. Parliament may also confer additional original jurisdiction on the High Court and make laws conferring rights to proceed against the Commonwealth and the States in relation to all matters within the judicial power.

6.62 The Parliament has exercised some of these powers in the *High Court of Australia Act 1979* and the *Judiciary Act 1903*. The High Court of Australia Act controls and directs the High Court in a number of ways which illustrate the prerogatives of Parliament. That Act provides for the number of justices to be seven, although Parliament could provide any number at all greater than three. The Act also provides for the qualifications of judges and here again Parliament could apparently provide for any qualifications at all. The Act also provides that justices are not capable of accepting or holding any other office of profit within Australia. Presumably without this provision justices could hold such an office. The Act provides detailed arrangements for the administration and procedures of the High Court, including a requirement to keep proper accounts and records of the affairs of the court and for the Auditor-General to audit the accounts and to report any irregularity. The Act also obliges the High Court to prepare an annual report for presentation to Parliament. The Act exempts the High Court from taxation by the Commonwealth, a State or Territory. Again, in the absence of this provision it may be that the High Court could be subject to such taxation. The Judiciary Act provides extensively for the actual operations of the High Court, including its general jurisdiction and power and procedures.

6.63 The other federal courts are entirely creations of the Commonwealth Parliament. The Constitution actually refers to federal courts created by the Parliament. In fact, for the great majority of the time since Federation in 1901 Australia has not had a general federal court, relying instead on Parliament giving federal jurisdiction to State courts. The Federal Court is created by the *Federal Court of Australia Act 1976*, which is 66 pages long and provides for

all aspects of its operation, including its constitution, jurisdiction and proceedings. The Family Court is created similarly by the *Family Law Act 1975*, which is 198 pages long and which similarly provides for all aspects of its operation. The Commonwealth Directory of December 1997 also refers to both the Australian Industrial Court and to the Industrial Relations Court of Australia, the functions of the latter being now exercised by the Federal Court. The fate of these two courts illustrates how Parliament can abolish a federal court as well as create them.

6.64 The Parliament has, therefore, provided in Acts for detailed aspects of the operation of both the High Court and of the other federal courts. However, these Acts not only provide directly for these matters but also give power to others to make legislative instruments affecting the courts. In common with almost all other Acts the Acts controlling the High Court and creating the other federal courts provide for the Governor-General to make regulations with respect to specified matters. Any such regulations are subject to disallowance by either House of Parliament. The Acts controlling federal courts also provide for the judges of the courts to make rules of court. The Parliament has given all of the courts a general "necessary or convenient" power to make rules. The High Court has also been given more specific powers, for seven matters. Parliament has been a bit more expansive for the Family Court, giving it not only the general power but also 24 specific powers, and even more expansive for the Federal Court, giving it a general power and 32 specific powers. The different Acts all provide for the rules of court of each of the three courts to be subject to certain provisions of the *Acts Interpretation Act 1901*, which provides generally that legislative instruments must be tabled in both Houses and are subject to other safeguards, as well as to the ultimate sanction of disallowance by either House.

6.65 Parliament has other options in its supervision and control of federal courts and their judges. For instance, two Senate select committees in 1984 and a statutory parliamentary commission of inquiry established in 1986 inquired into the conduct of Justice Murphy of the High Court. It also exercises some degree of scrutiny of the courts' financial management through examination of their proposed appropriations, and annual reports, by the relevant Senate legislation committee. However, the most direct relationship between the Parliament and the judiciary has been developed through scrutiny by the Regulations and Ordinances Committee of all delegated legislation relating to the courts.

6.66 This paper will now describe several case studies of scrutiny by the Standing Committee on Regulations and Ordinances of legislative instruments made both by judges and by members of the executive. In deference to the presence of Chief Justice Doyle and Justice Kenny the paper will first describe some instances of scrutiny of rules of court, which are of course subject to the same accountability to Parliament as legislative instruments made by the executive.

6.67 The first public exercise of the right of the Regulations and Ordinances Committee to propose disallowance of rules of court occurred in 1982, when on Budget Day the then chair of the Committee gave notice of disallowance of rules of the High Court. The Committee had noted that there was possible prejudicial retrospectivity against individuals in respect of interest on judgement debts. On its face this was a breach of the Committee's principles. In accordance with normal practice, the notice had been given to enable the Committee to continue negotiating with the High Court to provide a satisfactory solution. The rules of court were duly remade, and the Committee publicly acknowledged the High Court's cooperation in the matter.

6.68 Several other such instruments have been scrutinised, and as a result of the Committee's concern have been appropriately amended. But such scrutiny, and the attendant successful outcomes, have not been confined to the High Court. Two more recent examples involved the newly established Industrial Relations Court.

6.69 The Industrial Relations Court Rules, Statutory Rules 1994 No 110, were made by nine judges of the Court, including the Chief Justice, on 30 March 1994 and expressed to come into effect on the same day. The Committee scrutinised the Rules in the same way as it scrutinises all other disallowable instruments and found substantial deficiencies. The Rules included numerous drafting errors and oversights, with many wrong references, including one to an office abolished some 10 years previously. More serious problems included a provision which expressly negated provisions of an Act without the judges having the power to do so and the fact that the Rules were not gazetted until 5 May 1994, more than five weeks after they came into effect. Under s.48(2) of the Acts Interpretation Act, which applied to the Rules, any instrument which adversely affects anyone except the Commonwealth is void if it takes effect before gazettal. The Committee accordingly wrote to the Chief Justice for his comments.

6.70 The Chief Justice replied, advising that the Rules had been prepared under circumstances of great urgency and that he would consider what amendments were necessary. In relation to the delay in gazettal the Chief Justice advised that the delay could not prejudice anyone because the Rules were available publicly before gazettal. The Committee considered the reply and wrote again to the Chief Justice, advising that his comments on the availability of the Rules did not appear to be relevant to the question of validity and that in the opinion of the Committee the Rules were void, with all action taken under them similarly void. The Committee also informed the Chief Justice that in order to preserve its options it would give a notice of disallowance of the Rules.

6.71 By this time the Rules had been amended, but to address matters not related to the Committee's concerns. The amending Rules included a number of deficiencies, about which the Committee also wrote to the Chief Justice. The Committee then received a letter from the Acting Chief Justice, advising that the Court had discussed the matter with officers of the Attorney-General's Department who had offered to assist the court with remaking the Rules so that a clearly valid set of Rules could be made available.

6.72 The Committee then wrote to the Acting Chief Justice and to the Attorney-General for advice, noting that the undertaking to remake the Rules would certainly allow them to operate in the future with unambiguous validity but that there was a period of at least four months during which the apparently void Rules were administered. The Acting Chief Justice and the Minister for Justice replied, advising in effect that the Rules were procedural and therefore did not themselves adversely affect anyone. The Committee did not accept this advice but in the interests of the orderly administration of justice agreed to remove its notice of disallowance on the basis that the Rules would be repealed and remade. This subsequently occurred on 11 October 1994.

6.73 The Committee had further correspondence with the Court when the Industrial Relations Court Rules (Amendment), Statutory Rules 1996 Nos 219 and 220, were not tabled within the required time and subsequently ceased to have effect. This was the first time for many years that statutory rules were not tabled, although other types of disallowable instrument frequently become void for this reason. In this case the Committee asked the

Chief Justice for an assurance that the Rules were not administered between the dates upon which they ceased to have effect and the date upon which fresh Rules were made.

6.74 The Committee also scrutinises the rules of the other federal courts. In relation to the Federal Court Rules the Committee earlier this year advised the Chief Justice that the Rules incorporated a legislative instrument which had become void more than four years earlier because it was never tabled in Parliament. The Chief Justice then advised the Committee that the provision would be removed.

Scrutiny by the Regulations and Ordinances Committee of legislative instruments made by the executive

6.75 The Committee's scrutiny of the rules of the federal courts, while important, is nevertheless only a small part of its operations. Most of the instruments which it scrutinises are made by the executive and it is these upon which the Committee spends most time. This paper will now describe its scrutiny of a number of such instruments which illustrate accountability of the executive for, firstly, provisions which breach personal rights and, secondly, provisions which breach parliamentary propriety.

Personal rights

6.76 The Committee's inquiry into Public Service Determination 1992/27 began on 27 April 1992 after it received a representation from a retired officer of the Australian Public Service, which drew attention to an apparent injustice affecting what turned out to be a substantial group of retired officers, although this was not disclosed at the time. The problem related to credits received in lieu of recreation leave, dating back to the early 1970s. Without going into details, a combination of factors resulted in retiring officers receiving less money than that to which they were fairly entitled. The amounts involved were not great, in most cases less than $1,000. The matter could have been resolved by either retrospective legislation or an act of grace payment, but the Departments involved declined to do this, on the basis that it was too hard to identify potential claimants and publicise the change. Accordingly an aggrieved officer approached the Merit Protection and Review Agency (MPRA), which after investigation found that the application of the law was unfair and inequitable. Armed with this finding the officer then approached the Department of Industrial Relations (DIR), who were responsible for the matter. Three days later an officer of DIR made Public Service Determination 1992/27, which effectively extinguished the rights of the officers affected by the injustice. The Explanatory Statement which accompanied the Determination did not advise of these effects. Also, the DIR did not consult with the officer or the MPRA or inform them after the Determination was made. The officer therefore came to the Committee. Shortly after this DIR discovered that the Determination had not been drafted properly and so made a second Determination (1992/46), the sole purpose of which was to correct the errors in the previous instrument. Again the Explanatory Statement did not advise that the Determination extinguished the rights of officers and again the DIR did not consult with those affected before it made the second Determination or inform them after it was made.

6.77 This matter raised a number of concerns for the Committee. Firstly the Explanatory Statements for the two Determinations appeared to be misleading, both advising that they "clarified" the position. The Explanatory Statements even seemed to imply that they were to the benefit of all those affected. In fact the position was perfectly clear to the DIR and

everyone else, but the two Determinations then actively altered the position to the detriment of those affected.

6.78 Next, the Committee was concerned about the relationship between the MPRA and the DIR. The MPRA had been actively pursuing the matter with DIR, but DIR did not consult with the MPRA about its proposed course of action or inform it of developments even after they happened. This would have been a deficiency in any event. In the present case, however, there was an additional cause of concern. This was because the Committee had previously raised with DIR the question of review of discretions in Public Service Determinations. In each case the DIR replied that there was an adequate safeguard in that officers could go to the MPRA with any grievances. The Committee had always accepted those assurances and had refrained from taking further action. In the present case, however, the DIR had not only failed to implement recommendations of the MPRA but also had not even told those affected that it had done so.

6.79 Finally, and most importantly, here was an obvious injustice which was entrenched by a legislative instrument and which needed to be addressed.

6.80 The Committee first took action by asking its then Legal Adviser, Emeritus Professor Douglas Whalan AM, to prepare a special report on the Determinations and the representation. After the Committee considered this report it wrote to the Minister for Industrial Relations advising of its serious concerns and that it was disturbed by the whole matter, particularly by DIR ignoring recommendations of the MPRA in the way that it did. The Committee asked the Minister if the officer who made the Determinations, and other suitable officers, could attend upon the Committee at its next meeting. Also, in order to protect its options, the Committee advised the Minister that it would give a notice of disallowance of the Determinations.

6.81 The Committee then presented a short report to the Senate about the matter. This was done by the Chair of the Committee at the time, Senator Patricia Giles. The Committee also wrote to the MPRA about the issues raised. The Minister replied to the Committee advising that he had asked DIR to cooperate fully with our inquiries and that the appropriate officers would appear before the Committee. The Minister also advised that he had asked DIR to provide the Committee with a paper on the matter as soon as possible.

6.82 The officers of DIR duly met with the Committee and received what can be described as an unsympathetic reception. As an aside, this meeting illustrated one of the great strengths of the Committee, which is its non-political and non-partisan operation. In fact, the officials were questioned most closely by the late Senator Olive Zakharov and by Senator Kay Patterson, who are from opposite sides of the political fence but who united here in their efforts to see an injustice corrected. Under questioning by Olive Zakharov an official advised that the administrators of the *Public Service Act 1922* had been aware of the problem for some 20 years and that about 30,000 people, alive and deceased, were affected. The gist of the official's answers were that there were now considerable administrative difficulties in identifying these people and the amounts to which they were entitled and in deciding a method of payment. The substance of the comments by members of the Committee were that these administrative difficulties was not such as to preclude action. The meeting concluded with the Committee asking the DIR officials to prepare another paper setting out ways in which as many people as possible who had been unfairly treated by the Determinations could be compensated.

6.83 This paper from DIR advised that the best option would be to deal with the problem by direct appropriation through the current budget process and that this would be the basis of a submission to the Minister. The Committee then wrote to the Minister advising that it would be satisfied if the DIR option was adopted, but noted that another option was to amend the Public Service Act. The Minister then wrote to the Committee advising that he had written to the Prime Minister asking that the matter be dealt with by special budget appropriation. The Prime Minister then advised that in view of the actions of the Committee and of equity issues, the budget would include a one-line appropriation of $2.7 million with a further $1.4 million in the next year. The Committee thanked the Minister for his cooperation and presented a full report to the Senate.

Outcome of case

6.84 This case illustrates a number of aspects of the operations of the Committee. First, it is an instance of the effectiveness of the Committee in carrying out its mandate from the Senate to ensure that legislative instruments do not infringe personal rights. Most significant of all, the matter was raised by an individual, whom the Committee was willing to protect even if he had been the only person affected. In fact it is clear that without intervention by the Committee a serious injustice would have continued and affected thousands. The next conclusion is that the Committee has an appropriate variety of techniques for ensuring a satisfactory outcome in such cases. Here the Committee wrote to the Minister, reported to the Senate, gave notices of disallowance of the offending provisions, asked for officials to attend upon it and asked for officials to prepare an options paper. The Committee's concerns were also communicated to the Prime Minister.

6.85 This matter also illustrates the high level of cooperation which the Committee receives from Ministers, with the Prime Minister, the Minister for Industrial Relations and the Minister for Finance all responding generously to its concerns. The reasons for this cooperation are, as mentioned previously, the non-partisan nature of its operations and secondly the fact that the Committee does not question policy, restricting itself to ensuring that legislative instruments do not breach personal rights or parliamentary propriety. The case also shows the flexibility of the Committee. The difficulty here could have been addressed either by amendment of the Act, by amendment of the Determinations or, as actually happened, by parliamentary appropriation. Any of these courses of action, which would have resulted in further parliamentary scrutiny, would have been acceptable.

6.86 The case also illustrates that the concerns of the Committee are not theoretical or speculative. Here tens of thousands of employees were treated unfairly over two decades. The actions of the Committee removed a real and not a possible injustice. This matter also illustrates how the Committee complements and reinforces other agencies whose charter is to protect personal rights. For instance, the Committee ensures that discretions in legislative instruments will, where appropriate, be subject to review by the Administrative Appeals Tribunal. On other occasions the Committee has asked that certain matters should be referred to the Administrative Review Council and the Auditor-General. In the present case the Committee took account of findings by the MPRA. The Committee does not act in isolation but cooperates with other bodies whose function is to achieve the same outcomes as the Committee.

6.87 The case also illustrates the insistence of the Committee that the Explanatory Statement which, due to previous activities of the Committee, now accompanies every legislative instrument, should genuinely explain what the instrument does and why it was made. In the present case the Explanatory Statements were misleading and this was a significant deficiency. Finally the case illustrates the need for openness, consultation and transparency, all of which were grievously lacking in the process and substance of the two Determinations.

Parliamentary propriety

6.88 The previous case illustrates a breach of personal rights by the executive, which was corrected by the Committee. Breaches of parliamentary propriety, however, present different problems and the following case studies are instances of these.

6.89 The Tenth Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons among other things corrected some substantive errors in earlier deeds. The Explanatory Statement, however, advised that the Deed was administered to produce the intended outcomes pending the present corrections. The Committee wrote to the Minister noting that the scheme had been administered in the form it was intended, rather than the form in which it actually existed after being legally made under the authority of an Act of Parliament. The Minister wrote back advising that this was acceptable because the intended effect had been clearly set out in the Explanatory Statements for the earlier Deeds. The Committee wrote again to the Minister, asking under which provisions of Commonwealth law this had been done. At the Committee's suggestion the Minister then agreed to amend the enabling Act to validate the administrative actions.

6.90 There was a similar problem with some Rules under the *Life Insurance Act 1995*, which commenced on 18 September 1996. The Explanatory Statement, however, advised that the Rules would be administered as if they had taken effect on 1 January 1996 and that since that date the Rules had been administered according to their intent rather than their literal legal provisions. The Committee advised the Minister that this was a matter of some concern. If the Rules had no adverse effect on anybody then they could and should have been made retrospective to 1 January 1996. If, however, there were any adverse provisions then the amending Act should be amended to provide for prejudicial retrospectivity. The Committee emphasised that agencies should administer the actual provisions of legislation, not what the agency considered those provisions should be. The Minister then advised that he agreed with the Committee and that instructions had been given to apply strictly the earlier Rules and that a new Explanatory Statement would be produced which would be tabled in Parliament.

6.91 Excessive delay is making legislative instruments when it is appropriate to do so may be a breach of parliamentary propriety. The enabling legislation for the Heard Island Wilderness Reserve Management Plan provided that a Plan must be made as soon as possible after it commenced, which was 11 January 1988. The Plan was not made, however, until 11 September 1995, more than seven years later. In reply to the Committee's query, the Minister advised that the delay was due to extensive, protracted and difficult consultation with interest groups. The Committee also raised the question of delay in relation to the Australian Pork Corporation Regulations, which provided a legal basis for that Corporation to pay pay-roll tax. In response to the Committee's query the Minister advised that the Corporation had been paying this tax for nine years although under no legal obligation to do

so. The Committee advised that it was concerned that a Commonwealth agency had for years mistakenly paid these State and Territory taxes because of a failure to make the necessary legislative instrument.

Personal rights and parliamentary propriety

6.92 The next case raises issues of personal rights as well as parliamentary propriety. In the last 10 years regulations made under a variety of Acts have implemented United Nations total or partial sanctions against a number of countries, initially Iraq and Kuwait and then Yugoslavia and Libya. These presented especial difficulties for the Committee. The sanctions on their face affected personal rights to travel, while restrictions on imports, exports and foreign exchange transactions would affect adversely the right to earn a living. Also, the scheme of the sanctions was similar in each case, being a general prohibition subject to exemption by the Minister. In such cases this may be a breach of personal rights if there is no independent, external review of these decisions. Also, importantly, the regulations could have breached parliamentary propriety, in that they may have been more suitable for inclusion in a Bill which would be subject to all of the safeguards of parliamentary passage. In addition, the regulations were unusual in that their provisions were not directly authorised by the enabling Act or any other Act. Rather, the sanctions were the consequences of United Nations resolutions with which international law obliges Australia to comply.

6.93 The Committee scrutinised these regulations in the usual way and at first glance they appeared to be a case where the matters dealt with should be included in an Act rather than be prescribed by regulations. However, the Committee took advice that Australia had a legal obligation to comply with sanctions imposed by the United Nations. As such the regulations did not impose any new duties but instead merely spelt out the details of duties which already existed. They therefore came within the classic function of legislative instruments and were acceptable as regulations rather than an Act. In relation to merits review of the discretions in the regulations, the Committee ascertained that these generally had to be exercised personally by the Minister; delegation was not possible. In such cases the Committee usually does not press for merits review. Also, in the circumstances, the regulations did not appear to operate harshly on individuals.

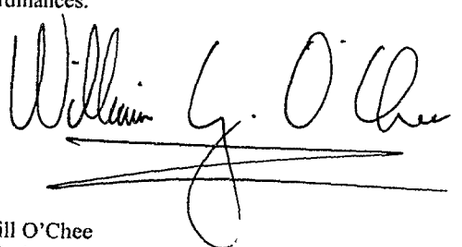
6.94 In fact, the regulations illustrated the speed and flexibility which are among the main advantages of legislative instruments, implementing the United Nations sanctions faster than would normally be the case if done by Act. For instance, the initial three sets of regulations imposing sanctions on Iraq and Kuwait were made on 8 April 1990, only two days after the relevant United Nations resolutions. The initial regulations in relation to Yugoslavia were made on 2 June 1992, three days after the resolution.

6.95 The report of the Committee in these regulations was the inspiration for the *Charter of the United Nations Amendment Act 1993*, which provides almost entirely for the power to make regulations. The Minister's second reading speech and the Explanatory Memorandum both referred positively to the Committee's findings. The Minister explained that under the existing legislation it was not possible to apply strict new sanctions against Yugoslavia. For instance, it was not possible to freeze funds held in Australia by companies based in Yugoslavia. The new Act would give power to do this. In the five years that the amendments have been in force regulations have imposed sanctions upon Yugoslavia, Angola, Haiti, Libya, Bosnia and Herzegovina, Rwanda and Sierra Leone.

Conclusion

6.96 As noted earlier, the theme of this session of the Forum is accountability and this paper has examined the broader aspects of the general accountability of the executive and the judiciary to Parliament, noting that in the case of the executive such accountability is total in the context of responsible government. In relation to the judiciary the paper noted that the Parliament controlled important aspects of the operation of the High Court and that the other federal courts were mere creations of Parliament. The accountability of the executive and the judiciary for legislative instruments made under the authority of Acts of Parliament is even greater, with the Standing Committee on Regulations and Ordinances exercising a mandate from the Senate to ensure that such instruments meet the highest standards of personal rights and parliamentary propriety. It should be noted that the Senate has never failed to accept a recommendation from the Committee in relation to disallowance of a legislative instrument, although this step is rarely necessary. In fact, it has been more than three years since the Committee resolved formally to recommend disallowance of a regulation unless the Minister on that same day undertook to amend it. In that case the Minister did so.

6.97 It is appropriate to close with a quotation from the late Senator Ian Wood, who was a member of the Committee for 28 years and Chairman for 22 years. In successfully moving for the disallowance of a legislative instrument Senator Wood referred (Hansard, Vol S49, 17 August 1971, p.195) to a reported quotation from Sir Robert Garran, a counsel who helped draft the Constitution and the first Commonwealth Solicitor-General, that the Regulations and Ordinance Committee was the most important in Parliament, because "Its duty was to see that Parliament ran the country with legislation, not the Executive with regulations and ordinances."



Bill O'Chee
Chairman

A Classification of Legislative Instruments under the heading 'Miscellaneous' in paragraph 1.8

Aboriginal and Torres Strait Islander Commission Declaration	1
Aboriginal and Torres Strait Islander Commission Rules	1
Accounting Standards	7
ACT National Capital Plan	3
Actuarial Standards	2
Amending Deed Occupational Superannuation Scheme	1
Australian National Railways Agreements	2
Broadcasting Services – Notices	5
Chemical Weapons determination	1
Commonwealth Procurement Guidelines	1
Currency Act – Determinations	6
Employment Services Act – Determinations	2
Endangered Species Declarations	4
Export Control Act – Orders	16
Export Market Development Grants Act – Determinations	7
Financial Management and Accountability Act – (1 order, 6 determinations)	7
High Court Rules	1
Income Tax Assessment Act – Determinations	17
Insurance Act (Approvals, Determinations, Rules)	5
Insurance Agents and Brokers Act – Approval	1
Military and Superannuation Benefits Trust Deeds	2
Motor Vehicle Standards	1
National Environment Protection Council Measure	1
Native Title Determination	1
Parliamentary Presiding Officers' Determinations	2
Privacy Determination	1
Private Health Insurance Principles	1
Retirement Savings Account Act – Determination	1
Safety, Rehabilitation and Compensation Act – Notices	12
Seafarers Rehabilitation and Compensation Act – Seacare Authority Notice	1
Social Security instruments	5
States Grants Petroleum Products Amendment	1
Student and Youth Assistance Act – (Directions, Determinations)	3
Superannuation Acts – Determinations	10
Sydney Airport Demand Management – Determination	1
Sydney Airport Slot Management Scheme Determination	1
Wildlife Protection Declarations	2
Total	**136**

B Disallowable Instruments tabled in the Senate 1997-98

During the year 1997-98 there were 1888 disallowable legislative instruments considered by the Committee. Of these, 454 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 1434 instruments are generally less accessible, possessing less advantages than statutory rules. These other series are listed as follows:

Aboriginal and Torres Strait Islander Commission Act 1989	rules (zone election), s.138
Aboriginal and Torres Strait Islander Heritage Protection Act 1984	declarations, s.9
Aged Care Act 1997	principles, s.96-1
Aged or Disabled Persons Care Act 1954	determinations, s.10
Audit Act 1901	guidelines, s.73
Australian Capital Territory (Planning and Management) Act 1988	territory plans, s.21
Australian Communications Authority Act 1997	determinations, s.53
Australian National Railways Commission Sale Act 1997	agreements, s.67AZR
Broadcasting Services Act 1992	notices, s.31
Child Care Act 1972	guidelines, ss. 2.6,4C,4E,12A directions, s.12H
Childcare Payments Act 1997	guidelines, s.18
Childcare Rebate Act 1993	determinations, s.28 directions, s.39B

Christmas Island Act 1958	list of Acts of Western Australian Parliament, s.8B ordinances, s.10 orders, s.8G
Civil Aviation Act 1988	orders, s.98(5) amendments, r.252 exemptions, r.308
Cocos (Keeling) Islands Act 1955	list of Acts of Western Australian Parliament, s.8B ordinances, s.13
Corporations Act 1989	accounting standards, s.32
Currency Act 1965	determinations, s.13A
Customs Act 1901	instruments of approval, s.4A business plans, reg.71
Defence Act 1903	determinations, ss.52,58B notices, reg.49
Employment Services Act 1994	determinations, s.37
Endangered Species Protection Act 1992	declarations, s.18
Export Control Act 1982	orders, s.25
Export Market Development Grants Act 1974	approvals, s.40BH determinations, ss.13K,68
Farm Household Support Act 1992	schemes, ss.52A,52B
Fisheries Management Act 1991	determinations, s.17 directions, s.17 management plans, s.17
Financial Management and Accountability Act 1997	determinations, ss.20,21 orders, ss.49,63
Health Insurance Act 1973	declarations, s.124X determinations, s.3C guidelines, s.20AB instruments, s.3GC

Hearing Services Act 1988	determinations, s.8
Hearing Services Administration Act 1997	determinations, s.5 rules, s.17
Hearing Services and AGHS Reform Act 1997	determinations, s.94
Higher Education Funding Act 1988	determinations, ss.15,16,24,27A guidelines, ss.20A,27
Imported Food Control Act 1992	orders, s.16
Income Tax Assessment Act 1936	declarations, s.159UB determinations, ss.82CE,159UF notices, s.159UD
Income Tax Assessment Act 1997	determinations, s.30-240 guidelines, s.30-235
Insurance Act 1973	determinations, ss.44,49J,68 rules, s.70
Insurance (Agents and Brokers) Act 1984	approval of forms, s.9C
Jervis Bay Territory Acceptance Act 1915	ordinances, s.4F
Judiciary Act 1903	rules of court, s.86
Life Insurance Act 1995	actuarial standards, s.101 Commissioner's rules, ss.117,244
Meat and Live-stock Industry Act 1995	orders, s.68
Military Superannuation and Benefits Act 1991	trust deeds, s.5
Motor Vehicle Standards Act 1989	determinations, s.7
National Environment Protection Council Act 1994	protection measures, s.14
National Health Act 1953	declarations, s.85 determinations, ss.85,98,99, schedule 1 para (bj) notices, s.40AA principles, ss.40AA,48,
National Parks and Wildlife Conservation Act 1975	plans of management, s.12
Native Title Act 1993	determinations, s.202

Navigation Act 1912	marine orders, s.19 revocation of order, s.422A
Pasture Seed Levy Act 1989	declarations, s.9
Plant Breeder's Rights Act 1994	instrument of approval, s.7
Privacy Act 1988	determinations, s.18K
Private Health Insurance Incentives Act 1997	principles, s.12
Public Service Act 1922	determinations, s.82D determinations (FAT), s.82D determinations (LES), s.82D determinations (SES), s.82D determinations (Parliamentary), s.9
Quarantine Act 1908	determinations, s.86E
Radiocommunications Act 1992	declarations, s.153B determinations, ss.98,107 plans, s.34
Radiocommunications (Receiver Licence Tax) Act 1983	determinations, s.7
Radiocommunications (Transmitter Licence Tax) Act 1983	determinations, s.7
Remuneration Tribunal Act 1973	determinations, ss.7,8,37
Rice Levy Act 1991	specifications, ss.3,6
Safety Rehabilitation and Compensation Act 1988	notices, ss.4,5
Seat of Government (Administration) Act 1910	ordinances, s.12
Social Security Act 1991	determinations, ss.198,1069,1157 rules, s.1061ZX
States Grants (Petroleum Products) Act 1965	amendments, s.4
Student Assistance Act 1973	determinations, s.7 directions, s.338A
Superannuation Act 1976	determinations, ss.238,240,241

Superannuation Act 1990	deeds, s.5
Superannuation Industry (Supervision) Act 1993	determinations, s.153
Sydney Airport Demand Management Act 1997	determinations, ss.40,54
Telecommunications Act 1991	determinations, s.242 notices, s.246
Telecommunications Act 1997	codes, s.6 declarations, s.63 determinations, ss.7A,51,95,99, 236,265,468 notices, s.376 plans, ss.455,465 standards, s.234
Telecommunications (Interception) Act 1979	declarations, s.34
Telecommunications (Numbering Charges) Act 1997	determinations, ss.20,22
Telstra Corporation Act 1991	determinations, ss.20,21,23
Therapeutic Goods Act 1989	determinations, s.19A orders, s.10
Veterans' Entitlements Act 1986	determinations, s.115B instruments, ss.5JA,52B guide to assessment of rates, s.29 principles, s.196B
Wildlife Protection (Regulation of Exports and Imports) Act 1982	declarations, s.9

C Alphabetical index of legislation and delegated legislation with page references

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