THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

REPORT ON SCRUTINY BY THE COMMITTEE OF ORDERS MADE UNDER THE *FINANCIAL MANAGEMENT AND ACCOUNTABILITY ACT 1997*

ONE HUNDRED AND SEVENTH REPORT

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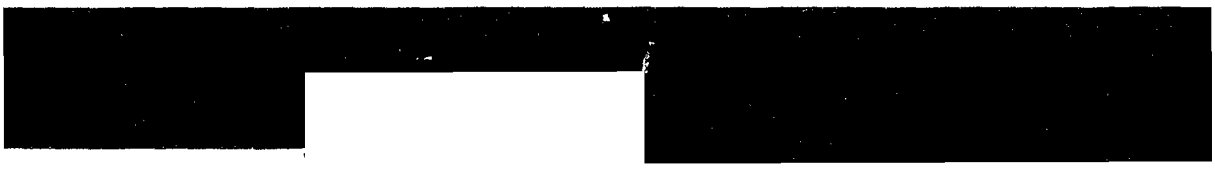

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

Senator Bill O'Chee (Chairman)
Senator Andrew Bartlett
Senator Helen Coonan
Senator Brenda Gibbs
Senator Stephen Hutchins
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.

Introduction

The Standing Orders require the Standing Committee on Regulations and Ordinances to scrutinise delegated legislation to ensure that it complies with four principles, which are reproduced at the start of this and every other report of the Committee. The fourth of these principles is that an instrument does not contain matter more appropriate for parliamentary enactment. This principle is not raised by the Committee as often as its other principles, but it is an important element of parliamentary propriety, complementing the first principle, which is that an instrument must be in accordance with the statute.

This Report describes scrutiny by the Committee of Orders made under the *Financial Management and Accountability Act 1997*, the substantive part of which was six lines long. The Orders established a managed insurance fund called Comcover to insure or arrange insurance for all specified insurable losses of Commonwealth agencies and entities except those already covered by Comcare. Background material obtained by the Committee, which was not tabled with the Orders, advised that Comcover would be a comprehensive disciplined managed fund, collect premiums, accumulate reserves, meet losses out of reserves, be modelled on the best managed funds in Australia and overseas, improve accountability and transparency to the Parliament, deliver a dividend to the government at least comparable to industry standards and adopt a business-like approach to the government's insurance and risk management arrangements through the provision of services at competitive market rates. The Committee considered that the establishment of such an operation may have been more appropriate for parliamentary debate and passage, particularly since an analogous entity, Comcare, was established by detailed statutory provisions.

The Report describes extensive correspondence between the Committee and the Minister, the appearance before the Committee of the head of Comcover and a meeting between the Chairman of the Committee and the Minister, following which the Minister undertook to amend the Orders to meet the Committee's concerns.

CHAPTER 1

MATTER MORE APPROPRIATE FOR PARLIAMENTARY ENACTMENT

The *Seventy-seventh Report* of the Committee, Legislation considered July 1984 - June 1985, March 1986, included a list of criteria which the Committee will consider in deciding whether delegated legislation includes matter more appropriate for parliamentary enactment. These included cases where delegated legislation:

- manifests itself as a fundamental change in the law, intended to alter and redefine rights, obligations and liabilities;
- is a lengthy and complex legal document;
- introduces innovation of a major kind into the pre-existing legal, social or financial concepts;
- impinges in a major way on the community;
- is calculated to bring about radical changes in relationships or attitudes of people in a particular aspect of the life of the community;
- is part of a major uniform, or partially uniform, scheme which has been the subject of debate and analysis in one or more of the State or Territory Parliaments but not in the Commonwealth Parliament; and
- takes away, reduces, circumscribes or qualifies the fundamental rights and liberties traditionally enjoyed in a free and democratic society.

The Committee also reported that if any of these characteristics were present then it may invite the Minister to introduce a Bill to provide for the matter in question. Also, the more of these criteria that are present, the greater the likelihood that this will happen. These criteria were, however, not exhaustive, the essential issue being whether the executive has made a legislative instrument on a matter or in circumstances which calls for parliamentary debate and decision. The criteria have been applied in a number of cases since then.

The *Eighty-ninth Report* of the Committee, Report on scrutiny by the Committee of regulations made under the *Sex Discrimination Act 1984*, October 1991, reported on the exercise of a power in the enabling Act to exempt by regulation any Commonwealth, State or Territory Act from the provisions of the enabling Act, which was intended to promote recognition and acceptance within the community of the principle of the equality of men and women. The Committee had raised concerns about regulations which exempted indefinitely specified legislation from the operation

of the Act. This was in contrast to other regulations which merely provided for exemptions for six months and 12 months. This concern led to the Minister agreeing to amend the regulations to provide for a two year period of exemption. The Committee also suggested that any further exemptions might best be done by parliamentary enactment and not by regulations. At the end of this period, however, the regulations extended the exemptions for a further 12 months, prompting the Committee to request and to receive from the Minister acceptance in principle that it would not be desirable to continue to extend exemptions from the Act by regulation. Nevertheless, at the end of this period further regulations extended the exemptions by another 12 months, following which the Committee obtained definite agreement from the Minister that the most appropriate way of dealing with exemptions was by amendment of the Act. Unfortunately the Minister considered it necessary to extend the exemptions by regulation yet again, but the Minister did write to the Committee advising that he had put in train action to amend the Act which should ensure that no more such regulations were necessary. The Committee then asked for departmental officials to brief it on details of the proposal, following which it advised the Minister that it looked forward to the expiry of the regulations which would bring to an end seven years of extension by executive action of discriminatory legislation in Australia.

The *Ninety-third Report* of the Committee, Report on scrutiny by the Committee of regulations imposing United Nations sanctions, December 1992, examined the 19 sets of regulations which implemented sanctions against Iraq, Kuwait, Libya and Yugoslavia in relation to whether these should have been addressed by Act. The Committee reported that its task was more difficult in this case because the sanctions were not imposed by an enabling Act but as a consequence of United Nations resolutions with which the Executive resolved Australia was obliged to comply under international law. The Committee reported that at first glance the matters in the regulations appeared to be more appropriate for an Act, because they included important policy decisions, imposing total or partial sanctions on exports and imports, foreign exchange, air navigation and migration, on four countries with whom Australia maintained diplomatic relations and which were fellow members of the United Nations.

In this case, however, the Committee was satisfied that the subject matter of the regulations was appropriate. The Committee accepted advice from the Minister that Australia had an obligation under international law to comply with Security Council resolutions. As such the regulations provided for details of existing legal duties, which is the classic function of delegated legislation. The Committee also took into account the speed and flexibility with which the regulations were made, which is one of the advantages of delegated legislation. The Committee noted that regulations were made two days after one resolution and three days after another resolution. There were also frequent amendments to implement changes in United Nations requirements, which may not have been suited to parliamentary passage. (See also the statement by Senator Loosley on behalf of the Committee, 27 May 1993, Senate Weekly Hansard, p.1014, in relation to the Charter of the United Nations Amendment Bill 1993. The second reading speech and Explanatory Memorandum for that Bill referred in positive terms to the work of the Committee.)

The Committee has also applied the criteria relating to parliamentary enactment in the following circumstances:

- the establishment of an entire new administrative scheme by regulations, replacing an existing scheme that was included in the Act;
- provision in the regulations for decisions to be made by officials on the grounds of nationality, sex, age and marital status;
- substantial constitutional change to Norfolk Island;
- fundamental changes to the laws of Christmas Island and the Cocos (Keeling) Islands;
- an extension of the circumstances under which employees of Australia Post may disclose information, including disclosure to ASIO and law enforcement agencies (see special statement by Senator Bishop on behalf of the Committee, 3 November 1992, Senate Weekly Hansard p. 2055);
- a power in regulations to alter radically the jurisdiction of a tribunal;
- an offence relating to the protection of wildlife being provided for by regulations, under which a penalty of only $1,000 could be imposed, instead of under the Act, which included penalties of $50,000;
- regulations which provided for the censorship of books, magazines, films and computer games;
- regulations which provided for a code of conduct and whistleblowing in the Australian Public Service (see special statement by Senator O'Chee on behalf of the Committee, 30 June 1998, Senate Hansard p.4438);
- regulations which prohibited the advertising of natural remedies as drug free (see special statement by Senator O'Chee on behalf of the Committee, 30 June 1998, Senate Hansard p.4438);
- qualifications of people authorised to carry out intimate forensic procedures on suspects provided by regulations.

CHAPTER 2

THE ENABLING ACT

The purpose of the *Financial Management and Accountability Act 1997* ("the Act"), which received assent on 24 October 1997, was to provide a framework for the proper management of public money and public property. It established an accounting system for public assets and also provided rules for dealing with them. The Reader's Guide which accompanied the Act advised that many detailed rules would also be provided in the regulations and in the Finance Minister's Orders.

The Act provided for important matters affecting its operation to be provided for by legislative instruments. Some of these were as follows:

- the definition of "agency", which was a keystone of the entire Act, provided for any agency at all to be prescribed, including any body, organisation or group of persons;

- the Minister could issue Special Instructions about special public money, which were subject neither to tabling nor disallowance, breach of which was punishable by imprisonment for two years. The Act provided expressly that in case of inconsistency Special Instructions override the Act, the regulations and the Finance Minister's Orders;

- the Minister could make determinations about the Reserved Money Fund and the Commercial Activities Fund which were required to be tabled, although there was no period within which this had to be done. Disallowance was possible only within five sitting days of tabling, instead of the usual 15, although there was a safeguard in that the determinations only took effect after the disallowance period;

- regulations could exempt any money from the section of the Act providing for uncommitted advances to lapse at the end of the appropriation period;

- the definition of "authorised investment" included any investment at all prescribed by the regulations;

- the regulations could authorise Chief Executives to give instructions to officials in their agencies on any matter on which regulations may be made;

- the regulations could modify the Act in its application to any intelligence or security agency by adding, omitting or substituting any provision;

- the Minister could make Orders on any matter expressly authorised by the Act or on any matter on which regulations may be made. These Orders are disallowable instruments;

- the regulations could provide both for the usual matters required, permitted, necessary or convenient to give effect to the Act and in particular for other listed matters;

- the regulations could provide for offences with a penalty of 10 penalty units.

Regulations and Orders were then made to commence at the same time as the Act. The nature of these instruments was such that it would not have been possible for the Act to operate effectively without them. The Committee scrutinised these in the usual way and wrote to the Minister about a number of deficiencies. These included provisions for important guidelines which were not subject either to tabling or disallowance, a lack of protection for people with an interest in property dealt with by the Commonwealth, absence of Administrative Appeals Tribunal review and delegation of power which appeared to be legislative rather than administrative. In these cases, however, the Minister provided an explanation which satisfied the Committee.

In all, seven sets of regulations and 14 other disallowable instruments were made under the Act up to the end of February 1999, but the only one which caused further concern was the **Financial Management and Accountability Orders 1998 (Amendment)**, made under s.63(1)(b) of the Act. The Committee's scrutiny of these Orders is the subject of this Report.

CHAPTER 3

SCRUTINY BY THE COMMITTEE

The **Financial Management and Accountability Orders (Amendment) 1998** were made by the Minister for Finance and Administration, the Hon John Fahey MP, on 24 June 1998 and expressed to commence on 1 July 1998. The substantive part of the Orders, which in the original print was six lines long, read as follows:

Comcover

6.3.1 A managed insurance fund to be known as Comcover will be established within the Department of Finance and Administration.

6.3.2 Comcover will indemnify, or arrange indemnity, for all member organisations in respect of all insurable losses, except employers' liability risks already covered by Comcare, specified in writing by Comcover to each member organisation. It will also promote transparency, accountability, and the better management of the Commonwealth's insurable risks.

The substantive part of the Explanatory Statement which accompanied the Orders was also very brief.

The Committee's Legal Adviser, Professor Jim Davis, scrutinised the Orders and prepared a report for the Committee.

After considering the report the Committee decided to write to the Minister. The Committee's concern at this stage was that it had virtually no information about the nature and operation of Comcover, apart from the fact that it appeared to be a substantial financial operation set up by the briefest instrument. The Committee noted that Comcare, to which the Orders expressly referred, was established by detailed provisions of an Act and it seemed appropriate to ask why Comcover was not similarly set up by primary legislation. The Committee wrote to the Minister along these lines on 27 August 1998.

On 23 November 1998 the Minister replied, as follows:

Senator Bill O'Chee
Chairman
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator O'Chee

Thank you for your letter of 27 August 1998 to the Hon John Fahey MP, Minister for Finance and Administration, seeking information about the

Financial Management and Accountability Orders (Amendment) 1998 establishing Comcover. Under the new Ministerial arrangements, I have been given responsibility for Comcover matters.

Accurate information on the size and nature of the Commonwealth's insurable risks is not available as there has been no systematic collection of such information since Federation. Indeed, one of the principal reasons for establishing Comcover is to provide a mechanism for capturing and recording this information. Seeding funds of $70 million were set aside in the 1998/99 Budget for the establishment of Comcover, but work is currently under way to more accurately assess the size of the risk pool.

The ultimate objective of Comcover is to reduce the cost of the Commonwealth's insurable risks. It will underwrite, and assist in the management of, the general insurance risks of over 150 Commonwealth bodies in the General Government Sector. I attach a copy of Comcover's Charter for your information.

I note the Committee's view that it might have been more appropriate to establish Comcover through primary legislation. However, Comcover is an administrative unit in the Department of Finance and Administration promoting policy objectives already established in the FMA Act, and I am advised that the Order provides it with the necessary level of authority.

With regard to the Attachment referred to in your letter, I understand that this matter has been resolved between your Committee's Secretary and the Parliamentary Liaison Section of the Department of Finance and Administration.

Yours sincerely

Chris Ellison

The Minister's letter attached a copy of the Charter for Comcover, which was two pages long.

The Committee considered the reply and decided to write again to the Minister as the Committee was still concerned that it did not have sufficient detail to decide on its core concerns about whether Comcover should be set up by Act.

In addition, the Charter for Comcover revealed other problem areas. These were that, first, the nature of the fund may have been such that it was beyond the power provided in the enabling Act. Secondly, the Charter expressly referred to improved accountability to the Parliament, but there was no provision for this either in the Orders, the Explanatory Statement or the Charter.

On 30 November 1998 the Committee accordingly wrote to the Minister as follows:

Senator the Hon Christopher Ellison
Special Minister of State
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 23 November 1998 on aspects raised by the Committee of the Financial Management and Accountability Orders (Amendment) 1998, which establishes Comcover.

The Committee is grateful for your reply and for the attached Charter for Comcover, but would appreciate your further advice. The Orders themselves, together with the Charter, seem to indicate a substantial commercial type operation, including the collection of premiums, accumulation of reserves and payment of claims out of those reserves. This will include a managed fund, based on the best managed funds in Australia and overseas, which will deliver a dividend to the government at least comparable to industry standards. Fund operations will include outsourced service providers. Seed money was $70 million.

The Committee would appreciate your advice on which provisions of the enabling Act provide the power to establish and operate such a Fund. The Act does not appear to contemplate such a substantial operation and the second reading speech made no mention of it. Indeed, the second reading speech advised that Orders would be used for the day-to-day application of the principles in the Act, not to establish major financial bodies. Moreover, it may be that the creation of a Fund results in certain trustee obligations not originally contemplated in the Act.

The Committee would appreciate further information on the scope of operations of Comcover. In particular, on behalf of which bodies is it proposed that the Fund would act? While it would be one thing for the Fund to insure various Government Departments, it would be quite another to undertake functions on behalf of statutory bodies or government business enterprises, or to owe an indirect obligation to other persons or corporations.

The Committee assumes that within the terms of their enabling Acts, statutory authorities and government business enterprises would be free to choose their own insurance companies. Is it intended to compel any Commonwealth agencies to use Comcover or will they be able to take advantage of competition from other suppliers of insurance services?

The Committee would be grateful for your advice on what is the industry standard of return to which the Charter refers and for confirmation that it is intended that Comcover will make profits at this level.

The Charter refers to the Comcover Advisory Board, for which the Orders do not appear to provide. What is this Board, who appoints it and what are its powers? Does the Parliament have any input to the appointment process? Is the Parliament informed of the composition of the Board?

The Committee would also appreciate further information on the reasons why Comcover will be a unit of the Department while Comcare is a separate authority established by an Act, with detailed provisions addressing its functions, powers, relations with the Minister, staffing, finance and operations. In this context Comcover will apparently be responsible for all Commonwealth insurable losses except employers' liability risks already covered by Comcare. The Orders expressly refer to transparency and accountability and it seems anomalous that part of Commonwealth insurance will be covered by elaborate statutory provisions while the rest is covered by six lines in a legislative instrument.

The Committee would also like further information on the accountability to the Parliament to which the Orders and the Charter expressly refer. How is it intended that Comcover should be accountable to Parliament? Is it intended that parliamentary oversight be limited only to that which applies generally to government departments? Will Comcover report separately to Parliament on its activities? The Committee would appreciate full advice on this aspect of the Charter for Comcover.

Yours sincerely

Bill O'Chee
Chairman

On 7 December 1999 the Minister replied to the Committee as follows:

Senator Bill O'Chee
Chairman
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator O'Chee

Thank you for your letter of 30 November 1998 seeking information on matters raised by the Committee about the Financial Management and Accountability Orders (Amendment) 1998 and the Government's decision to establish Comcover.

At the outset I should make it clear that, while I appreciate that the Committee could have formed a different impression from its reading of the Comcover Charter, Comcover is not in fact a substantial commercial operation or a major financial body. On the contrary, Comcover has been established as an administrative arrangement internal to government for the primary purpose of assisting agencies to better identify and manage their risks.

In November 1997, the Government decided to establish Comcover (a self-insurance arrangement) as an administrative unit within the Department of Finance and Administration (DOFA), rather than continue with the previous policy of non-insurance. The fundamental difference between self-insurance and non-insurance is that a self-insurance arrangement systematically identifies (and makes advance provision for) risks whereas under a non-insurance arrangement losses are met as they arise.

The *Comcover Reserve* was put in place as a component of the Reserved Money Fund by a Determination under Section 20 of the *Financial Management and Accountability Act 1997* (the FMA Act,) in April 1998. Comcover commenced operations on 1 July 1998.

The intention of the Order issued by the Minister for Finance and Administration under Section 63 of the FMA Act was that, in the absence of a traditional insurance contract between Comcover and its members, a number of members would not have been satisfied (and would not have been able to satisfy third parties with whom they deal) that valid claims would always be paid. The Order is intended to remove any discretion that might have been available to Comcover to deny payment of valid claims, and to provide the certainty of cover required by its members.

In terms of the other matters you have raised, I am advised as follows:

- In taking its decision to establish the Fund, the Government determined that Comcover's services would extend to approximately 150 members in the General Government Sector (a list of members is attached for the Committee's information). It will not cover Public Trading Enterprises or Public Financial Enterprises. This approach aims to maximize the economic benefits of pooling the risks of the greatest number of Commonwealth organisations practicable.

- The $70 million identified in the 1998/99 Budget represents an estimate of the level of premiums agencies would pay to Comcover and for which they would be supplemented. Comcover will have no investment powers. Member contributions will be set aside to meet operating expenses and overheads, as well as allowing for the gradual accumulation of sufficient reserves to fully fund its risks. A notional interest rate (yet to be determined) would be applied to generate earnings. Any surplus would be returned to the Budget.

- The expectation is that Comcover will be budget neutral in the long term, with dividends being returned to the Budget in terms of lower costs of risk delivered through improved risk management across the Commonwealth. Comcover's performance will be benchmarked against the results achieved by similar managed funds in the private and public sectors (most State governments have or are establishing similar arrangements).

- You ask why Comcover has not been established as a separate authority as in the case of Comcare. I am advised that Comcare was established as a

statutory authority because of its regulatory responsibilities for the *Safety Rehabilitation and Compensation Act 1988* and the *Occupational Health and Safety (Commonwealth Employees) Act 1991*. Comcover has no such regulatory responsibilities and a managed fund structure was adopted following examination of the various types of managed fund arrangements used by State and Territory governments, and by the corporate sector.

- The Comcover Advisory Board advises the Minister on the extent to which Comcover is meeting its objectives. Members are appointed by the Minister for Finance and Administration for a period of up to 3 years. The Board has no specific powers and its role is purely advisory in nature.

- In terms of accountability, Comcover will be subject to the same provisions as a Department of State. It will report annually through the Department of Finance and Administration's Annual Report, and will be subject to scrutiny by the Parliament through Senate Legislative Committees and other Committees of the Senate and the House of Representatives.

I hope that this information satisfies the needs of the Committee. I would be pleased to arrange for officers of the Department of Finance and Administration to meet with the Committee if there are any matters on which it requires further clarification.

Yours sincerely

Chris Ellison

After considering this reply the Committee believed that its key concerns had still not been resolved. It therefore decided that a briefing would be useful and on 10 December 1998 two senior officials of the Department, including the head of Comcover, met with the Committee to discuss its concerns. The Committee is grateful to the Minister for releasing these officers. The Committee was, however, still not satisfied with the position and wrote again to the Minister on 17 December 1998, as follows:

Senator the Hon Christopher Ellison
Special Minister of State
Parliament House
CANBERRA ACT 2600

Dear Minister

Thank you for your letter of 7 December 1998 on aspects raised by the Committee of the Financial Management and Accountability Orders (Amendment) 1998. Officials of your Department have now briefed the Committee and we would be grateful if you could convey our thanks to them. The briefing assisted the Committee but we would appreciate your further advice on the following matters.

The Committee remains concerned at the validity of the operation of the Orders. The Committee accepts that the position may be valid in relation to *Financial Management and Accountability Act 1997* agencies, but this may not be the case for *Commonwealth Authorities and Companies Act 1997* bodies. The list of CAC Comcover bodies which you gave to us appears to include many agencies set up by Act of Parliament, with functions and powers provided by those Acts. The Orders themselves do not directly compel the CAC agencies to insure with Comcover, and the Committee was told by the officials that this was done by Executive direction.

The Committee would be grateful for your advices as to where such a power is to be found. It would not appear unreasonable that the Executive might be able to direct the operations of the bureaucracy. The author is unaware, however, of any power to direct, by Executive decree, the operations of statutory corporations. Moreover, the Committee would appreciate your advice on which provisions, if any, of the *Commonwealth Authorities and Companies Act 1997* authorise this and for your assurance that the direction does not conflict with or pre-empt any of the existing statutory responsibilities of the boards, councils and other governing bodies of these CAC agencies set up by Act.

The Committee is also concerned at other aspects concerning the legality of the present arrangements. As noted above, many of the CAC agencies are set up by Act of Parliament and numbers of these, particularly the primary industries and resources agencies, engage in commercial type activities or in support of those who do. These bodies are often funded not only by appropriations but also from their own operations, and the contributions of private sector individuals. In this context the Committee understands that public trading bodies are exempted altogether from membership of Comcover and that there may be CAC statutory bodies which are similar to those. It may also be a breach of parliamentary propriety to subject bodies set up by Act to important financial arrangements which are provided for in six lines of a legislative instrument.

In respect of the requirement to insure with Comcover, the Committee was told relevant bodies could seek an exemption from the Minister for Finance. The Orders, however, make no provision for exemptions, nor is it clear on what basis an exemption can be sought, nor whether the Minister's decision is reviewable.

The Committee would also appreciate your advice on the implications of Comcover for national competition policy. For instance, it may be that following an assessment of risk management for a CAC agency that it may wish to take advantage of competition between insurance providers to accept alternative cover.

The Committee emphasises that it accepts that the general exercise, of which the Orders form a part, appears to be a useful reform which will assist in the administration of risk management for public assets, particularly the systematic collection for the first time of information on the size and nature of

the Commonwealth's insurable risks. The Committee would, however, appreciate your advices to matters raised herein. Until a satisfactory resolution of the Committee's concerns is achieved, the Committee is unable to report to the Senate that the Orders are acceptable.

Yours sincerely

Bill O'Chee
Chairman

On 20 January 1999 the Minister replied to the Committee as follows:

Senator O'Chee
Chairman
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator O'Chee

Thank you for your letter of 17 December 1998 concerning the Financial Management and Accountability Orders (Amendment) 1998.

As indicated in my earlier correspondence the purpose of the Orders is not to establish Comcover as the Commonwealth's managed fund, or to compel any Commonwealth organisation to become a fund member. The purpose of the Orders is to do no more than make clear that Comcover has a responsibility to indemnify its members against certain insurable losses, and provide a basis for members to have confidence in the cover provided.

Against this background, it would appear that the concerns you raise about the establishment of Comcover relate more directly to policy decisions of Government and the administrative means by which the Government has sought to bring Commonwealth organisations into the fund, rather than the legal purpose or effect of the Orders per se.

In relation to the specific matters you canvass I am advised as follows:

The legal basis on which the Government can require organisations established under the *Commonwealth Authorities and Companies* (CAC) *Act 1997* to join Comcover is in Sections 28 and 43 of the Act, and in many cases, the legislation constituting particular CAC bodies. These provisions empower the responsible Minister to notify the directors of Commonwealth authorities of policies of the Commonwealth which are to apply to the authority.

No consideration has been given to date to invoking these provisions of the Act in relation to Comcover as CAC bodies have generally accepted the Government's decision. However, it is open to the responsible Minister to issue a notice to any CAC body directing it to become a member of Comcover after having first consulted with the directors of the body as required by

section 28 of the CAC Act should this become necessary. I am advised that this is unlikely to be the case and it is expected that any concerns will be resolved administratively.

Indeed, not all organisations approached by the department have become Comcover members, and agreement has been reached in a number of special circumstances that particular Commonwealth organisations will not participate in the fund.

In relation to your comments about the possible inclusion of an exemption mechanism in the Orders, I am advised that if the purpose and effect of the Orders was to compel certain bodies to become members of Comcover it may well have been appropriate to include provision for an exemption mechanism, as well as a process for Ministerial review. However, as there is nothing in the Orders obliging any organisation to become a Comcover member, the question of providing such safeguards in the Orders does not arise.

I now turn to the competitive neutrality issues raised in your letter.

The goal of Government policy on competitive neutrality is to eliminate resource allocation distortions arising out of the public ownership of significant business activities, and to ensure that public sector monopolies compete with the private sector in an appropriate market structure. Comcover is not a Government business enterprise and does not compete in the market place in the supply of insurance services. It is an in-house administrative arrangement, modelled on self-insurance schemes in the private sector, to improve the management of the Commonwealth's own insurable risks.

During the development of Comcover there were extensive consultations between the Department of Finance and Administration and the Treasury on the issue of competitive neutrality. These consultations concluded that there are no competition policy issues raised by the creation of Comcover.

Indeed, given the significant outsourcing arrangements involved, Comcover's net impact on private sector insurance service providers has been to create access to Government business which was previously not available to them.

I hope the Committee's concerns have now been fully addressed and that you can now see your way clear to report to the Senate that the Orders are acceptable.

Yours sincerely

Chris Ellison

Not withstanding the clarification of some earlier concerns, the Committee continued to take issue with certain aspects of the Orders, particularly their effect on CAC agencies established by Act, and suggested that the Chairman meet with the Minister to discuss the situation. Following this meeting the Minister wrote to the Committee on 11 March 1999 as follows:

Senator Bill O'Chee
Chairman
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator O'Chee

I refer to David Creed's letter of 11 March 1999 to Evan Lewis concerning the Financial Management and Accountability Order relating to the establishment of Comcover.

In view of the Committee's concerns, I undertake to amend the Orders to clarify that the Orders do not place any express obligation on CAC bodies to insure with Comcover. This would provide an assurance to all CAC members, including those funded in part or whole by a statutory levy, that they can be exempted from the Fund on a case by case basis. Bodies wishing to be exempted would, of course, need to put forward a case for exemption via their portfolio Minister.

In seeking to not be insured with Comcover these agencies would need to clearly indicate what alternative arrangements are proposed or in place.

Yours sincerely

Chris Ellison

The Committee agreed that this letter made it possible to remove its motion of disallowance, which the Chairman did on 23 March 1999. When giving notice that it would remove the notice the Committee advised the Senate that it was most grateful to the Special Minister for State, Senator Chris Ellison, for his cooperation, which demonstrated a commendable commitment to parliamentary propriety.

CHAPTER 4

CONCLUSIONS

The Committee's scrutiny of the **Financial Management and Accountability Orders 1998 (Amendment)** is a case study of action by it in relation to a legislative instrument which may have contained matter more appropriate for parliamentary enactment. As noted earlier, the Committee does not raise this principle as often as its other three principles, but it is nevertheless a fundamental element of parliamentary propriety, complementing its first principle, which is that the instrument is in accordance with the statute.

The case illustrates the thoroughness with which the Committee pursues a matter when it is not satisfied that a legislative instrument meets its principles. The present instrument was made on 24 June 1998 but the Committee did not finalise its scrutiny until it removed its notice of disallowance on 23 March 1999. During that time, which spanned two Parliaments, the Committee's actions demonstrated the range of steps and options available to it to achieve an acceptable outcome.

At first instance the Committee considered the report on the instrument prepared by its Legal Adviser, Professor Jim Davis, which drew its attention to possible deficiencies. Next, the Committee initiated a series of correspondence with the Minister. Most of the concerns about which the Committee writes to Ministers are concluded after a relatively brief exchange of letters, with the Minister either agreeing to amend the instrument or providing a satisfactory explanation.

In the present case, however, there were seven letters exchanged between the Chairman and the Minister, each of which involved a further stage in scrutiny by the Committee. This correspondence was, among other items, considered by six separate meetings of the Committee. In the course of its consideration the Committee also met with senior officials of the Department and, in order to preserve its options, placed a protective notice of disallowance on the instrument. Finally, the Chairman met with the Minister to discuss the matter.

These stages demonstrate that the Committee has a variety of responses available to it to ensure that instruments are of an acceptable quality, with sufficient flexibility to enable the Minister to achieve his or her policy objectives, but at the same time making sure that an instrument complies with parliamentary propriety and personal rights.

The case illustrates that the Committee will always question legislative instruments which are not accompanied by a proper Explanatory Statement or other suitable explanatory material. An Explanatory Statement is necessary for individual Senators to know the nature and purpose of instruments which are made under the authority of Acts of Parliament and which are subject to disallowance if either House so wishes. The Committee was largely responsible for the requirement, recognised by the Federal Executive Council Handbook, that proper Explanatory Statements should be

prepared. In 1997 the Handbook was amended at the suggestion of the Committee to refine further the provisions relating to Explanatory Statements, see Senate Hansard, 25 June 1997, p.5190. Also, in recent years there has been an administrative requirement for instruments affecting business to be accompanied by a detailed Regulation Impact Statement (RIS). This is a positive development and the Committee was recently briefed on RIS by the Chairman of the Productivity Commission and the head of the Office of Regulation Review, who administer the RIS guidelines. In the present case the Explanatory Statement was very brief and gave no real explanation of the operation and effect of the Orders.

The case illustrates that the Committee will, where appropriate, ask to question the public officials who administer the legislative instrument which is the subject of scrutiny. This step is not taken often by the Committee, because the nature of its concerns are usually such that they can be resolved by correspondence with the Minister. It should be noted that the Committee always corresponds personally with Ministers. The importance of its work is such that it does not accept replies from public servants. In some cases, however, there may be concerns which can be addressed best through direct personal contact with the relevant officials. Also, as in the present case, issues may arise during the course of the correspondence which makes direct contact with officials desirable. Officials who attend upon the Committee should be of a suitable level of seniority and the groups of officials in recent years who have assisted the Committee have been led by division heads or the permanent secretary.

The case also illustrates that in suitable cases the Committee will ask the Chairman to discuss the matter directly with the Minister. This step is usually taken only after extended correspondence or a meeting with officials. In such cases the Minister invariably agrees to take action to meet the concerns of the Committee. The reason for this cooperation is that Ministers know that the Committee does not raise the policy merits of a legislative instrument, being concerned only with parliamentary propriety and personal rights. Ministers also know that the Committee operates in a non-partisan fashion without any intrusion of party political issues. In the present case the Chairman met with the Special Minister of State, Senator the Hon Chris Ellison, to discuss the matter after the Committee agreed that it was unable to report that the instrument was acceptable. The Minister then agreed to take action which would satisfy the Committee. The Committee is grateful to the Minister for his personal attention, which demonstrates a commitment to high principles of responsibility to Parliament.

The Committee is able, therefore, to report to the Senate that, following its detailed scrutiny and the Minister's undertakings, the amended arrangements established by this instrument do not contain matter more appropriate for parliamentary enactment.

Bill O'Chee
Chairman
May 1999