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SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES

REPORT ON SCRUTINY BY THE COMMITTEE OF PUBLIC SERVICE DETERMINATIONS 1992/27 AND 1992/46

NINETY-SECOND REPORT

NOVEMBER 1992

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

Senator Stephen Loosley (Chairman)(from 10 September 1992)
Senator Patricia Giles (Chair)(to 20 August 1992)
Senator Bronwyn Bishop (Deputy Chairman)
Senator Mal Colston
Senator Bill O'Chee
Senator Kay Patterson
Senator Olive Zakharov

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979)

The Committee scrutinises delegated legislation to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

INTRODUCTION

The scrutiny by the Committee of Public Service Determinations 1992/27 and 1992/46 was one of its most important actions this year.

These Determinations, made by an official of the Department of Industrial Relations, without adequate consultation, removed an injustice for some members of the Australian Public Service but entrenched the same injustice for some 30,000 other former members of the APS. This injustice, known to the administering authorities for almost 20 years, was recently described by the Merit Protection and Review Agency as "unfair and inequitable" and "obviously anomalous". The Explanatory Statements which accompanied the Determinations did not adequately describe their nature or effect.

The Committee wrote to the Minister for Industrial Relations and Minister Assisting the Prime Minister for Public Service Matters, Senator the Hon Peter Cook, who advised that he had asked his Department to cooperate fully with the Committee's enquires. Subsequently, officers of the Department attended a meeting of the Committee, where they were asked to prepare a paper on the ways in which the problem could be solved. Following further correspondence, Senator Cook wrote to both the Prime Minister, the Hon Paul Keating MP, and the Minister for Finance, the Hon Ralph Willis MP, who advised that allocations of $2.7 million for 1992-93 and $1.4 million for 1993-94 would be included in the 1992 Budget to cure this inequitable situation.

The actions by the above Ministers demonstrate an obvious commitment to the Committee's principles of personal rights and parliamentary propriety.

The Committee is pleased to present this Report as an example of the way in which it carries out its mandate from the Senate to scrutinise delegated legislation.

CHAPTER ONE

THE REPRESENTATION

1. On 27 April 1992 the Committee received a representation from Mr Graham Boucher, a former officer of the Australian Customs Service. The representation drew attention to a problem affecting the personal rights of a substantial group of people.

2. The problem related to credits received in lieu of recreation leave by officers retiring from the Australian Public Service. The difficulties arose from a change made on 1 January 1967 to the recreation leave accrual date, with adjustments to be made to credits as a result of this change for officers who commenced duty before 26 October 1966. The combination of these factors, together with the increase in leave entitlement in 1973 from 15 to 20 days per annum, led to officers such as Mr Boucher receiving on retirement less money than that to which they were fairly entitled. For Mr Boucher, the result was a loss of more than four days salary or, in his case, about $700.

3. The Australian Customs Service, for which Mr Boucher worked at the time of retirement, supported Mr Boucher in his claim for this money. However, both the Department of Industrial Relations (DIR) and the Department of Finance (DOF), either of which could have resolved the position by, respectively, retrospective legislation or an act of grace payment, declined to act. Accordingly, the matter was referred to the Merit Protection and Review Agency (MPRA).

4. The conclusions and recommendations of the MPRA are described in more detail in Chapter 2, but in summary the MPRA found that the application of the present law was "unfair and inequitable". The MPRA suggested that the problem could be solved either by prospective legislation with act of grace payments for past cases, or by retrospective legislation with the onus on former employees to substantiate their claims.

5. On 10 December 1991 the MPRA advised Mr Boucher that DIR had indicated that the legislation had been under review for some time with the object of dealing with the unintended effects of its present application. The MPRA continued:

> "The Agency (the MPRA) intends to pursue the matter to ensure that the review is carried out quickly and that, if changes are made, they are retrospective so that your situation, and the situation of others like you, is corrected. It is difficult at his stage to know the time frame which will be involved.

In the circumstances you should not be discouraged from making whatever prepresentations you believe may assist in bringing the matter to a favourable conclusion."

6. Mr Boucher then wrote to DIR on 6 March 1992. On 9 March 1992 an officer of DIR made Public Service Determination 1992/27 which, among other things, provided for "pre 1966" officers who retired after 17 March 1992 to receive the full recreation leave credit. However, the Determination did not address "pre 1966" officers, such as Mr Boucher, who retired before 17 March 1992. The result was that such officers would remain in their unfair and inequitable position. The Explanatory Statement which accompanied the Determination did not advise of these effects.

7. The DIR did not consult with either the MPRA or Mr Boucher before the Determination was made. Also, it did not inform them after the Determination had been made. However, Mr Boucher found out about the Determination and met with an officer of DIR on 15 April 1992. That officer told Mr Boucher that the drafting of the Determination was faulty and that it would be replaced, but that it still would not address Mr Boucher's position.

8. On 23 April 1992, an officer of DIR made Public Service Determination 1992/46, the sole purpose of which was to correct the defective drafting of the relevant provision of the previous Determination. This second Determination operated retrospectively to 17 March 1992. Again, the Explanatory Statement did not advise that some officers would be assisted and not others. The DIR did not consult with the MPRA before it made this Determination, nor did it inform MPRA that it had been made. Chapter 3 of this Report describes Determinations 1992/27 and 1992/46 in more detail.

CHAPTER TWO

CONCLUSIONS AND RECOMMENDATIONS OF THE MERIT PROTECTION AND REVIEW AGENCY

1. The Merit Protection and Review Agency (MPRA) was established under the *Merit Protection (Australian Government Employees) Act 1984.* The MPRA was established "to ensure that actions taken and decisions made in relation to Commonwealth employees are ... fair and equitable".

2. The MPRA investigated Mr Boucher's grievance. It noted that the Department of Industrial Relations (DIR) had earlier indicated that it was aware of the anomaly but, although a review was being made, it did not intend any retrospective action to correct the situation. The MPRA also noted that the Department of Finance (DOF) had declined a request from the Australian Customs Service (which was Mr Boucher's employing agency) for an act of grace payment to Mr Boucher. The reason for this refusal was a DOF understanding that DIR did not intend retrospective resolution of the anomaly, and that as there were other officers in the same position as Mr Boucher, it was difficult to see why he should receive special treatment.

3. The MPRA then wrote to DOF expressing its opinion that DOF's arguments against an act of grace payment were unconvincing. The DOF replied that DIR could resolve the problem retrospectively and, if this was not done, it would be inappropriate to circumvent the application of the legislation by the act of grace power. DOF noted that retrospective application would solve the problem for all disadvantaged former officers.

4. The MPRA then contacted DIR, which advised that DIR opposed retrospectivity in this case on administrative grounds (it was too hard to identify potential claimants and publicise the change) and because of the general policy against retrospectivity, even where the Commonwealth was the only person or body to be disadvantaged.

5. The MPRA found that Mr Boucher and all other "pre 1966" officers who retired after 1973 had been denied payment of recreation leave credits. Serving "pre 1966" officers would, on retirement, also be denied this credit. On the other hand, "post 1966" officers, both retired and serving, received or were entitled to receive the full credit. The MPRA concluded:

> "Clearly, a situation where some employees receive on resignation or retirement an amount reflecting all their previous service and others do not is inequitable. Legislation which can lead to such divergent results based on the

interplay of the anniversary of the date of commencement and the date of resignation or retirement (when such an interplay has no sound logical basis) is obviously anomalous and requires amendment or other action to mitigate its past and future consequences."

6. The MPRA stated that such mitigation was a matter for DIR and DOF. It suggested either -

(a) prospective legislation with act of grace adjustment to any past cases which come to notice; or

(b) retrospective legislation, with the onus on former employees affected by the provision to identify themselves and substantiate their claims.

7. The MPRA further concluded that the application of the legislation was "unfair and inequitable". It recommended that DIR and DOF consider the best means of compensating Mr Boucher, whether the grievance had illustrated a more general problem and, if so, how best to resolve it.

8. The MPRA advised Mr Boucher, the Australian Customs Service, DIR and DOF of its findings.

CHAPTER THREE

THE DELEGATED LEGISLATION

1. On 9 March 1992 an official of the Department of Industrial Relations (DIR), under subdelegation under subsection 18(3) of the *Public Service Act 1922*, made Public Service Determination 1992/27. The entire Determination was 30 pages long and dealt with aspects of recreation leave for the Australian Public Service. It was expressed to commence on the day on which section 26 of the *Public Service and Statutory Authorities Amendment Act 1980* commenced, which was 17 March 1992, more than 11 years after that Act received Royal Assent on 17 December 1980.

2. The relevant provision of the Determination was clause 11, "Adjustment of recreation leave for officers who commenced duty as officers before 26 October 1966". That clause read as follows:

> "11.1 An officer who commenced duty as an officer before 26 October 1966 is entitled to recreation leave and payment in lieu of recreation leave as if the Act and Regulations as in force immediately before this determination commences continued to apply to the officer and the reference in subsection 68A(2) of the Act to "one-twelfth of that credit" were a reference to "one-twelfth of 3 weeks".
>
> "11.2 For the purposes of section 68E of the Act, allowances which in accordance with Public Service Board Determination 1983/10 would be included in payment to an officer in lieu of recreation leave are to be included in the officer's salary."

3. The Explanatory Statement which accompanied the Determination advised as follows:

> "Clause 11 is a transitional provision which preserves the effect of the Act and Regulations in relation to officers who commenced duty before 26 October 1966. Sub-clause 11.1 clarifies the annual basis of accrual of such an officer's final credit as three weeks, which was the rate of accrual in 1966. Sub-clause 11.2 specifies the allowances to be included in salary for the purposes of the new section 68E of the Act inserted by section 31 of the Public Service and Statutory Authorities Amendment Act 1980; this sub-clause is authorised by subsection 68E(4) of the Act."

4. However, there were problems with the drafting of clause 11. Therefore, on 23 April 1992 an official of DIR made Public Service Determination 1992/46, expressed to commence retrospectively on 17 March 1992, the sole purpose of which was to

redraft subclause 11.1. The relevant clause of that Determination read as follows:

> "4. Sub-clause 11.1 of the Principal Determination is amended by omitting "and the reference in subsection 68A(2) of the Act to 'one-twelfth of that credit' were a reference to 'one-twelfth of 3 weeks'" and substituting "and -
>
> (a) paragraph 68A(1)(c) of the Act read as follows -
>
> '(c) ceases to be an officer after 1 January 1967; and ';
>
> (b) subsection 68A(2) of the Act read as follows -
>
> '(2) In the case of an officer to whom this section applies, the recreation leave credit that accrued to the officer on 1 January in the year in which he ceases to be an officer shall be deemed to have been reduced at the rate of one-twelfth of 3 weeks for each complete month in that year before the anniversary in that year of the date on which the officer commenced duties as an officer.'; and
>
> (c) regulation 46D(1)(b) of the Regulations were omitted."

5. The Explanatory Statement which accompanied the Determination advised as follows:

> "As a result of further consideration of the effect of the former section 68A, it has been concluded that the required adjustment is best achieved by modifying section 68A to include provisions clarifying the basis on which the final recreation leave credit of all 'pre-1966' officers is to be reduced to eliminate the excess credit which they were granted as part of the change in the basis of accrual which took effect in 1966. The residual effect of the former Regulation 46D is also removed in relation to these officers."

CHAPTER FOUR

ISSUES FOR THE COMMITTEE

1. The representation from Mr Boucher, together with the findings of the Merit Protection and Review Agency (MPRA) and the legislation itself, raised a number of issues of interest to the Committee.

2. The first issue was the technical validity of the legislation. The Determination purported to over-ride the words of section 68A of the *Public Service Act 1922*. In such cases the Committee satisfies itself that there is power provided in the parent Act or another Act to take this action. In this context, the Explanatory Statement gave the authority in the parent Act under which sub-clause 11.2 was made. However, it gave no authority for what appeared to be the more important sub-clause 11.1. This technical legality was even more important given that the first Determination was to commence on the same date as an Act which received Royal Assent 11 years before.

3. Next, the Explanatory Statements did not appear to tell the whole story, which may have been misleading. Both Explanatory Statements advised that each Determination "clarifies" the position for "pre 1966" officers. In fact, from the MPRA and other material it appears as if the Department of Industrial Relations (DIR), and everybody else, was perfectly clear as to the legal position. The Determinations then favourably altered the position for officers who retired after 17 March 1992, while leaving officers who retired before that date in their unfair position.The Determinations did not even assist any officers who retired between 9 March 1992, when the first Determination was made, and 17 March 1992, when they both commenced. However, both Explanatory Statements seem to imply that they cover all "pre 1966" officers.

4. Another area of concern was the relationship between MPRA and DIR. As late as 10 December 1991 the MPRA was still pursuing this inequitable situation. The Committee would wish to ensure that in cases such as the present MPRA was consulted and kept fully informed of developments. This would seem to be an obvious requirement in any event. However, there is an additional consideration. This is that the role of the MPRA is of some significance in relationships between the Committee and Departments, including DIR. On several occasions the Committee has raised the question of the review of the exercise of discretions in Public Service Determinations. In such cases DIR has replied, in effect, that personal rights are protected because officers can always go to the MPRA with any grievances. However, in the case of the "pre 1966" officers it seemed as if DIR had not only failed to implement MPRA recommendations, but also appeared to have done so without consulting or even informing MPRA.

5. Most importantly, on the question of personal rights, the Committee was concerned that the Determinations had, in curing the injustice for future retirees, only underlined the inequitable situation of others like Mr Boucher. That is, there was an admission that the law needed to be changed to overcome an injustice, but that injustice was to be removed for only some of those who suffered it. The Determinations even appeared to entrench the injustice. Again, this did not seem to accord with the MPRA recommendations.

CHAPTER FIVE

ACTION BY THE COMMITTEE

1. After considering the Determination and the representation the Committee asked its independent Legal Adviser, Emeritus Professor Douglas Whalan, to prepare a special report. Following consideration of this report the Committee wrote to the Minister for Industrial Relations, Senator the Hon Peter Cook, as follows:

"7 May 1992

Senator the Hon Peter Cook
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to Public Service Determination 1992/27, considered by the Committee at its meeting of 7 May 1992.

I attach a copy of a representation about the Determination from Mr Graham Boucher. The Committee would appreciate your comments on the representation.

On its face, the representation raises serious issues. The copy of the Merit Protection and Review Agency report in respect of this matter stated that the existing position was "clearly... inequitable" and that the legislation was "obviously anomalous" and required amendment. The MPRA recommended that in view of the "unfair and inequitable" application of the legislation that Mr Boucher should be compensated and that other action should be taken. It now appears that the Department may have expressly made delegated legislation which fails to implement the thrust of the recommendations. If this is so then the Committee would be disturbed.

The Committee also has several concerns about the instrument itself. Firstly, subclause 11.1 appears to interpret the words of s.68A of the Act in a particular way. We would be grateful for confirmation that this is legally possible. In this context the Explanatory Statement advised the statutory authority for subclause 11.2. Next, the Explanatory Statement does not appear to tell the whole story, if that story is as related by Mr Boucher and the MPRA.

The broader issues raised by this Determination are also serious. Numbers of Public Service Determinations grant discretions to decision makers. In the past the Committee has raised the question of merit review of these discretions. The answer we have received is that merit review is available under the grievance procedures of the *Merit Protection (Australian Government Employees) Act 1984*. For instance, see our correspondence on Public Service Determinations 1990/11, 1990/12, 1991/37 and 1991/39. A letter to the Committee of 22 July 1991 concerning Public Service Determination 1991/39 stated that the "regulations provide for internal review and for review by the Merit Protection and Review Agency of adverse decisions... The regulations are shortly to be amended... to ensure that the rights of officers and employees are protected". The Committee accepted these assurances and consequently refrained from raising other discretions. It is disturbing, to say the least, that the Department may apparently ignore a recommendation of the MPRA in this way.

Given the serious nature of this matter we would be grateful if the subdelegate in the Department who made the Determination, and other suitable officers, could brief the Committee at its next meeting at 8.30 am on 28 May 1992 in Senate Committee Room 1S6. The Department should contact the Committee secretary on 277 3066 to confirm this.

The Committee would also appreciate your comments on the above issues.

In order to preserve the options of the Committee I will give a notice of motion of disallowance in respect of the relevant clause of the Determination on the next sitting day.

Yours sincerely

Patricia Giles
Chair"

2. The Committee also asked the MPRA whether the Department of Industrial Relations (DIR) had consulted with it about the Determination. On 7 May 1992 Mr Geoff Cameron, Assistant Commissioner, MPRA, advised the Committee that the MPRA had not known about the Determination before Mr Boucher drew it to their attention and that they had tried, unsuccessfully so far, to obtain a copy from DIR.

3. On 26 May 1992, on behalf of the Committee, Senator Giles gave notice of intention to move to disallow clause 11 of the Determination. This preserved the option of the Committee to recommend to the Senate that it take this course of action. As usual when giving such a notice, the Committee reported briefly to the Senate on its concerns. The report read as follows:

"PUBLIC SERVICE DETERMINATION NO.27 OF 1992

This Determination deals with recreation leave for members of the Australian Public Service. Clause 11 corrects an anomaly under which the existing legislation operated to the detriment of a certain class of officers to the extent of depriving them of credit for up to one weeks recreation leave. However, this correction only applies to present officers of the APS. It does not apply to officers who retired before the date of the Determination. Therefore, clause 11 only benefits some of the people affected by the anomaly. For the others, it appears that the anomaly remains.

This general matter was the subject of an investigation and report by the Merit Protection and Review Agency, a statutory body whose charter, among other things, is 'to ensure that actions taken and decisions made in relation to a Commonwealth employee ... are fair and equitable.' The report, which examined the position of an officer who is not covered by clause 11, concluded that the existing position was 'clearly ... inequitable', 'obviously anomalous', 'unfair and inequitable' and required amendment or other action to mitigate its past and future consequences.

The Committee is concerned that a subdelegate in the Department then made a Determination which not only failed to implement the strongly expressed findings of the MPRA report but also which may entrench the anomaly.

The Explanatory Statement is of little assistance, merely stating that the clause was a transitional provision which 'clarifies' the matter. Clause 11 was also amended by a later Determination, although apparently without affecting its substance.

The broader issues raised by the Determination are also of concern. Numbers of Public Service Determinations confer discretions upon public officials. In the past the Committee has raised the question of merit review of these decisions. The answer the Committee has received was that merit review was available by the MPRA under established grievance procedures. The Committee accepted these assurances and refrained from raising other discretions. It would be disturbing if the Department felt itself able to ignore reports of the MPRA and legislate to preserve unfair and inequitable anomalies."

4. On 27 May 1992 the Minister replied to the Committee's letter of 7 May 1992 as follows:

"27 May 1992

Senator Patricia Giles
Chair
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Giles

Thank you for your letter of 7 May 1992 about Public Service Determination 1992/27.

I have asked the Department of Industrial Relations to cooperate fully with the Committee's enquires, and to make the appropriate officers available to brief the Committee on 28 May 1992.

In order to assist consideration of this complex matter, I have also asked the Department to provide the Committee as soon as possible with a paper clarifying the different roles of the Merit Protection and Review Agency in handling various kinds of grievances. The paper will also address the commitments given in the past about merit review of discretions, and comment on the representation from Mr Boucher taking account of relevant policy.

I will write to you again when I have had the opportunity to consider the Department's views and the outcome of discussions with the Committee.

Yours fraternally

Peter Cook"

5. On 28 May 1992 officials of the DIR met with the Committee to discuss the Determination. The officials had sent a briefing paper to the Committee two days before.

6. The officials advised the Committee that the authorities administering the Public Service Act had been aware of this problem for almost 20 years and that some 30,000 people, alive and deceased, were affected. The officials further advised that there were now considerable administrative difficulties in identifying these people, the amounts to which they were entitled and methods of payment.

7. Members of the Committee discussed these issues with the officials. The gist of the questions and comments by Members was that these administrative problems were not such as to preclude action. Members also questioned the officials on the effect of an MPRA recommendation and whether DIR had consulted with the MPRA

when making the present Determination.

8. The meeting concluded with the Committee asking the officials to prepare another paper setting out ways in which officers who had been unfairly treated in this matter could be compensated.

9. On 15 June 1992 the Committee received the second paper from DIR. After considering the paper it wrote to the Minister as follows:

"18 June 1992

Senator the Hon Peter Cook
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 27 May 1992 on aspects raised by the Committee of Public Service Determination 1992/27.

Officers of your Department have since then assisted the Committee by appearing before it to speak to a paper and, after that meeting, by preparing another paper. The Committee considered that second paper at its meeting of 18 June 1992.

The Department's second paper covered various courses of action available in this matter. Under the heading "Conclusion" the paper advised that "the preferred option" is to deal with this problem by direct appropriation "through the current budget process". This confirms earlier advice in the paper that these arrangements "could be achieved in the 1992/93 budgetary process". The Department also advised, in a covering letter, that the paper would be the basis of a submission to you.

The Committee would be completely satisfied if the matter was dealt with under the Department's preferred option. However, the Committee considers that another appropriate solution would be to amend the parent Act.

The Committee emphasises its view that the present position for relevant officers, characterised by the Merit Protection and Review Agency as unfair and inequitable and the existence of which has been known for almost 20 years by the administering authorities, should be addressed.

The Committee would be grateful for your advice on proposed action on the Department's preferred option. It would be appreciated if this could be received by, say, the end of July, to enable the Committee to finalise its consideration of this matter by the start of the Budget sitting. Given that the preferred option is to operate in the context of the 1992/93 budgetary process we do not suppose that this will cause any difficulties.

The Committee also noted that Public Service Determination 1992/46 replaced the substantive provisions of subclause 11.1 of Public Service Determination 1992/27. Your Department advised that this was because "it was realised that subclause 11.1 did not have the intended effect". In order to preserve the options of the Committee I will give a notice of disallowance on this second Determination during the next sitting week.

Yours sincerely

Patricia Giles
Chair"

10. The Minister then replied to the Committee as follows:

"15 July 1992

Senator Patricia Giles
Chair
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Giles

Thank you for your further letter of 18 June 1992 about Public Service Determination 1992/27 and the options for retrospectively adjusting recreation leave payments made to certain former officers.

I note that the Committee would be completely satisfied if the matter was dealt with under the preferred option put by the Department of Industrial Relations in its second paper on the subject.

I have now written to the Prime Minister (with a copy to the Minister for Finance) proposing that this option should be implemented by the Government from next financial year.

I will keep the Committee informed of further developments on this matter as they occur.

For the record, I should point out that I have reservations about the Committee's alternative solution (amending the parent Act), for reasons similar to those in paragraphs 49 to 51 of the Department's paper.

Yours fraternally

Peter Cook"

11. The Committee then noted from proceedings of Estimates Committee F that the Minister's undertaking of 15 July appeared to have been implemented. Accordingly, it wrote to the Minister as follows:

"17 September 1992

Senator the Hon Peter Cook
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to previous correspondence about Public Service Determination 1992/27 and specifically correspondence of 18 June and 15 July 1992 between Senator Giles, the former Chair of the Committee, and you. You may recall that, in the letter from Senator Giles, she indicated that a notice of disallowance of Public Service Determination 1992/46 would be given in order to preserve the Committee's options while awaiting the final resolution of the matters of concern in Determination 1992/27.

The Committee has noted from the proceedings of Estimates Committee F of 10 September 1992 (*Hansard*, pp F42-43) that it appears that your undertaking to the Committee is in the process of being fulfilled. Before giving notice of its intention to withdraw the disallowance motion in respect of Determination 1992/46, however, the Committee would appreciate your confirmation that its understanding is correct.

As the notice of disallowance is scheduled for debate during the October sittings, the Committee would appreciate your early advice on the matter.

Yours sincerely

Stephen Loosley
Chairman"

12. The Minister then wrote to the Committee as follows, attaching copies of letters from the Prime Minister, the Hon Paul Keating MP, and the Minister for Finance, the Hon Ralph Willis MP:

"29 September 1992

Senator Stephen Loosley
Chairman
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Loosley

I refer to your letter of 17 September 1992 about Public Service Determinations 1992/27 and 1992/46. In view of the pending notice of motion to disallow the latter determination, you requested my advice about action to address the Committee's concerns on the anomaly in the treatment of recreation leave payments for certain officers.

I am pleased to be able to confirm that the Government has agreed to implement the option which had been foreshadowed to the Committee. Funding of $2.7 million for 1992-93 and $1.4 million for 1993-94 was included in the 1992 Budget for this purpose. I attach copies of the letters from the Prime Minister and the Minister for Finance, for the information of the Committee.

I trust that this fully meets the Committee's concerns, and I would like to thank the Committee for its constructive approach towards resolving a difficult issue.

Yours fraternally

Peter Cook"

13. The letter from the Prime Minister, the Hon Paul Keating MP, read as follows:

"27 August 1992

Senator the Hon Peter Cook
Minister Assisting the Prime Minister
for Public Service Matters
Parliament House
CANBERRA ACT 2600

My dear Minister

I am writing in response to your letter of 15 July 1992 seeking my agreement to a scheme to correct under-payments of recreation leave in the Australian Public Service.

In view of the actions taken by the Senate Standing Committee on Regulations and Ordinances to give notice of motion to disallow a determination under Public Service Act relating to recreation leave, and in view of the issues of equity raised by the under-payments, I have agreed to the course of action outlined in your letter.

A one-line appropriation has been included in 1992-93 Budget for expenditure of $2.7m in 1992-93 and $1.4m in 1993-94.

I have sent a copy of this letter to Mr Willis.

Yours sincerely

P J Keating"

14. The letter from the Minister for Finance, the Hon Ralph Willis MP, read as follows:

"17 August 1992

Senator the Hon Peter Cook
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter to the Prime Minister, which was copied to me on 15 July 1992, regarding recreation leave credits for pre-1966 Australian Public Service Officers.

I agree that the anomaly of recovering recreation leave credits at a 4 weeks rate rather than the 3 weeks rate at which the leave accrued should be corrected. This correction should be made retrospectively, to include those pre-1966 officers who left the service between January 1973 and March 1992. I note that it is not possible in this case to correct the problem through a section 82D determination. Accordingly, the scheme you have proposed appears to be the most effective method of achieving the desired outcome and will properly give Parliament the opportunity to scrutinise the process.

A one-line appropriation has the advantage, over the other options canvassed in your letter, of clearly setting out the purpose and amount of the payments in the Budget Papers. Thus Parliament will have been given the opportunity to scrutinise the scheme and, if it authorises the purpose expressed through the one-line appropriation, satisfies any concern that the proposed scheme might not have Parliamentary sanction.

I am copying this letter to the Prime Minister.

Yours sincerely

Ralph Willis"

15. The Committee then wrote to the Minister on 12 October 1992, thanking him for his cooperation.

CHAPTER SIX

CONCLUSIONS

1. The first and most important conclusion from this matter is the effectiveness of the Committee in carrying out its mandate from the Senate to ensure that delegated legislation does not infringe personal rights and liberties. Here was a situation where delegated legislation, although correcting one anomaly, perpetuated and entrenched another. However, following intervention by the Committee, this situation was corrected. It seems clear that, without such intervention, an obvious injustice would have continued.

2. The next conclusion is that the Committee has an appropriate variety of techniques for investigating a matter and for ensuring a satisfactory outcome. In the present case the Committee was only concerned with one clause of the first Determination, the remaining provisions relating to other things. Therefore, the Committee only gave notice of possible disallowance of this single clause. Even if the clause was eventually disallowed, the other clauses in the Determination would still operate. The *Acts Interpretation Act 1901* authorises disallowance of any one or more numbered provisions in an instrument or inserted by an instrument. The second Determination related entirely to the deficient clause in the first Determination, so it was appropriate in that case for the Committee to give notice of possible disallowance of the entire instrument. In its scrutiny of these Determinations the Committee also asked officials of the Department to meet with it to discuss the issues. This is a procedure available to the Committee where, as in this case, there are difficult and complex issues involved. Meeting with officials not only assists the Committee, but also indicates to the officials the detail and extent of its concerns.

3. The Committee's scrutiny of these instruments confirmed another continuing feature of its operations. This is the high level of cooperation which it receives from Ministers. In the present case, the Minister for Industrial Relations, Senator the Hon Peter Cook, asked his Department to cooperate with the Committee and to assist it by personal attendance and by prepared papers. Later, when informed in more detail of the Committee's wishes, the Minister wrote to both the Prime Minister, the Hon Paul Keating MP, and to the Minister for Finance, the Hon Ralph Willis MP, suggesting that the inequity be remedied. Both the Prime Minister and the Minister for Finance replied affirmatively in generous fashion, the Prime Minister mentioning the role of the Committee. This demonstrates an obvious commitment by these Ministers to the Committee's principles of defending personal liberties and parliamentary propriety.

4. Another conclusion is the flexibility of the Committee in addressing a problem. In this case the initial problem was one clause in an instrument of delegated legislation. However, the solutions canvassed by the Committee included amendment of the Act, amendment of the delegated legislation and administrative action. Eventually, the Committee accepted a one-line appropriation in Appropriations Bill (No.2) 1992-93, with that appropriation being spent under administrative, rather than legislative, guidelines. The Committee has no difficulty with its concerns being met by administrative action, as long as that action will solve the problem and is appropriate in the circumstances.

5. This case also illustrates that the concerns of the Committee are not merely theoretical or speculative. This was a situation where tens of thousands of employees over a period of almost two decades were treated unfairly by the administering agencies. The actions of the Committee removed a real and not a possible injustice.

6. The case also illustrates how representations to the Committee are taken up and pursued. In this case, a representation from an employee gave the Committee substantial information about an inequitable condition of work. This information, which was not in the Explanatory Statement, was used by the Committee to alleviate this condition for the entire class of numerous similar employees.

7. This case illustrates how the Committee is concerned even with indirect injustices. The clause in respect of which the Committee gave a notice of motion of disallowance was objectionable not for what it did, but rather for what it did not do. In itself, the clause was reasonable, as it corrected an injustice for present employees. However, the clause ignored and thereby perpetuated the same injustice for past employees. It was this omission which was the problem and which the Committee addressed.

8. The case also illustrates how the Committee complements and reinforces the activities of agencies whose charter is to protect personal or parliamentary rights or provide review processes. For instance, the Committee ensures that administrative discretions are, in appropriate cases, subject to review by the Administrative Appeals Tribunal. On other occasions, the Committee has asked that certain matters be referred to the Administrative Review Council and to the Auditor-General. Here, the Committee took account of findings and recommendations of the Merit Protection and Review Agency (MPRA). The Committee does not act in isolation and sees itself as cooperating with other bodies whose purpose is to achieve the same outcomes as the Committee.

9. The Committee involves itself in protecting not only the rights of the general public, but also the rights of employees of the Commonwealth and its agencies. Such rights and duties are set by the Public Service Act and regulations, by other Acts, by delegated legislation apart from regulations and by awards and other rulings of industrial tribunals. In spite of, or perhaps because of, this considerable legislative and administrative web, the Committee has a substantial role in this area. The Committee protects the rights of all persons affected by delegated legislation.

10. This case illustrates the attitude of the Committee to policy questions The Committee operates under a convention that party political considerations do not enter into its discussions. Instead, its actions are a non-partisan reflection of a common determination among Members to ensure that delegated legislation is technically of the highest standard. It follows that the Committee avoids consideration of the policy merits of programs and schemes whose administration is put into place by delegated legislation. In the present case, the decision to include one-line appropriations amounting to $4.1 million in the Budget could be regarded as a policy decision. Nevertheless, the Committee did not hesitate to urge this course of action. The Senate, Ministers, Departments and the public accept that any such suggestions by the Committee are unrelated to party positions. The Committee's function is to protect personal rights and parliamentary propriety.

11. The Committee was not assisted by either of the Explanatory Statements which accompanied the two Determinations in this case. The representation which the Committee received about the relevant clause in the first Determination put to us that the Explanatory Statement was misleading. The Committee is inclined to agree with this. The Explanatory Statement with the second Determination was little better. An Explanatory Statement should set out the legislative authority under which an instrument was made and briefly describe the background issues, the reasons why it was made and its intended effect. Where appropriate, it should also include "plain English" notes on each clause.

12. Finally, the Committee believes that delegated legislation should be made with as much openness and consultation as possible. In the present case, officers of the Department of Industrial Relations should have informed the MPRA of their intention to correct an injustice for existing, but not for past, employees. The Committee recommends that DIR institute a continuing publicity campaign to advise employees of the Commonwealth and its agencies of the existence and functions of the MPRA.

Stephen Loosley
Chairman