

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

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**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

MEMBERS OF THE COMMITTEE

JULY 1990 - JUNE 1991

Senator Patricia Giles (Chair)²
Senator Bronwyn Bishop (Deputy Chairman)
Senator Mal Colston¹
Senator Bill O'Chee
Senator Kay Patterson
Senator Olive Zakharov

1. Resigned as Chair 18 October 1990 due to duties as Deputy President
2. Elected Chair 18 October 1990

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979)

The Committee scrutinises delegated legislation to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

CHAPTER 1

OVERVIEW AND STATISTICS

Introduction

1.1 The Senate Standing Committee on Regulations and Ordinances was established in 1932 and except for certain committees concerned with internal parliamentary matters, it is the oldest Senate Committee. Its functions, which are set out in the Standing Orders, are broadly to examine every disallowable instrument of delegated legislation tabled in the Senate to ensure that they comply with non-partisan principles of personal liberty and parliamentary propriety.

1.2 The Committee has six members with, as provided in Standing Orders, a government Chair and a non-government Deputy Chairman. The Committee is a non-partisan, technical legislative scrutiny Committee. That is, it does not look at the policy merits of delegated legislation. Rather, it applies parliamentary standards of scrutiny, backed by its power to recommend to the Senate that a particular instrument, or a discrete provision in an instrument, be disallowed. In the almost six decades of the Committee's existence the Senate has never failed to act on such a recommendation. However, this power is rarely invoked, as Ministers virtually always agree to amend delegated legislation or take other action to the Committee's satisfaction.

1.3 The general requirements of personal liberties and parliamentary proprieties which the Committee imposes upon delegated legislation are further refined by the Standing Orders into four Principles. These Principles, which appear at the start of this and every other Report of the Committee, are to ensure that delegated legislation -

- (a) is in accordance with the statute;
- (b) does not trespass unduly on personal rights and liberties;
- (c) 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) does not contain matter more appropriate for parliamentary enactment.

1.4 The above Principles have only been amended once since 1932. This was in 1979, in response to the establishment of the Administrative Appeals Tribunal, the first Commonwealth tribunal intended to review a comprehensive range of administrative decisions.

Membership Change

1.5 On 18 October 1990 Senator Mal Colston resigned as Chair of the Committee, due to additional demands from his office of Deputy President of the Senate. However, Senator Colston remained a member. Senator Pat Giles was elected as Chair on the same day. There were no other changes to the membership of the Committee.

Independent Legal Adviser

1.6 The Committee is advised by an independent legal adviser, who reads and reports on every instrument of delegated legislation, comments on all correspondence received from Ministers, writes special reports and attends meetings of the Committee when required. Since 1982 the independent legal adviser has been Emeritus Professor Douglas Whalan of the Law Faculty of the Australian National University.

Committee Staff

1.7 The Committee secretariat, together with that of the other legislative scrutiny committee, the Standing Committee for the Scrutiny of Bills, has a smaller staff than other Senate Committees engaged in the continuous review of an activity of the executive. The secretariat consists of a Secretary, a research officer, a clerical officer and a typist.

1.8 The Committee is grateful to the staff for their efforts during the year.

Statistics

1.9 During the year the Committee scrutinised 1,645 instruments. This number was greater than in any previous year. This increase is even more striking because almost all ACT Ordinances, Regulations and other instruments are now the responsibility of the ACT legislature and government. The Committee met 20 times, during which it considered 52 reports from its independent legal adviser. On behalf of the Committee, the Chair moved notices of motion of disallowance in respect of 19 instruments, in order to preserve the freedom of action of the Committee to recommend disallowance, should the response of a Minister be unsatisfactory.

1.10 The Committee scrutinised the following numbers and types of instruments.

TABLE

Statutory Rules	484
Public Service and Defence Determinations	473
Civil Aviation Orders	208
Education instruments	111
Primary Industries and Energy instruments	73
Community Services and Health instruments	67
Superannuation instruments	45
Remuneration Tribunal Determinations	40
Parliamentary Presiding Officers' Determinations	33
Miscellaneous instruments (details of which are in Appendix 1)	111
	<hr/>
	1,645

Ministerial Undertakings

1.11 During the year Ministers and other law makers undertook to amend or review 54 different instruments or parent Acts to meet the concerns of the Committee. This number only includes undertakings to amend existing legislation. It does not include dozens of other undertakings to improve Explanatory Statements, include provisions for numbering and citation, or take administrative action. Details of undertakings are given in Chapter 3.

Other Committee Activities

1.12 On 29 November 1990 the Committee tabled its *Eighty-Seventh Report*, the Special Report on Subdelegation of Powers. This Report discussed aspects of subdelegation of powers in delegated legislation.

1.13 As usual, the Chair made a major statement to the Senate at the end of each Sittings during the reporting period. Senator Giles did this on 20 December 1990 and 21 June 1991. (See Chapter 2)

1.14 On 16 May 1991 the Committee tabled its *Eighty-Eighth Report*, the Annual Report for 1989-90. This was a general Report on the work of the Committee during that period.

- 1.15 On 23 October 1990 Senator Giles wrote to the Prime Minister about aspects of the work of the Committee. (See Chapter 6)
- 1.16 On 20 September 1990 Senator Bishop made a statement to the Senate and tabled departmental manuals as examples of quasi-legislation. (See Chapter 7)
- 1.17 On 26 November 1990 Senator Patterson wrote to the Chair about certain instruments which, although legislative, were not subject to tabling and disallowance. (See Chapter 8)
- 1.18 A delegation from the Committee attended the Third Conference of Australian Delegated Legislation Committees held in Perth from 21-23 May 1991. The leader of the delegation, Senator Giles, reported to the Senate on the Conference on 21 June 1991. (See Chapter 9)
- 1.19 On 21 June 1991 Senator Bishop tabled the proceedings and made a further report to the Senate on the Third Commonwealth Conference on Delegated Legislation, held in Westminster from 20-23 November 1989. (See Chapter 10)
- 1.20 On 10 September 1990 the Committee made a submission to the Administrative Review Council on the Issues Paper for the major ARC project on Rule Making by Commonwealth Agencies. (See Chapter 11)
- 1.21 On 24 August 1990 the Committee wrote to the Chairman of the Regulation Review Committee of the Parliament of New South Wales about fee units. (See Chapter 12)

CHAPTER 2

ISSUES AND ROLES

2.1 At the end of each sittings during the reporting year the Chair made a detailed statement to the Senate on the work of the Committee. The following are extracts from those statements.

Senator Giles, 20 December 1990, Senate Weekly Hansard p.6097

2.2 “The operations of the Committee over these sittings have been characterised by the high volume of delegated legislation which has come before it for scrutiny. Delegated legislation authorised by Acts of Parliament was made by Ministers administering every Department of State, by the larger statutory authorities, by the High Court, the Federal Court, the Family Court and by other tribunals. Almost all of the more important programs of the Government rely on delegated legislation to provide finer details and technical requirements, particularly where frequent changes to these are necessary. Delegated legislation often provides for changes in the level of taxes, levies, fees and charges. Some delegated legislation made by the executive incorporates other material, which in a number of cases is *thousands of pages long*.

2.3 “There is a duty on the Parliament to ensure that this material, which is no less Commonwealth law than Acts of the Parliament itself, complies with the high standards of parliamentary propriety and personal liberties upon which the Parliament properly insists for Acts. The Regulations and Ordinances Committee acts on behalf of Parliament to scrutinise all delegated legislation in close detail. The Committee draws to the attention of the Senate cases where there are significant defects in an instrument, often placing a protective notice of disallowance in order to preserve its option to recommend this final sanction. However, it is *only in rare cases* that this is necessary. Ministers and officials normally agree to amend the offending instrument to meet the concerns of the Committee. In other cases *Ministers agree to amend the parent Act, take administrative action or advise the Committee on special circumstances relating to the instrument.*

2.4 “During these sittings Ministers have agreed to amend no fewer than 38 instruments to meet the concerns of the Committee. This does not include *undertakings to provide or improve Explanatory Statements, provide numbering and citation or take administrative action.* Many of these undertakings have been to amend an instrument in a number of ways.

2.5 “This is a high level of cooperation from Ministers, and represents a *commitment by them to the parliamentary ideals of the Committee.*

2.6 "The following Table (not reproduced) sets out the broad categories of instruments which have come before the Committee during the four months of the present sittings. The categories are necessarily broad. This is because there are more than 100 different series of delegated legislation, the great majority of which have a poor standard of numbering and citation. Even these broad categories do not indicate the extent of the reliance by the executive on delegated legislation. For example, the Statutory Rules series alone, most of which are regulations, are made under parent Acts administered through all Departments of State. The Territory ordinances cover all external territories. Both the Employment, Education and Training and the Community Services and Health portfolio instruments include more than a dozen different series of delegated legislation made under a number of parent Acts.

2.7 "The 881 instruments scrutinised by the Committee this sittings is the largest number of instruments ever scrutinised in a sittings.

2.8 "Every instrument of disallowable delegated legislation is scrutinised by the Committee under its four Principles, which may conveniently be called its terms of reference. These Principles are now included in the Standing Orders. The Committee discusses each instrument which appears to be defective and writes to the Minister or other law-maker for advice about the apparent breach of its Principles.

2.9 "During these sittings the Committee detected prima facie defects in 171 out of the 881 instruments which it scrutinised. These defects are set out below under each of the four Principles of the Committee.

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

2.10 "This Principle of the Committee is not interpreted narrowly to include mere technical legal validity. Rather it is interpreted widely to include all aspects of parliamentary propriety.

2.11 "Naturally the Committee does scrutinise instruments for technical validity. During these sittings the Committee questioned instruments which purported to provide directly for the same matters dealt with a month earlier by a determination of a specialist tribunal. Other instruments purported to allocate identical sums of money for similar projects in a series of determinations without attempting to revoke, replace or remake the earlier instruments in the series.

2.12 "In another case affecting validity a supposed revocation was ineffective as the instrument did not include any words of revocation. In another the stated purpose of the instrument was not effected due to the omission of appropriate words. Several instruments referred to Schedules which were not provided. In one case Schedule headings were transposed. On two occasions two separate instruments were given the same number in the series. In one case two separate and important provisions were given the same number. In two cases statutory authorities were referred to by incorrect titles. Finally, four fresh instruments were made which were

evidently intended to replace four earlier ones. Some three weeks later two more instruments were made which purported to revoke two of the earlier instruments from that later date.

2.13 "A number of instruments were felt by the Committee to breach parliamentary propriety even though validity was not in question. Some instruments had no system of numbering or citation, without which delegated legislation may be imprecise and confusing. Others either had no Explanatory Statement or explanatory material of poor quality. Several Explanatory Statements cited Acts incorrectly. One Explanatory Statement advised that the purpose of the instrument was to allocate a sum of money among several institutions. However, the sums actually allocated by the instrument did not add up to that sum. Parts of some instruments were so poorly reproduced that they could not be read. Others appeared to omit words and phrases.

2.14 "Some instruments provided for further instruments which appeared to be legislative in nature, but which were not subject to tabling and possible disallowance in Parliament. One provision referred to the "published policy of the Department", with no provision for tabling or disallowance.

2.15 "On several occasions the Committee queried the technical drafting of instruments. One single provision used four cumulative negatives. Another used archaic language such as "Deck Boy". A similar instrument referred separately to a "kitchenman" and a "kitchenmaid", although both of these categories have the same grades and salaries.

2.16 "Many principal instruments of delegated legislation have been amended often, with large numbers of additional provisions inserted. Some of the more important of these principal instruments were amended by renumbering all provisions. This was done without any charts or tables comparing old provisions with new. In these cases the Committee believes that a reprint of the principal legislation should be produced at once. Without such reprints the legislation is extremely complicated. In several cases the renumbered provisions were themselves subsequently amended with no reprint produced at all.

2.17 "It is common for delegated legislation to incorporate other material. This is generally valid only insofar as the incorporated material, apart from Acts and regulations, is in existence and is not amended. However, in some cases it appeared that makers of delegated legislation were unaware of this requirement. In one case an instrument expressly incorporated future material.

- (b) Does the delegated legislation trespass unduly upon personal rights and liberties?

2.18 "The Committee closely scrutinises delegated legislation for possible breaches of personal liberties.

2.19 "Strict liability offences are accepted by the Committee only in unusual circumstances. The Committee generally regards it as inappropriate for the executive to create offences where no intention to commit a crime is required. In one case during this sittings strict liability was provided for all of the officers of an organisation if the organisation itself breached a provision. The instrument which created this offence was not accompanied by an Explanatory Statement to explain the necessity for such a provision.

2.20 "Another provision reversed the usual onus of proof in criminal cases, so that a person was presumed guilty unless that person could prove themselves innocent. Again the Committee insists on a full explanation before it will accept such an offence. Similarly, the Committee believes that there should be clear protection against persons being required to incriminate themselves. In one case, the person in charge of an establishment could refuse to answer questions on the grounds of self-incrimination. However, if that person waived this right then the right was waived for all persons present on the premises, who were then required to answer questions even if the replies incriminated them. In another case, it was an offence to refuse to answer a question without reasonable excuse. It was unclear whether self-incrimination was a reasonable excuse.

2.21 "In a related type of case, public officials could demand personal information from any person at all. The Committee obtained an undertaking that such information could only be required from a narrow class for the purposes of the scheme.

2.22 "In another offence provision, the owner of a motor vehicle was deemed guilty of certain offences even if the vehicle had been stolen or taken illegally at the time the offences were committed. At the other end of the scale, the Committee questioned mandatory provisions which did not include any sanctions.

2.23 "The Committee examined a number of provisions which empowered officials to enter private premises. In such cases the Committee believes that warrants to enter, search and seize should be issued only by a judge or magistrate, should be in a mandatory form subject to tabling and disallowance in Parliament, and should be limited as to the hours, dates and places of entry. The Committee questioned one provision where it was unclear whether these safeguards existed. In another case a warrant was in a discretionary rather than a mandatory form.

2.24 "The officials who actually execute a search warrant should be required to produce a photographic identity card on demand, or else leave the premises if requested. This safeguard was not provided in several instruments. Under one instrument photographic identity cards did not have to be produced in an emergency, although written identification did.

2.25 "One instrument provided that a public official could remove persons from an area if they had contravened the regulations. The Committee pointed out that whether a person had contravened offence provisions was a matter for a properly constituted court, not for the opinion of an official.

2.26 "It is not only offence provisions which may breach personal liberties. The Committee is vigilant to ensure that all procedures in delegated legislation are fair and equitable. One instrument provided that certain property dealt with by a statutory authority became the property of its new owner free of any charges and encumbrances. The Committee sought assurances that holders of a mortgage or charge over this property would not thereby lose their rights.

2.27 "The Committee questioned what appeared to be harsh provisions in an area with important financial and livelihood implications. In one of these there was a time limit for the provision of information. Failure to meet the time limit would have severely adverse financial consequences, yet there was no discretion (subject to external merits review) to extend the limit. In another there was only a restricted right to apply for an extension of time. One provision queried by the Committee purported to operate notwithstanding certain other provisions. This procedure appeared to avoid a number of important safeguards.

2.28 "In a related series of instruments some individuals were required to make an important decision within eight days while others were given thirty days to make the same decision.

2.29 "A considerable proportion of delegated legislation imposes or changes the level of taxes, levies, fees and charges. The Committee always requires that the Explanatory Statement advise of the basis for the imposition or the change. This is often to effect a policy of cost recovery, or to reflect changes in the CPI. In any event, it should be notified.

2.30 "Duties and rights imposed by delegated legislation should be clear and unambiguous. In one instrument there was no indication of who was to exercise a number of discretions. In another, obligations were "subject to the conditions which the Department from time to time notifies". Other provisions were questioned by the Committee because they were vague, uncertain and subjective. Some rights were expressed to be subject to the "national interest". Others were required to be "consistent with the interests of Australia".

- (c) Does the delegated legislation 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?

2.31 "The Committee examines all discretions which may affect individuals to ensure that external review of the merits of a decision is provided in appropriate cases. In the reporting period the Committee inquired about discretions granted to Ministers, to the Registrar of a Court, to secretaries of departments and to statutory officers. In many cases the power to exercise these discretions could be delegated to others. The Committee believes that the case for independent review is stronger where there is a wide power of delegation. Where delegation is to any person at all the case is overwhelming. In any event, the Committee also examines delegations to ensure that they are restricted to the narrowest possible class.

2.32 "In one case, an instrument provided that only a restricted class of public officials could be authorised for certain purposes. However, the power to appoint individuals within this class could be delegated to any person at all.

2.33 "The Committee examines the type of discretion to decide which review rights may be suitable. Some discretions are to exempt individuals completely from the operation of a scheme. Wide discretions like this should usually be subject to AAT review. Other discretions may have a commercial value or affect a person's livelihood. Here external review will also usually be essential. Other discretions may have a financial value. It is common for delegated legislation to provide that an official may refund fees already paid, or waive or remit in whole or part fees which are payable. Here also the case for external review is strong.

2.34 "The Committee believes that discretions should not be open ended but rather limited and guided by objective criteria. In the absence of any criteria at all, or where criteria are subjective, vague or wide, then external review should be provided. In some instances an instrument may set out criteria but then provide that an official may make a decision regardless of the criteria.

2.35 "Review rights should not only exist, but also be notified to the person affected by the adverse exercise of a discretion. The Committee believes that where such a decision is made, there should be an express requirement that any review rights be advised in writing at the same time as advice of the decision itself. If there are no review rights this should also be advised to the person affected. At present, many instruments of delegated legislation are unclear as to whether review is provided for discretions. This is particularly so in the large number of instruments which amend principal instruments. Such principal legislation, or the parent Act, may provide review rights. In such cases the Explanatory Statement, or Notes in the body of the instrument should indicate whether review exists for individual discretions. If review is not provided this also should be clearly advised in the Explanatory Statement. The Committee has scrutinised instruments which refer to reviewable decisions without any indication as to the decisions subject to review.

2.36 "Some instruments provide for decisions to be reviewed by special bodies established for the purposes of the parent Act or delegated legislation made under it. The Committee generally prefers that decisions be reviewed by the AAT, which places itself in the position of the original decision maker and which may substitute its decision for the original decision. The *Administrative Appeals Tribunal Act 1975*, which established the AAT, provides many safeguards for the appeals process. The Committee accepts specialist internal review procedures in place of the AAT only if they are genuinely independent of the original decision makers and of the executive generally, and include similar safeguards.

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

2.37 "The Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1990 No.244, prolonged for a further 12 months Commonwealth, State and Territory legislation which would otherwise be in breach of the *Sex Discrimination Act 1984*. The total period of such exemptions is now seven years. The Committee has indicated that any further exemptions should be by Act rather than regulations.

2.38 "During this sittings the Committee made a submission to the Administrative Review Council's major project on Rule Making by Commonwealth Agencies. The ARC, the peak Commonwealth advisory body on administrative law, had expressly invited the Committee to make such a submission. The submission covered most areas of current concern to legislative scrutiny committees. In particular, it emphasised that the drafting and presentation of delegated legislation, including access by the public, should not be less than that of Acts of Parliament. To this end the present proliferation of types of instruments of executive law-making should be subsumed within a single delegated legislation series, preferably the Statutory Rules series, professionally drafted and made by the Governor-General, subject to the highest levels of safeguards expressed in the *Acts Interpretation Act 1901* and the *Statutory Rules Publication Act 1903*.

2.39 "The submission emphasised that consolidated reprints of delegated legislation should be available at least with the same frequency as those of Acts. The Committee also considered that automatic repeal provisions under which existing delegated legislation is repealed after a fixed number of years might be appropriate.

2.40 "There might be merit in a single series of delegated legislation being presented and amended by the loose-leaf method which is, in effect, an instant consolidation. Agencies could also be required to produce convenient ADP access to a definitive consolidation each time the principal instrument is amended.

2.41 "During the sittings the Committee initiated a project on quasi-legislation, which is one of the most important issues facing legislative scrutiny committees. Delegates to the Third Commonwealth Conference on Delegated Legislation, held in Westminster in November last year, including the Australian delegation, expressed concern at the increase in quasi-legislation. Quasi-legislation is difficult to define. At the conference Professor Gabriele Ganz said that quasi-legislation is not a term of art. It may include circulars and press releases or even oral directives from Ministers or others in the executive. Often it will include matter which is administrative in nature as well as legislative. However, any material which determines a general rule of conduct or declares a power, right or duty applying to broad classes, as opposed to applying the law in individual cases, is legislative. Insofar as this material is made by the executive, it is the duty of Parliament to supervise and control such legislation. I hope that the work of the Committee will advance this process. During these sittings Senator Bishop, the Deputy Chairman of the Committee, tabled on behalf of the Committee on 20 September 1990 the manuals used by officials in the Department of Immigration, Local Government and Ethnic Affairs to administer the Migration Act and Regulations. Senator Bishop pointed out that the 195 manuals were 3,300 pages long and cost 400 dollars. This is the type of quasi-legislation which the Committee will scrutinise.

2.42 "In the initial stages of the project the Committee is examining the lists of procedural manuals produced by agencies under the provisions of the Freedom of Information Act. The Committee will examine all manuals from selected Departments or statutory authorities for legislative implications, particularly for control by Parliament and other safeguards. It will also examine all manuals relating to selected topics from across the range of Departments or agencies, with the same object.

2.43 "The Committee has continued its practice of hearings with public officials to explain aspects of delegated legislation which it has raised. In a previous report Honourable Senators will recall that the Committee asked officials from two different Departments to brief the Committee on delays in implementing undertakings given to it to amend legislation to meet its concerns, and on delays in replying to correspondence. During this sittings, at the invitation of the Committee, a Minister nominated senior officials from the Department to attend the Committee to discuss progress on aspects of changes to delegated legislation and parent Acts. The Committee is grateful to the Minister for this cooperation.

2.44 "On 29 November 1990 I tabled the *Eighty-Seventh Report* of the Committee, the Special Report on Subdelegation of Powers. This Report is a survey of the law and practice in this area, written by Emeritus Professor Douglas Whalan, the Legal Adviser to the Committee. Subdelegation of legislative or administrative powers is an important area of concern to the Committee. Many instruments of delegated legislation provide, for example, that the Minister may exempt classes of persons or individuals from paying fees or charges. Often this power may be delegated, sometimes to any person at all. The Committee insists that such delegation be restricted to appropriate levels of persons. Similarly, other subdelegations are, in some cases, to approve the spending of hundreds of millions of dollars of Commonwealth money. Here again, the Committee scrutinised carefully all aspects of such delegations.

2.45 "One area of concern to the Committee is the existence of significant instruments, clearly legislative in character, which are subject neither to tabling nor disallowance. It is, of course, only by chance that the Committee becomes aware of these instruments. Since the establishment of our sister legislative scrutiny committee, the Standing Committee for the Scrutiny of Bills, such instruments are picked up in the Bills stage. However, there are some legislative instruments for which provision was made before that Committee was established, which lack any parliamentary safeguards. Senator Kay Patterson drew the attention of the Committee to one such instrument, which appeared to contain defects which in a disallowable instrument would lead to a protective notice of motion of disallowance pending a reply from the Minister. The Committee scrutinised the instrument and wrote to the Minister, asking if the parent Act could be amended to provide for full parliamentary supervision. The Committee also asked if the present instrument could be amended.

2.46 "The work of the Committee now includes scrutiny of instruments of a type possibly not seen before in Commonwealth delegated legislation. The *Community Services and Health Legislation Amendment Act (No.2) 1989*, among other things amended two parent Acts to provide for the making of six new types of delegated legislation. This delegated legislation cannot be disallowed outright by either House of the Parliament. However, the Act provides for either House to approve amendments of the legislation, with the legislation only coming into effect if such amendments are approved by the other House. The Committee scrutinised a number of these types of instrument, and wrote to the Minister where it detected possible deficiencies. As usual, the Minister replied with a prompt and helpful explanation, including an undertaking to amend an instrument to meet the concerns of the Committee.

2.47 "The Committee acknowledges the high level of commitment to its principles shown by Ministers. Recently the Committee advised a Minister that certain review provisions were a credit to the portfolio legislation.

2.48 "It is not usual for the Committee to mention individual Ministers in these reports. However, there were two instances of major reforms by Ministers which the Committee felt should be drawn to the attention of the Senate. The Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, a former Chairman of the Committee, has advised that the numerous and bulky Civil Aviation Orders will progressively be included in the Statutory Rules series. This series is better drafted and presented than the rest of the more than 100 other series of delegated legislation. The Minister for Primary Industries and Energy, the Hon John Kerin MP and the Minister for Resources, the Hon Alan Griffiths MP, have made instruments in which each amendment is part of a complete reprint. This provides the best possible access to delegated legislation by the Parliament and by those members of the public whom it affects.

2.49 "The Committee has been greatly assisted in its work by its Legal Adviser, Emeritus Professor Douglas Whalan of the Faculty of Law at the Australian National University. Douglas Whalan comments on every disallowable instrument of delegated legislation, attends Committee meetings when required, writes special reports and generally provides high level legal support.

2.50 "The Committee thanks the Senate for continuing the strong support which the Committee has always received during its 58 years of existence".

Senator Giles, 21 June 1991, Senate Weekly Hansard, p.5370

2.51 "During the present sittings the work of the Committee has involved the scrutiny of the usual large volume of delegated legislation.

2.52 “Delegated legislation must be made under the authority of Parliament expressed through a parent Act. It should not deal with policy issues, which are debated in Parliament during the passage of Bills. Rather its purpose is to provide the administrative details of a scheme or program. However, these details are so important that without them normal public administration would not be possible.

2.53 “The Committee acts on behalf of the Senate to scrutinise every disallowable instrument of delegated legislation to ensure that it complies with its standards of parliamentary proprieties and personal liberties. Instruments of delegated legislation impose duties and grant rights in the same way as an Act of Parliament. The Committee’s scrutiny ensures parliamentary supremacy in law-making and that in this respect the executive is responsible to Parliament. Every instrument examined by the Committee is subject to the final sanction of disallowance by the Senate.

2.54 “During the present sittings the Committee considered 764 instruments, which make a total of 1,645 for the 1990-1 year. This was the largest number of instruments ever considered by the Committee in one year.

2.55 “The Committee considered each of these instruments under the four Principles which are set out in Standing Orders and which comprise its terms of reference. The Chairman writes to the Minister in respect of each instrument in which there is an apparent deficiency, with a request to explain the difficulty. In the present sittings the Committee detected prima facie defects in 116 of the 764 instruments scrutinised. These defects are discussed below under each of the four Principles.

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

2.56 “This first Principle relates to parliamentary propriety. Therefore, it is concerned not only with technical validity but also with all aspects of drafting, presentation and access. The Committee believes that, as legislative instruments, delegated legislation should be in no way inferior to the standards set by Acts.

2.57 “Perhaps the most important aspect of parliamentary propriety is that instruments should be validly made. In several cases the drafting of instruments was such that it was uncertain whether this requirement was satisfied. One instrument was not signed. Another referred to related provisions when others were intended. Another referred incorrectly to provisions in other instruments. An invalid provision in one instrument was referred to in five other instruments in such a way as to taint all five instruments. In another case validity was affected by a failure to comply with certain procedures required before an instrument could be made. In another an instrument was expressed to take effect from a particular year, with a blank in the space for the day and the month. In another there were typographical errors which could have affected validity.

2.58 “It is essential that delegated legislation effects any purpose evident on its face or expressly stated in the Explanatory Statement. The drafting of one instrument did not indicate whether it was intended to apply to local as well as

State authorities, to statutory authorities and government business enterprises and to external territories. The Explanatory Statement for another instrument advised that certain licences were not required for destinations listed in a Schedule to the instrument, yet there was no Schedule and no provision made for one. In another the Explanatory Statement advised a date of effect different from that in the instrument itself. The drafting of another was so ambiguous that it was not possible to decide whether it effected its purpose. One instrument used the permissive expression "may", to the detriment of those affected, when it was clear from the context that the mandatory "shall" or "must" should have been used.

2.59 "Many instruments impose or amend fees and charges and grant or amend allowances. The Committee ensures that the basis for all fees and allowances is explained. It is a breach of personal rights if fees are unreasonably imposed. It is also a breach of parliamentary propriety. In one case the Committee questioned an allowance which was increased by 100% without explanation. In another case an instrument gave a statutory authority power to impose fees without parliamentary oversight. Conversely, the Committee protects Commonwealth revenue. In one case there was an increase in Commonwealth liability from \$100,000 to \$180,000. In another the Committee questioned a provision which enabled a delegation to anyone in the Department to waive unlimited amounts of fees due to the Commonwealth, such fees in a single case amounting to \$35,000.

2.60 "Drafting must comply with appropriate contemporary standards. The Committee questioned such archaic expressions as "deck boy", "diet maid", "kitchenman" and "kitchenmaid". The latter two expressions followed each other in an instrument which provided identical salaries for both.

2.61 "The Committee has previously raised the issue of copies of delegated legislation substituted for earlier defective copies. The Committee asks for an explanation of such copies. In most cases this is now provided as a matter of course. However, in one case the explanation included explanations for two defects in the earlier copy but not a third and did not explain the omission in the second copy of a provision included in the first.

2.62 "The Committee normally raises the possible waste of time and resources when two sets of regulations are made on the same day, on the advice of the same Minister, under the authority of the same parent Act and amending the same principal regulations. The Committee accepts that there may be occasions when this is appropriate, but usually asks for an explanation.

2.63 "Explanatory Statements must be provided for every instrument of delegated legislation. This was not done in several cases. However, in each case this was an oversight, rather than legislative policy. Some Explanatory Statements were deficient in quality. One merely stated that the date of revocation earlier effected for another instrument was now changed, with no further explanation. Another stated that the instrument was made by the Minister, when it was made by a delegate.

Some Explanatory Statements did not advise that the purpose of the instrument was to implement an undertaking given to the Committee by the Minister to correct a defective instrument. On the other hand, many Explanatory Statements are full and detailed.

2.64 “The presentation of, and public access to, delegated legislation, should not be less than that of Acts. This is so even though defects in this area may not affect validity. One instrument included a corrigendum stuck on with sticky tape. This corrigendum referred to page numbers, although the pages of the instrument were not numbered. Several instruments cited and spelt other legislation incorrectly. Two other instruments were tabled twice. The same well known Australian town was spelt incorrectly in three separate series of delegated legislation administered through two portfolios. Several instruments were not numbered, with resulting confusion to users. Two separate instruments were given the same number.

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

2.65 “This second Principle is also interpreted broadly to safeguard and protect the position of the individual against any possible encroachment by delegated law-makers.

2.66 “One aspect of personal rights is that any obligations or duties imposed by legislation must be certain in effect. A number of instruments were deficient in this respect. A condition of one approval was that an applicant had to take all reasonable steps to ensure that the maximum advantage is derived in Australia by suitable licensing and franchising. Another instrument, in separate provisions, used the expressions “genuine reasons”, “compelling reasons” and “exceptional reasons”, which presumably all had different meanings. Other undefined expressions included “in the national interest”, “an appropriate standard”, “extreme hardship” and “irreparable prejudice”. Other instruments were drafted in such a way that obligations were ambiguous. In one case this involved financial benefits for individuals. Even where the legislation provides an independent external right of review such uncertainty breaches personal liberties.

2.67 “The presentation of delegated legislation must not confuse users. The Committee believes that principal instruments should be reprinted at suitable intervals. Some delegated legislation is made in a loose leaf form and some is consolidated each time an amendment is made. These are useful techniques. The Committee raised the question of reprint and renumbering following an amending instrument which included provisions numbered 2ADAAA, 2ADAAB and 2ADAAC. In another case the Explanatory Statement advised that categories of permit had been reduced from 94 to 12. This was literally true, but there were now 94 subcategories under the 12 new categories.

2.68 “Delegated legislation must not contain provisions which are harsh, arbitrary or unreasonable. In one case certain individuals were given three days to make an election with important financial consequences, while others were given three weeks.

In another case a statutory authority was required to cancel approval of a valuable commercial concession if the holder failed to comply with certain conditions, even though such failure may not be within the control of the holder. In another, public officials were empowered to give directions in respect of certain premises and vehicles, but there was no requirement that such directions be reasonable.

2.69 "Any fees or penalties provided in delegated legislation must be reasonable both in substance and in certainty of procedural arrangements. In one case an extensive schedule of costs payable by the public was increased by 13.39%, with no indication of the new amounts. In another case a parking penalty was \$500, the same penalty provided elsewhere in the instrument for malicious damage to priceless national heritage relics. Strict liability offences are now rare, but one instrument provided for such an offence. In another case there were no apparent safeguards for collection from individuals of outstanding debts to the Commonwealth. On the other hand, the Committee also questioned a series of mandatory provisions with no apparent penalties for their breach.

2.70 "It is a breach of personal liberties if an instrument provides for powers to be delegated to inappropriate levels of official. The Committee questioned several instruments under which important powers could be delegated to any person at all.

2.71 "The Committee ensures that provisions which empower public officials to enter private premises are restricted by appropriate safeguards. Two instruments did not provide that such officials have photographic identity cards. Following action by the Committee this protection is now almost universal. The Committee also questioned the confidentiality of the results of drug testing of athletes.

2.72 "Under the provisions of the *Acts Interpretation Act 1901* delegated legislation generally may not operate retrospectively where this would prejudice the rights of, or impose liabilities on, any person apart from the Commonwealth. The Committee questions instruments where there may be such prejudicial operation. In one case, there was retrospective operation of a mandatory technical engineering requirement to 1 January 1983. In other cases the Committee questioned instruments which, while not expressed to operate retrospectively, may have had that effect.

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

2.73 "This Principle is a refinement of one aspect of the Committee's protection of personal rights and liberties. Many instruments grant discretions to various organs of the executive to make decisions with important personal or financial consequences for individuals. In all appropriate cases such discretions should be subject to external, independent, merits review by a body such as the Administrative Appeals Tribunal. In the present sittings such discretions have included the cancellation of an export quota and the cancellation of the right to harvest natural

resources. In another case, discretions were provided in respect of Commonwealth payments for dispensing pharmaceutical products. In another, a discretion could exclude an individual from a scheme for closures and amalgamations in a particular industry.

2.74 “Many discretions are not only to reject or refuse an application, but also to impose conditions upon its grant. The Committee treats the right to grant with conditions as the same as a right to refuse and will insist on review rights where appropriate.

2.75 “The Committee ensures appropriate review of discretions to remit, waive or reduce any fees or charges.

2.76 “The Committee also ensures that any material incorporated into legislation complies with its Principles. The Committee did this with incorporated Principles and Codes affecting commercial operations.

2.77 “Some instruments made express provision for discretions which are exercised personally by the Minister. In some cases this may be useful. Often the power to exercise a discretion is granted to the Minister, who may then delegate the power. The possibility of delegation, sometimes to junior officials, is usually a compelling argument for external merits review. On the other hand, a Minister is personally answerable in Parliament for his or her decisions. On a related issue, the Committee was concerned about an instrument which granted discretions to State and Territory officials, whose actions would not, or possibly could not, be subject to AAT review.

2.78 “Numbers of instruments not only did not provide for review of discretions, but also failed to provide criteria to define and narrow the power being exercised. Every important discretion provided in delegated legislation should include such criteria, as well as appropriate review.

2.79 “Some schemes of commercial supervision imposed by delegated legislation provide for review rights of some discretions but not others, with no apparent logical distinction between them. In these cases the Committee usually considers that if review is provided for some discretions in a scheme then it should be provided for all.

2.80 “Other discretions may not affect business or commercial operations but instead may impinge directly upon personal rights and liberties. The Committee is particularly vigilant in such cases. Several instruments provided for discretions in respect of elections for certain councils. These related to valid votes, recounts and a decision to void an election. Many discretions were provided in respect of the right of foreigners to enter and remain in Australia. Others were in respect of recognition of professional qualifications.

2.81 "A number of discretions related to conditions of employment for members of the Australian Defence Force and the Australian Public Service. Here also the Committee questions instruments which do not appear to provide suitable review rights. In one case discretions were provided for study leave and another for general leave credits. Others were in respect of different allowances.

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

2.82 "This Principle is the least frequently breached of the four. Like the first Principle, its purpose is to protect parliamentary propriety. The Committee did not question any instrument on this ground during the present sittings. However, it noted with satisfaction the introduction of the Sex Discrimination Amendment Bill 1991, which provides for the exemption of certain Commonwealth, State and Territory legislation from the operation of the principal Act. This legislation was previously exempted by regulation, a procedure which the Committee considered breached its fourth Principle. However, the introduction of this Bill now implements an undertaking given by the Minister that he would introduce an amendment Bill to give Parliament an opportunity to debate the continuation of discriminatory legislation. The Committee will make a separate report on its consideration of Regulations made under the Sex Discrimination Act.

Future Issues

2.83 "The most important event affecting delegated legislation in the next few months is the forthcoming Report by the Administrative Review Council on its project on Rule Making by Commonwealth Agencies. The ARC has already published its initial proposals which, if implemented, will have perhaps the most far reaching impact on delegated legislation since the passage of the Acts Interpretation Act in 1901.

2.84 "The Committee made a major submission to the ARC during the formulation of these proposals. It is pleasing that virtually all of the recommendations of the Committee have been accepted. The proposals appear to address most of the areas in which the system of Commonwealth delegated legislation is at present deficient. The following is a summary of the more significant proposals.

1. The proposals list in considerable detail the matters which should be covered by Acts rather than by delegated legislation. This should clarify the present uncertain division of content between Acts and delegated legislation.
2. The proposals list detailed criteria to determine whether an instrument is legislative in character. This is a first step to ensure that all such instruments are subject to tabling and disallowance.

3. All legislative instruments should be drafted to the standard of an Act, subject to tabling and disallowance in Parliament, prepared after a public consultation process and easily accessible. The Committee has previously argued that all of these measures should be adopted, although the public consultation process should not involve the Committee in any consideration of the policy merits of proposals.

4. Delegated legislation should be promulgated through the Executive Council. At present, only Statutory Rules are so promulgated. The Committee has long expressed its opinion that the Statutory Rules is the most satisfactory of the more than 100 separate series of delegated legislation.

5. Delegated legislation should be drafted by the professional drafters of the Office of Legislative Drafting (OLD) in the Attorney-General's Department. The Committee has previously argued in favour of this step.

6. Disallowance, or negative resolution, should remain the main mechanism for parliamentary scrutiny but variations of disallowance such as positive resolution and postponed commencement, could also be used. The Committee has no objection to this, as long as either House has the power ultimately to disallow an instrument or to prevent it entering into effect.

7. The present 15 sitting day period for disallowance should remain. However, if either House resolves, the disallowance power may be revived within six months for a further 15 sitting days. The Committee supports this.

8. Public consultation should be mandatory before any instrument of delegated legislation is made. The Committee supports this.

9. Consultation would take the form of a publication of the proposal and an explanatory document which sets out details of the proposal, its goals and objectives and alternative courses of action to achieve the desired goals. The Committee has no objection to this. However, as mentioned earlier, the procedure must not involve the Committee in any way with policy merits.

10. Parties would then have a period within which they could make submissions about the effect of the instrument. The Committee supports this.

11. The present Statutory Rules series should be expanded to include all delegated legislation. The Committee has previously argued in favour of this.

12. Failure to include delegated legislation in the Statutory Rules series would carry the consequence that the instrument could not be used and would be of no effect. The Committee supports this.

2.85 "In short, the above ARC proposals, which are in accordance with the views of the Committee, will largely eliminate a number of the most obvious defects in present delegated legislation.

2.86 "If the proposals are implemented, all delegated legislation will be restricted to appropriate subject matter, be properly drafted following input from the public, be subject to tabling and disallowance and be located in a single, uniform, definitive series. When the final ARC Report is presented the Committee will make a more detailed statement to the Senate".

CHAPTER 3

GUIDELINES ON THE APPLICATION OF THE PRINCIPLES OF THE COMMITTEE

Introduction

3.1 Standing Order 23(3) sets out the four Principles under which the Committee is required to scrutinise every disallowable instrument of delegated legislation. These Principles are set out at the start of this and every other Report of the Committee. The Principles have been amended only once in the 59 years of the existence of the Committee, to reflect the establishment of the Administrative Appeals Tribunal. The Principles are not intended to be rigid or inflexible. Rather, they are intended to cover any possible defect which may affect personal rights or parliamentary proprieties. The purpose of this Chapter is to illustrate different aspects of delegated legislation which the Committee has raised with Ministers and other law makers. Officers of Departments of State and statutory authorities may find the Chapter useful as a check-list of what the Committee regards as defects in delegated legislation.

PRINCIPLE (A)

IS DELEGATED LEGISLATION IN ACCORDANCE WITH THE STATUTE?

Provision of Numbering and Citation

3.2 Each instrument of delegated legislation should include a system of numbering or citation, without which users may find legislation imprecise and confusing. At present, there are more than 100 separate series of delegated legislation, even if the Statutory Rules series is only counted as one series. The Committee has recommended that all delegated legislation should be included in a single series, possibly based on the Statutory Rules, which should be subject to the numbering and publication requirements of the *Statutory Rules Publication Act 1903*. However, until that occurs each series will require separate identification. Ministers undertook to provide numbering or citation for the following: Instrument under s.40AA(6)(ce) of the *National Health Act 1953*, Direction under s.73(2) of the *Telecommunications Act 1989*, Determination under s.19(4B) of the *Social Security Act 1947*, Determination of Price Control Arrangements and Price Cap Arrangements under the *Telecommunications Act 1989*, Determination under s.10.03 of the *Trade Practices Act 1974*, Declaration under s.11 of the *Nuclear (Non-Proliferation) (Safeguards) Act 1987*, Determination under s.17 of the *States Grants (Schools Assistance) Act 1988*, Determination of Terms and Conditions of the Aboriginal and Torres Strait Islander Commission Chairperson, Determination of Terms and Conditions of the Aboriginal and Torres Strait Islander Commission

Chief Executive Officer, Notice under s.9(1) of the *Pasture Seed Levy Act 1989*, Guide to the Assessment of Rates of Veterans' Pensions, Revocation of the Guide to the Assessment of Rates of Veterans' Pensions, Direction under s.269TA of the *Customs Act 1901*, Direction under s.12 of the *Anti-Dumping Authority Act 1988*, and Tax File Number Guidelines under s.17 of the *Privacy Act 1988*.

Inappropriate Levels of Delegation

3.3 It is common for delegated legislation to provide that powers granted to Ministers or other public officials or bodies may be delegated. Such delegations should be restricted to as narrow a class or level of persons as possible. Usually it will not be appropriate for powers provided under Commonwealth legislation to be delegated to any person at all. The *Environment Protection and Management (Amendment) Ordinance, Territory of Heard Island and McDonald Islands Ordinance No.1 of 1990*, provided that the Minister may delegate to any person at all any of his or her powers under the most important provisions of the principal Ordinance. The Minister undertook to amend the Ordinance to restrict delegation to senior executive service officers in the Department. The *Regional Council Election Rules, Rules No.1 of 1990* under the *Aboriginal and Torres Strait Islander Commission Act 1989*, provided that the presiding officer at an election could appoint any person at all as a substitute during a temporary absence. Such a person could exercise all the powers of the presiding officer. The Minister undertook to review the provision. *Overseas Defence Determination 1989/201* provided that the Chief of the Defence Force could delegate powers with respect to certain personnel decisions to any person. The Minister advised that this was justified by special circumstances overseas. Also, the scope of the power was limited to dealing with a minority of cases which require special consideration, circumscribed by criteria, and subject to review by the Defence Force Ombudsman. The provision was intended to devolve decision making to allow management flexibility to respond to operational needs. However, the Minister will draw the views of the Committee to the attention of the CDF and suggest that he give consideration to those views when devolving authority. *Defence Determination 1990/123* provided that only senior officers could make certain decisions. However, the power to appoint these senior officers could be delegated to any person at all. The Minister advised that this was unintended and that the instrument had been amended to remove this power.

3.4 Many instruments provide for delegation of powers to officers of the Department. In such cases delegation should be restricted to suitably senior officers. The *Therapeutic Goods Regulations, Statutory Rules 1990 No.394*, provided that the Secretary could delegate all of his or her powers to any person in the Department. Thus, it was possible to delegate to a junior officer the power to waive unlimited amounts of Commonwealth revenue from fees of up to \$35,000 each. The Minister advised that delegation would be restricted to senior executive service officers and other senior officers. The *Wheat Industry Fund Regulations, Statutory Rules 1990 No.28*, empowered the Treasurer to guarantee borrowings of the Australian Wheat board of up to \$100 million. This power could be delegated to any officer of the Department, no matter how junior. The Minister advised that delegates were only given to suitably senior officers when there were no policy issues which required the

approval of the Treasurer. However, the Regulations would be amended to restrict delegation to the Secretary and Deputy Secretary. The *Hostel Variable Capital Funding Guidelines (No.2) 1989* under s.9B of the *Aged or Disabled Persons Homes Act 1954* empowered the Minister to delegate his or her powers to any officer of the Department. The Committee asked for an assurance that delegations are made to levels commensurate with the importance of decisions. The Minister advised that delegation was necessary because of the volume of decisions. All delegations were personally and carefully considered.

3.5 The form of instruments should reflect the exercise of delegated power. Determination BPT 9/1990 under s.4D(1)(a) of the *National Health Act 1953*, Determination BPT 10/1990 under s.4B(b) of the *National Health Act 1953*, and Determination BPT 11/1990 under s.4B(a) of the *National Health Act 1953*, were all notified in the Gazette as being made by the Minister. In fact, they were made by a delegate. The Minister undertook to provide correct notification for future Determinations.

Failure to Explain Increases in Fees or Charges

3.6 An increase in fees or charges may be so great as to breach parliamentary propriety. A sudden, unexpectedly large increase may also be a breach of personal liberties. The Explanatory Statement should advise the basis for any imposition or increase of fees. The Navigation (Coasting Trade) Regulations (Amendment), Statutory Rules 1989 No.381; Navigation (Compass) Regulations (Amendment), Statutory Rules 1989 No.382; Navigation (Tonnage Measurement) Regulations (Amendment), Statutory Rules 1989 No.383; Shipping Registration Regulation (Amendment), Statutory Rules 1989 No.384; and the Ships (Capital Grants) Regulations (Amendment), Statutory Rules 1989 No.385, all increased fees under the principal Regulations. However, the only reasons given in the Explanatory Statements were "cost increases since the last adjustment". In one case the increase was from \$860 to \$2,000 in 13 months. The Minister advised that fees in this area were based on full cost recovery. In some cases there had been new cost recovery guidelines and new administrative arrangements.

3.7 The Horticultural Levy (Apple and Pear) Regulations (Amendment), Statutory Rules 1989 No.345, and the Horticultural Export Charge (Apple and Pear) Regulations (Amendment), Statutory Rules 1989 No.346, both included good quality recitals advising that the required statutory consultation procedures had been observed before fees were amended. However, there was no explanation of the basis for the increases. The Minister provided a Supplementary Explanatory Statement with full details and background of the changes.

3.8 The Fisheries Levy (Gemfish Fishery) Regulations (Amendment), Statutory Rules 1990 No.80, increased a levy from 2.5 cents to 13.5 cents, a considerable percentage increase. The Fisheries Levy (South East Trawl Fishery) Regulations (Amendment), Statutory Rules 1990 No.81, increased one levy by 50% and reduced another by 7%. There was no explanation for these changes. The Minister advised that the largest increase was due to underrecovery of costs, together with an

increase in the percentage of costs recovered from 75% to 90%. The other changes reflected cost recovery. The Explanatory Statement for the Marriage Regulations (Amendment), Statutory Rules 1990 No.246, advised that increases in fees after a two year period reflected CPI increases. However, one increase was 50%. The Minister advised that this particular increase was due to an increased amount of time needed to administer the activity covered by the fee. The Civil Aviation (Carriers' Liability) Regulations, Statutory Rules 1991 No.6, increased levels of liability for death, injury or property damage. One increase was from \$100,000 to \$180,000. There was no explanation for the increase. The Minister advised that the increases were based on CPI movements since 1982, the last time such fees were amended. The Seamen's Compensation Regulations (Amendment), Statutory Rules 1990 No.122, provided a chart of old and new amounts of compensation. This was helpful, but the Explanatory Statement did not explain the basis of the changes. The Minister advised that the increases were based on movements in average weekly earnings. The Health Insurance (Variation of Fees and Medical Services) (No.54) Regulations, Statutory Rules 1990 No.250, amended certain fees. There was no indication of the absolute or percentage changes in the fees, or of the basis of the changes. The Minister explained that the fees were increased by 2% as the result of a government decision. The Locally Engaged Staff Determination 1990/16 more than doubled a particular allowance, without explanation. The Minister advised that the CPI in the relevant overseas country had increased by that amount in the five years since the last change was made. In future changes would be made more frequently.

Failure to Provide Adequate Explanatory Material

3.9 Due largely to the efforts of the Committee, Ministers in recent years have universally accepted that each instrument of delegated legislation should be accompanied by suitably detailed explanatory material to assist the public, the Parliament and the Committee. Usually this will be an Explanatory Statement. The few instruments that were not tabled along with explanatory documents were oversights, with the Minister in every case promptly agreeing to provide such material. These instruments were the Nursing Homes Financial Arrangements Principles 1989 (NHP 1/1989) under the *National Health Act 1953*, Notice of Declared Rate in respect of the Diesel Fuel Rebate, Notice No.1 of 1990; Ships (Capital Grants) Act Guidelines (No.1) 1990; Determination under s.19 (4B) of the *Social Security Act 1947*; Determinations BPT2/1990, BPT 3/1990 and BPT4/1990 under the *National Health Act 1953*; Determination of Terms and Conditions of the Aboriginal and Torres Strait Islander Commission Chairperson; Determination of Terms and Conditions of the Aboriginal and Torres Strait Islander Commission Chief Executive Officer; and the Regional Council Election Rules, Rules No.1 of 1990 under the *Aboriginal and Torres Strait Islander Commission Act 1989*. Of course, the lack of explanatory material is emphasised when, as with three of the above instruments, delegated legislation is not numbered.

3.10 Explanatory material must not only be provided, but also be of adequate volume and detail. The Tobacco Research and Development Regulations, Statutory Rules 1990 No.145, included a formula which provided the basis of the scheme

established by the Regulations. The Rules under the *Federal Court of Australia Act 1976*, *Statutory Rules 1990 No.276*, provided for important procedural changes. The *Overseas Defence Determination 1990/107* reduced Commonwealth revenue, a mere six weeks after other provisions increased such revenue. The *Australian Capital Territory (Self-Government) Regulations (Amendment)*, *Statutory Rules 1990 No.153*, added an Ordinance to the list of those which bind the Crown in the right of the Commonwealth. The *Companies Regulations (Amendment)*, *Statutory Rules 1990 No.285*, made changes for the purposes of ss.18(2)(a)(ii) and 20(2)(a)(ii) of the parent Act; 13 *Determinations under s.17 of the States Grants (Schools Assistance) Act 1988* provided details of considerable Commonwealth expenditure. None of the Explanatory Statements which accompanied the above instruments provided an adequate description of their background, intended effect or detailed provisions. The relevant Ministers all undertook to provide these details for future instruments.

3.11 When an instrument implements an undertaking given by a Minister to the Committee, the Explanatory Statement should mention this, so that the public and Parliament might be more familiar with the matters raised by the Committee. This was not done for the *Therapeutic Goods Regulations*, *Statutory Rules 1990 No.394*, and the *Archives Regulations (Amendment)*, *Statutory Rules 1990 No.391*. The relevant Ministers undertook to do so in future such cases.

3.12 On the other hand, many instruments are provided with high quality explanatory material. The Committee often writes to Ministers, usually in the context of other matters which it raises in respect of the relevant instrument, commending the quality of Explanatory Statements.

Contemporary Drafting Standards

3.13 It is now usual in legislative drafting to use expressions such as "he or she" and "him or her" rather than the previous "he" or "him" alone. *Public Service Determinations 1990/95* and *1990/177* provided for classifications such as "groundsman", "handyman", "maintenance man", "deck boy", "watchman", "sculleryman", and "fireman", as well as "kitchenman" and "kitchenmaid", both of whom received the same salary. The Minister advised that this was inappropriate and that new classifications would be included in future Determinations.

3.14 The Rules under the *Federal Court of Australia Act 1976*, *Statutory Rules 1990 No.319*; and *Australian National Railways Commission General By-law Amendments Nos.6 and 9*, provided for references to "he" rather than "he or she". The lawmakers undertook to amend the instruments.

Substituted Copies of Delegated Legislation

3.15 During the year the Committee became concerned at the number of regulations which were issued in substitution for earlier, presumably defective copies. In two of these cases there were copies substituted for earlier substituted copies. Although most of these were not made under parent Acts administered by the Attorney-General, the Committee wrote to the Attorney-General as the Minister

responsible for the general oversight of the statutory rules series. The Committee asked for an assurance that all substituted copies had been validly made, and that reasonable steps had been taken to inform users that earlier prints had been superseded. The Minister advised that substituted copies had been issued in respect of 28 sets of regulations, mostly because the earlier print bore an incorrect date of making, with no other differences. In one case there was a printing error and in another the title of the Minister was incorrectly described. In all cases the regulations had been validly made. In almost all cases members of the public received only the correct, substituted copies. All subscribers received the correct copies, although a very small number of the earlier copies may have been sold over the counter. The Office of Legislative Drafting in the Attorney-General's Department would advise the Committee of the reasons for any future substituted copies.

Delay in Making Delegated Legislation

3.16 It may be a breach of parliamentary propriety if executive lawmakers delay making necessary legislation. The Explanatory Statement for Public Service Determination 1989/114 advised that the purpose of the instrument was to implement determinations of the Australian Industrial Relations Commission. However, the instrument was not made until some 18 months later. The Minister explained that the apparent delay was due to the time taken by State authorities to match the determinations. The Explanatory Statements for the Consular Privileges and Immunities Regulations, Statutory Rules 1989 No.286, and the Diplomatic Privileges and Immunities Regulations, Statutory Rules 1989 No.287, advised that the instruments implemented respectively a three year old agreement with the United States and a one year old agreement with the European Community. The Minister advised that both parent Acts had required amendment before the regulations could be made, and that administrative arrangements had put the agreements into effect. The Committee then noted that the amendments had taken place some 18 months before the Regulations. The Minister advised that the area of the Department was severely understaffed at the time.

Invalid or Inappropriate Retrospectivity

3.17 Subsection 48(2) of the *Acts Interpretation Act 1901* provides that delegated legislation may only operate retrospectively if it does not adversely affect any person, apart from the Commonwealth. *Defence Determination 1990/52*, which ceased the payment of a certain allowance to specified serving officers, operated retrospectively for seven weeks. The Minister advised that this was beyond power and that the Determination had been amended to remove the commencement clause. *Civil Aviation Orders Part 105 AD/F23/45 Amendment No.2*, breach of which was an offence, was expressed to operate retrospectively from 1 January 1983. The Minister explained that the provision was not intended to operate retrospectively, but was rather to indicate the period of coverage for that particular aircraft type. The instrument would be amended. *Determination HS/3/1989* under s.3C(1) of the *Health Insurance Act 1973*, which operated retrospectively for 14 days, imposed an

extra liability on patients undergoing treatment during that period. The Minister undertook to make a new Determination.

3.18 Other instruments did not operate with prejudicial retrospectivity, or there were other acceptable explanations, although this was not noted in the Explanatory Statement. Provisions of the *Ships (Capital Grants) Act Guidelines (No.1) 1990* clearly provided for prejudicial retrospectivity. The Minister advised that the parent Act expressly provided for this, the date of retrospectivity being the date of a particular press release by the Minister. Relevant Ministers assured the Committee that retrospective provisions were wholly beneficial, or only prejudicially affected the Commonwealth, in respect of the *Rural Industries Research Regulations (Amendment), Statutory Rules 1990 No.77; Fringe Benefits Tax (Application to the Commonwealth) Regulations, Statutory Rules 1989 No.11; Interstate Road Transport Regulations (Amendment), Statutory Rules 1990 No.144; Overseas Defence Determination 1990/67; and Determination No.PCI/1990 under s.40AFA(3) of the National Health Act 1953*.

Possible Duplication of Time and Resources

3.19 During the year the Committee became concerned at some 50 separate sets of regulations which were made on the same day as another set, under the same parent Act, amending the same principal regulations, on the advice of the same Minister and often with successive numbers in the Statutory Rules series. This appeared to be a duplication of resources. In one case, eight such instruments were made on the same day; in two other cases three were made on the same day. In another case two were made on one day followed by three more eight days later. In another case three separate principal regulations were amended by 10 sets of regulations in 16 days. The Committee wrote to the Attorney-General, who advised that numbers of these instruments were made not only under the provisions of the parent Act, but also under the provisions of s.4 of the *Acts Interpretation Act 1901*. Section 4 provides that regulations may be made under provisions of a parent Act which have not yet come into operation. It was not possible for the same instrument to include both regulations made under provisions of the parent Act in force at the time of making and regulations made under provisions not yet in force. However, the Minister undertook to amend the Act to make this possible.

3.20 The Committee also wrote to individual Ministers about possible duplication of resources. In respect of the *Australian Federal Police Regulations (Amendment), Statutory Rules 1989 Nos.343,344,361 and 362; the Australian Federal Police (Discipline) Regulations (Amendment), Statutory Rules 1989 Nos.332, 333 and 363; and the Merit Protection (Australian Federal Police) Regulations (Amendment), Statutory Rules 1989 Nos.349, 350 and 364*, the Minister advised that complex amendments of the parent Acts were developed simultaneously. The multiplicity of amendments of regulations was necessary to separate those made under the provisions of section 4 of the *Acts Interpretation Act*. Although this appeared expensive it was cheaper than the costs of possible litigation. The eight *A.C.T. Self-Government (Consequential Provisions) Regulations (Amendment), Statutory Rules 1989 Nos.391-398*, all amended the same Schedule of the parent Act. The Minister

advised that ideally all amendments would have been made by one instrument, but there was a time limit after which the regulation making power expired. Unfortunately, this urgency meant there was less delay and expense in making eight separate instruments. In respect of the **Great Barrier Reef Marine Park Regulations (Amendment)**, **Statutory Rules 1989 Nos.367 and 368**, the Minister also advised that two sets of amendments were developed separately and when it was realised that both were ready at the same time there would have been unjustifiable delay in drafting the two instruments as one. The Minister advised that the **Crimes (Amendment) Ordinances**, **ACT Ordinances Nos.1 and 2 of 1990** provided for essentially unrelated amendments which came to fruition simultaneously. In the case of the **Civil Aviation Regulations (Amendment)**, **Statutory Rules 1990 Nos.215, 216, 258 and 260**, it would have been preferable to combine them but unfortunately this was not possible. In respect of the **Customs Regulations (Amendment)**, **Statutory Rules 1990 Nos.147, 148, 217, 218, 220, 221, 222 and 223**; the Minister advised that administratively it was sometimes more efficient to process amendments separately. Amendments effected by the **Occupational Superannuation Standards Regulations (Amendment)**, **Statutory Rules 1990 Nos.149, 150, 185 and 202**, were of such a range and complexity that they were developed separately as discrete exercises. Consolidation was considered but was not practicable. Finally, in respect of the **Income Tax Regulations (Amendment)**, **Statutory Rules 1990 Nos.331 and 332**, the Minister advised that the amendments were unrelated and better managed independently. The amendments were sent for approval separately but came up for consideration at the same meeting of the Executive Council.

Drafting Deficiencies

3.21 Delegated legislation should be drafted to a standard not less than that of Acts of Parliament. Even if drafting defects do not affect validity, they may be confusing to users. **Australian Meat and Live-stock Order No.MQ34/89** included two Orders with the same number. There were two instruments numbered **Determination BPT3/1990** under the **National Health Act 1953**. The **Federal Airports (Amendment) By-laws No.1 of 1990** included a provision that was not expressed clearly. **Fisheries Notice No.TEC2** included two paragraphs with the same number. **General Conditions under s.10F of the Agod or Disabled Persons Homes Act 1954** included a Table of Contents which was incomplete and inaccurate. **Public Service Determination 1990/183** misspelt two well known Australian place names. The **Australian Horticultural Corporation (Export Control) Regulations**, **Statutory Rules 1990 No.422**, misspelt the name of a friendly Pacific Ocean country. The **Occupational Superannuation Standards Regulations (Amendment)**, **Statutory Rules 1990 No.202**, included cross reference errors in both the instrument itself and the Explanatory Statement. The Explanatory Statement for **Public Service Determination 1990/31** used the word "principal" when "principle" was meant while **Public Service Determination 1990/33** used the word "principle" when "principal" was meant. In all these cases the relevant Minister undertook to correct the drafting oversight.

3.22 The Superannuation (Approved Authorities) Regulations (Amendment), Statutory Rules 1990 No.96, referred to the "Australian Capital Territory Health Authority", a body which no longer existed, following legislative changes effected in 1988. The Minister advised that the principal Regulations would be repealed following amendments of the parent Act. The Superannuation (Eligible Employees) Regulations, Statutory Rules 1990 No.97, added a sub-paragraph 4 (zj)(i)(C) which included four cumulative negatives. The Minister undertook to amend the provision to provide a simpler form of drafting.

3.23 Renumeration Tribunal Determinations Nos.5 and 6 of 1990, made some two weeks apart, among other things both fixed the remuneration and allowances of certain officers of the Aboriginal and Torres Strait Islander Commission. As both were expressed to take effect from date of appointment there was no ambiguity, but the Committee raised the matter. The Minister advised that although this procedure was unusual, it was intended to help users as the second Determination grouped together the terms and conditions of the many ATSIC officers. The Determination of Terms and Conditions of the Aboriginal and Torres Strait Islander Commissioner Chairperson and the Determination of Terms and Conditions of the Aboriginal and Torres Strait Islander Commission Chief Executive Officer, both made separately two months later, also fixed the same remuneration and allowances. The Minister undertook to revoke these two Determinations.

3.24 On the other hand, the Committee compliments Ministers where drafting is of good quality. The Livestock Export (Merino) Orders, Livestock Orders No.1 of 1990, among others, had a high standard of drafting and presentation.

Access, Presentation and Publication

3.25 As with drafting, standards of access, presentation and publication of delegated legislation should not be less than those of Bills. Public Service Determination 1990/36 included some handwritten alterations with no initials or other authentication. The Minister advised that the instrument was produced to a tight schedule. The print of Overseas Defence Determination 1990/108 cut off eight dates from which its provisions were effective. The Minister advised that quality control measures would be improved. The tabled copy of the Northern Prawn Fishery Management Plan (Amendment), Plan of Management No.6, had blank spaces for the date of gazettal. The Minister advised the Committee that copies provided to the public included that date. A corrigendum was attached to Public Service Determination 1990/143 with scotch tape. The Minister advised that the mistake was in the Determination as printed, not as made.

3.26 Amendments of various Civil Aviation Orders referred to a specified publication. Although the publication was not incorporated in the Orders, the Committee obtained a copy to ensure that it did not contain anything which might breach its Principles. Public Service Determinations 1990/147, 148, 208, 212 and 217 were all provided to commence on the same day as another Determination in a

separate series of delegated legislation. The Committee was concerned that users would need to consult another instrument to find out the date of effect. The Minister advised that future Determinations would avoid the need to purchase or consult other instruments.

3.27 The **Livestock Export (Merino) Orders, Livestock Orders No.1 of 1990**, provided a Note in the body of the Orders which advised of the existence of AAT review rights. The Committee suggested that this helpful practice could be adopted for other instruments such as the **Export Control (Dairy Produce) Orders as amended (Amendment), Export Control Orders No.4 of 1990**. The Minister undertook to do this. The **Export Control (Dried Fruits) Orders as amended (Amendment), Export Control Orders No.8 of 1989**, provided a full consolidation of the Orders as part of an amendment. This was a very high standard of access and presentation. However, the Committee suggested that this could be improved even further if the Notes in the body of the Orders referred to specific provisions in other instruments rather than just to the titles of those instruments.

3.28 The **National Health Regulations (Amendment), Statutory Rules 1990 No.114**, provided for the principal Regulations to be renumbered. Such provisions assist users with clearer and more accessible legislation. However, these reforms are only useful if a prompt consolidation and reprint is issued at once. In this case there was no chart or table in the instrument or the Explanatory Statement comparing old and new regulation numbers. The Minister undertook to provide a reprint. The Minister similarly undertook to provide a reprint of the principal Income Tax Regulations, renumbered by the **Income Tax Regulations (Amendment), Statutory Rules 1990 No.192**.

Legislative and other Instruments not Subject to Appropriate Scrutiny

3.29 It is essential that any legislative instruments provided for by delegated legislation should be subject to parliamentary scrutiny. The **Excise Regulations (Amendment), Statutory Rules 1989 No.327**, provided for matters "prescribed by Department By-laws". The Committee was concerned that these may be legislative yet not subject to tabling and disallowance. The Minister advised that the By-laws were administrative not legislative; they could not change the law but merely applied it in particular cases; they were expressly authorised by the parent Act and in no case could impose duties or liabilities. The **Military Financial Regulations (Amendment), Statutory Rules 1990 No.286**, the **Naval Financial Regulations (Amendment), Statutory Rules 1990 No.287**, and the **Air Force Regulations (Amendment), Statutory Rules 1990 No.288**, all provided for the Minister to determine conditions under which medical and dental treatment is provided to members of the ADF. The Committee was concerned at the nature of these determinations. The Minister advised that such determinations were administrative, not legislative, and that it was not intended, or even possible, for the Minister to delegate this power. The **Common Form of Agreement No.URA/1/90** between a **Resident and a Proprietor** under s.40 ABB of the **National Health Act 1953** referred to "the published policy of the Department" and to "Conditions or directions issued by the Department or Minister". The Minister advised that the published policy

referred to administrative matters published as departmental circulars, available from the Department on request. The conditions and directions referred to actions by the Minister authorised by the parent Act.

3.30 The **National Health Regulations (Amendment), Statutory Rules 1990 No.114**, provided for statutory bodies established by the Regulations to furnish Annual Reports to the Minister. Although it was not necessary for such Reports to be subject to disallowance, it seemed appropriate that they should be tabled. The Minister undertook to amend the Regulations.

Technical Validity

3.31 Delegated legislation must comply with the technical requirements of the parent Act or of umbrella Acts such as the *Acts Interpretation Act 1901*. Determinations 7/90 and 8/90 under s.13 of the *States Grants (Technical and Further Education Assistance) Act 1989* approved identical sums of money as grants to the same educational institutions. The Minister advised that this was done to give a complete picture of all expenditure, including payments previously authorised. The Committee suggested that the Minister seek advice from the Attorney-General's Department and the Australian Audit Office on the validity of the instruments, under which it appeared that payment of considerable sums had been authorised twice. The AAO advised that, while the present procedure was valid, a much more acceptable practice would be to indicate which amounts had been previously approved. Attorney-General's Department advised that the approvals were valid, but that it was clearly desirable for variations of earlier Determinations to be expressed as such. The Minister undertook to do this in future. Determination No.1989/29 under s.14 of the *States Grants (Technical and Further Education Assistance) Act 1989* merely determined amounts of certain grants. However, the parent Act required the Minister or delegate to approve proposals before determining grants. The Minister advised that the failure to approve proposals was contrary to current practice and was an oversight. The Explanatory Statement for Determination No.8 of 1990 under s.6(3) of the *Superannuation Benefits (Supervisory Mechanisms) Act 1990* advised that the "*Australian Meat and Live-stock Corporation Act 1980*" had been declared for the purposes of the parent Act by Notice published in the Gazette. Such a declaration would have been invalid, as there was no such Act. The Act in question was intended to be the *Australian Meat and Live-stock Corporation Act 1977*. The Minister advised that the Notice included the correct citation. Public Interest Determination No.2 under s.72 of the *Privacy Act 1988* was revoked and remade by the Privacy Commissioner after the Committee expressed doubts about its validity.

3.32 The **Regional Council Election Rules, Rules No.1 of 1990** under the *Aboriginal and Torres Strait Islander Commission Act 1989*, provided that, in certain circumstances, people may be appointed on the spot to specified positions. However, such appointments were only valid if the Australian Electoral Commission afterwards ratified the appointment. The Committee raised the position where the AEC declined to ratify an appointment. Would this affect the validity of the voting procedures? The Minister advised that there were similar provisions in the

Commonwealth Electoral Act 1918 and the parent Act required the Minister to provide for elections in a manner similar to those for the Parliament.

3.33 The *Live-stock Export (Merino) Orders (Amendment), Live-stock Export Orders No.2 of 1990*, provided that a definition was "subject to such guidelines determined and published in the *Guidelines and Conditions for Export Sales* by the Australian Association of Stud Merino Breeders Ltd". This was valid if the publication was an existing publication and it was that publication as it then existed which was incorporated. But if it was intended to incorporate the publication as amended from time to time, then without express authority in the parent Act, s.49A of the *Acts Interpretation Act 1901* would preclude such incorporation. The Minister assured the Committee that if it was intended to incorporate amendments of the publication then a fresh instrument would be made each time.

Failure to Effect Legislative Effect

3.34 Delegated legislation should effect any intentions evident on its face or notified in the parent Act or the explanatory material. The Explanatory Statement for the *Australian Horticultural Corporation (Export Control) Regulations, Statutory Rules 1990 No.422*, advised that the Regulations may be extended to cover horticultural products which would be listed in a Schedule to the Regulations. It also advised that certain licences were not required for some destinations listed in a Schedule. However, the Regulations as drafted made no provision for such matters. The Minister advised that it was intended to provide for this at some time in the future. The Explanatory Statement for *Fisheries Notice No.ORF8* advised that it was intended to revoke *Fisheries Notice No.ORF7*. However, there was no express provision effecting this intention, although the earlier Notice may have been revoked by implication. The Minister accepted the point made by the Committee, but did not undertake to amend the Notice as the earlier instrument had now expired so users were unaffected. The Explanatory Statement for *Determination SEP90(1)* under ss.16 and 17 of the *States Grants (Schools Assistance) Act 1988* advised that its purpose was to transfer \$13,273 from one education program and \$2,355 from another, to a third program, following a request from a State Minister. If this was the case the third program would receive \$15,628. However, the instrument increased the third program by \$16,078. The Minister advised that this was an oversight and the Determination would be amended.

3.35 The parent *Training Guarantee (Administration) Act 1990* provided that a statutory authority may cancel a registration if it is so empowered under the Guidelines. The *Industry Training Agents Guidelines No.1, ITA No.1 of 1990*, did not include such an express power, although other provisions were drafted as if a power did exist. The Minister undertook to amend the Guidelines. *Overseas Defence Determination 1990/19* provided in one Part for separate allowances for each of the 50 States of the United States. Another Part provided allowances for only 49 States. The Minister advised that this was intentional.

Failure to Implement Undertakings Given to the Committee

3.36 Each year Ministers give many undertakings to amend legislation to meet the concerns of the Committee. Such undertakings should be implemented as soon as possible, and certainly the next time the principal instrument is amended. The Civil Aviation Regulations (Amendments), Statutory Rules 1989 No.276, made on 12 October 1989, did not implement undertakings given to the Committee on 1 November 1988. The Minister explained that the matter had a high priority, that a first draft had been received, that 18 amendments were required to implement the undertakings and that other matters would have been delayed if those amendments had been included in the present Regulations.

PRINCIPLE (B)

DOES DELEGATED LEGISLATION TRESPASS UNDULY ON PERSONAL RIGHTS AND LIBERTIES?

Strict Liability and Vicarious Liability Offences

3.37 The Committee always questions whether such offences are justified. The Committee will normally only accept provisions for these offences after detailed explanations and assurances.

3.38 In the following cases the Minister undertook to amend the instrument to remove offences providing for these types of liability. The Australian National Railways Commission General By-law Amendment No.6 provided for a strict liability offence relating to taking heavy or long loads across railway level crossings. The offence made no provision for people who might reasonably breach the provision because of, say, accident, fire or a toxic leak. Other provisions in the same Amendment provided for an excuse of reasonability. The Air Navigation (Aerodrome Curfew) Regulations, Statutory Rules 1989 No.354, provided strict liability for an aircraft operator who failed to provide certain information. Other provisions included a requirement that offenders must have acted "knowingly or recklessly". The Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1990 No.35, provided that a vessel or hovercraft operator must not discharge more than 20 passengers in a specified area, even apparently if the craft was sinking or on fire. The Committee suggested to the Minister that such a result could not have been intended. The Australian National Railways Commission General By-law Amendment No.9 provided for a vicarious liability offence, the owner of a vehicle being deemed guilty unless he or she provided a statutory declaration with the name and address of the person actually in charge of the vehicle at the time of the alleged offence. However, this may be impossible if the vehicle was stolen or illegally used. The Regional Council Election Rules, Rules No.1 of 1990 under the *Aboriginal and Torres Strait Islander Commission Act 1989* provided for a strict and vicarious liability offence. If certain material was published on behalf of an organisation, then not only the actual publisher but every officer of the organisation was deemed guilty of an offence. The *Regional Council Election (Casual Vacancy) Rules*, Rules No.3

of 1990 under the *Aboriginal and Torres Strait Islander Commission Act 1989* included a similar provision. The Australian National Maritime Museum Regulations, Statutory Rules 1991 No.10, provided for a strict liability offence of printing or selling a photograph or other replica of historical material in the collection. The Committee pointed out that there must be many existing photographs of material now in the Museum. The Defence (Areas Control) Regulations, Statutory Rules 1989 No.337, provided strict liability offences for bringing onto land an object hazardous to aircraft, for obstructing a public official, or for obstructing anything done under the Regulations.

3.39 In the following case the Minister explained a strict liability offence to the satisfaction of the Committee. The Crimes (Amendment) Ordinance (No.2) 1990, A.C.T. Ordinance No.2 of 1990, provided for a strict liability offence of making threats or demands, the effect of which was to hinder a police officer in the course of his or her duty. The Committee was particularly concerned that the penalty for this offence was 10 years imprisonment. The Committee gave an instance of a case where the application of strict liability to these circumstances would be unfair. The Minister advised that the offence required a threat for an express purpose, with intent, the onus of proof for which lies with the prosecution. In the case raised by the Committee, prosecutorial discretion would be exercised in the person's favour.

Safeguards and Restrictions on the Power of Entry Upon Private Premises

3.40 The entry of officials upon private or business premises should be subject to appropriate safeguards. One aspect of this concern of the Committee is that authority to enter private premises should be given by a judicial officer, either a judge or a stipendiary magistrate. The Committee believes that it is usually not appropriate for a Justice of the Peace to have the power to authorise such entry. The Committee raised this concern with the Minister in respect of the Goat Fibre Levy Collection Regulations, Statutory Rules 1989 No.277, even though the parent Act expressly provided that Justices of the Peace could issue warrants. The Minister advised that goats were raised in remote and inaccessible areas where judicial officers may not be available, that field officers were instructed to seek advice from head office before approaching a Justice of the Peace, and that wherever practicable magistrates would be used. The Defence (Areas Control) Regulations, Statutory Rules 1989 No.337, provided for four separate authorities to enter on land for a number of purposes, including the use of force and the destruction of property. All four could be issued by the Minister, rather than by a judicial officer. The Minister could delegate this power to senior Defence Force or departmental officers. The Committee pointed out that these officers would be "judges in their own cause" and asked whether procedures for entry could be administered by impartial judicial officers. The Minister advised of other safeguards. Entry may only be effected after the occupier has failed to comply with a notice, authority to enter must be in writing and identify the extent of the authorisation and the periods during which it may be exercised, and the authority to enter must be produced. Also, the decision to issue the notice is subject to AAT review, which suspends its operation, and there are compensation provisions for any damage to property on the land.

3.41 Many instruments of delegated legislation provide a general power for public officials to enter private premises. In such cases the Committee insists on suitable safeguards. The *Formulation ADPHA 10F 1 HOS under section 10F of the Aged or Disabled Persons Homes Act 1954* provided for inspectors to enter premises. The power was limited by an appropriate reasonability requirement but did not include the usual provision that such officials carry a photographic identity card, the production of which was a condition of entry. The Minister advised that a week's notice was given of each visit by inspectors and there was an administrative requirement that photographic identity cards, which included the relevant sections of the Act, be produced at the start of each visit. The *Navigation (Maritime Casualty) Regulations, Statutory Rules 1990 No.257*, provided for the Minister to issue identity cards to investigators and authorised persons, who had extensive powers of entry. This was appropriate. However, the Regulations also provided that this was not necessary in urgent cases. The Committee asked what these cases might be. The Minister advised that there might be marine casualties at a remote location where it would be more suitable to use investigators from a State or overseas authority, rather than the usual Commonwealth employees. In any event, in such cases identity cards are issued and dispatched as soon as possible. The Minister's powers in urgent cases would be delegated only to senior officials. The *Industry Training Agents Guidelines No.1* did not provide for photographic identity cards for officials entering private premises, although the parent Act included this safeguard for similar sets of circumstances. The Minister undertook to amend the Guidelines.

3.42 The Committee ensures that safeguards for individuals against entry by officials upon private or business premises are as comprehensive as possible. The *Laying Chicken Levy Collection Regulations, Statutory Rules 1990 No.121*, properly provided that only judicial officers could issue a warrant to enter. However, the form prescribed for the warrant was not mandatory, but merely advisory. The Minister explained that the parent Act required certain matters to be included in a warrant, and the form was only for guidance. The provision that a warrant must be issued only by a judicial officer was a strong safeguard. Similarly, the *Trade Practices (Consumer Product Safety Standards) Regulations (Amendment), Statutory Rules 1989 No.336*, also prescribed an advisory, not a mandatory, form of a search warrant. The Committee raised this with the Minister, even although the warrant could only be issued by a judge. The Minister advised that only the general layout of the form was optional. The contents were tightly controlled by the parent Act, and any warrant which did not comply with these provisions would be invalid. The form was not mandatory in order to ensure flexibility.

3.43 The Committee ensures that other safeguards are provided. The *Horticultural Export Charge Regulations, Statutory Rules 1989 No.251*, provided a mandatory form of search warrant. However, it provided that entry by officials may be at specified times or "at any time". The Committee suggested that these times should be limited by a reasonability requirement or by objective criteria. The mandatory form of the warrant included three other reasonability requirements. The Committee noted that the instrument was intended to deal with exporters of potted plants, for whom the possibility of unrestricted entry at any time may not

have been necessary. The Minister advised that it was expected that entry would be sought only for business hours, unless there were other compelling reasons. Nevertheless, amendment would be considered. The **Trade Practices (Consumer Product Safety Standards) Regulations (Amendment), Statutory Rules 1989 No.336**, also provided that entry might be effected by officials at any hour. In addition, they provided for entry by officials with assistance and by force, with no reasonability *limits on the assistance or the force*. The Committee considered that such provisions should include express and objective safeguards. The Minister advised that the words used were identical to those in the parent Act and that under that Act judges may only issue warrants for assistance and force where satisfied there are reasonable grounds for this. Also, the judge may restrict entry to particular times and again under the parent Act must be reasonably satisfied that the times in a warrant are appropriate. The **Industry Training Agents Guidelines No.1** provided for officials to enter certain premises. The Committee was concerned that these provisions appeared to duplicate, rather than complement, provisions in the parent Act which provided full powers of entry. The Minister advised that the powers in the Act related to officers of the Department, while those in the instrument related to *officers of the relevant statutory authority*.

Reversal of the Onus of Proof

3.44 The Committee requires detailed explanation before it will accept reversal of the usual onus of proof in offence provisions. The **Juries (Amendment) Ordinance 1989, ACT Ordinance No.61 of 1989**, provided that if other elements of an offence of penalising an employee summoned for jury service were proved, then the onus of proving that the employer did not so penalise the employee, lay upon the employer. The offence carried a penalty of \$3,000 for a natural person and \$15,000 for a body corporate. The Minister explained that jury trial was essential to our system of *criminal justice, that here the prosecution must prove all elements of the offence other than the reasons, that the reasons are peculiarly within the knowledge of the employer, that the provision would be virtually ineffective without the reversal of onus, that if there are valid reasons for the action then it will be easy to discharge the onus, that it would be contrary to the public interest to deny such a reversal, that public policy required the reversal, and that although there should only be "very limited" exceptions to the general rule, this was one of them*. There were similar provisions in the **NSW Juries Act 1977**, in the **Industrial Relations Act 1988** and in other Commonwealth Acts. Again, the **Crimes (Amendment) Ordinance (No.2) 1990, ACT Ordinance No.2 of 1990**, reversed the usual onus of proof in a defence of diminished responsibility in a trial for murder. The penalty for murder was *life imprisonment*. The Minister advised that the reversal was common to all jurisdictions which provide for this defence, that the matters involved are within the particular knowledge of the defendant and in relation to which the prosecution cannot compulsorily require evidence, and that without the reversal such a defence would become an attractive option for persons charged with murder, who would virtually be guaranteed a manslaughter verdict.

3.45 The Minister undertook to amend both the *Regional Council Election Rules, Rules No.1 of 1990*, and the *Zone Election Rules, Rules No.4 of 1990*, made under the *Aboriginal and Torres Strait Islander Commission Act 1989*, to remove identical provisions which reversed the onus of proof in respect of strict liability, vicarious offences relating to the publication of certain material.

Proper Compensation for Persons Affected by Commonwealth Actions

3.46 If Commonwealth actions cause loss or damage to individuals then compensation procedures should be objective, detailed and clear. The *Defence (Areas Control) Regulations, Statutory Rules 1989 No.337*, provided compensation procedures where the value of land had been reduced, buildings damaged or persons suffered loss or expense, as the result of a Commonwealth program. Notification of the rights of affected individuals was in some cases by personal service. The Committee considered that this was an important safeguard. However, in other cases notification of rights was merely by substituted service, or by publication in the *Gazette* or a local newspaper. The Committee noted that this may be harsh, as a land owner may be away from the district, or otherwise miss the notice. In such cases no compensation was payable unless undue hardship could be proved. The Committee considered that these procedures may be limited and uncertain. Also, compensation was not payable where the Minister, in good faith, had already paid compensation in respect of an interest in the land. This may not safeguard the interests of all persons whose interests were affected. This could happen more easily where there was substituted service. The Minister advised that the program only operated in rural and semi-rural areas, where the lower standards of notification would have less impact. In any event, the higher standard of notification was prescribed where the value of land or property would be appreciably diminished in value. The lower standards were only used where serious damage was less likely. There was maximum publicity for the program in affected areas, in consultation with State governments and local councils. The Department would liaise with State land titles offices to see if the restrictions imposed by the program could be included in a central register of restrictions. It would cost a considerable amount of money to notify individually all affected landowners. This cost would not be matched by benefits. Also, landowners would not be excluded from compensation in cases where payments were made mistakenly in good faith to someone who was, in effect, the wrong person.

3.47 Similar principles were involved in the Committee's scrutiny of the *Federal Airports (Amendment) By-laws No.1 of 1990*. This instrument provided for a purchaser to receive a clear title to certain aircraft sold by the *Federal Airports Corporation*. The Committee was concerned about the rights of holders of a mortgage or charge over the aircraft. These concerns were whether it was intended to extinguish their security without recourse, whether proceeds of the sale were to be held in trust for any mortgagee and whether the Corporation would indemnify the holder of any charge. The Minister advised that aircraft sold were usually derelict and of little value, but were continuing to incur parking charges. There

were five such aircraft at Bankstown Aerodrome alone. Before sale the Corporation notified the holder of any charge over the aircraft noted on the register. Any person who could demonstrate a legal or equitable right to the aircraft could apply for the proceeds of the sale.

Proper Notification of Rights and Liabilities

3.48 It is essential that affected parties are notified of any rights or obligations provided by delegated legislation. The **Banking (Statistics) Regulations, Statutory Rules 1989 No.357**, provided that the Reserve Bank of Australia could fix an accounting date for banks. If it did so, then it was required to "tell" the bank. The Committee considered that this should be "tell in writing", rather than leave such an important requirement to the uncertainties of possible oral, informal advice. Similarly, the **Australian Federal Police Regulations (Amendment), Statutory Rules 1989 No.361**, provided that the Commissioner of the AFP must "tell" specified persons of certain personnel decisions. Here also the Committee considered that such telling should be in writing, particularly as several other provisions in the same regulations required decisions to be notified in writing. In both these cases the Minister undertook to amend the Regulations.

3.49 Mandatory requirements imposed on members of the public must be clear. Thus, the **General Conditions under section 10F of the Aged or Disabled Persons Homes Act 1954**, included a number of mandatory provisions with no apparent sanctions. The Minister explained that the sanction for failure to comply was that money provided under the parent Act would be stopped or reduced. The **Industry Training Agents Guidelines No.1** also did not appear to provide a penalty for a mandatory requirement. The Minister explained that the penalty was that under the parent Act the relevant registration could be cancelled. The **Cattle and Beef Levy Collection Regulations, Statutory Rules 1991 No.4**, provided a penalty for a breach of one provision, but not for others. The Committee considered that it may be a breach of personal liberties if penalties are set out elsewhere than in the delegated legislation with no indication to those affected of what the penalties are. The Minister explained that penalties were set out in the parent Act, although Attorney-General's Department advised that in this case it may be possible to include an Explanatory Note in the Regulations. In any event, both the parent Act and the Regulations would shortly be replaced, when the Committee's concerns will be taken into consideration.

3.50 **Determination of Application No.1 under section 72 of the Privacy Act 1988** provided that the Director of Public Prosecutions may disclose specified information about individuals to the Victorian Mental Health Review Board. **Determination of Application No.3** provided that certain public officials could disclose information about foreign-born persons to the several different bodies concerned with the award of Australian honours. The **Tax File Number Guidelines under section 17 of the Privacy Act 1988** provided for the provision and use of tax file numbers. Because of the personal liberties aspects of these instruments the Committee asked for further advice on the access by the public to this legislation. The Minister advised that the Privacy Commissioner would discuss with the Commonwealth Bookshop the

possibility of distributing the two Determinations. However, the Commissioner had already planned to have the Determinations available from his office and through the Privacy Handbook, a loose-leaf publication which would commence circulation shortly. The Privacy Commissioner had also published the Tax File Number Guidelines together with the annotations and compliance notes provided for Parliament at the time of tabling.

Protection of Rights of Persons Appearing before Courts or Tribunals

3.51 The Committee ensures that procedures of courts or tribunals take account of the personal rights of persons who appear before them. The Committee raised two aspects of the *Australian Federal Police Regulations (Amendment), Statutory Rules 1989 No.361*. The Regulations provided that no party other than the Commissioner was entitled to be represented before an appeal committee reviewing an appointment to act at a higher salary level. On its face, this was a breach of personal rights. The Regulations also provided that even where the appeal committee recommended that an appeal be allowed, the Commissioner could overrule the recommendation. With respect to the latter, the Minister advised that such a procedure was necessary to ensure the ultimate authority of the Commissioner over the AFP as a disciplined force. A similar provision had been in operation for many years under which the Commissioner had only very rarely departed from recommendations of a committee. With respect to the former, appellants could appear in person. The present procedure was the same as that for the Australian Public Service. The rights of the appellant were protected by the presence of a nominee of the principal relevant staff association. The Committee sought further information from the Minister on this aspect, asking to what extent such a nominee is expected to be an advocate for the appellant. The Minister advised that each member of a committee could question any party on any matter they considered relevant. A committee is independent, and may inform itself as it thinks appropriate.

The Right to Privacy

3.52 The Committee always ensures that delegated legislation respects the basic right to privacy. The *Regional Council Election Rules, Rules No.1 of 1990* under the *Aboriginal and Torres Strait Islander Commission Act 1989* provided that all ballot papers, certified lists of voters, copies of the electoral roll, various forms of declaration and postal vote certificates may be used to collect specified statistical information. The Committee raised the privacy interests of persons whose names and personal details appeared in these documents. The Minister advised that the present provisions were the same as those in the *Commonwealth Electoral Act 1918*, that safe custody of the information was provided in the Rules, and that access was restricted to officers of the Australian Electoral Commission.

Harsh or Unreasonable Provisions

3.53 It is a breach of personal liberties if provisions of delegated legislation are harsh or unreasonable. The Australian National Maritime Museum Regulations, Statutory Rules 1991 No.10, provided for a number of offences, all with a penalty of \$500. The Committee considered that in most cases this penalty was reasonable. However, in the case of what was essentially a parking offence, \$500 may have been excessive. The Minister undertook to amend the Regulations to reduce this penalty to \$100.

3.54 The Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1990 No.460, made it an offence to import certain firearms. The Committee was concerned that the effect of the Regulations may have been that articles which were previously lawful to possess and which may have been in a person's possession for many years, were effectively made unlawful to possess. This would have been the effect if another Commonwealth, State or Territory law made it an offence to possess the articles, or provided for their seizure. The Committee also raised the case of imports prohibited by the present Regulations which were in the course of transit to Australia or awaiting customs clearance at the time the Regulations came into effect. The concern here was whether such importers would be unfairly disadvantaged. The Minister advised that the affected firearms were only liable to seizure if imported after the Regulations came into effect. Articles in the course of transit were subject to seizure on arrival. It was not practicable to exempt prohibited articles merely because their journey had commenced. However, articles already in Australia but awaiting clearance were not affected because they had already been imported.

3.55 Australian Meat and Live-stock Orders Nos.35/90 and 36/90 provided that if a licensee did not load exports on a ship or aircraft within a certain time, then the Australian Meat and Live-stock Corporation must withdraw that export approval. The Committee was concerned that an exporter may not have been able to load exports due to events beyond his or her control. The Minister advised that this mandatory effect was intended. Export quotas from Australia to the European Community must be used or a lower quota might be imposed for the following year. However, the AMLC gave first option on any quota being reallocated to exporters whose approval had lapsed.

3.56 Public Service Determination 1990/159, 1990/164, 1990/165 and 1990/166 provided for certain benefits on retirement to officers of the Australian Public Service if specified officers retired within a particular period. While some officers were given up to 30 days to make up their minds on this important step, others were only given 8 days. The Minister advised that all the periods were carefully worked out with the consent of the officer concerned.

Inappropriate Powers Given to Public Officials

3.57 Powers given to public officials should be limited by appropriate safeguards. Not only should there be external review of the merits of decisions made by officials, but also suitable constraints should exist on the face of each instrument. The Navigation (Marine Casualty) Regulations, Statutory Rules 1990 No.257, provided that a person must answer certain questions put by a public official. Although some provisions included a defence of self-incrimination in such cases, there was no such protection in one important provision. Also, it appeared that if the master of the ship agreed, then any person present could be asked incriminating questions. In addition, under another provision, a person need not answer if he or she has a reasonable excuse. However, there was no indication whether self-incrimination is a reasonable excuse. Finally, there appeared to be no safeguards at all when public officials effected entry by a warrant, or in an emergency. The Minister undertook to amend the Regulations retrospectively to provide uniform safeguards. Similarly, the Industry Training Agents Guidelines No.1 required a person to answer questions, with no protection against self-incrimination. The Minister undertook to amend the instrument.

3.58 The Control of Naval Waters Regulations (Amendment), Statutory Rules 1990 No.206, provided that a public official could remove persons from certain waters or foreshores if they have contravened the Regulations. The Committee pointed out that until conviction by a court there is no certainty that the Regulations have been contravened. The Minister advised that the provision was not intended to override the principle that a court, not a public official, should decide whether a person is guilty of an offence. The Regulations would be amended to meet the concerns of the Committee.

3.59 The Meat Inspection (General) Orders as amended (Amendment), Meat Inspection Orders No.4 of 1990, provided that the owner or occupier of certain premises must comply with a direction of an authorised officer given under the Orders. There was no requirement that the directions be reasonable, although the Committee noted the substantial safeguard that directions had to be in accordance with the Orders. The Minister advised that a reasonability requirement was not considered necessary because of the safeguard mentioned by the Committee.

3.60 According to the Explanatory Statement, the purpose of the Wool Marketing Regulations (Amendment), Statutory Rules 1990 No.203, among other things, was to provide that the Australian Wool Corporation could require information about wool tax payments from persons registered under the Act. This seemed reasonable. However, the actual drafting of the provision allowed the AWC to require information from any person at all. The Minister undertook to amend the instrument.

PRINCIPLE (C)

DOES DELEGATED LEGISLATION MAKE RIGHTS UNDULY DEPENDENT ON ADMINISTRATIVE DECISIONS WHICH ARE NOT SUBJECT TO INDEPENDENT REVIEW OF THEIR MERITS?

Review of Decisions which Affect Commercial and Business Operations

3.61 The Committee is particularly concerned that decisions by officials which affect members of the public earning a livelihood should be subject to appropriate review. In most cases, only the external and independent merits review provided by the AAT will be suitable.

3.62 The **Futures Industry Regulations (Amendment), Statutory Rules 1989 No.371**, included a number of vague and uncertain expressions. Thus, certain licence holders had to ensure that their representatives were "sufficiently trained" and kept "up-to-date". The **National Companies and Securities Commission** was provided with a discretion to take action if these conditions were not met. The Minister advised that although the expressions had no settled legal meaning they had been judicially considered and the NCSC had issued a practice note to clarify the requirements. In any event, the present scheme would shortly be replaced and the new Act would provide a general right of AAT review. The **Insurance (Agents and Brokers) Regulations, Statutory Rules 1989 No.277**, provided neither criteria nor review of discretions with a public official which could affect the conduct of a business. The Minister advised that criteria were included in Departmental circulars which were written after extensive industry consultation. Nevertheless, the Minister undertook to review the Regulations to consider amendment. The **Air Navigation (Aerodrome Curfew) Regulations, Statutory Rules 1989 No.354**, gave the Minister a discretion to authorise particular types of aircraft to take off during curfew hours. The Minister undertook to amend the Regulations to provide for AAT review. **Fisheries Notice No.NPF7** provided for the Secretary to exercise a discretion, affecting commercial operations, with no external review. The Minister undertook to amend the Notice to remove the discretion. The **Industrial Chemicals (Notification and Assessment) Regulations, Statutory Rules 1990 No.231**, provided for the Director to waive or remit, either wholly or in part, fees of up to \$28,000 each, as he or she "thinks fit". There was no review. The Minister undertook to amend the parent Act. The **Australian Meat and Live-stock Order No.M41/89** provided for discretions affecting the grant or cancellation of export licences. There were no criteria apart from what the Australian Meat and Live-stock Corporation itself considered fair and reasonable. The parent Act provided for AAT review of some of these discretions but not others. The Minister undertook to amend the Act. A number of **Civil Aviation Orders** provided wide discretions affecting safety. The Committee was pleased to accept the Minister's explanation that safety considerations often required immediate action, but that the Orders would be amended to provide for AAT review of a failure to approve a variation of technical requirements or an extension of time to complete them. The **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1990 No.460**, provided

Commonwealth, State and Territory police commissioners with wide discretions with no review rights. The adverse exercise of such discretions could affect a person's livelihood. The Minister undertook to amend the Regulations retrospectively to remove the discretions, particularly those granted to State and Territory officials, in respect of which independent review may have been unenforceable on jurisdictional grounds.

3.63 Sometimes the Committee is persuaded that it is not necessary to amend legislation to provide for independent review. Thus, the *Customs (Prohibited Imports) Regulations (Amendment)*, Statutory Rules 1990 No.39, and the *Customs (Cinematograph Films) Regulations (Amendment)*, Statutory Rules 1990 No.40, provided discretions relating to the import of films, most of which were subject to general AAT review. However, both sets of Regulations also provided for the Minister to issue a certificate that particular decisions should not be reviewable by the AAT. The Minister advised that the ARC had been consulted on this procedure and had raised no objection to it. The *Quarantine (General) Regulations (Amendment)*, Statutory Rules 1990 No.352, increased the discretionary control of the Director over insect and disease control. This could have affected the operation of businesses. There was no review. The Minister advised that the discretions involved complex scientific, biological and technical considerations not appropriate for external review. In addition, the discretions were required to fulfil Australia's international obligations. The Regulations were unique because of the nature of quarantine protection and the controls necessary to ensure Australia's agricultural and general quarantine security. *Australian Meat and Live-stock Orders Nos.MQ 35/90, 36/90 and 37/90* provided for commercial discretions which were generally subject to AAT review. However, one other discretion was drafted in such a way that it was uncertain whether AAT review was provided. The Minister advised that although AAT review was prima facie appropriate in this case, it was not provided because the discretions affected European Community export quotas which had to be fully utilised. Nevertheless, any exporter whose quota was cancelled was offered the first option on any quota being reallocated. This was a reasonable safeguard.

3.64 Normally the Committee prefers external merits review by the AAT. However, sometimes the Committee is persuaded that other review bodies are appropriate to the particular circumstances. The *Excise Regulations (Amendment)*, Statutory Rules 1989 No.327, provided for merits review by the Industries Commission. The Minister advised that these procedures had been endorsed by the ARC. The *Hostel Variable Capital Funding Guidelines (No.2) 1989* did not provide review of commercially valuable discretions. The Minister advised that disputes over the value of land, or the costs of acquiring, altering or installing equipment associated with land, were referred to the Australian Valuations Office for an independent assessment. The *National Health Regulations (Amendment)*, Statutory Rules 1990 No.114, provided for review of discretions by a Standards Review Panel. The Committee accepted this, but suggested to the Minister that the Regulations be amended to provide that persons adversely affected should be expressly notified of this right. The Minister undertook to do this. The *Designs Regulations (Amendment)*, Statutory Rules 1990 Nos.239 and 240, provided for commercial

discretions with no criteria and no review. The Minister advised that the decisions did not finally determine any matters, but were only a stage in a process which includes final review by a court.

3.65 In respect of review rights generally, the Committee wrote to Ministers seeking assurance that discretions in 12 separate instruments were subject to review rights provided by the parent Acts.

Review of Decisions Affecting Personal Rights

3.66 As with discretions affecting commercial operations, those operating upon personal rights should be limited by appropriate criteria, as narrow and objective as possible. Discretions under the **Aboriginal and Torres Strait Islander Commission (Election of Executive Committees) Regulations, Statutory Rules 1990 No.399**, were not limited by criteria or subject to review. The Minister gave a detailed explanation of why review was not provided and undertook to amend the Regulations to provide criteria. The **Occupational Superannuation Regulations, Statutory Rules 1990 No.185**, provided reasonable criteria for the exercise of a discretion. However, these criteria were subject to a final criterion of "any other matters that the Commissioner considers relevant". The Minister explained that the purpose of this subjective criterion was to provide flexibility to deal with situations which could not be foreseen, that it had the support of industry in this highly technical area, and that there was AAT review of any adverse decisions. Similarly, the **Australian Federal Police Regulations (Amendment), Statutory Rules 1989 No.361**, provided reasonable criteria for decisions. However, these criteria were qualified by "any other factors that are relevant" and "any other matters the Commissioner considers relevant". The Minister undertook to amend the latter, but advised that the former did not reduce any other safeguards established by the earlier criteria and was important in ensuring that the individual circumstances of each case were considered. Again, **Overseas Defence Determination 1990/76** provided appropriate criteria for decisions, but then provided that these were subject to "any other relevant factor". In this particular case, it should have been possible to produce a finite set of criteria. The Minister undertook to amend the Determination.

3.67 The **Archives Regulations (Amendment), Statutory Rules 1990 No.184**, did not provide for review of decisions to waive or reduce charges. Some criteria were provided but the charges were substantial. The Minister undertook to amend the Regulations to provide review for members of the public. However, this would not be done for Commonwealth agencies.

3.68 The Administrative Review Council is an independent Commonwealth agency which investigates and makes recommendations on important aspects of review of administrative decisions. The Committee normally accepts provisions based on these recommendations. Thus, the **Wheat Industry Fund Regulations, Statutory Rules 1990 No.28**, provided for the Australian Wheat Board to determine payments out of a fund to holders of equity in the fund. However, the Explanatory Statement advised that equity holders had no automatic right to payment. Also, there were no provisions to prevent the AWB from discriminating between classes of holders of

equity or even between individuals in a class. There was no review of any such payment by the AWB. The Minister advised that the ARC position was that review was usually not appropriate in cases involving distribution of a finite fund. Nevertheless, the Minister undertook to amend the Regulations to provide criteria and detailed procedures for the exercise of discretions. The Defence (Areas Control) Regulations, Statutory Rules 1989 No.337, provided good review rights for an eventual decision at the end of a process, but not for adverse decisions made in the course of that process. The Minister advised that the ARC position was that merits review may be inappropriate for preliminary decisions which may lead to later substantive decisions. This approach had been taken in several recent Acts, such as the *Ozone Protection Act 1989* (ss.15 and 16) and the *Hazardous Waste (Regulation of Exports and Imports) Act 1990* (ss.15, 28 and 57). However, the Minister undertook to amend the Regulations to define more closely the exercise of the preliminary discretions.

3.69 In some cases the Committee may be satisfied that internal merits review of discretions is appropriate. Such cases included the Bankruptcy Rules (Amendment), Statutory Rules 1989 No.245; the Rules of the Supreme Court of the Australian Capital Territory (Amendment), Statutory Rules 1990 No.129; and the Rules Under the Federal Court of Australia Act 1976, Statutory Rules 1990 No.319, where decisions of the Registrar were reviewable by a Judge. Similarly, in respect of discretions provided by Public Service Determinations 1990/11 and 1990/12, review was provided by the grievance procedures of the *Merit Protection (Australian Government Employees) Act 1984*. Discretions under Defence Determination 1990/123 and Overseas Defence Determination 1991/117 were reviewable by the Defence Force Ombudsman. The Australian Federal Police Regulations (Amendment), Statutory Rules 1989 No.361, provided internal review for some decisions but not for others. The Minister advised that review provisions were based generally on those available to members of the Australian Public Service. However, these had been modified in some cases to recognise that the AFP was a disciplined force with unique fixed term appointments.

3.70 Some provisions which are expressed in the form of apparent discretions are not intended to affect personal rights. In such cases the Committee still seeks confirmation that merits review would not be appropriate. Public Service Determinations 1989/114, 1990/1 and 1990/24 granted the Secretary discretions in respect of the payment of allowances. The Minister advised that the Secretary had no real discretion as the intention of the Determinations was to implement decisions of the Australian Industrial Relations Commission. Determination No.PB6 of 1990 under s.85 of the *National Health Act 1953* granted discretions to the Secretary. The Minister advised that the discretion did not affect the rights of medical practitioners to prescribe treatment for patients. The purpose of the discretion was to ensure that prescriptions were in quantities convenient for pharmacists to dispense.

PRINCIPLE (D)

DOES DELEGATED LEGISLATION CONTAIN MATTER MORE APPROPRIATE FOR PARLIAMENTARY ENACTMENT?

3.71 This is a Principle which is not often the subject of concern. Nevertheless, it is important that matter which should be subject to the full scrutiny and safeguards of the parliamentary passage of a Bill is not included in laws made by the executive.

3.72 The Navigation (Marine Casualty) Regulations, Statutory Rules 1990 No.257, established an entire new scheme which was previously in the Act itself. Although the Explanatory Statement advised that this system was more modern and flexible and reflected that already in use for civil aviation, the Committee wrote for further information. The Minister advised that the old scheme was based on the outdated notion that investigations must find some person at fault and should therefore be quasi-judicial in nature. The new scheme is intended to find the cause of an incident, without necessarily finding fault, so all that is required are procedural rules.

3.73 The Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1990 No.244, extended for a further 12 months the operation of discriminatory Commonwealth, State and Territory legislation which would otherwise be in breach of the parent *Sex Discrimination Act 1984*. The Committee had carefully examined these and related Regulations over a number of years and had obtained some helpful undertakings from the Minister. However, the Committee now indicated that it seemed appropriate either to bring the exemptions to an end by simply letting the Regulations expire, or to enable the Parliament to debate these discriminatory exemptions and include them in the Act. The Minister accepted this view and undertook to amend the Act. (The entire scrutiny by the Committee of these and earlier Regulations was reported in detail in the *Eighty-Ninth Report, Report on Scrutiny by the Committee of Regulations made under the Sex Discrimination Act 1984*, tabled after the reporting period on 16 October 1991).

CHAPTER 4

MINISTERIAL UNDERTAKINGS IMPLEMENTED

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

Air Navigation Regulations (Amendment)
Statutory Rules 1988 No.159

4.2 On 1 November 1988 the Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, undertook to amend the Regulations to ensure that persons who have authority to discharge firearms have a photographic identity card. This undertaking was implemented by **Air Navigation Regulations (Amendment), Statutory Rules 1990 No.255**, of 2 August 1990.

Archives Regulations (Amendment)
Statutory Rules 1990 No.184

4.3 On 24 August 1990 the Minister for Administrative Services, Senator the Hon Nick Bolkus, undertook to amend the Regulations to make decisions to waive a charge subject to independent review. This undertaking was implemented by **Archives Regulations (Amendment), Statutory Rules 1990 No.393**, of 29 November 1990.

Australian Federal Police Regulations (Amendment)
Statutory Rules 1989 Nos. 344 and 361

4.4 On 31 July 1990 the Minister for Justice and Consumer Affairs, Senator the Hon Michael Tate, undertook to amend the Regulations to provide for a notification to be given in writing, to refine criteria, and to correct a drafting oversight. This undertaking was implemented by **Australian Federal Police Regulations (Amendment), Statutory Rules 1990 No.409**, of 10 December 1990.

Australian National Maritime Museum Regulations
Statutory Rules 1991 No.10

4.5 On 16 April 1991 the Minister for the Arts, Tourism and Territories, the Hon David Simmons MP, undertook to amend the Regulations to reduce an excessive penalty and to remove a strict liability offence. This undertaking was implemented by **Australian National Maritime Museum Regulations (Amendment), Statutory Rules 1991 No.220**, of 27 June 1991.

**Australian National Railways Commission General By-Law
Amendment No.9**

4.6 On 25 October 1990 the Chairman of the Australian National Railways Commission, Dr D.G. Williams, undertook to amend the By-Laws to remove a vicarious, strict liability offence. This undertaking was implemented by Australian National Railways Commission General By-Law Amendment No.10, of 7 December 1990.

**Civil Aviation Regulations (Amendment)
Statutory Rules 1988 No.158**

4.7 On 1 November 1988 the Minister for Transport and Communications, Senator the Hon Gareth Evans, undertook to amend the Regulations to require authorised persons to carry identification and for people to be notified of decisions. This undertaking was implemented by Civil Aviation Regulations (Amendment), Statutory Rules 1990 No.289, of 30 August 1990.

**Control of Naval Waters Regulations (Amendment)
Statutory Rules 1990 No.206**

4.8 On 8 October 1990 the Acting Minister for Defence, Mr Gordon Bilney MP, undertook to amend the Regulations to ensure that the power to remove persons from Naval waters is explicitly restricted to situations where persons contravene a notice under the Regulations. This undertaking was implemented by Control of Naval Waters Regulations (Amendment), Statutory Rules 1990 No.407, of 10 December 1990.

Defence Determination 1990/52

4.9 On 9 July 1990 the Minister for Industrial Relations, Senator the Hon Peter Cook, advised that the Determination had been amended to remove prejudicial retrospectivity by Defence Determination 1990/92, of 28 June 1990.

Defence Determination 1990/183

4.10 On 15 April 1991, the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the determination to correct a drafting oversight. This undertaking was implemented by Defence Determination 1991/38, of 5 April 1991.

Determination of Application No.2 under s.72 of the Privacy Act 1988

4.11 On 4 March 1991 the Privacy Commissioner, Mr Kevin O'Connor, undertook to revoke the Determination. This undertaking was implemented by Notice of Revocation of Public Interest Determination, of 7 March 1991.

Determination of Terms and Conditions of the Aboriginal and Torres Strait Islander Commission Chairperson

Determination of Terms and Conditions of the Aboriginal and Torres Strait Islander Commission Chief Executive Officer

4.12 On 29 November 1990 the Minister for Aboriginal Affairs, the Hon Robert Tickner MP, undertook to revoke the Determinations. This undertaking was implemented by *Revocation of Determination of Allowances and Further Determination of Allowances of the Chairperson of the Aboriginal and Torres Strait Islander Commission*, and *Revocation of Determination of Allowances and Further Determination of Allowances of the Chief Executive Officer of the Aboriginal and Torres Strait Islander Commission*, of 13 February 1991.

Determination BPT3/1990 under s.4D(1)(a) of the *National Health Act 1953*

Determination BPT3/1990 under s.4(1)(dd) of the *National Health Act 1953*

4.13 On 3 October 1990 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Determinations to correct drafting oversights. This undertaking was implemented by *Determination BPT4/1990 under s.4D(1)(a) of the National Health Act 1953*, and *Determination BPT5/1990 under s.4(1)(dd) of the National Health Act 1953*, of 3 July 1990.

Determination SEP90(1) made under ss.16 and 17 of the *States Grants (Schools Assistance) Act 1988*

4.14 On 17 December 1990 the Department of Employment, Education and Training, undertook to revoke and remake the Determination to clarify legislative intent. This undertaking was implemented by *Determination SEP90(1)(a) made under ss.16 and 17 of the States Grants (Schools Assistance) Act 1988*, of 17 December 1990.

Environment Protection and Management (Amendment) Ordinance 1987

Territory of Heard Island and McDonald Islands Ordinance No.1 of 1987

4.15 On 17 May 1988 the Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon Graham Richardson, undertook to amend the Ordinance to allow greater latitude in making representations in respect of a proposed plan of management, to limit fees which may be prescribed, to provide improved notice in respect of certain decisions and to provide for consistency in definitions. The Minister also undertook to consult with the Attorney-General's Department with respect to certain strict liability offences. These undertakings were implemented by *Environment Protection and Management (Amendment) Ordinance 1990, Territory of Heard Island and McDonald Islands Ordinance No.1 of 1990*, of 9 November 1990.

**Environment Protection and Management (Amendment) Ordinance 1990
Territory of Heard Island and McDonald Islands Ordinance No.1 of 1990**

4.16 On 11 March 1991 the Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon Ros Kelly MP, undertook to amend the Ordinance to limit the level of delegation of powers. This undertaking was implemented by **Environment Protection and Management (Amendment) Ordinance 1991, Territory of Heard Island and McDonald Islands Ordinance No.1 of 1991, of 30 May 1991.**

**Excise Regulations (Amendment)
Statutory Rules 1989 No.307**

4.17 On 24 May 1990 the Minister for Industry, Technology and Commerce, Senator the Hon John Button, undertook to repeal a provision that conferred a discretion not subject to review. This undertaking was implemented by **Excise Regulations (Amendment), Statutory Rules 1990 No.236, of 5 July 1990.**

**Export Control (Fish) Orders as amended (Amendment)
Export Control Orders No.2 of 1988**

4.18 On 17 June 1988 the Minister for Resources, Senator the Hon Peter Cook, undertook to amend the Orders to specify actual instruments incorporated in the Orders. The Minister also undertook to amend the Orders to include criteria before certain approvals may be made by the Secretary. The undertakings were implemented by **Export Control (Fish) Orders as amended (Amendment), Export Control Orders No.6 of 1990, of 15 October 1990.**

**National Health (Nursing Home Respite Care) Regulations
Statutory Rules 1989 No.173**

4.19 On 10 October 1989 the Minister for Housing and Aged Care, the Hon Peter Staples MP, undertook to amend the Regulations to limit the Minister's discretion to approve benefit respite care places in nursing homes. This undertaking was implemented by **National Health (Nursing Home Respite Care) Regulations, Statutory Rules 1990 No.404, of 10 December 1990.**

Overseas Defence Determination 1989/188

4.20 On 9 July 1990 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Determination to correct a drafting oversight. This undertaking was implemented by **Overseas Defence Determination 1990/92, of 28 June 1990.**

Overseas Defence Determination 1990/76

4.21 On 13 November 1990 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Determination to provide more appropriate criteria. This undertaking was implemented by **Overseas Defence Determination 1990/165**, of 29 October 1990.

Overseas Defence Determination 1990/107

4.22 On 13 November 1990 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Determination to clarify its legislative intention. This undertaking was implemented by **Overseas Defence Determination 1990/165**, of 29 October 1990.

Prescribed Goods (General) Orders as amended (Amendment) Export Control Orders No.3 of 1988

4.23 On 11 August 1988 the Minister for Resources, Senator the Hon Peter Cook undertook to amend the Orders to clarify the intention that a delegated power does not permit further delegation. This was implemented by **Prescribed Goods (General) Orders as amended (Amendment)**, **Export Control Orders No.5 of 1990**, of 28 September 1990.

Sex Discrimination (Operation of Legislation) Regulations Statutory Rules 1989 No.200

4.24 On 4 October 1989 the Minister for Justice, Senator the Hon Michael Tate, undertook to introduce new legislation to cease exemptions to the Act by regulation. This undertaking was implemented by **Sex Discrimination Amendment Act 1991**, of 25 June 1991.

Superannuation (Continuing Contributions for Benefits) Regulations (Amendment) Statutory Rules 1989 No.168

4.25 On 13 September 1989 the Minister for Finance, Senator the Hon Peter Walsh, undertook to amend the Regulations to provide that a certain declaration be a disallowable instrument. This undertaking was implemented by **Superannuation (Continuing Contributions for Benefits) Regulations (Amendment)**, **Statutory Rules 1990 No.379**, of 29 November 1990.

**Therapeutic Goods Regulations
Statutory Rules 1990 No.88**

4.26 On 15 May 1990 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Regulations to -

- (a) provide AAT review of the power of the Secretary to waive or reduce fees
- (b) limit the persons to whom a power to waive or reduce fees may be delegated
- (c) correct a drafting oversight
- (d) provide that certain powers be exercised reasonably
- (e) provide criteria for the removal of members of certain statutory committees, and
- (f) limit the appointment of acting members of such committees.

4.27 On 16 May 1990 the Senate disallowed the Therapeutic Goods Regulations and the associated Therapeutic Goods (Charges) Regulations, Statutory Rules 1990 No.89.

4.28 The undertakings given to the Committee were implemented when new Regulations, Therapeutic Goods Regulations, Statutory Rules 1990 No.394, were made on 29 November 1990.

**Wheat Industry Fund Regulations
Statutory Rules 1990 No.28**

4.29 On 13 November 1990 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the Regulations to restrict the exercise of delegated powers to senior members of the Department and to provide criteria for a discretion. This undertaking was implemented by Wheat Industry Fund Regulations (Amendment), Statutory Rules 1990 No.417, of 17 December 1990.



CHAPTER 5

MINISTERIAL UNDERTAKINGS NOT YET IMPLEMENTED

5.1 Below are Ministerial and other undertakings, given to amend legislation to meet the concerns of the Committee, which had not been implemented at 30 June 1991, the end of the reporting period. Some have been implemented since that date.

Agricultural and Veterinary Chemicals Regulations
Statutory Rules 1989 No.165

5.2 On 21 November 1989 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the Regulations to correct a drafting oversight and to consider amendment to provide AAT review of certain discretions.

Air Navigation (Aerodrome Curfew) Regulations
Statutory Rules 1989 No.354

5.3 On 10 July 1990 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to amend the Regulations to provide a right of review and a defence of reasonable excuse.

Australian Horticultural Corporation (Export Control) Regulations
Statutory Rules 1990 No.422

5.4 On 15 May 1991 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the Regulations to correct a drafting oversight and to consider providing for parliamentary scrutiny of fees.

Australian Meat and Live-stock Orders
Nos. L8/89, MQ32/89, MQ33/89 and MQ34/89

5.5 On 13 August 1990 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the parent Act to provide AAT review of decisions affecting Performance Accounts, non-issuance of export permits and cancellation of permits once issued.

Australian Meat and Live-stock Order No.MQ34/89

5.6 On 13 August 1990 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the Order to correct a drafting oversight.
Australian Meat and Live-stock Order No. M41/89

5.7 On 13 August 1990 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the parent *Australian Meat and Live-stock Corporation Act 1977* to provide for more extensive ATT review.

**Bankruptcy Rules (Amendment)
Statutory Rules 1989 No.245**

5.8 On 18 June 1990 the Minister for Justice and Consumer Affairs, Senator the Hon Michael Tate, undertook to amend the Regulations to provide criteria for decision makers, if there was an increase in applications to exercise a particular discretion.

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

5.9 On 23 July 1990 the Minister Assisting the Treasurer, the Hon Simon Crean MP, undertook to amend the Regulations to require that a notification be in writing.

Civil Aviation Orders

5.10 On 16 July 1990 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to repeal the Orders progressively over the next four years and replace them with Regulations.

**Civil Aviation Orders Parts 105, 106 and 107
Amendment Lists 12/90**

5.11 On 5 March 1991 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins undertook to amend the Orders to restrict discretions and to provide for AAT review.

Civil Aviation Orders Part 105 AD/F28/45 Amdt No.2

5.12 On 28 March 1991 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to amend the Order to clarify legislative intent.

**Common Form of Agreement No URA/1/90 between a Resident and a Proprietor
under s.40ABB of the *National Health Act 1953***

5.13 On 13 November 1990 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Agreement to correct a drafting oversight.

**Customs (Prohibited Imports) Regulations (Amendment)
Statutory Rules 1990 No.460**

5.14 On 8 May 1991 the Minister for Small Business and Customs, the Hon David Beddall MP, undertook to amend the Regulations retrospectively to remove a discretion.

**Defence (Areas Control) Regulations
Statutory Rules 1989 No.337**

5.15 On 22 August 1990 the Minister for Defence Science and Personnel, the Hon Gordon Bilney MP, undertook to amend the Regulations to remove a strict liability offence.

**Defence Force Regulations (Amendment)
Statutory Rules 1989 No.290**

5.16 On 8 January 1990 the Minister for Defence Science and Personnel, the Hon David Simmons MP, undertook to amend the Regulations to remove a strict liability offence.

**Determination of Australian Design Rules as National Standards Order
Determination of Motor Vehicle Standards - Order No.1 of 1989**

5.17 On 15 November 1989 the Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, undertook to amend the Order to provide AAT review of a discretion.

Determination HS/3/1989 under s.3C(1) of the Health Insurance Act 1973

5.18 On 26 July 1990 the Minister for Community Services and Health, the Hon Neal Blewett MP, undertook to amend the Determination to correct a procedural defect.

Federal Airports (Amendment) By-laws No.1 of 1990

5.19 On 1 November 1990 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to amend the By-law to correct a drafting oversight.

Fisheries Notices Nos. ORF8 and TEC2

5.20 On 14 November 1990 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the Notices to correct a drafting oversight.

**Great Barrier Reef Marine Park Regulations (Amendment)
Statutory Rules 1990 No.35**

5.21 On 4 September 1990 the Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to remove a strict liability offence.

**Horticultural Export Charge (Nursery Products) Regulations (Amendment)
Statutory Rules 1989 No.251**

5.22 On 11 January 1990 the Minister for Resources, the Hon Alan Griffiths MP, undertook to address the Committee's concerns about search warrants when legislation was being considered.

**Industrial Chemicals (Notification and Assessment) Regulations
Statutory Rules 1990 No.231**

5.23 On 31 October 1990 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Regulations to provide criteria for the exercise of certain discretions.

Industry Training Agents Guidelines No.1

5.24 On 4 December 1990 the Minister for Employment, Education and Training, the Hon John Dawkins MP, undertook to amend the Guidelines to clarify legislative intent, to restrict the power of public officials to obtain information and to require public officials to produce identification documents when entering private premises.

**Insurance (Agents and Brokers) Regulations (Amendment)
Statutory Rules 1989 No.277**

5.25 On 7 February 1990 the Minister Assisting the Treasurer, the Hon Peter Morris MP, undertook to consider the provision of AAT review.

**Lotteries Ordinance 1989
Territory of Christmas Island Ordinance No.4 of 1989**

5.26 On 15 November 1989 the Minister for the Arts, Tourism and Territories, the Hon Clyde Holding MP, undertook to amend the Ordinance to -

- (a) provide detailed criteria for a discretion
- (b) provide AAT review for the same discretion
- (c) limit the persons to whom the discretion may be delegated
- (d) limit the power of officials to enter premises, and
- (e) limit the power of officials to give directions.

Marine Orders Part 51 - Navigation Orders
Order No.1 of 1989

5.27 On 12 July 1989 the Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, undertook to provide a Note in the body of Marine Orders indicating that particular decisions are reviewable by the AAT.

Migration Regulations

5.28 On 29 November 1990 the Minister for Immigration, Local Government and Ethnic Affairs, the Hon Gerry Hand MP, undertook to take the Committee's concerns into consideration during a review of the Regulations.

Motor Vehicle Standards Regulations
Statutory Rules 1989 No.202

5.29 On 26 October 1989 the Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, undertook to amend the parent Act to provide that certain forms be disallowable instruments. The Minister also undertook to amend the Regulations to provide for AAT review of all discretions.

National Health Regulations (Amendment)
Statutory Rules 1990 No.114

5.30 On 14 September 1990 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Regulations to provide for the notification of review rights and the tabling of annual reports.

Navigation (Marine Casualty) Regulations
Statutory Rules 1990 No.257

5.31 On 8 November 1990 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to amend the Regulations retrospectively to remove possible self-incrimination.

Occupational Superannuation Standards Regulations (Amendment)
Statutory Rules 1990 Nos. 149 and 185

5.32 On 9 January 1991 the Minister Assisting the Treasurer, the Hon Simon Crean MP, undertook to amend the principal Regulations to correct a drafting oversight. The Minister also undertook to consider a possible amendment of the Regulations to simplify certain applications.

Prescribed Goods (General) Orders as amended (Amendment)
Export Control Orders No.5 of 1990

5.33 On 20 March 1991 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the Orders to clarify legislative intent.

Public Service Determinations 1990/95 and 1990/177

5.34 On 20 November 1990 and 25 February 1991 respectively, the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Determination to remove archaic drafting expressions such as “kitchenman”, “kitchenmaid” and “diet maid”.

Regional Council Election Rules, Rules No.1 of 1990 under the *Aboriginal and Torres Strait Islander Commission Act 1989*

5.35 On 12 April 1991 the Minister for Aboriginal Affairs, the Hon Robert Tickner MP, undertook to amend the Rules to clarify the powers of a public official, to remove a strict liability offence and to remove a reversal of the usual onus of proof.

Remuneration Tribunal Determination No.23 of 1988

5.36 On 20 December 1989 the Minister for Industrial Relations, the Hon Peter Morris MP, undertook to consider amending the *Remuneration Tribunal Act 1973* to require that copies of Determinations be provided to the Minister for tabling within 15 sitting days of their being made.

Rules of the Australian Industrial Relations Commission Statutory Rules 1989 No.46

5.37 On 8 June 1989 the President of the Australian Industrial Relations Commission, the Hon Mr Justice B J Maddern, undertook to amend the Rules to correct a drafting oversight.

Rules under the *Federal Court of Australia Act 1976* Statutory Rules 1990 No.319

5.38 On 20 November 1990 the Acting Chief Justice, the Hon C A Sweeney CBE, undertook to amend the Rules to correct a drafting oversight.

Statutory Rules series

5.39 On 10 August 1990 the Attorney-General, the Hon Michael Duffy MP, undertook to amend the *Acts Interpretation Act 1901* to provide that statutory rules relying on s.4 of that Act for their authority as well as another parent Act, may be made in the same instrument as those which rely only on a parent Act.

Superannuation (Approved Authorities) Regulations (Amendment) Statutory Rules 1990 No.96

5.40 On 4 December 1990 the Minister for Finance, the Hon Ralph Willis MP, undertook to repeal the principal Regulations.

Superannuation (Eligible Employees) Regulations (Amendment)
Statutory Rules 1990 No.97

5.41 On 4 December 1990 the Minister for Finance, the Hon Ralph Willis MP, undertook to amend the Regulations to improve drafting.

Wool Marketing Regulations (Amendment)
Statutory Rules 1990 No.203

5.42 On 3 October 1990 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the Regulations to limit the right of a statutory authority to obtain information.

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

5.43 On 12 April 1991 the Minister for Aboriginal Affairs, the Hon Robert Tickner MP, undertook to amend the Rules to remove a strict liability, vicarious offence and a reversal of the usual onus of proof.

CHAPTER 6

LETTER FROM SENATOR GILES TO PRIME MINISTER

6.1 After being elected Chair of the Committee Senator Giles wrote to the Prime Minister on aspects of the work of the Committee. The letter is a useful summary of how the Committee views its relationship with the executive.

“23 October 1990

The Hon Bob Hawke AC, MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

I am writing as the new Chair of the Standing Committee on Regulations and Ordinances. As you know, the Committee scrutinises all delegated legislation in a non-partisan fashion to ensure compliance with personal liberties and parliamentary proprieties.

The Committee has been pleased to note the helpful assistance of Ministers when possible defects in delegated legislation have been drawn to their attention. This assistance has taken the form of undertakings to amend the legislation to safeguard the principles of the Committee. Some Ministers have asked their Departments to accommodate the suggestions of the Committee wherever possible. Another Minister has advised the Committee that he personally is to be the first contact point in his Office on any matter regarding delegated legislation.

Ministers have recently initiated major reforms in *delegated legislation*, greatly improving its technical quality. One Minister has introduced loose leaf amendments of principal instruments, which enable a full reprint of legislation every time an amendment is made. Another Minister has indicated that a major series of delegated legislation is to be brought within the Statutory Rules series. The Committee is generous in its acknowledgment of such reforms. Recently the Committee advised a Minister that certain review provisions were a credit to the legislative program of the portfolio.

I am certain that you agree with the Committee that Australian delegated legislation should achieve as high a technical standard as possible. The Committee would be grateful if you could draw this letter to the attention of your Office and your Department, asking that they maintain and enhance the already good cooperation received by the Committee from Ministers.

Yours sincerely,

Pat Giles
Chair"

CHAPTER 7

DEPARTMENTAL MANUALS AS QUASI-LEGISLATION: STATEMENT BY SENATOR BISHOP

7.1 On 20 September 1990 Senator Bishop made a statement in the Senate and tabled certain departmental manuals as examples of quasi-legislation. The statement illustrates several important aspects of quasi-legislation.

Senator Bishop, 20 September 1990, Senate Weekly Hansard p.2656

7.2 "Honourable senators will recall that at the end of 1989 the *Migration Act 1958* was amended extensively. Following these amendments a completely fresh group of Migration Regulations was made. These Regulations were scrutinised by the Standing Committee on Regulations and Ordinances for compliance with its principles of personal liberties and parliamentary proprieties. The Committee has difficulties with some aspects of these Regulations. However, following advice from the Minister for Immigration, Local Government and Ethnic Affairs (the Hon Gerry Hand MP) that an announced major review of the Regulations should satisfy the concerns of the Committee, it was decided to defer final consideration until after the review was completed.

7.3 "In the meantime, to assist in its scrutiny, the Regulations and Ordinances Committee asked the Minister for a copy of the *Procedures Advice Manual* of the Department of Immigration, Local Government and Ethnic Affairs. This is the manual of guidelines and procedures used by officers of the Department to administer the Act and the Regulations. The Minister promptly furnished a copy, for which the Committee is grateful.

7.4 "The Committee decided that it would be appropriate to table the manual as an example of the quasi-legislation through which the day-to-day administration of many Acts and Regulations is conducted. These are the documents piled on my desk. In the present case, the manual comprises 195 booklets, some 3,300 pages, as amended by 41 policy control instructions. It is 30 centimetres or about one foot high.

7.5 "The manual is a public document available for purchase at the Australian Government Bookshop, although it is priced at about \$300, with special folders to keep the booklets costing another \$100. Individual booklets may be purchased for \$1.50 each. In this case the documents are at least available, even though they are expensive. In some other agencies manuals are unavailable to members of the public, who face procedural difficulties even in obtaining knowledge of their existence.

7.6 "When dealing with members of the public or people overseas wishing to visit or migrate to Australia, it is to the manual that departmental officers refer, at least in the first instance. This quasi-legislation is not subject to tabling or disallowance

in Parliament, although it may have an important effect upon the way in which entire classes of individual cases are decided and is, therefore, at least partly legislative in character. For example, the expression "reasonable period" is not defined in respect of a particular provision of the Regulations. The manual advises, however, that for this purpose a reasonable period is normally three years. Other procedures in the manual are less certain. One booklet advises that certain persons are to be contacted by overseas posts of the Department and "invited" to purchase an application for migration to Australia package.

7.7 "The manual demonstrates an awareness that the entire migration program is based upon powers contained in Acts of Parliament and in regulations and other instruments made under the authority of Acts. The manual urges all officers of the Department to become familiar with the general provisions of the Migration Act and Regulations. The manual wisely advises that its procedures and guidelines do not have the same legal standing as Acts or regulations and should be applied in accordance with the principles of administrative law on the merits of each individual case. In addition, the manual properly points out that government actions must be consistent with the laws enacted by the Federal Parliament to regulate migration. Accordingly, I have tabled this huge manual and seek leave to incorporate in Hansard a table of contents of the manual".

7.8 The table read as follows -

PROCEDURES ADVICE MANUAL - TABLE OF CONTENTS

(The numbers in brackets indicate the number of Booklets dealing with that topic)

1. Technical procedures relating to visas and entry permits

The visa system (3)
Visa and entry permit exemptions (1)
The entry permit system (1)
Travel documents (1)

2. Criteria and procedures for various classes of visas and entry permits

Permanent entry visas (19)
Refugee and humanitarian visas (12)
Student and trainee visas and entry permits (9)
Temporary resident visas and entry permits (27)
Visitor visas and entry permits (8)
Transit visas (1)
Diplomatic and official visas (1)
Territorial asylum (1)
Conditional visas and entry permits (6)
Border visas and entry permits (1)
Return visas for Australian residents (7)
Processing entry permit (1)

Statutory visitors (1)
Limitations on further applications (1)
Permanent entry permits after entry (6)
Refugee temporary entry permits (5)
Humanitarian responses to people temporarily in Australia (6)
Transitional arrangements (7)

3. Subjects common to two or more classes of visas or entry permits

People with extremist or controversial views (1)
Bona fides requirement (1)
Character requirement (1)
Settlement requirement (1)
Health requirement (6)
Special procedures for particular countries or nationalities (3)
Access to education outside student status (1)
Marriage and divorce (1)
De facto marriage relationships (1)
Custody of minor children (1)
Family unit and dependency (1)
Balance of family test (1)
Immigration (Guardianship of Children) Act 1946 (1)
Sponsorships (1)
Assurances of support (1)
Assessment of skills and qualifications (3)
Occupational classification (1)
Tripartite negotiated arrangements (1)
Employer nomination scheme (1)
Business migration program (1)
Special skills (1)
Reporting (1)
Entry program management (1)
Fees (1)
Review by Migration Internal Review Office (1)

4. Matters primarily related to compliance functions

Introduction to compliance (3)
Status of illegal entrant (3)
Illegal entrants (8)
Custody and apprehension (4)
Deportation (13)
Offences and prosecutions under the Migration Act (1)
Issue of documents to facilitate travel for prohibited entrants and deportees (1)
People with outstanding debts to the Commonwealth (2)
People excluded from readmission to Australia (1)

CHAPTER 8

DELEGATED LEGISLATION AND DISALLOWANCE: INITIATIVE BY SENATOR PATTERSON

8.1 On 26 November 1990 Senator Patterson wrote to the Chair pointing out that certain delegated legislation was subject neither to tabling nor disallowance. After considering the letter the Committee wrote to the Minister, as follows:

“4 December 1990

The Hon Peter Staples MP
Minister for Aged, Family
and Health Services
Parliament House
CANBERRA ACT 2600

Dear Minister,

I refer to the Determination under s.98C(1)(b) of the *National Health Act 1953*, made by the Minister's delegate with effect from 1 August 1990. The Committee considered the Determination at its meeting of 29 November 1990.

The Committee understands that the Determination is subject neither to tabling in the Parliament nor to possible disallowance. Instruments made under s.98C(1)(b) are clearly legislative in nature, affecting as they do the rights and obligations of classes of people. This provision was first inserted in the Act by the *National Health Amendment Act (No.4) 1976*. At that time the Senate Standing Committee for the Scrutiny of Bills had not been established. If that Committee had examined the provision it may well have asked that Determinations be made subject to tabling and disallowable. The Standing Committee on Regulations and Ordinances has often expressed the view that all legislative instruments should be so subject. Accordingly the Committee asks whether the next time the Act is amended that you sponsor an amendment that requires the matters in s.98C(1)(b) to be prescribed. In this context the Committee notes that you have recently agreed on a number of occasions to amend portfolio legislation to meet concerns of the Committee, thereby demonstrating your commitment to its principles of parliamentary propriety and personal liberties.

The Committee also noted substantial defects in the instrument itself. The Committee's copy of the instrument is not signed and does not indicate the date upon which it was made. There are references in paragraph 4 of the Determination to Schedules 2, 3, 4, and 5. Again, our copy does not have these Schedules attached. If the instrument purported to be made without signature or dating and without the Schedules attached it may be invalid.

The instrument does not include numbering or citation. The need for such unique identifiers is shown by paragraphs 16-18, each of which refers to “the Determination made under sub-section 98B(1) of the Act”. If there has only ever been one such Determination and if that Determination is never going to be amended or replaced, then there is not a problem. Otherwise, there are problems of interpretation.

There are numbers of discretions granted by the Determination. Under s.98C(2) of the Act the Pharmaceutical Benefits Renumeration Tribunal may be requested to report on the matters dealt with in a Determination. In view of the number of discretions the Committee asks whether such a report has been made. Such advice would normally be provided in an Explanatory Statement. The Committee's copy of the instrument was not accompanied by an Explanatory Statement.

Discretions are provided in paragraphs 5, 6(a)(i), (ii), (iii) and (iv), (b) and (c), 23, 24, 25, 35, 37, 38(f), 39, 40(f) and (g), 41, and 42. No criteria are provided for the exercise of most of these discretions. In other cases the criteria are flawed. For example, paragraph 38 provides criteria. Unfortunately it also provides that “A computer software system is not, or ceases to be, acceptable to the General Manager if... the General Manager deems the system to be unacceptable”.

Similarly, paragraph 40 provides criteria. However, it also provides that “A claim is not of acceptable standard if... the General Manager deems the claim to be of unacceptable standard”. Neither paragraph 38 nor paragraph 40 appear to require the General Manager to give reasons for his or her decision. Also there does not appear to be any AAT review of adverse decisions.

Other important discretions affecting livelihood do not require reasons for decisions to be given or appear to provide for AAT review. Paragraph 37 grants the General Manager a discretion to accept a software system which he or she previously deemed unacceptable. Unless and until this discretion is exercised favourably there is mandatory exclusion from claims processing by the Claims Transmission System. Under paragraph 39 the General Manager may suspend a pharmacist or medical practitioner from such claims processing. If a person is so suspended, then under paragraph 41 there is a mandatory exclusion from reinstatement for six months.

Under the Act there is provision for AAT review of some decisions made under the Act. There does not appear to be provision for AAT review of any decisions under the Determination.

The Determination appears to incorporate documents by reference. This occurs in paragraphs 7, 11, 12, 15, 17 and 18. As long as these documents are incorporated as they exist at the time the Determination is made there is no difficulty. But the documents may not be incorporated in the form in which they are “in force from time to time”.

Paragraphs 33 and 36 refer to “operational testing” and meeting “operational audit requirements”. These are not defined. Do they involve entry onto premises by public officials? If so, there are none of the usual safeguards provided.

Some of the provisions appear to raise privacy questions which may affect pharmacists, medical practitioners and patients. These questions relate particularly to unauthorised computer data. It is customary to consult with the Privacy Commissioner on such issues. Usually the Explanatory Statement would indicate whether this has been done.

The Committee would appreciate your advice on these matters. In particular, the Committee believes that it may be appropriate to amend the instrument to remedy some of these apparent defects.

The Committee also noted that there may be other provisions in the parent Act empowering the Minister or others to make legislative instruments which are not subject to tabling or disallowance. The Committee suggests that it may be a worthwhile longer term project for your Department to review that Act and other portfolio Acts to identify any such provisions with a view to making them subject to appropriate scrutiny.

Yours sincerely,

Patricia Giles
Chair"

8.2 The Minister replied as follows:

"15 February 1991

Senator Pat Giles
Chair
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA

Dear Senator Giles,

I refer to your letter of 4 December 1990 concerning Determinations under paragraph 98C(1)(b) of the *National Health Act 1953* and in particular the questions you raised concerning the future of this Determination. As you correctly point out this Determination is not required to be tabled nor is it subject to disallowance.

I understand that the Committee has never sought a copy of the instrument from the Department nor any of the amending determinations. To assist the Committee I enclose a complete copy of the current 98C(1)(b) determination.

I emphasise that all remakes and amendments of the instrument have been correctly executed within the terms of the Act.

It is necessary in examining this determination to make frequent reference to the determination under subsection 98B(1) of the Act. This latter determination is that made by the Pharmaceutical Benefits Remuneration Tribunal relating to the manner of ascertaining the Commonwealth price of pharmaceutical benefits. Of course references to the 98B(1) determination is to that version of the 98B(1) determination which is in force as at the date of effect of the 98C(1)(b) determination. If the former instrument relevantly changes, than the appropriate changes are made to the latter.

These matters have not been the subject of a report under the provisions of subsection 98C(2) of the Act as they are not matters relating to the manner of ascertaining the Commonwealth price.

With respect to paragraph 38 and 40 of the determination, I note that the Committee now finds these paragraphs to be flawed, but that the Committee itself previously approved these provisions in the Information Provision Incentive Payment Rules made under section 99AAA of the Act.

The payment rules were simply transferred to the 98C(1)(b) determination when section 99AAA ceased to apply to pharmacists by the effluxion of time (expiry of incentive payment period).

The Claims Transmission System (CTS) is a pharmacy computer system which is used to submit data to the Health Insurance Commission (HIC) for the purpose of payment for the supply of pharmaceutical benefits (see paragraph 3 of the 98C(1)(b) determination). The CTS payment rules, which are incorporated in that determination, deal only with the mechanical detail of the manner of submission of claims by CTS (specifications for file structure, etc) for payment for pharmaceutical benefits already supplied, so that the information will be compatible with HIC's computer.

It is emphasised that, at present, suspension from CTS processing does not affect payments to a pharmacist. It only affects the way in which the amount is assessed. In only one case, which I noted in my letter to the Committee of 13 November 1989, has an unsuitable computer system been detected and in that case the pharmacist changed to a different supplier.

The Government now intends to make the CTS compulsory. Draft instructions have been issued for an amendment to the Act to provide for this, with a provision for payment rules. The rules will be a disallowable instrument, with provision for appeal to the AAT against the exercise of administrative discretions in the rules. When this occurs, matters relating to both CTS and manual claiming methods will be removed from the 98C(1)(b) determination.

"Operational Testing", under paragraph 33 and 36 does not require entry onto premises by public officials. It is done entirely "in house" within the Health Insurance Commission. Only persons authorised under section 104 of the Act may enter premises on official duty.

I reiterate that I continue to support the work of the Committee and the principles of parliamentary propriety and personal liberties and will readily assist the Committee's consideration of these matters at all times.

Yours sincerely,

Peter Staples”

8.3 The Committee replied as follows:

“14 March 1991

The Hon Peter Staples MP
Minister for Aged, Family
and Health Services
Parliament House
CANBERRA ACT 2600

Dear Minister,

I refer to your letter of 15 February 1991 on aspects raised by the Committee of Determinations under paragraph 98C(1)(b) of the *National Health Act 1953*.

The Committee welcomes your assurance that all remakes and amendments of the instrument have been validly made. The Committee also welcomes the advice that drafting instructions have been issued for amendments of the Act, providing for disallowable rules and appropriate AAT review. This is a very positive development.

The Committee is grateful for your advice that operational testing does not require entry onto premises by public officials, for your further reassurance that in only one case has an unsuitable computer system been detected and for your advice on changes to related documents.

Your letter correctly notes that the Committee found paragraphs 38 to 40 of the present instrument to be defective although the Committee did not raise with you similar earlier provisions made under s.99AAA of the Act. The reason for this is that the helpful explanatory material which accompanied that instrument advised that the Act would be amended to provide AAT review. There did no appear to be any such express assurance in respect of the present instrument. However, you have now given this undertaking for which the Committee is grateful.

Your letter of 15 February did not appear to address the privacy issues raised in the Committee's letter of 4 December 1990. Your advice would be appreciated on this, and on whether the Privacy Commissioner has been consulted on the proposed amendment of the Act.

The Committee is also grateful for the comments in the last paragraph of your letter. In this context the Committee would appreciate your advice on another matter raised in its letter of 4 December. The Committee suggested that it may be a worthwhile longer term project for your Department to review the Act and other portfolio Acts to identify any legislative provisions which are not subject to tabling and disallowance with a view to providing for appropriate parliamentary scrutiny.

Yours sincerely,

Patricia Giles
Chair"

8.4 The Minister replied as follows:

"16 May 1991

Senator Pat Giles
Chairperson
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Giles,

I refer to your letters of 18 February 1991 and 14 March 1991 concerning instruments made under section 85 and paragraph 98C(1)(b) of the *National Health Act 1953* (the Act) respectively.

With respect to the Declaration made under section 85 of the Act I confirm that the discretions in paragraphs 14 and 15 are not matters that require an independent right of review for the reasons I pointed out in my letter to your Committee of 9 July 1990 (copy attached).

With respect to the role of the Privacy Commissioner in the preparation of an amendment to the Act relating to a Determination made under paragraph 98C(1)(b) of the Act I make the following points:

1. The Claims Transmission System is only a method of providing prescription information to the Health Insurance Commission to enable faster claims processing and settlement of pharmacists' claims;
2. No information is captured which is not already available from the hard copy of the prescription, which also must be forwarded to the Commission;
3. The prescription information is required to enable processing of the claim in accordance with normal audit requirements.

The Privacy Commissioner has not been consulted on the proposed amendment to the Act relating to compulsory use of the CTS under the Pharmaceutical Benefits Scheme and, for the reasons above, I do not believe this to be appropriate.

On your general question of the future of those few instruments that are not disallowable instruments I again emphasise that all remakes and amendments of the instruments have been correctly executed within the terms of the Act; however, I will continue to review the role of these determinations and will when the opportunity is appropriate make such instruments disallowable instruments.

I reiterate that I continue to support the work of the Committee and, consistent with the principles of parliamentary propriety, I will continue to assist the Committee's consideration of these matters at all times.

Yours sincerely,

Peter Staples”

8.5 The Committee thanked the Minister as follows:

“30 May 1991

The Hon Peter Staples MP
Minister for Aged, Family
and Health Services
Parliament House
CANBERRA ACT 2600

Dear Minister,

I refer to your letter of 16 May 1991 on aspects raised by the Committee of Determinations under s.98C(1)(b) of the *National Health Act 1953*.

The Committee noted your advice that you will continue to review the role of instruments under that Act which are not subject to tabling and disallowance and will when the opportunity is appropriate make such instruments disallowable. This is a very helpful commitment to the principles of the Committee, and we look forward to these developments which we know you will expedite as far as possible.

Yours sincerely,

Pat Giles
Chair”

8.6 In summary, this initiative of Senator Patterson, followed up by the Committee, resulted in an undertaking from the Minister to provide for disallowance for all delegated legislation made under the parent Act which provides for perhaps the greatest number of different series of delegated legislation of all Commonwealth Acts. The final result illustrates how the Committee can intervene to produce a higher standard of delegated legislation and also the high level of commitment by Ministers to its principles of personal liberties and parliamentary proprieties.

CHAPTER 9

THE THIRD CONFERENCE OF AUSTRALIAN DELEGATED LEGISLATION COMMITTEES

9.1 A delegation from the Senate attended the Third Conference of Australian Delegated Legislation Committees, held in Perth from 21-23 May 1991. This Conference is the most important forum in Australia for legislative scrutiny committees.

9.2 The delegation was Senator Giles, Senator Bishop, Senator Colston, Senator Cooney, Senator Patterson and Emeritus Professor Whalan.

9.3 Prior to the Conference the organisers expressly invited Senator Mal Colston, a former Chair of the Committee, to chair the key session, the Report on the Resolutions from the Second Conference. This was an honour not only for Senator Colston, but also for the Committee.

9.4 Other noteworthy contributions from the delegation were papers presented by Senator Giles and Senator Bishop. Senator Cooney, Chairman of the Standing Committee for the Scrutiny of Bills, and Senator Patterson, a former Deputy Chairman of that Committee, made particular contributions to discussions on the legislative scrutiny of Bills, which was a major theme of the Conference.

9.5 On 21 June 1991 Senator Giles reported to the Senate on the Conference.

Senator Giles, 21 June 1991, Senate Weekly Hansard, p.5364

9.6 "From 21 to 23 May a delegation from the Senate attended the Third Conference of Australian Delegated Legislation Committees held in the Legislative Assembly and Legislative Council chambers in the Western Australian Parliament.

9.7 "The First Conference of Delegated Legislation Committees was held in Brisbane in 1986 and the second was hosted by the Standing Committee on Regulations and Ordinances in Parliament House, Canberra, in 1989. At the Canberra conference, the President of the Senate, the Hon. Kerry Sibraa, welcomed the delegates and introduced the Governor-General, His Excellency the Hon. Bill Hayden, who opened the Conference in his first official duty in Parliament House since his swearing in.

9.8 "The Senate delegation to Perth consisted of myself, as Chair of the Committee; Senator Bishop, as Deputy Chairman; Senator Colston, a former Chairman; Senator Patterson, a member of the Committee and a former Deputy Chairman of the Committee for the Scrutiny of Bills; and Senator Cooney, Chairman

of the Committee for the Scrutiny of Bills and a former Chairman of the Committee. The delegation was accompanied by the Committee's independent legal adviser, Emeritus Professor Douglas Whalan, and the Committee secretary.

9.9 "Delegations attended from all States, the Australian Capital Territory and the Northern Territory, New Zealand and Kiribati. The delegation from New South Wales consisted of officials rather than parliamentarians owing to the State election. There was a similar situation at the Canberra conference in 1989 when Tasmanian parliamentarians could not attend owing to a State election. There was also an impressive group of official observers, including 17 Parliamentary Counsel officials from five separate jurisdictions, officials from the Administrative Review Council, the peak Commonwealth advisory body on administrative law, and the Administrative Appeals Tribunal, private solicitors, academics and State government officials. In all there were 52 delegates and their staff, and 34 observers.

9.10 "The Conference was opened by the Speaker of the Legislative Assembly with an opening address by the Chief Justice of Western Australia. The President of the Legislative Council closed the Conference. The Senate delegation took an active part in the proceedings. Both Senator Bishop and I presented papers and Senator Bishop chaired a session and reported on a workshop. Senator Colston chaired the first session of the Conference after the opening, which was the important report by delegations on the resolutions of the previous Conference. I was told of the excellent impression created by the Deputy President of the Senate attending the Conference and chairing this key session. Members of the delegation attended and spoke at all sessions. At the conclusion of the Conference two of the five resolutions accepted were proposed by the delegation.

9.11 "Several themes ran through the Conference proceedings. One related to the increasing use of quasi-legislation. There was general concern about legislative instruments authorised by Acts but not made subject to tabling and disallowance. Such instruments are no less legislation than Acts or regulations, although generally referred to as quasi-legislation. The other form of quasi-legislation is the multitude of departmental manuals and policy guidelines which officials treat as binding in their dealings with the public. This type of quasi-legislation was the subject of my paper to the conference.

9.12 "Another major theme was the relationship between legislative scrutiny committees and the executive. In particular, delegates emphasised that committee operations should continue to be non-partisan, avoiding party political controversy. This relationship was dealt with by Senator Bishop in her paper. A third theme was publicity for delegated legislation proposals, with opportunities for public comment and input into the process through which the executive makes laws. There was much discussion of the regulatory impact statements required in Victoria and New South Wales.

9.13 "A fourth major theme was that delegated legislation committees cannot operate effectively without the support of a Scrutiny of Bills Committee. The Senate is one of the minority of Australian legislatures which has such a committee, and the

Conference was fortunate to have Senator Cooney and Senator Patterson available to discuss its operation.

9.14 "The forthcoming Administrative Review Council (ARC) report on rule making was mentioned during a number of sessions. The ARC preliminary proposals have already been released and, if adopted, will address many important deficiencies in delegated legislation. The proposals are that all legislative instruments be restricted to suitable subject matter and be subject to tabling and disallowance, drafted by professional drafters after public consultation and input and included in a single series. This would solve many present problems relating to quasi-legislation and to public access and presentation. I seek leave to incorporate in Hansard a summary of conference proceedings".

9.15 The document read as follows-

**THE THIRD CONFERENCE OF AUSTRALIAN DELEGATED
LEGISLATION COMMITTEES PERTH, 21-23 MAY**

Summary of Proceedings

Tuesday, 21 May 1991

Opening of Conference

Michael Barnett, Speaker of the Legislative Assembly, Western Australia

The Speaker emphasised the value of the parliament to parliament contacts encouraged by conferences such as this one. Previously, governments have been more active than parliaments in setting up structures to make cooperation easier. For this reason, conferences such as the present one are welcome.

Parliaments are now showing greater interest than ever before in delegated legislation. There is a resurgence of support for parliaments which are more independent of government. The scrutiny by parliament of government law-making is a part of this process.

The limitations, if any, on the powers of parliament to delegate the power to legislate

David Malcolm, Chief Justice of Western Australia

The Chief Justice said that parliamentary scrutiny of delegated legislation asserted the supremacy of parliament over the executive. This upholds the principles upon which Commonwealth and State constitutions are based and contributes substantially to the maintenance of the rule of law.

In Britain it is said that parliament is supreme and omnipotent. If this is so, it seems that parliament may delegate all of its powers to legislate. However, this is not the case at the federal level in Australia. The Parliament of the Commonwealth cannot abdicate its powers of legislation so that a law-making body is set up in

substitution for parliament. Nevertheless, parliament may authorise subordinate legislation in the widest and most general terms.

State parliaments, in contrast to the Commonwealth are supreme within the limits of their constitution. Therefore, it is strongly arguable that a State parliament could delegate the whole of its legislative competence.

In any event, the delegated power remains subject to the scrutiny of parliament. Delegation can always be terminated or recalled. Experience has shown the necessity for wide criteria for such parliamentary control.

Report on Resolutions from the Second Conference Senator Mal Colston

The resolutions were as follows-

"That at the Third Conference, all Committees will report, verbally or in writing on -

a. the nature, the extent and the implications for Delegated Legislation Committees of the proliferation, within the Commonwealth, the States and the Territories, of legislative and quasi-legislative instruments which are either:

(i) not subject to parliamentary scrutiny and control, or

(ii) whether so subject or not, represent a developing trend in delegated law-making by virtue of their origins, content, presentation or otherwise;

b. the extent to which the Parliaments of the Commonwealth, the States and the Territories have been able to monitor and scrutinise and where necessary improve by amendment provisions in Bills which confer delegated law-making powers; and

c. the progress of staged repeal of delegated legislation (where this occurs) and the problems this may have produced for scrutiny committees and their responses to it".

Senator Colston called on the delegations.

There was general agreement that quasi-legislation in the form of legislative instruments not subject to parliamentary scrutiny presented a problem for legislative scrutiny committees. In one jurisdiction there were more legislative instruments outside the scrutiny of the committee than within it. It was necessary that delegated legislation committees have the power to scrutinise such instruments and if necessary to recommend disallowance.

A committee for the scrutiny of bills should exist as a complement to each delegated legislation committee. Without such a committee scrutiny of delegated legislation was incomplete. In some jurisdictions the same committee carried out both functions. Although at present only a minority of jurisdictions has a scrutiny of bills

committee, most are in the process of establishing one or have recommended such establishment.

Most jurisdictions now have some form of automatic expiry of *delegated legislation*, ranging from five through seven to 10 years. The concept of such staged repeal was supported.

Regulatory review: a catalyst for broader legislative reform
Greg Hogg, an official of the Regulation Review Committee, NSW

The NSW *Subordinate Legislation Act 1989* provides for staged repeal of delegated legislation and for mandatory public consultation and a regulatory impact statement (RIS) for the more important statutory rules. The purpose of RIS is to oblige departments to justify new regulations. Departments must actively inform and consult interested groups and take account of their comments. Departments must produce a cost benefit analysis of each proposal. Unfortunately there is no comparative RIS procedure for Acts.

The first RIS were defective, but are now better, although there is still apparent reluctance to give dollar values for costs and benefits. Some RIS had been rejected for these reasons. Preparation of RIS should not be an additional task for departments, which should have addressed such issues as costs and benefits as part of their routine procedures.

The effect of prorogation on committees
Hugh Hiscutt, Subordinate Legislation Committee, Tasmania

Legislative scrutiny could be effected best in parliaments such as the Commonwealth, where prorogations were infrequent. On the other hand, in parliaments such as Western Australia and Tasmania, where prorogations occurred each year, there was a detrimental effect upon such scrutiny. In Tasmania there is a procedure under which the committee could initiate the suspension of regulations while parliament was prorogued. Similarly, there was helpful legislation in NSW and Victoria under which delegated legislation committees can sit while parliament is prorogued.

Delegated legislation committees should have the power to scrutinise regulations while parliament is prorogued and in suitable cases suspend regulations at any time when parliament is not sitting.

Henry VIII Clauses
Ray Barber, Subordinate Legislation Committee, Queensland

There is strong general disapproval of such provisions, under which Acts may be amended by executive instrument. The reason for this is that parliament must always remain supreme in all aspects of legislation. Henry VIII clauses negate such supremacy, even when there is provision for disallowance. They are only acceptable in exceptional cases where, for example, a schedule of wildlife may need to be

amended in such a way that would not affect the intention of an Act. While there may be rare, justifiable uses of Henry VIII clauses which are subject to tabling and disallowance, they have no legitimate general application in the legislative process.

Wednesday, 22 May 1991

Quasi-legislation and departmental decision-making
Senator Patricia Giles

An important aspect of quasi-legislation is the mass of departmental manuals, guidelines and orders used by officials when dealing with the public. Legally, the position of such guidelines is ambiguous. In any event, both departmental officers and members of the public often treat them as if they were binding.

Several Commonwealth Acts provide safeguards against abuse by the executive of departmental guidelines. Under the *Administrative Decisions (Judicial Review) Act 1977* it is an improper exercise of power to apply a rule or policy without regard to the merits of each individual case. It also requires officials to provide, on request, a statement of reasons for each decision. The *Freedom of Information Act 1982* provides that all such guidelines must be publicised. Many decisions by Ministers and officials are now subject to independent, external, merits review by the AAT. The Ombudsman investigates complaints of maladministration by officials.

The Committee has examined numbers of departmental manuals, which in fact seem to acknowledge the primary position of Acts and delegated legislation in the administration of schemes and programs. Nevertheless, legislative scrutiny committees must remain vigilant to ensure that the position of Parliament is not diluted by such quasi-legislation, and that the rights of the public are protected.

A regulation by any other name

Bob Wiese, Joint Standing Committee on Delegated Legislation, Western Australia

There is a trend towards a proliferation of delegated legislation and a variety of terminology. This makes the task of delegated legislation committees more difficult. The real concern here is that not all of these instruments are subject to scrutiny. There are no objective criteria to determine which instruments are suitable for tabling and disallowance. For some departments the criteria simply relate to administrative convenience. Recent instruments which are not subject to parliamentary control impose fees and in one case even determine how those fees are to be applied. There should be an independent inquiry to examine the extent to which parliament is deprived of an opportunity to scrutinise the actions of the executive.

During discussion it was mentioned that the present ARC project on rule making aimed to identify all instruments which were legislative, regardless of terminology, and bring them within parliamentary scrutiny.

The executive and parliamentary scrutiny of delegated legislation
Senator Bronwyn Bishop

The relationship with the executive is the core of the operations of the Committee. In this context Ministers are the most important element of the executive. The Commonwealth position, under which there are Cabinet Ministers, Ministers outside the Cabinet, and Parliamentary Secretaries, assists the Committee. The Committee is also assisted by the fact that seven out of the nine Ministers and Parliamentary Secretaries in the Senate are former members of the Committee.

The Committee receives good cooperation from Ministers, one of whom has indicated that he personally is to be the first point of contact in his office for all matters regarding delegated legislation. Cooperation is helped by the Chairman always being from the government. From time to time the Committee invites departmental officers to brief it on particular instruments.

The main reason for the cooperation from Ministers is that the Committee acts in a non-partisan fashion and avoids involvement in the policy merits of delegated legislation.

Parliamentary counsel panel and discussion

Representatives from the Commonwealth, NSW, Queensland, Western Australia and the ACT

No jurisdiction had formal contact between parliamentary counsel and committees. In some states parliamentary counsel sometimes attend committee meetings. In others there may be irregular meetings but not day to day contact. In others there may be contact between counsel and the committee's legal adviser. However, it is probably beneficial that the parties be at a professional arm's length.

In all jurisdictions counsel advise departments of committee requirements. Sometimes this is done by a pro forma. Because of the committees, counsel can be more persuasive in dealing with clients. What starts out as a ministerial view will finish as a more rounded parliamentary view. It is good that a legislative scheme that may have been put together in haste can be independently considered by committees.

It may be useful if departments were to consult counsel on how to reply to queries from committees. This is particularly the case when departments have inexperienced instructing staff and inexperienced drafters.

The existence of scrutiny committees contributes to a higher standard of delegated legislation.

The changing nature of subordinate legislation and the ramifications for security committees—a Victorian perspective
Ken Jasper, Subordinate Legislation Subcommittee of the Legal and Constitutional Committee, Victoria

There is a trend to remove a large range of issues from parliamentary debate and deal with them by subordinate legislation. This trend emphasises the importance of scrutiny committees. It also emphasises the need for public justification of regulatory proposals through RIS.

In the first years after RIS procedures were established, the Committee concentrated simply on supervising compliance with those procedures. Now it scrutinises the quality of each RIS. This form of activity is now more necessary than ever before. There have been instances where major policy changes have been effected by regulation. Unfortunately, there are constraints on the operation of the Committee. For example, a regulation must be disallowed by both houses. Also, by control of the notice paper the government can ensure that a disallowance motion is not debated.

Committees must continue to avoid party political issues, even though interest group comments normally relate to the policy merits of regulations.

Workshop Session: Standardisation of regulations

Patricia Azarias, an official of the Regulation Review Committee, NSW

There are many costly, complex and anti-competitive regulations in the Commonwealth and States. These might be reduced by either a "mutual recognition" or a "coordination and harmonisation" approach. Under the former, each jurisdiction recognises the legislation of other jurisdictions. Under the latter, a common standard is imposed on all jurisdictions. It might be useful if the chairs of all delegated legislation committees meet regularly to discuss recognition and uniformity, and if committees circulate copies of their reports which raise these issues.

Discussion did not support either meetings or circulation. The success of legislative scrutiny committees is due to their avoidance of political issues. The concept of uniform legislation was such an issue and therefore outside the purview of committees. NSW delegates pointed out that their position was somewhat different, as their terms of reference exempt regulations which are complementary to, or uniform with, legislation of the Commonwealth or other States.

Workshop Session: Fee units

Patricia Azarias, an official of the Regulation Review Committee, NSW

In NSW there are scores of different fees which are changed every year. There could be advantages in adopting similar provisions to those already existing for pecuniary penalty units. That is, that fees are expressed by a standard fee unit set by the Treasury or by individual departments. Instead of amending each instrument, it would only be necessary to amend the amount of the fee unit. This would have administrative benefits. However, it may be confusing to the public. It may also be difficult to set a common denominator because of the variety of types of fees.

Most delegates did not support the introduction of fee units. Although units are suitable for penalties they are not suited for fees. There would be no incentive for

departments to reduce costs because fee rises would be automatic. Good administration dictates that fees should reflect costs. Fees would get out of line with costs. There would be no accountability by departments, with fee rises without reasons. Any fee increase should be individually justified.

The impact of delegated legislation on the community and the public profile of review committees

Judy Edwards, Joint Standing Committee on Delegated Legislation, Western Australia

It is important that the public have full and immediate access to delegated legislation. New information technology should ensure that complete and consolidated instruments are available to the public immediately they are made. This should be a major concern of committees. At present, much delegated legislation is only disseminated through the Gazette. Another problem is unintelligible drafting. There should be a single series of delegated legislation, rather than the present multiplicity of series.

Interest groups and individuals should be consulted and have their views taken into account before regulations are made. The RIS procedures in several jurisdictions assist this requirement. These procedures oblige departments to publicise proposed legislation. The RIS requirements should not affect the non-partisan operation of committees, as they are concerned only with procedures rather than policy merits.

Committees have several public profiles. These involve reports to parliament, facilitating access by the public to the RIS process, and educating the public about delegated legislation.

Thursday, 23 May 1991

Fees and taxes-a New Zealand perspective

David Caygill, Regulations Review Committee, New Zealand

It is a fundamental constitutional principle that only parliament should impose taxes. Parliament should act as a check on the executive if it intrudes into this area.

The New Zealand committee has recommended that whenever the executive proposes to impose fees or charges, it should estimate the revenue and by how much this exceeds costs and why. Even this does not protect rights and liberties. There must be an incentive to minimise costs through productivity gains. Also, in New Zealand fees have been set high to discourage a particular activity or to cross-subsidise other activities. In some cases it would be appropriate for fees to be set by tender or the market process. A RIS process would be of considerable help. The power to remit fees must not distort the cost recovery process.

The executive versus the legislature: restoring the balance

Tom Helm, Joint Standing Committee on Delegated Legislation, Western Australia

Scrutiny of delegated legislation reinforces the sovereignty of parliament. This is achieved mostly by persuasion. Committees must have no political bias, but must nevertheless ensure that the executive is answerable to parliament. If necessary, the committee will subpoena officials to appear before it. The committee may then approach ministers and even the premier. The power of the committee to initiate amendment of legislation is valuable. The role of the committee is to educate administrators as well as to correct individual instruments.

Discussion followed on a number of issues. There should be automatic disallowance of instruments where debate is not brought on a defective instrument. Given advances in information storage and retrieval perhaps the required period for tabling should be shortened from 15 sitting days to 10 or 5. In New Zealand instruments are subject to scrutiny even before tabling. Some legislative instruments were still not subject to tabling and disallowance. Explanatory documents should be improved. Schools and colleges should be given articles and material on the role of committees. Legislative scrutiny is not in conflict with the activities of the executive, but rather facilitates and advances the ideals of efficient government.

Open forum and final comments

The Senate delegation mentioned the United Nations Covenant on Civil and Political Rights and the Convention on the Rights of the Child and how our commitments under these charters would affect the operation of committees. It also emphasised that all legislative instruments must be made subject to tabling and disallowance. Access and presentation of delegated legislation must be improved. The present project by the ARC on rule making, which had accepted almost all of the recommendations in a major submission from the committee, would greatly assist the present position with respect to quasi-legislation. The Senate committee was particularly fortunate in having both a complementary scrutiny of bills committee and an independent legal adviser.

The ACT delegation also emphasised the advantages of a scrutiny of bills function and procedures for automatic disallowance if the motion is not brought on for debate.

The NSW delegation said that quasi-legislation was the greatest problem facing committees, together with an appropriate hierarchy of legislative content. The ARC project should be of assistance here.

The New Zealand delegation said that committees would be most successful if they combined a robust attitude to the executive with a strict non-partisan operation. Committees should ensure that public officials explain and clarify their actions in detailed explanatory material.

The Northern Territory delegation welcomed moves to ensure appropriate scrutiny of legislation during periods of prorogation. Also, it was preferable to have a government chair of the committee.

The Queensland delegation emphasised that legislative scrutiny must not be the prerogative of those who are legally qualified. It was important that committees explain what they do to the public.

The South Australian delegation said that quasi-legislation was an important problem. Committees should have the power to amend legislation. Legislative scrutiny committees will become more important in the future.

The Tasmanian delegation said that legislative scrutiny was well suited to upper houses.

The Victorian delegation said that quasi-legislation was a problem, with governments trying to avoid scrutiny of legislative instruments. Committees were aware of the importance of delegated legislation but governments were not. Thorough and revealing RIS were important. The lack of a scrutiny of bills committee was regrettable.

The Western Australian delegation said that the new scrutiny of bills committee would assist their operations. Prorogation each year is disruptive.

The Administrative Review Council representative said that the ARC proposals on rule-making are that all legislative instruments should be drafted to a suitable standard, prepared after a period of public consultation, be subject to scrutiny and disallowance and be accessible to the public.

Formal Close

Clive Griffiths, President of the Legislative Council, Western Australia

The President said that parliament should monitor and, where necessary, veto laws made by the executive. This has an educative and deterrent effect upon those who devise or administer delegated legislation. Government departments and other agencies will therefore know what parliament will tolerate for inclusion in such legislation.

(Copies of all papers are available from the Committee secretariat)

CHAPTER 10

FURTHER REPORT ON THIRD COMMONWEALTH CONFERENCE ON DELEGATED LEGISLATION

10.1 A Senate delegation led by Senator Bishop attended the Third Commonwealth Conference on Delegated Legislation, held in Westminster from 20-23 November 1989. On 7 December 1989 Senator Bishop made a detailed statement to the Senate on the Conference. The text of this statement was included in the *Eighty-Eighth Report* of the Committee, the Annual Report for 1989-90. As foreshadowed in the statement, Senator Bishop tabled the full record of the Conference on 21 June 1991, soon after it was received.

Senator Bishop, 21 June 1991, Senate Weekly Hansard p.5374

10.2 "As Deputy Chairman of the Regulations and Ordinances Committee and leader of the Australian delegation to the Third Commonwealth Conference on Delegated Legislation, I have pleasure in following the Chairman of the Regulations and Ordinances Committee, Senator Giles, in drawing attention to the work of delegated legislation committees throughout the Commonwealth. In this case, in accordance with the statement I made to the Senate on 7 December 1989, I am tabling the full record of the proceedings of the British Commonwealth Conference on Delegated Legislation which was held in London in November 1989, as provided by the conference secretariat in London. The full text of my statement in December 1989 is included in the annual report of the Regulations and Ordinances Committee for 1989-90 tabled in the Senate in May of this year.

10.3 "It is appropriate that both Senator Giles and I should be advising the Senate of the productive conferences which have been held on such important but underrated issues. Indeed, it is noteworthy that all who participated in the London conference are still actively involved in the consideration of both primary and delegated legislation under civil liberties criteria.

10.4 "At the time of the conference we held the following positions: I, as leader of the delegation, was Deputy Chairman of the Regulations and Ordinances Committee, a position I still hold; Senator Patricia Giles was in 1989 a member of the Regulations and Ordinances Committee and is now the Chairman of that Committee; Senator Kay Patterson was a member of the Regulations and Ordinances Committee and Deputy Chairman of the Scrutiny of Bills Committee and she remains a member of the Regulations and Ordinances Committee; Senator Rosemary Crowley was, and remains, a member of the Scrutiny of Bills Committee. The continuing commitment of all senators to the arduous work of the legislative scrutiny committees is thus demonstrated.

10.5 "In addition, the distinguished Professor Douglas Whalan was then and remains legal adviser to the Regulations and Ordinances Committee. In the interim, in the absence on sabbatical leave of Professor Jim Davis, he undertook simultaneously to act as legal adviser to the Scrutiny of Bills Committee. Anne Lynch was and remains Deputy Clerk of the Senate.

10.6 "It is pleasing for all of us who attended the conference in London that matters raised during that conference have been diligently pursued, as indicated by the statement just made by Senator Giles and the summary she has incorporated in Hansard. As additional proof of this assertion I draw the attention of honourable senators to a debate that occurred in the House of Lords in February 1990 concerning the desirability of establishing a Scrutiny of Bills Committee. Not surprisingly, in light of comments which I reported to the Senate in 1989, the debate was led by Lord Rippon, who was an active participant in the London proceedings. The Lords debate is included as an appendix to the proceedings. The enthusiasm for such a committee in other legislatures was also manifest at the Australian conference.

10.7 "However, it is depressing to note that, in addition to the positive trends evidenced by the uniform adoption of the concept of a Scrutiny of Bills Committee, themes and trends which caused some disquiet at the London conference continue to bedevil delegated legislation committees at both Commonwealth and State level. For example, much attention during the London conference was paid to quasi-legislation, both as legal instruments and as pseudo-legal manuals, guidelines, or instructions to staff of departments and authorities. Further, there is mounting evidence at Commonwealth level of ineptly drafted but nonetheless binding delegated legislation, well illustrated by examples given in the Delegated Legislation Monitor which is published each sitting week. Recent issues of the Monitor in particular draw attention to the ascendancy of departmentally drafted delegated legislation over the statutory rules series. This is a worrying development which generated significant discussion in both London and Perth.

10.8 "Other matters raised at the London conference that remain of continuing concern are the inaccessibility of delegated legislation, the obscure and often ungrammatical language in which legislation is drafted, and the unprofessional formatting of legislation. The problem of Henry VIII clauses, which is of such concern in British Commonwealth legislatures and those of the Australian States, is, as I was able to indicate at the conference and in my statement of December 1989 to the Senate, a lesser problem at the Federal level in Australia, due in no small measure to the vigilant Scrutiny of Bills Committee. This Committee endeavours to ensure that the temptation by the Executive and/or the bureaucracy to resort to such clauses is at the very least made public, with the attendant shame, or is thwarted by amendment in either House.

10.9 "The problem was again addressed at the Perth conference when, after vigorous discussion, I moved the following motion, which was adopted by the plenary session as its resolution:

"While noting that there may be a rare, justifiable use of a Henry VIII clause where such use would be subject to tabling and disallowance, this conference believes that Henry VIII clauses have no legitimate general application in the legislative process".

10.10 "In summary, conferences such as my colleagues and I have been privileged to attend enable discussion of common problems: a refreshing antidote to the relentless and often thankless task of scrutiny which all committees of this nature must endure.

10.11 "In order to complete the records of the Regulations and Ordinances Committee and the Senate in relation to the Third Commonwealth Conference on Delegated Legislation, I move that the report of the Conference be printed. (Question resolved in the affirmative).

10.12 "I understand from communications with London that, in accordance with the resolutions incorporated in the Senate Hansard of December 1989 and reproduced at pages 89 and 90 of the proceedings I have just tabled, the question of the next conference is actively being pursued. As the Pacific representative of the continuing coordinating committee, I shall ensure appropriate input from this region in order that the fourth Commonwealth conference on delegated legislation will be as successful in every way as its three predecessors.

10.13 "I also understand that other members of the delegation may wish to comment on this matter during the Budget sittings. For this reason, I seek leave to move a motion to take note of the report and the statement".

CHAPTER 11

RULE MAKING BY COMMONWEALTH AGENCIES

11.1 Following a conference on rule making sponsored by the Administrative Review Council on 31 August 1989 the ARC initiated a major project on Rule Making by Commonwealth Agencies. At the invitation of the President of the ARC, Professor Cheryl Saunders, the Committee commented on the terms of reference of the project on 22 November 1989. The text of these comments was included in the *Eighty-Eighth Report* of the Committee, the Annual Report for 1989-90.

11.2 On 30 June 1990 the ARC published an Issues Paper in respect of the project. On 10 September 1990 the Committee made a detailed submission on the Issues Paper. The submission and the paragraphs of the Issues Paper upon which it is based are too lengthy to reproduce here, but the following is an edited version of points made by the Committee.

TERM OF REFERENCE 1: TO EXAMINE THE DISTINCTION BETWEEN PRIMARY AND OTHER FORMS OF LEGISLATION AND WHAT SHOULD FORM THE PRIMA FACIE DIVISION OF CONTENT BETWEEN THEM.

11.3 The Committee has as its fourth Principle, or term of reference, the scrutiny of delegated legislation to ensure that it does not contain matter more appropriate for parliamentary enactment. The Committee has set out the areas where an Act is more appropriate, see *Seventy-Seventh Report*, March 1986. Other Reports, statements in the Senate by, most recently, Senator Collins and Senator Colston, and incorporation of Committee correspondence in Hansard have mentioned this point. Your statement that "the Parliament has given no indication of the sorts of matters that it wants to see in Acts in order that the content might be debated" is, therefore, not completely accurate as far as it applies to the Senate. On the motion of the Committee, the Senate has disallowed delegated legislation on the grounds that it contains matter more suited for an Act, the most recent of which was the **New South Wales Acts Application Ordinance 1985, ACT Ordinance No.25 of 1985**, deemed to have been disallowed when the Senate rose on 28 November 1985. In 1989 the Committee reported to the Senate that it considered recommending disallowance of the **Imperial Acts Repeal Ordinance 1988, ACT Ordinance No.94 of 1988**, on this ground. The Committee shares your concern, however, that these areas may not be observed in practice. In such cases, the Committee raises the matter with the Minister.

11.4 The Committee would have difficulties with broad policy statements being set out in delegated legislation. The Committee believes that such statements are more suitable for inclusion in Acts.

11.5 The Committee believes that agencies should be thoroughly familiar with the criteria relating to which material should be included in Acts and which in delegated legislation, such criteria being set out in the Reports and statements of the Committee and the Standing Committee for the Scrutiny of Bills. Agencies should apply these criteria when considering the division of the content of legislation.

11.6 The Committee believes that any mandatory rule affecting a class of people is legislative and should be included in delegated legislation. Any discretion to apply a rule to an individual should also be included in delegated legislation, with a right of review to the AAT of an adverse exercise of that discretion. The only material suitable for inclusion in purely administrative guidelines are the "rules or policies" contemplated by s.5(2)(f) of the Administrative Decisions (Judicial Review) Act, which may only be exercised properly by having regard to the merits of the particular case.

TERM OF REFERENCE 2: TO REVIEW THE NATURE AND FORMS OF LEGISLATIVE INSTRUMENTS TO PRODUCE UNIFORMITY OF TERMINOLOGY AND COMMON CONTENT IN THE VARIOUS FORMS OF INSTRUMENTS.

11.7 The Committee has commented adversely on the proliferation of types of instruments of delegated legislation. The Committee agrees that there appears to be no logical basis for the name or form of instruments. The Committee believes that the drafting, presentation and nomenclature of delegated legislation should not be of a lesser standard than Acts of Parliament. This standard is generally met by the Statutory Rules series of instruments, but by few others. It follows that the present variety of types should be subsumed within a single delegated legislation series, either the Statutory Rules or a new series.

11.8 The Committee agrees with your proposition that a diversity of types of instruments serving a similar purpose is likely to be confusing to users.

11.9 The Committee believes that the quality of drafting of the Statutory Rules series is generally superior to that of other series. The Committee believes that all delegated legislation should be drafted by the full time, professional drafters in the Attorney-General's Department, who are responsible for drafting the Statutory Rules series. The Committee does not accept that possible delay is a reason to prevent this.

11.10 The Committee believes that the Governor-General, or at least Ministers, should make delegated legislation. Generally speaking they are more appropriate than public servants or statutory authorities. On balance, delegated legislation should be made by the Governor-General rather than by Ministers. The Committee supports the present procedures whereby almost all Statutory Rules are made by the Governor-General. There is little doubt that the Executive Council procedures result in a higher quality instrument.

11.11 The Committee considers that the drafting and presentation of all delegated legislation should not be of a lesser standard than Acts. Therefore, it would not support different categories of delegated legislation, some of which are subject to higher safeguards than others.

11.12 In summary, the Committee believes there should be a single, uniform series of Commonwealth delegated legislation, possibly subsumed within the existing Statutory Rules series, subject to uniform and high levels of safeguards. This single series should be professionally drafted and presented and made by the Governor-General.

TERM OF REFERENCE 3: TO REVIEW THE ACTS INTERPRETATION ACT AND THE STATUTORY RULES PUBLICATION ACT TO DESIGNATE THE DIFFERENT FORMS OF SUBORDINATE LEGISLATION AND THE MAKING AND REVIEW PROCESSES APPROPRIATE TO EACH.

11.13 As noted in our earlier comments, there should not be different levels of delegated legislation. All legislative instruments should, therefore, be subject to the full safeguards of both the Acts Interpretation Act and the Statutory Rules Publication Act.

11.14 It is incorrect to assert that Parliament is not concerned with the policy of delegated legislation. In December 1989 and May 1990 instruments of delegated legislation were disallowed by the Senate on policy grounds. It is correct to say, however, that the Committee is not concerned with the broader policy merits of delegated legislation, limiting itself to matters of parliamentary propriety and personal liberty. Bearing this in mind, the Committee expresses no view on whether instruments of delegated legislation should be referred to a Committee for examination of their policy, or whether commencement of delegated legislation or Acts should be subject to positive approval by Parliament.

11.15 The Committee sees no need to amend the Principles which are its terms of reference. These have been changed only once since 1932. This was in 1979, to reflect the establishment of the AAT. The Committee has found that its Principles enable it to scrutinise any aspect of parliamentary propriety or personal liberties affected by delegated legislation.

11.16 Although it is correct that a notice of motion of disallowance of an instrument of delegated legislation must be given within 15 sitting days, the notice may be expressed to take effect within a further 15 sitting days. If expressed to take effect earlier, it may be extended to 15 sitting days. This makes a total of 30 sitting days, which is a reasonable time. The Committee would have no objection to delegated legislation standing referred to Parliament for consideration at any time. In most cases, however, the Committee completes its non-partisan, technical scrutiny within the 30 sitting days. An indefinite period would be more beneficial for those Senators who wished to disallow an instrument on policy grounds. The Committee does not support any particular legal or procedural provisions in respect of undertakings by Ministers which are not acted upon within a specified time.

11.17 It follows from our earlier comments that all instruments of delegated legislation should be brought within the Statutory Rules or a similar, single, uniform series subject to the provisions of the Statutory Rules Publication Act. The Committee has drawn attention to the relative, though not absolute, decline in the number of Statutory Rules compared to other instruments. This development is of concern because of the lower standards of drafting and presentation of instruments other than Statutory Rules. The Committee has also supported prompt consolidation of principal instruments. Reprints of delegated legislation should be available at least with the same frequency as reprints of Acts. As discussed later, ADP access to a full consolidation of all new and amended delegated legislation should be provided at the time an instrument is made.

TERM OF REFERENCE 4: TO REVIEW PROCEDURES FOR MAKING SUBORDINATE LEGISLATION WITH REGARD BEING PAID TO NOTICE AND CONSULTATION PROCEDURES AND THE IMPACT THAT THE VICTORIAN SUBORDINATE LEGISLATION ACT PROCEDURES HAVE HAD.

11.18 The Committee has always operated with the complete confidence of the Senate itself. The Senate has not failed to act upon a recommendation of the Committee since it was established in 1932. Perhaps the main reason for this confidence has been the knowledge that the Committee does not intrude into policy, but restricts itself to breaches of parliamentary proprieties and personal liberties. The Committee believes that any attempt by it to become involved in consultation procedures might threaten this confidence. This is so even though such supervision may be nominally procedural rather than policy-based. The Committee, therefore, would not wish to be involved directly itself in a consultation process along the lines of the Subordinate Legislation Acts of NSW and Victoria. Some provisions for notice or consultation may be useful, but not along the lines of those Acts. The Committee has indicated, for example, that it endorses the circulation of regulations in draft form to enable public comment. In such cases, of course, commentary would be provided by interested parties and the public, not the Committee itself. In practice the Committee understands that it is not uncommon for Ministers or agencies to circulate draft regulations for comment before they are made.

11.19 The Committee similarly does not support Regulatory Impact Statements in so far as the Committee's operations are concerned. Again the reason for this is that the Committee may be seen to be involved in policy. The Committee does insist that every instrument of delegated legislation be accompanied by an Explanatory Statement, which sets out the background to the instrument, its legal authority and a summary of each of its provisions. The Committee believes that Explanatory Statements may be developed further, but would not wish to scrutinise material to enable a judgement to be made on whether the proposed instrument is "an appropriate policy initiative". Explanatory Statements must be provided for every instrument of delegated legislation considered by the Committee, not a somewhat lesser number of the more important instruments as is the case with the Victorian and New South Wales legislation.

11.20 The Committee supports automatic repeal provisions under which existing delegated legislation is repealed in phases and new instruments repealed after fixed number of years.

11.21 Some aspects of the United States Federal Register may be useful in the Commonwealth context, although the Committee would not support the United States approaches to consultation. Once again, this is because it might be seen as becoming involved in policy.

11.22 In summary, the procedures for notice and consultation in Victoria and New South Wales may not be appropriate for the Commonwealth if they are seen as touching the policy merits of legislation. Phased and then automatic repeal is supported.

TERM OF REFERENCE 5: TO REVIEW THE METHOD OF PUBLICATION OF SUBORDINATE LEGISLATION WITH ATTENTION BEING PAID TO THE NEED FOR CONSOLIDATION OF INSTRUMENTS AND THEIR PUBLICATION IN ACCESSIBLE FORM, AND TO CONSIDER IN THIS CONTEXT THE POSSIBILITY OF THE ESTABLISHMENT OF A FEDERAL REGISTER.

11.23 The Committee agrees that there are defects in accessibility and presentation of delegated legislation. The position of the Committee on this aspect of delegated legislation is clear. The presentation, accessibility, numbering, consolidation, availability, publication and indexing of delegated legislation should not be of a lesser standard than that of Acts. This standard is achieved by the Statutory Rules series. It is achieved by few other series. All of the defects you mention would largely disappear if all delegated legislation was subsumed within that series.

11.24 The Committee has no objection to private publishers producing, say, annotated consolidations with commentaries, where a market exists. However, this should not relieve agencies of the obligation of providing regular and prompt consolidations.

11.25 The Committee has noted with approval the loose leaf format of reproducing and amending certain Orders administered through the Primary Industries and Energy portfolio. The Committee has congratulated the portfolio Minister, the Hon John Kerin MP, and the Minister for Resources, the Hon Alan Griffiths MP on this, expressing its hopes that the practice might be used in other portfolios. There has been another helpful development in the Primary Industries and Energy portfolio. Some Orders are actually consolidated each time there is an amendment. The Committee has also written to the Ministers on this.

11.26 At this point it is appropriate to mention another major reform in this general area. The Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, a former Chairman of this Committee, has written to the Committee indicating that the Civil Aviation Orders will progressively be subsumed by Regulations. This will result in greater accessibility and availability. The Committee has congratulated the Minister on this.

11.27 The Committee intends to report to the Senate on these encouraging developments. The Committee believes that there is no reason why the loose leaf format could not be adopted for the Statutory Rules series. As indicated earlier, the Committee believes that there should be a single series of Commonwealth delegated legislation. This series would preferably be amended by the loose leaf method, which is, in effect, an instant consolidation.

11.28 The view of the Committee is that any register of Commonwealth delegated legislation should be at least as elaborate as the Statutory Rules series. This accords with the fundamental requirement that no aspect of the drafting, presentation or access of delegated legislation should be inferior to that of Acts. The Committee supports such a register.

11.29 The Delegated Legislation Monitor, produced by the Procedure Office of the Senate on a pilot basis during the latter half of 1989 and on a regular basis this year, is a definitive index by parent Act and administrative portfolio of all disallowable instruments of delegated legislation tabled in the Senate. Constraints of space and resources, however, preclude inclusion of the instruments themselves in the Monitor.

11.30 The Committee believes that each time an instrument of delegated legislation is made or amended, the agency through which the instrument is administered should be required to produce convenient ADP access to the instrument itself and to a definitive consolidation. The Acts Interpretation Act or the Statutory Rules Publication Act should be amended to require such access.

CHAPTER 12

FEE UNITS

12.1 Correspondence between the Chairman of the Regulation Review Committee of the Parliament of New South Wales and the Committee illustrates aspects of the attitude of the Committee towards the many instruments of delegated legislation which impose or amend fees and charges.

12.2 On 1 June 1990 the Chairman of the Regulation Review Committee wrote to the Committee, as follows:

“1 June 1990

The Chairman,
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Sir

FEE UNITS

I write to seek your assistance in respect of a matter that recently came before my Committee.

My Committee has observed that when fees are imposed by regulation this is usually done by separate clauses setting the fee in dollars and cents for each service under the Act or regulation. Each amendment of those fees requires a change to the individual clauses and for this reason may run to a number of pages.

A regulation which was recently considered by my Committee has instead adopted a system where the fees for the various services referred to throughout the regulation were expressed as a number of fee units.

The fee unit was set in one clause of the regulation as a number of dollars and cents. This meant that when it was necessary to increase fees, instead of amending each clause of the regulation which imposed a fee, it was only necessary to amend the one clause, by increasing the value of the fee unit.

My Committee is considering whether it should recommend the wider adoption of fee units.

Initial advice was sought from the NSW Treasury. In their view the main disadvantage of this system was that the public may not understand the application of the fee unit to the actual amount they are required to pay for services. Treasury thought the main advantage of the system was that it would be simpler for the Bureaucracy, in that it would be easier to amend the fees.

The Committee noted that this fee unit system was similar to the penalty unit system which had been enabled by the Interpretation Act 1987, New South Wales.

Section 56 of the Interpretation Act 1987 states:

“A reference in any Act or statutory rule to a number (whether fractional or whole) of penalty units shall be read as a reference to an amount of money equal to the amount obtained by multiplying \$100 by that number of penalty units”.

The Committee also noted that in the Debate on the Bill for that Act the Minister in the Upper House explained the system as follows:-

“The fourth proposal I wish to comment on is the proposal to allow monetary penalties in legislation to be described by the use of penalty units rather than a dollar amount. The Bill defines a penalty unit as being initially equal to \$100 so that, for example, legislation providing a penalty of ten penalty units would be interpreted as a penalty of \$1,000. The advantage of this system is that the dollar amount of all penalties using the penalty unit system can be increased by one simple amendment. As a result, it will be much easier in the future to increase penalties periodically to keep them in step with current monetary values. Penalty units have been used extensively in Victoria and are also used in the New South Wales credit legislation”.

In the light of this, the Committee thought it would be desirable to obtain advice from other States and the Commonwealth as to whether a Fee Unit system had been introduced or considered in their jurisdictions.

I would welcome any advice you could provide in this regard.

Yours sincerely,

Adrian Cruickshank MP
Chairman”

12.3 On 24 August 1990 the Committee replied to the Chairman as follows:

“24 August 1990

Mr Adrian Cruickshank
Chairman
Regulation Review Committee
120 Macquarie Street
SYDNEY NSW 2000

Dear Mr Cruickshank

I refer to your letter of 1 June 1990 on fee units. I understand the Secretary of this Committee has supplied you with relevant extracts from Discussion Paper No.18 “Penalties”, and Interim Report, July 1990, both issued by the Review of Commonwealth Criminal Law. I also understand that this matter is on the agenda for your meeting of 30 August 1990.

In 1989, this Committee considered 433 Statutory Rules. Of these about a third imposed or amended fees, charges, levies, scales of costs, allowances and amounts of compensation, or imposed penalties expressed as amounts of money. Of these, almost all were expressed by separate provisions setting the fee or penalty in dollars and cents. As you point out, each amendment of these requires a change to individual provisions.

Some 1,011 instruments of delegated legislation other than Statutory Rules were also considered in 1989. Many of these, particularly those relating to allowances for members of the Australian Defence Force and the Australian Public Service, also provided for specific sums of money. Again, these were all expressed in separate amounts.

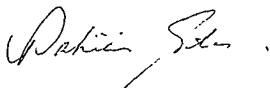
The main interest of the Committee would be to ensure that users were not disadvantaged by any system of fee units or penalty units. In this context the Committee has insisted that every instrument of delegated legislation be accompanied by an Explanatory Statement which sets out its background and details. In the case of instruments which impose or alter fees or other impositions, the Committee believes that the Explanatory Statement should set out the previous amount of the fee, the new fee and the basis on which the imposition, increase or decrease was made. This may be cost recovery, CPI increase, an outright tax or some other method. The Committee believes that any introduction of fee units for penalties or fees should not make legislation more confusing for users. This could be the case if penalties or fees are increased not by the amendment of the principal instrument but by amendment of some other instrument. Similarly, the Committee has urged that reprints and consolidations of principal instruments should be frequent and definitive. Again, the purpose of this is to assist users. Amendment of fees or penalties through an unrelated instrument could mean that copies of consolidated legislation become out of date earlier.

Many fees and charges in Commonwealth legislation are expressed in relatively small amounts, even in cents, and many more in amounts which are *not* multiples of 10, much less multiples of 100. Fee units in these cases would have to be expressed and changed by decimal figures to a number of places. Also, as mentioned earlier, many Commonwealth fees and charges are calculated not by reference to the CPI. The amending instrument could not, therefore, increase fee units "across the board". All this could be confusing and inconvenient to users.

The length or number of amendments of principal legislation dealing only with changes in penalties or fees has not generally been a problem. Any difficulties have been offset by the convenience to the public in having a full description of the changes in an Explanatory Statement.

Yours sincerely,

Mal Colston
Chairman"


Patricia Giles
Chair
12 December 1991

APPENDIX 1

CLASSIFICATION OF LEGISLATIVE INSTRUMENTS UNDER THE HEADING "MISCELLANEOUS" IN PARAGRAPH 1.10

Territory instruments	21
Trade practices instruments	14
Customs and excise instruments	11
ATSIC Determinations	9
Privacy instruments	7
Veterans' affairs instruments	6
Telecommunications instruments	6
Social security instruments	5
Commonwealth employees rehabilitation and compensation instruments	4
Freedom of information instruments	4
Motor vehicle standards instruments	4
Marine orders	4
Quarantine instruments	3
Wildlife protection declarations	3
ANRC General By-laws	2
Nuclear non-proliferation declarations	2
Anti-dumping instrument	1
Defence Service Homes instrument	1

Federal Airports By-law	1
Petroleum products instrument	1
Training guarantee instrument	1
World heritage instrument	1

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APPENDIX 2

INSTRUMENTS MADE UNDER ACTS AND SUBJECT TO DISALLOWANCE OR DISAPPROVAL BY EITHER HOUSE OF PARLIAMENT

<i>Enactments</i>	<i>Instruments</i>
Aboriginal Councils and Associations Act 1976	by-laws (s.30)
Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987	by-laws(ss.15,23)
Aboriginal Land Rights (Northern Territory) Act 1976	declarations (grants of mining interest)(s.41) proclamations (mining interests and operations)(s.42)
Aboriginal and Torres Strait Islander Commission Act 1989	determinations (Chairperson and Chief Executive Officer)(s.194) notices (constitution, election procedures, operations, terms of members of Commission)(s.116) rules (regional council and zone elections)
Aboriginal and Torres Strait Islander Heritage Protection Act 1984	declaration (significant areas and objects) (s.15) declaration (emergency) (s.9)
Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management) Act 1978	by-laws (s.10)
Acts Interpretation Act 1901	orders (administrative arrangements)(s.19BA)

Aged or Disabled Persons Homes Act 1954	Charter (hostel resident's rights and responsibilities) determinations (approved home grants)(s.9) determinations (personal and respite personal care subsidy)(s.10) general conditions (hostels)(s.10F) guidelines (hostel variable capital funding)(s.9B)
Aged or Disabled Persons Homes Amendment Act 1989	principles (s.25)
Anti-dumping Authority Act 1988	directions (interpretation of legislation) (s.12)
Ashmore and Cartier Islands Acceptance Act 1933	ordinances of territory (s.6) regulations of territory
Atomic Energy Act 1953	declarations that the Approved Defence Projects Protection Act 1947 applies (s.60)
Australian Antarctic Territory Act 1954	ordinances of territory (s.12) regulations of territory
Australian and Overseas Telecommunication Corporation Act 1991	determinations (price control arrangements) (s.25)
Australian Broadcasting Corporation Act 1983	rules (Tenure Appeal Board and Disciplinary Appeal Board) (s.83)
Australian Capital Territory Supreme Court Act 1933	rules of court (s.28)
Australian Horticultural Corporation Act 1987	orders (accounts, returns and registration of premises)(s.122)
Australian Horticultural Corporation Amendment Act 1991	determinations (rate of interest payable) (s.25A)
Australian Meat and Live-stock Corporation Act 1977	orders (export licences and meat quotas)(s.16H, 16J,16K, 16L)

Australian National Airlines Act 1945	by-laws (s.69)
Australian National Railways Commission Act 1983	by-laws (s.79)
Australian Wool Corporation Act 1991	determinations (rate of interest payable) (ss.98A and 98B)
Australian Wool Realisation Commission Act 1991	determinations (rate of interest payable) (ss.80A and 80B)
Automotive Industry Authority Act 1984	suspension of number of statutory authority (s.21)
Bankruptcy Act 1966	rules (records and inspection)(s.172), (bankruptcy proceedings)(s.315)
Bass Strait Freight Adjustment Levy Act 1984	rates of levy (s.6)
Bounty (Books) Act 1986	declarations (s.4)
Bounty (Computers) Act 1984	notices (classification of machines) (s.5)
Bounty (Metal Working Machines and Robots) Act 1985	declarations (classification of machinery and components, specification, value and percentages) (ss.6, 7, 8)
Broadcasting Act 1942	orders (technical services, interference, examinations)(s.15), (Broadcasting Tribunal)(s.17), (planning, technical services)(s.125E)
Census and Statistics Act 1905	determinations (release of information)(s.13)
Christmas Island Act 1958	ordinances of territory (s.10) regulations of territory (s.23)
Civil Aviation Act 1988	orders (technical requirement for aircraft, engines and equipment) (s.98(5)) exemptions (compliance with regulations)

Cocos (Keeling) Islands Act 1955	ordinances of territory (s.13) regulations of territory (s.20)
Commonwealth Employees Rehabilitation and Compensation Act 1988	declarations (rehabilitation and compensation) (s.21) notices (declaration of body corporate)(s.73), (declaration of administering authority)(s.101) (eligible Commonwealth employees) (ss.4,5)
Commonwealth Electoral Act 1918	rules of court (s.375)
Commonwealth Teaching Service Act 1972	determinations (remuneration, benefits and allowances)(ss.20, 23)
Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980	<i>instruments applying to relevant Acts</i> (s.4)
Coral Sea Islands Act 1969	ordinances of territory (s.7)
Corporations Act 1989	accounting standards (s.32)
Crimes (Foreign Incursions and Recruitment) Act 1978	declarations (Ministerial dispensation) (s.9)
Customs Act 1901	<i>declarations (diesel fuel rebate)</i> (s.164) directions (interpretation of anti-dumping legislation) (s.269TA), (factory costs)(s.269S), notices (diesel fuel rebate)(s.164) instrument of approval (forms for diesel rebate)(s.4A)
Customs Tariff Act 1987	directions (substitutes and imitations)(s.25) directions (goods consisting of separate articles)(s.26) orders (application of duties)(s.36)
Dairy Industry Stabilization Act 1977	principles (determination of quotas)(s.11A)
Data-Matching Program (Assistance and Tax) Act 1990	guidelines (s.12)

Defence Act 1903	determinations (superannuation interim arrangements)(s.52) determinations (remuneration, benefits and allowances)(58C) orders (control and administration of rifle ranges)(s.123G) interim determinations (conditions of employment)(s.13) determinations (inconsistent regulations)(s.14) rules (punishment)(s.36)
Defence Force Discipline Act 1982	rules of procedure (s.149)
Defence Service Homes Act 1918	guidelines (financial hardship) (ss.18(5C), 20(4), 21(3), 23(6))
Defence (Special Undertakings) Act 1952	orders (restricted areas)(s.15)
Disability Services Act 1986	determinations (training allowances) (s.24) principles (administrative)(s.5)
Employment, Education and Training Act 1988	determinations (higher education institutions)(s.4(1))
Environment Protection (Impact of Proposals) Act 1974	orders (administrative procedures)(s.7)
Environment Protection (Nuclear Codes) Act 1978	orders under regulations (s.15) orders (codes of practice, nuclear activities)(s.9) orders (special situations, nuclear activities)(s.14)
Excise Act 1901	declarations (rebate of oil duty) (s.78B) determinations (import parity pricing Bass Strait oil)(s.6A) notices (diesel fuel rebate)(s.78A) instrument of approval(forms for claims for 'drawback' of excise duty, diesel fuel rebate)(s.4AA)

Explosives Act 1961	orders (handling of explosives)(s.16)
Export Control Act 1982	orders (prescribed goods, inspection, seizure, trade descriptions, fees, livestock)(s.25)
Family Law Act 1975	rules of court (s.123)
Federal Airports Corporation Act 1986	by-laws (s.72)
Federal Court of Australia Act 1976	rules of court (s.59)
Fisheries Act 1952	determinations (plans of management)(s.7B) fisheries notices (s.8) orders (s.18) plans of management (fisheries)
Foreign Proceedings (Prohibition of Certain Evidence) Act 1976	orders (instruments of the Attorney-General)(s.5)
Great Barrier Reef Marine Park Act 1975	zoning plans (marine parks)(s.12)

Health Insurance Act 1973

approvals of form of undertaking (pathology authorities and practitioners)(s.23)
determinations (approved pathology authorities and practitioners)(s.23)
determinations (Pathology Services Advisory Committee)(s.78C)
determinations (pathology services)(ss.4A, 4BA, 4BB, 23DC, 23DF, 23DN)
determinations (variation of table of services)(s.4)
guidelines (payment of Medicare benefits)(s.3)
determinations (definition of 'basic private' and 'basic table')(s.13)
determinations (acute cases)(s.27)
determinations (medical services outside Australia)(s.40)
determinations (Medical Participation Review Committee) (s.40)
determinations (health services)(s.9)
directions (registered organisations)(s.19)
directions (Health Insurance Commission)(s.73)
orders (eligibility of immigrants and refugees)(s.8)
instruments of revocation (pathology authorities and practitioners) (s.23)
principles (approval of private hospitals)(s.31)

Heard Island and McDonald Islands Act 1953

ordinances of territory (s.11)
regulations of territory

High Court of Australia Act 1979

directions (functions and powers of Clerk)(s.19)

Higher Education Funding Act 1988	<i>determinations (grants for building and operating expenses) (ss.26, 31)</i> <i>directions (grants for expenditure and operating purposes)(ss.18(3), 20(1), 21(2), 26(2), 29(3), 31(2), 32(3), 100, 101)</i>
Horticultural Research and Development Corporation Act 1987	<i>orders (s.81)</i>
Human Rights and Equal Opportunity Commission Act 1986	<i>declarations of international instruments (s.47)</i>
Interstate Road Transport Act 1985	<i>orders (federal road safety standards)(s.35)</i>
Judiciary Act 1903	<i>rules of court (s.86)</i>
Liquid Fuel Emergency Act 1984	<i>guidelines (allocation of fuel)(s.41)</i>
Liquified Petroleum Gas (Grants) Act 1980	<i>determinations (wholesale LPG prices)(s.5)</i>
Meat Inspection Act 1983	<i>orders under regulations (s.36)</i> <i>orders (production of standards inspection, official marks, fees) (s.37)</i>
Military Superannuation and Benefits Act 1991	<i>Instrument (Trust Deed and Rules) (s.5)</i>
Motor Vehicle Standards Act 1989	<i>determinations (national standards, auditing procedures)(ss.7, 9)</i> <i>orders (s.7)</i>

National Health Act 1953

agreement (residents and proprietors of nursing homes)
approvals (pharmacists, medical practitioner) (ss.90,92)
charter (nursing homes residents' rights and responsibilities)
declarations (pharmaceutical benefits)(s.85)
declarations (nursing home care standards)(s.45D)
determinations (basic benefits for patients in nursing homes) (s.47(2B))
determinations (basic table)(s.4)
determinations (benefits payable to proprietors of non-government nursing homes for disabled people) (s.47(1))
determinations (daily allowance for occupied beds)
determinations (amounts payable for hospital treatment)(s.4D)
determinations (pharmaceutical benefits)(s.98, 99)
instrument of approval (forms)(s.40AA)
instrument of revocation (guidelines for medical and hospital benefits plans)(s.73E)
notices (benefit rate for non-government nursing homes for disabled people)(s.47)
notices (recurrent funding for nursing homes)(s.12)
principles (exempt nursing homes fees and status, methodology for determining service need classification)(ss.39, 40)
principles (guidelines for approving an 'approved operator' of a nursing home)
principles (terms and conditions of employment of staff)
principles (scales of fees)(s.3)
rules (pharmaceutical benefits) (s.99)

Navigation Act 1912	orders (navigation, safety stowage)(s.19), (ships and shipping, shipping law codes and tonnage)(ss.405PA,427)
Nuclear Non-Proliferation (Safeguards) Act 1987	declaration (equipment, material and technology)(s.4) declarations (exemptions and terminations)(ss.4,11) orders (grants of permits)(s.73)
Nursing Homes Assistance Act 1974	notices (Minister's determination of rates) (s.36) principles (approval of nursing homes)(s.31A)
OTC Act 1946	rules (proceedings of the compensation Board)(s.73)
Overseas Students (Refunds) Act 1990	determinations (s.4)
Parliament House Construction Authority Act 1979	directions of Minister (s.9)
Pasture Seed Levy Act 1989	notices (levy for certified medic seed)(s.9)
Primary Industries and Energy Research and Development Act 1989	determinations (rate of interest payable) (ss.89B, 89C)
Privacy Act 1988	guidelines (s.17) determinations (approval for disclosure of information) (s.72) notices (revocation) (s.78) public interest determinations (s.78)
Protection of the Sea (Powers of Intervention) Act 1981	orders under regulations (s.24)
Protection of the Sea (Prevention of Pollution from Ships) Act 1983	orders (under regulations and articles of international convention)(s.34)

Public Service Act 1922	determinations (locally engaged staff)(s.82) determinations (parliamentary officers terms and conditions of employment)(s.9) determinations (terms and conditions of employment)(s.82D)
Quarantine Act 1908	determinations (fees)(ss.25, 86E)
Radiocommunications Act 1983	guidelines (transmitter licences) (s.25) emergency orders (s.42) orders (emergency prohibitions or restrictions on transmitters)(s.41) plans (spectrum plans)(s.18) plans (frequency bands)(s.19) standards (performance and compliance of devices)(s.9)
Remuneration Tribunal Act 1973	determinations (salaries and allowances)(ss.7, 12DD)
Seat of Government (Administration) Act 1910	determinations (fees) (s.12(9A)) ordinances of territory (s.12) modifications or variations of the Canberra Plan (s.12A)
Ships (Capital Grants) Act 1987	guidelines (claims for payment for ships, converting of ships, structural or equipment changes to ships) (s.18(8))
Social Security Act 1947	determinations (loan rate) (s.4C) determinations (deeming rate) (s.4D) determinations (guidelines for exercise of Secretary's power) (s.19) determinations (property rate) (s.6A) determinations (claims for benefits, allowances, pensions)(s.168(4)) determinations (fees for witnesses appearing before Social Security Appeals Tribunal)(s.233)

Social Security Act 1991	notices (waive recovery of debt) (s.1237)
States Grants (Petroleum Products) Act 1966	amendments of schemes (grants to states, petroleum prices) (s.7A)
States Grants (Schools Assistance) Act 1988	determinations (grants for Special Education Program) (ss.16, 17(3))
States Grants (TAFE Assistance) Act 1989	determinations (grants for operating expenses, building and capital expenditure)(ss.9(1), 10(4), 11(1), 12(1), 13, 14)
States Grants (Tertiary Education Assistance) Act 1984	directions (variations in recurrent expenditure)(s.31) directions (variations in State entitlements, additional conditions) (ss.36, 42, 46)
Steel Industry Authority Act 1983	suspension of member of statutory authority (s.18)
Superannuation Act 1976	determination (employees eligible for scheme)(s.153AC) determinations (benefits)(s.153AD) determination (employer component payment) (s.241) determination (assets transfer) (s.240) determinations (period for transfer arrangements to new Commonwealth Superannuation Scheme)(s.238)
Superannuation Act 1990	deed (occupational superannuation scheme)(s.5) determinations (assets transfer) (s.133) determinations (employment component payment) (s.134)
Superannuation Benefits (Supervisory Mechanisms) Act 1990	determinations (guidelines for provision of benefits) (s.6)

Taxation Administration Act 1953	suspension of officer (s.6C)
Telecommunications Act 1989	determinations (technical standards) (s.106) directions to Australian Telecommunications Authority (s.73) determinations (price control arrangements)
Telecommunications Act 1991	declarations (conditions for licences) (s.65) determinations (technical standards) (s.246) determinations (eligible control areas) (s.16) directions (authorised facilities) (s.106) directions (RADCOM facilities) (s.204) licences (public, general) telecommunications carrier (s.57)
Telecommunications (Interception) Act 1979	declarations (State law enforcement authorities as agencies) (ss.21, 34(1)) declarations (Independent Commission Against Corruption) (s.35)
Therapeutic Goods Act 1989	determinations (manufacturing principles) (s.36) orders (standards) (s.10)
Trade Practices Act 1974	declarations (designated secondary shipper body) (s.10.03) declarations (operation of Act and acquisition outside Australia) (ss.50A(1), 163A)
Trade Representatives Act 1933	determinations (salaries) (s.11A)
Training Guarantee (Administration) Act 1990	guidelines (registration of industry training agents) (s.30,94)
Various Acts	regulations (statutory rules)

Veterans' Entitlements Act 1986	guide to assessment of rates of pension (s.29)
Wildlife Protection (Regulation of Exports and Imports) Act 1982	declarations (imports and exports of wildlife)(s.9)
Wool Marketing Act 1987	determinations (prices of wool) (s.120)
World Heritage Properties Conservation Act 1983	proclamations (property listing)(s.15)

APPENDIX 3

ALPHABETICAL INDEX OF LEGISLATION AND DELEGATED LEGISLATION WITH PARAGRAPH REFERENCES 1990-1991

A

Aboriginal and Torres Strait Islander Commission (Election of Executive Committees) Regulations Statutory Rules 1990 No.399	3.66
A.C.T. Self-Government (Consequential Provisions) Regulations (Amendment) Statutory Rules 1989 Nos.391-398	3.20
<i>Acts Interpretation Act 1901</i>	2.38,2.72; 3.17,3.19,3.31,3.33; 5.39; 11.13,11.30
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