



THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

**NINETY-SIXTH REPORT
ANNUAL REPORT 1992-93**

DECEMBER 1993

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**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

MEMBERS OF THE COMMITTEE

JULY 1992 - JUNE 1993

Senator Stephen Loosley (Chairman)¹
Senator Bronwyn Bishop (Deputy Chairman)
Senator Mal Colston
Senator Patricia Giles²
Senator Bill O'Chee
Senator Kay Patterson
Senator Olive Zakharov

1. Appointed to the Committee on 20 August 1992 and elected as Chairman on 10 September 1992.
2. Resigned from Chair and from the Committee on 20 August 1992 consequent upon appointment as a long term delegate to the General Assembly of the United Nations.

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979)

The Committee scrutinises delegated legislation to ensure:

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

CHAPTER 1

OVERVIEW AND STATISTICS

Introduction

1.1 The Standing Committee on Regulations and Ordinances was established in 1932 and, apart from certain committees dealing with internal parliamentary matters, is the oldest Senate committee. Its functions, which are set out in the Standing Orders, are to scrutinise all disallowable instruments of delegated legislation to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

1.2 The Committee engages in technical legislative scrutiny. It does not examine the policy merits of delegated legislation. Rather, it applies parliamentary standards to ensure the highest possible quality of delegated legislation, supported by its power to recommend to the Senate that a particular instrument, or a discrete provision in an instrument, be disallowed. This power, however, is rarely used, as Ministers almost invariably agree to amend delegated legislation or to take other action to meet its concerns.

1.3 The general requirements of personal rights and parliamentary proprieties under which the Committee operates are refined by the Standing Orders into four principles. In accordance with these principles, the Committee scrutinises delegated legislation to ensure:

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

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

Membership

1.5 The Committee has six members with, in accordance with the Standing Orders, a government Chairman. There is a non-government Deputy Chairman. During the reporting period the membership of the Committee was as set out below:

Senator Stephen Loosley (Chairman)¹
Senator Patricia Giles (Chair)²
Senator Bronwyn Bishop (Deputy Chairman)
Senator Mal Colston
Senator Bill O'Chee
Senator Kay Patterson
Senator Olive Zakharov

1. Appointed to the Committee on 20 August 1992 and elected as Chairman on 10 September 1992.
2. Resigned from Chair and from the Committee on 20 August 1992 consequent upon appointment as a long term delegate to the General Assembly of the United Nations.

Independent Legal Adviser

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

Statistics

1.8 During the year the Committee scrutinised 1652 instruments, which was a greater number than in any previous year. Table 1 sets out the numbers and broad categories of these instruments.

TABLE 1

INSTRUMENTS EXAMINED BY COMMITTEE 1992 - 93

| | |
|---|-------|
| Statutory Rules | 408 |
| Civil Aviation Orders | 546 |
| Public Service and Defence Determinations | 339 |
| Community Services and Health instruments | 70 |
| Education instruments | 60 |
| Customs and excise instruments | 40 |
| Primary Industries and Energy instruments | 34 |
| Superannuation instruments | 29 |
| Remuneration Tribunal Determinations | 9 |
| Parliamentary Presiding Officers' Determinations | 8 |
| Miscellaneous instruments (details of which are in Appendix 1) | 109 |
| | <hr/> |
| | 1652 |

Ministerial Undertakings

1.9 During the year Ministers and other law makers undertook to amend or review thirty-one different instruments or parent Acts to meet the concerns of the Committee. This number includes only undertakings to amend existing legislation. It does not include many 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

1.10 On 26 November 1992 the Committee tabled its *Ninety-Second Report*, a Report on scrutiny by the Committee of Public Service Determinations 1992/27 and 1992/46. These instruments raised important issues of personal rights and parliamentary propriety.

1.11 On 16 December 1992 the Committee tabled its *Ninety-Third Report*, a Report on scrutiny by the Committee of regulations imposing United Nations sanctions. This Report was mentioned with approval in both the Second Reading Speech and Explanatory Memorandum for the Bill which is now the *Charter of the United Nations Amendment Act 1993*.

1.12 On 26 May 1993 the Committee tabled its *Ninety-Fourth Report, the Annual Report for 1991-92*. This was a general report on the work of the Committee during that period.

1.13 On 27 May 1993 the Committee tabled its *Ninety-Fifth Report, a Report on scrutiny by the Committee of instruments administered through the portfolio of Primary Industries and Energy*.

1.14 Several other significant matters, which are reported in subsequent chapters, are as follows:

- On 7 April 1993 Senator Loosley, on behalf of the Committee, wrote to the Prime Minister and all other Ministers about the work of the Committee.
- On 27 May 1993 Senator Loosley, on behalf of the Committee, made a statement to the Senate on delegated legislation and superannuation for Commonwealth employees.
- On 27 May 1993 Senator Loosley, on behalf of the Committee, made a statement to the Senate on the imposition of United Nations sanctions by delegated legislation.
- On 3 November 1992 Senator Bishop, on behalf of the Committee, made a statement to the Senate on the *Australian Postal Corporation Regulations*.
- On 16 December 1992 and 27 May 1993 Senator Loosley, on behalf of the Committee, made statements to the Senate on the work of the Committee.

CHAPTER 2 ISSUES AND ROLES

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

Senator Loosley, 16 December 1992, *Senate Weekly Hansard*, p.5216

Overview

2.2 "During these sittings the Committee continued its non-partisan scrutiny of disallowable instruments of delegated legislation tabled in the Senate. In the course of the sittings the Committee scrutinised 978 such instruments, making a total of 1,754 scrutinised this year. This was a record, both for the sittings and for the calendar year. Less than one quarter of the instruments were in the Statutory Rules series, which are generally superior in drafting, access and presentation to other types of delegated legislation. This confirms a trend which has been evident for some years.

2.3 "As usual, the Committee scrutinised each one of these instruments to ensure compliance with its four principles, which cover all aspects of personal rights and parliamentary propriety. Where the Committee had concerns with an instrument it wrote to the Minister responsible for the legislation. On a number of occasions it also required further information from Ministers after receiving an initial reply. It also gave 15 notices of motion of disallowance of individual instruments, in order to preserve its option to recommend this action to the Senate. However, the Committee is pleased to report that it received a good level of cooperation from Ministers, who undertook to amend 22 instruments to meet its concerns.

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

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

2.5 "This principle is interpreted broadly by the Committee to cover all aspects of parliamentary propriety apart from whether a provision is more appropriate for parliamentary enactment, which is the Committee's fourth principle. Thus, the committee scrutinises every aspect of parliamentary propriety.

2.6 "The Committee always checks the legal validity of instruments. Four instruments appeared to incorporate provisions of the laws of foreign countries as amended from time to time, which may not have been possible under the parent Act. Another instrument invalidly incorporated an external publication as in force from time to time.

2.7 "The Committee is concerned that the quality of drafting and presentation of delegated legislation should not be inferior to that which is reflected in Acts. This standard is generally met by the Statutory Rules, drafted by the specialist Office of Legislative Drafting. However, the quality of instruments drafted by other agencies is often below this standard. The Committee questioned imprecise and unclear drafting, obsolete expressions and inaccuracies in references to other provisions.

2.8 "The Committee ensures that all procedural formalities are complete, even if these are not legal requirements. Numbers of instruments were not accompanied by Explanatory Statements, others had no system of numbering or citation, and others were missing attachments. In one case an umbrella provision at the end of a set of amending regulations renumbered the entire principal regulations. This was a helpful initiative, but the Committee suggested that a reprint of the principal regulations was now required.

2.9 "The Committee ensures that an instrument effects its intended purpose as expressed in the Explanatory Statement or as evident from its provisions. One instrument made new provisions without repealing the old. The Explanatory Statement for another advised that its purpose was to make two discretions subject to AAT review, but the instrument only included one discretion. The Explanatory Statement for another advised that its purpose was to increase fees by the cost of living for the last two years, but the increase in one fee was 87 per cent, in another 50 per cent and another 33 per cent.

2.10 "Any power to delegate in delegated legislation should be as narrow, limited and specific as possible. Under one instrument a decision maker could delegate important powers to any person at all, while under another a major government business enterprise could delegate powers to any employee, no matter how junior. In another case, the Committee asked for an assurance that power to authorise medical treatment to certain persons without their consent could not be delegated.

2.11 "Any legislative powers provided by delegated legislation should, where appropriate, be subject to tabling and possible disallowance. One set of amending regulations provided for determinations, declarations, directions, permits, signs, authorities, approvals and lists, some of which were certainly legislative but none of which were subject to disallowance.

2.12 "The Committee always questions a long period of retrospectivity, even if no person other than the Commonwealth is prejudiced. In one instrument members of a statutory authority were paid expenses with more than two years retrospectivity. Another instrument reflected an amendment of the parent Act

which had been in operation for more than two years.

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

2.13 "There is no part of the work of the Committee more important than the protection of personal rights. The Committee interprets in the broadest possible way its mandate to ensure that delegated legislation does not breach personal rights.

2.14 "The Committee ensures that penalties, taxes and fees are neither harsh nor unreasonable. One instrument increased a penalty from \$500 to \$5000 with no explanation in the Explanatory Statement for the increase. Another instrument increased a levy with no explanation in the Explanatory Statement whether the purpose of the increase was to raise money, recover costs, deter use, or for some other reason. Another instrument was drafted in such a way that the amount, the imposition and the collection of a fine were all uncertain.

2.15 "Government business enterprises should treat their customers fairly and equitably. One Explanatory Statement advised that the reason for a progressive increase in fees for applications for certain exemptions was to deter users. The Committee considered that this discouragement of a legislative right could have been a penalty. Another instrument required payment in advance except for regular users with a good record of payment on time. Another instrument provided that long established refunds for certain charges would no longer be paid.

2.16 "Statutory authorities should not impose harsh conditions on the public. One instrument provided that straying livestock and other animals could be impounded and destroyed with inadequate opportunity for their owners to claim them.

2.17 "The Committee always questions prejudicial retrospectivity, even in the rare cases where it is legally valid. However, the Committee also questioned one instrument which corrected an oversight for public servants but which did not provide for retrospective operation. Here the Committee considered that the lack of retrospectivity was prejudicial.

2.18 "The Committee always protects personal privacy. One instrument provided for wide disclosures of personal information to law enforcement and security organisations with no indication that the agency had sought the views of the Privacy Commissioner. Another provided for the mandatory collection of detailed personal information about employees, which may not have been relevant to the stated purpose of its collection.

Principle (c)

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

2.19 "The Committee was concerned at a number of instruments which did not provide for merits review of decisions where it may have been appropriate to do so. These included decisions under discretions which conferred power to waive, vary or reduce fees; grant public service allowances; permit public gatherings; extend a time limit for applications; exempt a person from general prohibitions; enable costs to be taxed; grant benefits; pay interest at a particular rate; and control exports. In all these cases the Committee received from Ministers either an undertaking to amend the instrument to provide AAT review, or a satisfactory explanation of the provision.

2.20 "The Committee raised with Ministers other issues about merit review. In one case it asked for more information about the powers and functions of internal review panels and in others it asked for an assurance that AAT review provisions in the parent Act covered the regulations as well.

2.21 "The Committee is more vigilant about merit review where the exercise of a discretion is not guided and controlled by objective criteria. One instrument included subjective criteria such as "the honesty of the applicant" and "the likely efficiency of the proprietor".

2.22 "The Committee scrutinises review provisions more closely where the discretion is wide and imprecise. One instrument set out detailed objective calculations for amounts which the Minister could determine. However, it then provided that an amount could be "such other amount as the Minister may determine".

Principle (d)

Does delegated legislation contain matters more appropriate for parliamentary enactment?

2.23 "The Committee raises this principle less often than it raises other principles. However, it is a principle which goes to the heart of parliamentary propriety and as such complements the first principle of the Committee, that an instrument should be in accordance with the statute.

2.24 "The Committee raised the principle in respect of an instrument which transferred important powers to the government of Norfolk Island. These powers included the maintenance of law and order and the administration of justice; the whole of private law; corporate affairs; regulation of businesses and professions; child, family and social welfare; industry; and mining. The Committee noted that the transfer of similar powers to the Northern Territory and the Australian Capital Territory had been largely implemented by Act.

2.25 "The Committee also raised the principle when instruments modified, repealed and suspended the operation of Western Australian Acts in their

application to Christmas Island and the Cocos (Keeling) Islands. In addition, one of the modifications included a "Henry VIII" provision or, in other words, a provision under which delegated legislation may amend an Act.

2.26 "The above instruments were all legally valid. However, the importance of their provisions was such that they may have been more appropriately included in a Bill and debated in Parliament.

Other Developments

2.27 "In addition to its core work of scrutinising delegated legislation, the Committee was active in other ways during the Budget sittings.

2.28 "The Committee tabled two Reports during the sittings, the *Ninety-Second* and *Ninety-Third Reports*. The first was on Committee scrutiny of Public Service Determinations 1992/27 and 1992/46, where the Committee found that the Department of Industrial Relations, without proper consultation, effectively entrenched an injustice for some 30,000 former members of the Australian Public Service. The Determinations did not take into account strong recommendations by the Merit Protection and Review Agency that what it described as an "unfair and inequitable" situation should be addressed. Following intervention by the Committee and prompt and helpful cooperation from the Minister for Industrial Relations, the Prime Minister and the Minister for Finance the matter was resolved by a one line Budget appropriation. The second Report examined the 19 sets of regulations which implemented Australia's obligation to impose United Nations sanctions on Iraq, Kuwait, Libya and Yugoslavia. The Report concluded that it was appropriate to provide for sanctions by regulation rather than by Act.

2.29 "Senator Bishop also made a special statement on scrutiny of the Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No.132, which presented problems about possible breaches of privacy.

2.30 "In suitable cases, the Committee invites departmental officials to attend meetings to brief it on matters of interest. Three officers of the Department of Transport and Communications attended to discuss the amendments of the Australian Postal Corporation Regulations; two officers of the Federal Office of Road Safety assisted with the Australian Design Rules; and the Public Service Commissioner, Mr Denis Ives, and another officer, briefed the Committee on a review of the *Public Service Act 1922* and regulations made under that Act.

2.31 "The Committee made a submission to the inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into Commonwealth legislative drafting. The Committee also responded to the Administrative Review Council Report on rule making by Commonwealth agencies.

2.32 "A delegation from the Western Australian Joint Standing Committee on Delegated Legislation visited the Committee to discuss matters of mutual interest. Senator Mal Colston, a member and former Chairman of the Committee, chaired a

four hour meeting with the Western Australians, which the Clerk of the Senate, the Legal Adviser, the secretary and others also attended.

2.33 "The Committee has asked the Legal Adviser to prepare a paper and brief it on the operations of the *Administrative Decisions (Judicial Review) Act 1977*. It has also asked for a paper on the implications for delegated legislation of the use of rulings by the Commissioner of Taxation.

2.34 "On 20 August 1992 the then Chair, Senator Patricia Giles, resigned from the Committee to represent the Australian Parliament at the United Nations General Assembly. The Committee benefited from her wise counsel during her two years as Chair and seven years as a member, during a period when the Committee had increasing responsibilities. Senator Loosley was then elected as Chairman.

2.35 "During the sittings the Committee secretary was absent on compassionate leave for six weeks and the Deputy Clerk, Anne Lynch, acted as secretary. It is a compliment to the Committee that the Deputy Clerk, a former secretary of the Committee, considered that its work was sufficiently important and challenging for an officer of her stature to undertake the duties of secretary.

2.36 "The Committee also records its appreciation for the work of its independent Legal Adviser, Emeritus Professor Douglas Whalan.

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

Senator Loosley, 27 May 1993, *Senate Weekly Hansard*, p.1401

Overview

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

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

2.40 "Normally by the end of a sittings Ministers would have given the Committee undertakings to amend dozens of provisions in different instruments or parent Acts to meet its concerns. However, the 13 March 1993 election resulted in the Senate meeting later than usual. Nevertheless, even at this early stage of its scrutiny the Committee can report the usual high level of cooperation from Ministers in its non-partisan operations. The Committee is grateful for this cooperation.

2.41 "During the sittings the Committee scrutinised 674 instruments, which is an historically high number, even considering the interruption to normal public administration caused by the election. Of these, 166 were statutory rules, which are generally better drafted and presented than other series of delegated legislation. The other 508 instruments were the usual heterogeneous collection of different series.

2.42 "Each of the 674 instruments were scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 76 prima facie defects or matters worthy of comment in those 674 instruments. The defects are described below under each of the four principles.

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

2.43 "This principle, together with principle (d), includes every aspect of parliamentary propriety. Therefore, it is not merely a narrow check on legal validity. Nevertheless, the first requirement under this principle is that an instrument should not, on its face, be technically defective. In this context, one provision of an instrument was made under section 4 of the *Acts Interpretation Act 1901*, which provides that delegated legislation may be made under provisions of Acts which have not yet commenced. However, the relevant provision in the instrument appeared to commence before the enabling provision of the parent Act, which would result in invalidity.

2.44 "Delegated legislation should effect an intention evident from the face of an instrument or advised by the *Explanatory Statement*. In one case, the *Explanatory Statement* advised that it was intended to provide for specified matters by orders, which were disallowable. However, the instrument provided for the matters by directions, which were not disallowable.

2.45 "The *Acts Interpretation Act* limits the type of material which may be incorporated in delegated legislation. One instrument may have incorporated a statutory list, which could have breached the requirement that such incorporation not include material as amended from time to time. In this context, the Committee continued its scrutiny of the validity of instruments which provided for certain Commonwealth employees overseas to be paid under foreign laws, as amended from time to time.

2.46 "The Acts Interpretation Act also provides that delegated legislation must not operate retrospectively, unless no person is prejudiced apart from the Commonwealth. Here, several instruments commenced retrospectively with no advice in the Explanatory Statement that the retrospectivity was beneficial. In at least one case the retrospectivity appeared able to operate prejudicially. The Committee also questions long periods of retrospectivity, or unusual retrospectivity, even where it is valid. For instance, one amending instrument amended the commencement of the principal instrument to operate retrospectively.

2.47 "It is a breach of parliamentary propriety if delegated legislation provides for powers to be delegated to inappropriate persons. In one case both the Minister and the Secretary could delegate all of their substantial and sensitive powers to any person at all. In another case, an official could delegate all of his or her powers to any person at all, who in turn could subdelegate those powers to any person. Finally, one amending instrument amended the principal instrument to restrict the class of persons to whom a power could be delegated. This implemented an undertaking given to the Committee and the role of the Committee was acknowledged in the Explanatory Statement. However, another amending instrument, made on the same day, amended another provision of the same principal instrument to provide for the original wide delegation.

2.48 "Delegated legislation often provides for further legislation to be made. As well as questions of validity, it is a breach of parliamentary propriety if this further legislation is not subject to appropriate scrutiny by tabling and possible disallowance. Some instruments which were clearly legislative were not even subject to gazettal, much less to tabling and disallowance. Others were subject only to gazettal. One instrument provided for similar legislative powers to be exercised by both orders, which were disallowable, and by directions, which were not. Another provided for legislative directions, with no apparent power to do so. Numbers of mandatory forms were not subject to any form of scrutiny. Some of these legislative powers dealt with sensitive matters. For instance, agreements which provided for the supply of personal information were subject only to gazettal.

2.49 "It is a breach of parliamentary propriety if changes in taxes, levies, charges and fees are not explained in the Explanatory Statement. One instrument increased and reduced different levies and changed the dates upon which they were to be paid. Another increased some levies by up to 60%, reduced others (the Explanatory Statement advised that two reductions of 17.5% were reductions of 'about 25%'), added new levies and removed others. Another imposed charges of \$1,020, \$2,040 or \$4,080, on items which appeared similar, with supplementary charges in some cases double that for others. None of these changes were explained.

2.50 "It may be a breach of parliamentary propriety if the drafting, presentation and access of delegated legislation is of a lower standard than that of Acts. One instrument purported to contain a schedule, but the putative schedule was not headed as such. In another, substantial powers were given to authorised persons, but there was no provision for their appointment. One provision had no verb, while others contained errors of citation and reference. Another instrument

was so complex that the Committee suggested a reprint. Another provided only for 'his', instead of the now usual 'his or her'. Another instrument provided for 'persons connected with a corporation', without defining such persons. Another provided for an archaic commencement by the Minister giving notice in the *Gazette*, instead of a mandatory date or set period for commencement. Others included vague and subjective expressions which were not defined, such as, 'will benefit the Australian economy', 'consistent with the interests of Australia', and 'children suffer persecution or abuse of human rights'. Often these expressions were drafted as if they were objective criteria, rather than matters of possible dispute which would have to be settled. Some of these expressions, which really require the exercise of a discretion, included 'all reasonable steps' and 'circumstances beyond his or her control'.

2.51 "On a lighter note, one instrument provided that a requirement to provide an address in Perth could be satisfied by providing an address in the Cocos (Keeling) Islands, while another referred to a 'statutory' authority, which may have been accurate but which was certainly unintended.

Principle (b)

Does delegated legislation trespass unduly on personal rights and liberties?

2.52 "The Committee interprets this principle in a broad and expanding fashion to ensure that delegated legislation does not operate adversely on any aspect of personal rights or liberties.

2.53 "A number of instruments may have affected the right to carry on a trade or profession. One instrument changed the voting procedures at an annual general meeting of primary producers, which may have affected the interests of those producers. Another provided that the authorities may keep seized goods for 60 days before they are dealt with by a court. Another appeared to prejudice the rights of property owners, without providing for compensation. Another provided that in certain cases a person was ineligible to hold a licence for five years. One instrument provided for a search warrant which did not include the usual provision that only reasonable force may be used to enter a building.

2.54 "One instrument imposed heavy obligations on persons acting as sponsors for others or giving assurances of support for those persons. These included responsibility for all financial obligations entered into by the person sponsored, and for compliance by that person with all industrial legislation and awards. There were other onerous liabilities relating to repayment of job search and new start allowances and special benefits. These obligations may also have operated retrospectively, with certain of them deemed to be debts due and payable to the Commonwealth.

2.55 "Another instrument provided that the Minister may authorise the use of certain personal information for law enforcement, national security, taxation, customs and other purposes. This provision had implications for the privacy of the persons affected. Another instrument reviewed, for the first time in five years, an

allowance payable to certain Commonwealth employees in a foreign country.

Principle (c)

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

2.56 "Many instruments of delegated legislation grant discretions to Ministers or other public officials. Such discretions should be drafted as narrowly as possible, include objective criteria to guide and limit the exercise of the discretion, and provide an appropriate right of review of the merits of a decision to an external, independent tribunal, which would usually be the Administrative Appeals Tribunal.

2.57 "In one case, the Committee asked the Minister for the policy upon which review rights were based. In this case, the Committee also questioned the seniority of departmental officers who were responsible for internal review of decisions. In another case, an instrument described a discretion as an 'absolute discretion', which included subjective criteria subject to the opinion of the decision maker. Another instrument granted discretions to State Ministers. Another instrument provided that some discretions must be exercised by the Minister or the secretary respectively, acting personally, but that many others could be widely delegated, with no apparent provision for review. Other instruments provided for discretions which were drafted as if they were objective criteria, with no indication even of who was to exercise them. In one case, an instrument providing expressly for review of other discretions itself provided for unreviewable discretions.

2.58 "The Committee is particularly vigilant where the exercise of a discretion may affect a person's right to earn a livelihood. For instance, one instrument provided for discretions affecting endorsements on a pilot's licence, and another for suspension of that licence. Another provided for discretions affecting appointment as government inspectors. Another dealt with medical examinations, the result of which determined whether a person could continue to work in a particular field. One discretion gave an official power to reduce a legislative allowance payable to specified Commonwealth employees.

2.59 "Many discretions have commercial and financial implications. The Committee ensures that these are subject to appropriate review. In several cases the discretion to grant a licence was subject to AAT review, but the imposition of conditions on the licence was not. In another case the grant of a licence was reviewable but a discretion to vary a licence was not. In another the grant of a licence was reviewable but the grant of a temporary licence was not. One instrument provided for AAT review for some matters but not for others and for review by the Minister for some matters but not for others. One instrument provided for a fee of \$7,500 and a concessional fee of \$1,500, with no indication of review of a decision to charge the full fee. Another discretion was to decide whether a building or proposed buildings were hazardous. There was another discretion to exempt persons completely from compliance with the principal instrument.

2.60 "Other discretions affected persons in the exercise of their personal rights, such as voting in local government elections, continuing to live in Australia and being admitted to a private hospital at largely government expense.

Principle (d)

Does delegated legislation contain matter more appropriate for parliamentary enactment?

2.61 "This principle is not invoked by the Committee as often as the other principles. However, it complements the first principle of the Committee to cover all aspects of parliamentary propriety.

Other developments

2.62 "On 6 April 1993 the Committee exercised its right to sit while the Senate was prorogued, in order to deal with the considerable backlog of delegated legislation made even during the election campaign and its aftermath.

2.63 "At midnight on 3 May 1993 existing members of the Committee ceased to hold their places. On 18 and 19 May 1993 Senators Bishop, Colston, Loosley, O'Chee, Patterson and Zakharov were appointed to the Committee. This was the same membership as the previous Committee. At the first meeting of the Committee on 20 May 1993, Senator Loosley was elected Chairman, in accordance with S.O.23(7). The Chairman then appointed Senator Bishop as Deputy Chairman, in accordance with S.O.23(8). Senators Loosley and Bishop were respectively the previous Chairman and Deputy Chairman.

2.64 "The Committee continued its practice of meeting with other people and bodies concerned with delegated legislation. During these sittings it met with Dr Susan Kenny, the new President of the Administrative Review Council; with Ms Jean Baker, head of the Office of Legislative Drafting, and two of her Branch heads; and with members and staff of the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria. The Committee secretary also met with a Branch head of the Department of Industrial Relations about an undertaking given to the Committee.

2.65 "During the sittings the Committee tabled two Reports, the *Ninety-Fourth Report*, the Annual Report for 1991-92; and the *Ninety-Fifth Report*, a Report on scrutiny by the Committee of instruments made in the Primary Industries and Energy portfolio.

2.66 "During the sittings the Committee made two special statements to the Senate. One brought the Senate up to date with developments analysed in the *Ninety-First Report*, dealing with delegated legislation providing for superannuation for Commonwealth employees. The second statement advised of developments since the *Ninety-Third Report*, which dealt with regulations imposing United Nations sanctions. That statement noted that both the second reading speech and the Explanatory Memorandum for the Charter of the United Nations Amendment Bill

1993 referred with approval to the *Ninety-Third Report*.

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

CHAPTER 3

GUIDELINES ON THE APPLICATION OF THE PRINCIPLES OF THE COMMITTEE

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

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

Technical validity and effect

3.2 Delegated legislation must be made and operate validly under both its parent Act and any other relevant legislation such as the *Acts Interpretation Act 1901*. The *Federal Airports (Amendment) By-laws No.2 of 1992* provided that it was an offence to operate a vehicle in breach of the Airside Vehicle Control Handbook "applying to that airport at that time". This appeared to be in breach of s.49A of the *Acts Interpretation Act 1901*, which provides that only Acts or regulations may be so incorporated in delegated legislation. The Minister acknowledged that the provisions were void and undertook to remake them.

3.3 Similarly, the *Locally Engaged Staff Determinations 1992/18, 1992/22, 1992/27 and 1992/31* incorporated Maltese, Czechoslovakian and Irish law as in force or existing from time to time. The Minister advised that there was some ambiguity in the instruments, and a fresh instrument had been made to correct this. The Committee suggested that advice on the fresh instrument be sought from the Attorney-General's Department. That advice was that the instrument was valid, but there were defects in the authorising provisions of the parent *Public Service Act 1922*. The Minister undertook to amend the Act.

3.4 The Determination No.BG 1 of 1991 (1991-92/11) under s.9B(1) of the *Aged or Disabled Persons Homes Act 1954* renumbered an early determination and revoked and substituted four appendices. The appendices were not tabled, however, with the result that they ceased to have effect under s.48(3) of the *Acts Interpretation Act*. The Minister advised that the entire instrument was invalid, as it purported to revoke an instrument which had already been revoked, but did not purport to revoke a later valid instrument. The instrument would be remade.

3.5 The Nursing Homes Patients Classification Principles 1992 (PCI/1992) made under the *National Health Act 1953*, provided for the calculation of certain Commonwealth benefits. The Secretary, however, was given power to alter the figures. This appeared to be an invalid subdelegation of legislative power. The Minister confirmed that the power was invalid and would be removed from the Principles. Similarly, the Minister acknowledged that there were subdelegation problems with the 24 Hour Registered Nurse and Small Nursing Homes Additional Funding Principles (24 SH 1/1992) under s.48B of the *National Health Act 1953*, the Nursing Home Nasogastric Principles 1992 (NGP 1/1992) and the Nursing Home Oxygen Treatment Principles 1992 (OPT 1/1992) made under the *National Health Act 1953*, and undertook to remove the invalid provisions.

Drafting deficiencies

3.6 The drafting of delegated legislation should be of a standard equal to that of Acts. The Committee raised a number of different issues under this heading. The Jury Exemption Regulations (Amendment), Statutory Rules 1992 No.123, intended to add two paragraphs to the principal Regulations. There were, however, no operative words in the instrument which actually did so. The Minister advised that the provision would be remade.

3.7 Other drafting oversights may not have affected the validity or operation of instruments, but corrections were still desirable. The Federal Airports Corporation Regulations, Statutory Rules 1992 No.255, and the Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No.251, both included reference errors. The former instrument also referred to a "dredging area", which was not defined, when it was intended to refer to a "dredging site", which was defined. The relevant Ministers undertook to amend the instruments. The Public Service Determination 1992/30, the Cash Transaction Reports Regulations (Amendment), Statutory Rules 1992 No.90 and the Bankruptcy Rules (Amendment), Statutory Rules 1992 No.194, included drafting oversights, which the relevant Ministers undertook to correct.

3.8 The Broadcasting (Limited Licences) Fees Regulations (Amendment), Statutory Rules 1992 No.126, and the Therapeutic Goods Regulations (Amendment), Statutory Rules 1992 No.89, both included definitions of terms, in respect of which the Committee asked for further information from the Minister. This was so that the Committee could satisfy itself that the drafting of the definitions was adequate.

3.9 Delegated legislation should conform to contemporary drafting practice. The Public Service Determination 1992/50 and its Explanatory Statement both referred to a female officer as "he" and "his". The Determination of Technical Standard TS003 - 1992 under s.246 of the *Telecommunications Act 1991* used "shall" to express a mandatory intention, whereas "must" was now more usual. The Committee drew these matters to the attention of the relevant Ministers. The Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1992 No.69, listed sea creatures which could be collected or fished. These creatures, however, were only listed by their scientific names. The Minister undertook to

provide the common names as well.

3.10 The Telecommunications (Applications and Fees) Regulations, Statutory Rules 1991 No.359, referred to a provision of the Telecommunications Regulations, which were made under the repealed *Telecommunications Act 1989*, but saved by the repealing Act. The Committee noted that there were regulations with the same name made under the *Telecommunications Act 1991* and suggested to the Minister that drafting practice may indicate some minor recasting to avoid ambiguity. The Minister advised that this had now been done.

Inadequate explanatory material

3.11 Because of the previous efforts of the Committee, it is now accepted that each instrument of delegated legislation should be accompanied by adequate explanatory material. The Minister advised that it was an oversight that Fisheries Notices Nos.NPF 15 - NPF 21 had not been accompanied by Explanatory Statements, and furnished statements to the Committee. Similarly, the Primary Industries Levies and Charges (Apple and Pear) Regulations (Amendment) and the Primary Industries Levies and Charges Collection (Horticultural Export Charge) Regulations (Amendment), Statutory Rules 1992 Nos.145 and 147, were accompanied by Explanatory Statements which referred to Attachments A and B, which were missing. These attachments were important, relating to statutory requirements without which the regulations would be invalid. The Minister supplied copies of the attachments.

3.12 The Explanatory Statement for the Civil Aviation Regulations (Amendment), Statutory Rules 1992 No.325, advised that one of the main provisions of the regulations was to provide AAT review of a discretion. The regulations themselves, however, did not do this. The Minister advised that it was the parent Act which provided for such review.

3.13 There was an apparent discrepancy in the Explanatory Statements which accompanied Determinations Nos.T11 and T12 made under ss.15 and 16 of the *Higher Education Funding Act 1988*; the Minister supplied an amended Explanatory Statement. The Explanatory Statement which accompanied the Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No.251, referred to a provision of the instrument which did not exist; the Minister advised that this was an oversight.

3.14 Many instruments of delegated legislation implement undertakings given by Ministers to the Committee. This should be acknowledged in the Explanatory Statement, so that Senators and Members are aware of the issues raised by the Committee. This was not done for the Bankruptcy Rules (Amendment), Statutory Rules 1992 No.400, the Health Insurance Regulations (Amendment), Statutory Rules 1992 No.111, the Jury Exemption Regulations (Amendment), Statutory Rules 1992 No.289, or Determination No.1992-93/5 under s.10F of the *Aged or Disabled Persons Care Act 1954*. The Committee was advised, however, this would be done in all future cases. The Department of the Prime Minister and Cabinet were also

considering whether this requirement of the Committee should be included in the next revision of the *Federal Executive Council Handbook*.

3.15 It is another requirement of the Committee that Explanatory Statements advise of the reasons for any change in taxes, levies, fees or charges, or of the reason for setting the initial levels of these imposts. The Explanatory Statements for the Fisheries Levy (Southern Bluefin Tuna Fishery) Regulations (Amendment), Statutory Rules 1992 No.340 and the Immigration (Education) Charge Regulations, Statutory Rules 1993 No.30, did not do this. The Ministers provided the Committee with reasons.

Retrospectivity

3.16 Many instruments of delegated legislation operate retrospectively. Under s.48(2) of the Acts Interpretation Act, however, such instruments are void if they prejudice any person apart from the Commonwealth. The Explanatory Statement should advise that retrospectivity is not prejudicial. There was no such advice for the Instrument No.2 of 1992 under s.5(1) of the *Military Benefits and Superannuation Act 1991*; the Determination 1992/1 under s.7 of the *Student Assistance Act 1973*; Remuneration Tribunal Determination No.16 of 1992; the Training Guarantee (Wool Industry) Regulations (Amendment), Statutory Rules 1992 No.426; or the Leases Ordinance 1992, Jervis Bay Territory Ordinance No.1 of 1992. In each case, however, the Minister subsequently assured the Committee that the retrospectivity was not prejudicial.

3.17 The Explanatory Statement for the Fringe Benefits Tax Regulations, Statutory Rules 1992 No.130, advised that some six years retrospectivity was not prejudicial. The Committee, however, twice asked the Minister for further details before being satisfied that this was the case.

3.18 Even if retrospective delegated legislation is valid, the Committee may still question excessive delay in making an instrument. The Committee did this in the case of Public Service Determination 1992/30, with more than two years retrospectivity; with the Australian Film, Television and Radio School (Allowances) Regulations, Statutory Rules 1992 No.135, with more than three years retrospectivity; and the Industrial Relations Regulations (Amendment), Statutory Rules 1992 No.139, with some two years retrospectivity. The relevant Ministers advised the Committee of the reasons for the apparent delay.

3.19 The Industrial Relations Regulations (Amendment), Statutory Rules 1992 No.159, among other things, corrected an error in the principal Regulations which excluded certain public officials from a benefit. This provision, however, was not retrospective and the Committee received an assurance from the Minister that the lack of retrospectivity was not prejudicial.

Inappropriate levels of delegation

3.20 Many instruments of delegated legislation provide for a decision maker to

delegate his or her powers. The Committee ensures that such delegation is restricted to persons of suitable seniority and experience. In some cases, delegation may not even be appropriate. For instance, the Migration Regulations (Amendment), Statutory Rules 1992 No.311, provided for the Secretary of the Department to cause, or consent to, compulsory medical treatment for detainees or persons in custody. This was such an important power that it may have been appropriate to restrict its exercise to the Secretary acting personally. The Minister undertook to amend the regulations to provide for this restriction at the earliest opportunity and to transfer the provisions to the parent Act when it was next amended. The Health Insurance Regulations (Amendment), Statutory Rules 1992 No.111, provided for the General Manager of the Health Insurance Commission to release personal information about individual patients. This power could be delegated to any member of the staff of the Commission, no matter how junior. The Minister undertook to amend the regulations to restrict delegation to senior executive service officers or their professional equivalents. The Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1991 No.288 and 1992 No.412, provided that the Secretary of the Department could delegate to any person at all the power to grant or refuse authority to export. The position was mitigated somewhat by provisions for AAT review of decisions made by the Secretary or a delegate. Nevertheless, the Minister undertook to amend the regulations to restrict delegation to members of the Department.

3.21 The Leases Ordinance 1992, Jervis Bay Territory Ordinance No.1 of 1992, provided for the Minister or authorised persons to make certain decisions. There were, however, no provisions for the appointment or qualifications of an authorised officer. The Minister undertook to provide that an authorised person would be an officer of the Department authorised by the Minister. The Federal Airports Corporation Regulations, Statutory Rules 1992 No.255, conferred on the Chief Executive Officer the power to delegate his or her powers to an employee. Another provision empowered the FAC to employ any persons it thinks necessary. The Minister advised that the only delegates appointed were the General Manager and Technical Services Manager at Sydney Airport; any future delegations would be restricted to senior managers.

3.22 The Management Plans Omnibus Amendment 1992, Plan of Management No.31 (No.5 of 1992), amended five other Management Plans to provide that the General Manager of the Australian Fisheries Management Authority may delegate all of his or her functions to any person at all. The Southern Bluefin Tuna Management Plan (Amendment), Plan of Management No.32 (No.6 of 1992), amended another Plan in the same way. The Minister advised that when the Plans were made the General Manager occupied the only position in the newly created AFMA. Delegations would be restricted to named officers or occupants of positions in AFMA. The Therapeutic Goods Regulations (Amendment), Statutory Rules 1992 No.332, provided that the Secretary may delegate his or her powers to any officer of the Department. The Committee had previously raised this matter in respect of both the Therapeutic Goods Regulations, Statutory Rules 1990 No.88, disallowed by the Senate, and the Therapeutic Goods Regulations, Statutory Rules 1990 No.394, which replaced them. In all cases the Minister advised that delegation would be

restricted to senior executive service and other senior officers.

Legislative instruments not subject to tabling and disallowance

3.23 If delegated legislation provides for legislative instruments to be made the Committee first ensures that the power is valid. It then ensures that such instruments are subject to appropriate scrutiny. This will usually be by tabling and possible disallowance. The National Parks and Wildlife Regulations (Amendment), Statutory Rules 1992 No.319, provided for a variety of instruments to be made, including determinations, permits, directions, signs, declarations, authorities, approvals and lists. The Committee accepted the Minister's advice that not all of these need be subject to parliamentary scrutiny. The Minister, however, offered to amend the regulations to provide for tabling and disallowance of declarations that an animal or plant is not protected; and of notices that a program for the management of wildlife is an approved management program.

Access, presentation and publication

3.24 As with drafting, standards of access, presentation and publication of delegated legislation should not be less than those of Acts. The National Parks and Wildlife Regulations (Amendment), Statutory Rules 1992 No.319, as well as making 49 pages of amendments of the principal Regulations, renumbered the existing complex regulation numbers, such as regulation 2AAAA. The Minister agreed with the Committee that a reprint would assist the public.

Lack of numbering or citation

3.25 Due to the efforts of the Committee, it is now accepted that every instrument of delegated legislation should provide a system of numbering or citation. Without such a system delegated legislation may be imprecise and confusing. Ministers undertook to provide numbering or citation for future instruments in the following series: Principles under s.10GF of the *Aged or Disabled Persons Care Act 1954*; two Determinations under s.18K(3)(b) of the *Privacy Act 1988*; two Determinations under s.4 of the *Overseas Students (Refunds) Act 1990*; two Instruments under s.54 of the *International Air Services Commission Act 1992*; a Notice under ss.267 and 280 of the *Telecommunications Act 1991*; a Notice of Reservation of Spectrum for National Radio Services under s.31 of the *Broadcasting Act 1992*; a Notice of Reservation of Spectrum for National Television Services under s.31 of the *Broadcasting Act 1992*; a Determination of Class Licences under s.117 of the *Broadcasting Act 1992*; a Determination of Program Standards under s.21 of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*; and a Determination of Federal Routes under s.43A of the *Interstate Road Transport Act 1985*.

Principle (b)

Does delegated legislation trespass unduly on personal rights and liberties?

Privacy

3.26 The Committee ensures that delegated legislation respects the basic right of privacy. The Statutory Instrument No.46 of 1992 under s.1315 of the *Social Security Act 1991* set out guidelines under which the Secretary may give a certificate for the disclosure of information about a person. It provided that information may be disclosed where the information could not reasonably be obtained from another source and the person seeking it has an interest in obtaining it. Specifically, information could be released where there was an imminent threat to life or health; where disclosure was reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue; or, in specified circumstances, where the disclosure concerned a deceased person, a missing person or an abducted person. The Committee noted that Parliament took the conferral of the power to make such an instrument very seriously because, unusually, s.1513(3) provides that an instrument does not take effect until it is no longer liable to be disallowed, or to be deemed to be disallowed. The Committee was concerned at the wide application of, for instance, the disclosure provisions relating to criminal law and the public revenue. Such disclosure would seem to cover everything from murder to unpaid parking fines. The Explanatory Statement did not assist, advising initially that the provisions were intended to apply to serious offences but later advising that they would also include people who damage Commonwealth property in an altercation with the Department. The Explanatory Statement also advised that the instrument had been made with the Privacy Principles in mind. Given its importance, however, the Committee asked whether the Privacy Commissioner had been consulted about the instrument.

3.27 The Minister advised that the Act imposed an overriding public interest test on the release of information; this was a harsh test not readily met. For instance, it would not usually cover parking offenders. The Department had consulted the Privacy Commissioner, who had some reservations about a provision of the instrument. The Minister attached copies of this correspondence. The Committee then wrote to the Privacy Commissioner, asking for his comments on the final form of the instrument and whether he still had reservations about any of its provisions. The Committee also wrote back to the Minister about other matters arising from the correspondence with the Privacy Commissioner, asking for copies of other correspondence to which reference had been made, and for confirmation that instructions to departmental staff had been amended, in accordance with an undertaking given to the Privacy Commissioner. Finally, the Committee asked whether consideration was given to suggestions from the Privacy Commissioner that the instrument incorporate case examples. The Committee received advice and assurance on all these points before completing its scrutiny of this instrument.

3.28 The Instrument under s.40AA(6)(ce) of the *National Health Act 1953* approved a form in respect of nursing and personal care staff costs in non-government nursing homes for the aged. The form required the names and many

personal details of service of individual staff in relation to long service leave, sick leave and annual leave. The Committee asked the Minister for advice on the provisions which authorised the collection of such information, who had access to it, what safeguards existed for its protection and whether its collection accorded with the Privacy Principles. The Committee also asked for an assurance that it was necessary for such detailed information to be collected. The Minister advised that any information was subject to the secrecy provisions of the Act, breaches of which carried severe penalties, and to the Privacy Principles.

3.29 The Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No.132, extended the circumstances under which employees of the Corporation may disclose information, including express authorisation to give information to the Australian Security Intelligence Organization. The Committee's scrutiny of this instrument was the subject of a special statement to the Senate, see Chapter 9.

Harsh or unreasonable provisions

3.30 It is a breach of personal rights if provisions of delegated legislation are harsh or unreasonable. The National Parks and Wildlife Regulations (Amendment), Statutory Rules 1992 No.319, increased the penalty for illegally entering Aboriginal areas of Kakadu and Uluru (Ayers Rock - Mt Olga) National Parks from \$500 to \$5,000. The Committee asked the reason for this tenfold increase. The Minister advised that during the preparation of the present amendments, the Attorney-General's Department was asked to review all penalties in the regulations and the resultant advice was incorporated into the amendments.

3.31 On the initiative of Senator Bill O'Chee, the Committee conducted a lengthy and detailed scrutiny of the Road Vehicle (National Standards) Determination No.1 of 1992 made under the Motor Vehicle Standards Act 1989, "Omnibus Rollover Strength", which required manufacturers of coach bodies of 17 seats or more capacity to conduct separate tests for each body. The Committee was concerned at the apparent expense imposed upon small manufacturers who may produce only a small number of specialised units, often for tourism or other use in remote areas. The Committee received four separate sets of technical advice from the Department and met with two officers of the Department. The Department concluded that following discussions with the Committee it was apparent there was a need to clarify arrangements for manufacturers to demonstrate compliance with a particular design rule. The Department did this.

3.32 The National Parks and Wildlife Regulations (Amendment), Statutory Rules 1992 No.319, also appeared to have potential to operate unfairly. The regulations provided for animals which stray into a National Park to be impounded. If the owner of an impounded animal could not be identified, the Director was required to advertise a description of the animals in a newspaper circulating locally. Then, if the owner did not claim the animals within seven days of the impounding, the Director could destroy or otherwise dispose of them. Given the isolation and remoteness of some National Parks, the Committee asked whether seven days was

too short a period. The Minister undertook to amend the regulations to provide for the seven days to run from the date of publication rather than the date of impounding.

3.33 The Export Inspection (Service Charge) Regulations (Amendment), Statutory Rules 1992 No.249, provided for application fees for exemptions to increase progressively with the number of applications made. The Committee was concerned that this may have the effect of a penalty for exercising rights conferred by legislation. The Minister assured the Committee that the increasing charges reflected as accurately as possible the actual costs incurred in processing applications.

3.34 The Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No.251, provided that the Australian Quarantine Inspection Service would no longer refund certain registration charges. The Explanatory Statement did not advise of the reasons for this reduction of existing rights. The Minister advised that the charges were calculated to cover infrastructure costs over the whole year. There was a trend in the industry, however, for operators to remain registered only at those times of the year when inspection services were required at their establishment. Operators would then de-register and claim a refund, thus defeating the intention of the charges.

3.35 The Committee protects the rights of Commonwealth employees, as well as members of the general public. Following a representation from Senator Jocelyn Newman, the Committee wrote to the Minister about aspects of Instrument No.2 of 1992 under s.5(1) of the Military Superannuation and Benefits Act 1991. The Explanatory Statement advised that the operation of the principal legislation had revealed an unintended effect, in that certain superannuation contributions provided a member with greater benefits than those intended. The Instrument excluded these contributions from the operation of the scheme. The Minister advised that the Instrument did not operate harshly or unfairly, because contributors could not legitimately expect to take advantage of an unexpected windfall. The Instrument would ensure that all contributors received benefits as set out in their Personal Information Statements. The Senate disallowed the Instrument on policy grounds on 9 September 1992.

3.36 The scrutiny by the Committee of Public Service Determinations 1992/27 and 1992/46 was one of its most important actions of the year. These Determinations, made by an official of the Department of Industrial Relations, without adequate consultation, entrenched an injustice for some 30,000 former members of the Australian Public Service. This injustice was 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. Following action by the Committee, special allocations of \$4.1 million were included in the 1992 Budget to cure this inequitable situation. The Committee's scrutiny of these instruments is described in detail in its Ninety-Second Report, November 1992.

Appropriate safeguards for powers of public officials

3.37 The Committee ensures that personal rights are not adversely affected by arbitrary grants of power to officials or agencies. The Migration Regulations (Amendment), Statutory Rules 1992 No.311, provided that the Secretary may cause, or consent to, the giving of compulsory medical treatment, including the administration of nourishment and fluids or the use of restraint and sedatives, to detainees or persons in custody. The regulations involved serious personal invasions. The Explanatory Statement, however, advised of the reasons why they were made. Also, there were appropriate safeguards; the provisions may only be invoked where a medical practitioner has stated in writing that there is a serious risk to the life or health of a detainee, the treatment must be reasonably necessary to safeguard life or health and any force used must be reasonable. Nevertheless, the Committee sought and obtained an assurance that the provisions did not go beyond what was necessary to effect their purpose.

3.38 The Federal Airports (Amendment) By-laws No.1 1992, provided that an airport officer may serve a smoking infringement "fine" upon any person who smokes. In contrast to the smoking infringement "notice" system also established by these by-laws, a fine was required to be paid immediately. The Committee questioned the relationship between the two systems. The Minister advised that they operated in tandem, with a fine being imposed only where a smoker declined to provide a name and address or failed to comply with a direction to extinguish smoking materials.

3.39 The Prescribed Goods (General) Orders (Amendment), Export Control Orders No.4 of 1992, provided that the Secretary could determine who was a "fit and proper person" for the purposes of the legislative scheme which it implemented. The criteria which the Secretary could take into account were wide, including not only offences under the *Crimes Act 1914*, but also convictions under any other law of the Commonwealth, a State or Territory. They also expressly included references to associates of the person, defined widely to include a spouse or de facto spouse, an employer or employee of the person, and others connected with a corporation of which the person is an officer or employee or in which the person holds shares. The Committee accepted that these matters were merely criteria, with no independent operation, but asked the Minister about possible harshness. The Minister advised that the provision originated from recommendations of the 1982 Royal Commission into the Australian Meat Industry as one means of protecting the export meat industry from corruption. The Committee accepted the advice, chiefly because there was AAT review of any decision made under the criteria.

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 with commercial and livelihood implications

3.40 Delegated legislation often provides for discretions which affect business

operations or the right of a person to practise a trade or profession. In such cases, the Committee believes that discretions should be limited and guided by objective criteria and subject to external review of their merits by an independent body, usually the AAT. Examples of such instruments are set out below under Departments.

(a) Department of Health, Housing, Local Government and Community Services

3.41 The Nursing Homes Patients Classification Principles 1992 (PC 1/1992) made under the *National Health Act 1953*, provided categories into which patients were to be placed and figures upon which Commonwealth benefits were based. The Secretary, however, was given power to alter the figures. This discretion was important because its exercise would effectively change the legislation. The Committee asked for advice on the lack of criteria to guide and limit the Secretary in the exercise of the power and whether there was merits review of changes made by the Secretary. The Committee suggested that in the context of merits review that it would be worthwhile to seek advice from the Administrative Review Council. The Minister advised that the power was invalid and would be removed from the Principles.

3.42 The Nursing Home Nasogastric Feeding Principles 1992 (NGP 1/1992) and the Nursing Home Oxygen Treatment Principles 1992 (OPT 1/1992) made under the *National Health Act 1953*, formulated principles to be taken into account in determining certain funding. Both sets of Principles, however, conferred power on the Secretary to make decisions affecting specific nursing homes and possibly even specific patients. The Minister replied to the Committee's concerns about review with two separate letters. The first letter advised that, while it was desirable to minimise discretions, individual cases had arisen which the Department would never have predicted. There was no AAT review because no applicants had ever been refused and any possible appeal would involve quite small amounts. The second letter was generally similar to the first, but offered to provide review rights. The whole of the Commonwealth legislation on aged care, however, including review, was being reviewed by the Australian Law Reform Commission, and the Committee accepted the Minister's suggestion that the Principles remain on an interim basis.

3.43 The 24 Hour Registered Nurse and Small Nursing Homes Additional Funding Principles 1992 (24 SH 1/1992) under s.48B of the *National Health Act 1953*, provided for the Secretary to exercise important discretions. In addition, several provisions laid down express formulae to calculate Commonwealth benefits. The first amount, however, could be "such other amount as the Minister may determine". The Minister undertook to remove this provision and, following further correspondence with the Committee, to provide AAT review of decisions of the Secretary.

3.44 In respect of the New Nursing Homes Principles 1992 (NNH 1/1992) under s.54(1) of the *National Health Act 1953* and the Guidelines DSA 2-92 for the Administration of Part II of the *Disability Services Act 1986*, the Minister advised that discretions related to the allocation of a finite amount of money; the ARC

considered that such allocation may not be appropriate for AAT review. The Committee closely examined the latter instrument, because the parent Act provided not only that Parliament could amend the Guidelines, but also that if notice of a motion to amend the Guidelines is given, the Guidelines will come into effect only if both Houses approve the Guidelines in the same form. The Committee also asked about new statutory Disability Standards Review Panels; the Minister advised that these had an advisory function. Finally, the Committee asked for a copy of the reference to the Australian Law Reform Commission of the portfolio legislation, of which the Committee was notified earlier.

3.45 The Health Insurance (Pathology - Licensed Collection Centres) Determination (No.2) (HSB 18/1992) under ss.23 DNB and 23 DNC of the Health Insurance Act 1973, provided that the Minister may make a decision at variance with the result of the application of specific formulae in the Determination. The Minister advised that this reflected the provisions of the parent Act. The Therapeutic Goods Regulations (Amendment), Statutory Rules 1992 Nos.89 and 109, provided for commercially significant discretions; the Minister advised that AAT review of such decisions was available under provisions of the parent Act.

(b) Department of Transport and Communications

3.46 The Civil Aviation Regulations (Amendment), Statutory Rules 1992 No.174, and the Civil Aviation Orders Amendment, section 100.5, provided for a number of discretions relating to the operation of aircraft. The Minister advised that review was not provided because one discretion related to maintenance requirements which were extremely important for safety but which, in any case, struck an appropriate balance between safety and practicality; review of another may be in conflict with Australia's international obligations; while a third dealt with minor administrative details that were applied uniformly to all aircraft flown on a regular basis.

3.47 The Broadcasting (Limited Licence) Fees Regulations (Amendment), Statutory Rules 1992 No.126, provided that the Australian Broadcasting Tribunal could decide on whether an applicant for certain broadcasting licences had sufficient management and financial resources to provide the service and had access to an appropriate range of information about the service. The Minister advised that the obligations on a provider of the service were not as extensive as those on commercial broadcasters, that only one application had been made, which was successful, and that future applications would be dealt with under provisions of a new Act.

3.48 The AOTC Carrier Charges Price Control Determination 1992 under the Australian and Overseas Telecommunications Corporation Act 1991 conferred discretions on AUSTEL to decide on misuse of market power and to waive a giving of notice and information. The Minister advised that neither the Act nor the delegated legislation provided for merits review of these decisions, which related to the regulation of charges by AOTC. The reasons for this were that AUSTEL was an expert body, with extensive knowledge and experience of the industry; the Act provided for important safeguards in the exercise by AUSTEL of its functions; and AOTC was a large organisation with resources to look after its commercial and legal

interests. AOTC was not in the position of an individual whose right to earn a living or carry on a business is affected by an administrative decision.

(c) Department of Primary Industries and Energy

3.49 The Australian Meat and Live-stock Corporation Order No.L11/92 under the Australian Meat and Live-stock Corporation Act 1977 provided broad discretions, without apparent criteria, relating to approval of exports by the Corporation. The Minister advised that the Order resulted from the rejection of a trial export shipment of sheep, with serious implications for the future of the trade and for animal welfare. The Order was a temporary measure, made in consultation with producers and exporters, to ensure quality assurance and to meet the requirements of a foreign government. The Committee then asked how long the temporary measure would be in operation. The Minister provided details of the expected progress of the quality assurance program.

3.50 The Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No.251, provided for the payment of charges, in respect of which the Explanatory Statement advised that the Australian Quarantine and Inspection Service would generally require payment in advance or at the time of service for "all but regular clients with a good record of payment on time". There was no indication in the Regulations of any opportunity to challenge the exercise of this discretion. The Minister advised that at present the AQIS had annual bad and doubtful debts of \$4 million. The amending Regulations ensured that these losses would not have to be passed on to all clients. In any event, AQIS intended to move to systems where payment in advance or at the time of service becomes normal practice, with other forms of payment only where such payment is not administratively possible.

3.51 The Fisheries Notice No.NPF 19 provided that the Secretary may make certain decisions about aquaculture in the Northern Territory. The Minister advised that it was unusual for a Fisheries Notice to provide for discretions; in the next round of amendments they would be removed or criteria provided.

(d) Other Departments

3.52 The Designs Regulations (Amendment) and the Trade Marks Regulations (Amendment), Statutory Rules 1992 Nos.149 and 150, provided for the Registrar to exempt, remit or refund fees. Both parent Acts provided for AAT review of certain decisions and the Committee asked whether this review extended to the present discretions. The Minister advised that, in contrast with other discretions in the Act and Regulations in respect of which AAT review was available, the present discretions did not affect the rights of persons. Therefore, no review was provided.

3.53 The Repatriation Private Patient Principles, Instrument No.8 of 1992 under the Veterans' Entitlements Act 1986, provided for the Repatriation Commission to exercise discretions about financial authorisation for the treatment of veterans in private hospitals. The Minister advised that AAT review would not

provide any additional guarantee to a person's capacity to exercise his or her rights. The discretions did not relate to a right to treatment, but instead applied to how treatment is to be provided. The parent Act does not provide for AAT review in respect of related matters with which it deals. There is internal review of disputes and the Principles are monitored by national and State committees which report annually to the Commission and to the Minister, who must table the reports in Parliament.

Review of decisions affecting personal rights

3.54 The Committee also ensures that instruments provide appropriate criteria and review rights for discretions which affect personal rights apart from rights to carry on a business or practise a trade or profession. The Leases Ordinance 1992, Jervis Bay Territory Ordinance No.1 of 1992, provided for a group of discretions to grant leases, impose conditions upon leases and to determine rents. Some of these discretions were subject to review by the Minister while others were not. There was a further right of review by the AAT, but in respect of some matters and not others. The Ordinance also conferred wide powers on the Minister in relation to rent reduction and relief from compliance with conditions, discharge of obligations and the fixing of a survey fee for each lease, in respect of which there was no review. Other discretions with no apparent review included the power to determine persons to whom and the purposes for which leases may be granted, to determine the value of a lease, to value certain such leases, to require the fencing of boundaries and to terminate the lease.

3.55 The Minister advised that the initial granting of a lease was not subject to AAT review because the decision involved the disposal of a Commonwealth asset and it was not the usual role of the AAT to review such a process. Also, the A.C.T. Act, upon which the Ordinance was based, did not provide for review of these initial decisions. As the Committee noted, however, decisions in respect of subsequent leases were subject to review. The Minister further advised that the discretions to reduce rent, to grant relief from conditions, to decide on who could be granted a lease and for what purposes, were really commercial and "it would be inappropriate to have the AAT review such a commercial decision". This was another matter in respect of which the A.C.T. Act did not provide for review. The Ordinance would, however, be amended to provide for AAT review of the discretion to fix individual survey fees. There were at present no rural leases in the Territory and the power to value rural leases, upon which permission to transfer such leases rested, would be either removed or made subject to AAT review. The power to require lessees to erect boundary fences would be made subject to AAT review.

3.56 The National Parks and Wildlife Regulations (Amendment), Statutory Rules 1992 No.319, provided for the Director to exercise discretions to control animals that are not wildlife, to grant permits for public gatherings and to grant licences and permits for activities in National Parks or reserves. The Committee received an assurance from the Minister that the AAT review rights provided in the principal Regulations included the discretions in the present amending Regulations. The Committee similarly sought and obtained an assurance that a discretion granted

to the Insurance and Superannuation Commissioner in respect of reporting requirements by the Occupational Superannuation Standards Regulations (Amendment), Statutory Rules 1992 No.218, were included in AAT review rights provided by the parent Act.

3.57 Determination No.3 of 1992 under s.52 of the Defence Act 1903 provided for discretions dealing with access to superannuation benefits and with the payment of interest where payment of a benefit is delayed. Criteria were provided for the first discretion but not for the second. The Minister advised that the first discretion would be provided with AAT review rights. The second power was drafted as a discretion, but it was intended to treat all cases in the same way. The provision, therefore, would be amended to remove any element of discretion.

3.58 The Explanatory Statement for Defence Determination 1992/15 advised that a discretion granted to the Chief of the Defence Force to extend the period during which an allowance is payable, is subject to ADF grievance procedures, including appeal to the Defence Force Ombudsman. The Committee asked for further advice on this form of review, including instances where decisions of the DFO may not be binding. The Minister advised that in some ways the powers of the DFO were wider than those of the Commonwealth Ombudsman. For instance, the DFO may investigate matters relating to employment, including posting and promotion. The DFO's power of merit review is exercised by reporting recommendations to the relevant agency, with a copy to the Minister. Although recommendations are not binding, further reports may be made to the Prime Minister and ultimately to the Parliament. In the last five years only five reports were made to the Prime Minister and none to the Parliament.

3.59 The Health Insurance Regulations (Amendment), Statutory Rules 1992 No.111, provided for the General Manager to provide certain personal information to the Complaints Unit of a State Department of Health and to State Medical Registration Boards. This information was to be used to investigate possible fraud or excessive servicing by medical practitioners. The provision replaced an earlier one incorporating safeguards included at the suggestion of the Committee. Although the Explanatory Statement advised that the Regulations incorporated comments made by the Privacy Commissioner, the Committee asked about a power given to the General Manager to permit additional information to be made available. The Minister advised that AAT review was not provided because this would inhibit investigations.

Principle (d)

Does delegated legislation contain matter more appropriate for parliamentary enactment?

3.60 This is a principle not often raised by the Committee. It is, however, a breach of parliamentary propriety if matters which should be subject to all the safeguards of the parliamentary passage of a Bill are provided for in delegated legislation. The Norfolk Island (Exercise of Powers) Regulations, Statutory Rules 1992 No.164, conferred both legislative and executive power on the Norfolk Island

polity over a range of important areas, effecting a substantial constitutional change. Under the parent Act there was power to make these changes, but the Committee considered that the importance of the matters dealt with may have been more suitable for inclusion in a Bill. The Committee noted that the transfer of similar powers to the Northern Territory and the Australian Capital Territory was done largely by Act. The Minister persuaded the Committee that action by regulation was appropriate, referring to the preamble and to express provisions of the parent Act, to the administrative processes leading to the regulations and to parallels with the transfer of powers to the mainland territories.

3.61 The **Applied Laws (Implementation) Ordinance 1992, Territory of Christmas Island Ordinance No.1 of 1992, and the Applied Laws (Implementation) Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.5 of 1992**, both made fundamental changes to the laws of those two territories. The Minister advised that deficiencies in the previous legal regime were widely recognised and profound. Therefore, the Government set a tight time frame for reform. The Government also indicated, however, that it would consult the territory populations on the proposed changes. The use of delegated legislation enabled more time for consultation before the initial changes were made. These changes may require further amendment, for which delegated legislation appeared more suitable. In any event, Parliament always retained the ability to scrutinise all instruments changing the law of the territories.

3.62 The *Ninety-Third Report* of the Committee, a Report on scrutiny by the Committee of regulations imposing United Nations sanctions, presented on 16 December 1992, dealt with the question of whether such sanctions should be imposed by Act or regulation. This matter is referred to in Chapter 8.

3.63 The Committee's scrutiny of amendments of the **Australian Postal Corporation Regulations** included consideration of matter which may have been more appropriate for inclusion in a Bill. This matter is referred to in Chapter 9.

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.

**Aboriginal and Torres Strait Islander Commission (Election of Executive Committees) Regulations
Statutory Rules 1990 No.399**

4.2 On 15 August 1991, the Minister for Aboriginal Affairs, the Hon Robert Tickner MP, undertook to amend the Regulations to remove a discretion conferred on an electoral official. This undertaking was implemented by the **Aboriginal and Torres Strait Islander Commission (Election of Executive Committees) Regulations (Amendment), Statutory Rules 1992 No.393, of 9 December 1992**

**Administrative Appeals Tribunal Regulations (Amendment)
Statutory Rules 1992 No.450**

4.3 On 9 April 1992 the Attorney-General, the Hon Michael Duffy MP, undertook to amend the Regulations to provide for a waiver of a fee and for review of decisions not to grant the waiver. This undertaking was implemented by the **Administrative Appeals Tribunal Regulations (Amendment), Statutory Rules 1993 No.64, of 27 April 1993.**

**Air Navigation (Charges) Regulations (Amendment)
Statutory Rules 1991 No.237**

4.4 On 30 September 1991 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to amend the Regulations to clarify drafting. This undertaking was implemented by the **Air Navigation (Charges) Regulations (Amendment), Statutory Rules 1992 No.253, of 21 July 1992.**

**Australian Horticultural Corporation (Dried Fruits Export Control) Regulations
Statutory Rules 1991 No.199**

4.5 On 29 October 1991 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to correct reference errors. This undertaking was implemented by the **Australian Horticultural Corporation (Dried Fruits Export Control) Regulations (Amendment), Statutory Rules 1992 No.377, of 23 November 1992.**

Australian Postal Corporation Regulations (Amendment)
Statutory Rules 1992 No.132

4.6 On 13 October 1992 the Minister for Land Transport, the Hon Bob Brown MP, undertook to amend the Regulations to alter the circumstances in which disclosure of information may occur under the trial of the National Change of Address Scheme; and to provide for sunseting 12 months after the making of the Regulations. This undertaking was implemented by the **Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No.375**, of 23 November 1992.

Bankruptcy Rules (Amendment)
Statutory Rules 1992 No.194

4.7 On 22 September 1992 the Minister for Justice, Senator the Hon Michael Tate, undertook to amend the Regulations to correct a reference to the classification of Senior Executive Officers. This undertaking was implemented by the **Bankruptcy Rules (Amendment), Statutory Rules 1992 No.400**, of 9 December 1992.

Customs (Prohibited Exports) Regulations (Amendment)
Statutory Rules 1991 No.288

4.8 On 19 December 1991 the Minister for Small Business and Customs, the Hon David Beddall MP, undertook to amend the Regulations to limit a power to delegate. This undertaking was implemented by the **Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1992 No.414**, of 9 December 1992.

Declaration No PB8 of 1992 made under s.85 of the *National Health Act 1953*

4.9 On 26 November 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to alter the print of the Determination to improve the quality of the document. This undertaking was implemented by **Declaration No PB1 of 1993 made under s.85 of the *National Health Act 1953***, of 21 January 1993.

Determination No. 1991-92/12 made under s.10GI of the *Aged or Disabled Persons Care Act 1954*

4.10 On 28 May 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Determination to provide for review of discretions and to limit a power to delegate. This undertaking was implemented by **Determination No. 1992-93/5 made under s.10F of the *Aged or Disabled Persons Care Act 1954***, of 23 September 1992.

Determination No 9BG 1 of 1991 (1991-92/11) made under s.9B(1) of the *Aged or Disabled Persons Homes Act 1954*

4.11 On 1 July 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to revoke and remake the instrument. This undertaking was implemented by **Determination No 9BG 1 of 1992 (1992-93/1) made under s.9B(1) of the *Aged or Disabled Persons Care Act 1954***, of 17 September 1992.

Determination No.3 of 1992 made under s.52 of the *Defence Act 1903*

4.12 On 7 December 1992 the Minister for Defence Science and Personnel, the Hon Gordon Bilney MP, undertook to amend the Determination to remove a discretionary power and to provide for AAT review. This undertaking was implemented by **Determination No.1 of 1993 made under s.52 of the *Defence Act 1903***, of 23 January 1993.

Determination of Federal Routes made under s.43A of the *Interstate Transport Act 1985*

4.13 On 11 February 1993 the Minister for Land Transport, the Hon Bob Brown MP, undertook to number future instruments. This undertaking was implemented by **Determination 93/04 of Federal Routes made under s.43A of the *Interstate Transport Act 1985***, of 2 March 1993.

Exemption made under Regulation 308 of the Civil Aviation Regulations

4.14 On 12 May 1992 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to number future exemptions. This undertaking was implemented by **Exemption No.3 of 1992 made under Regulation 308 of the Civil Aviation Regulations**, of 21 July 1992.

Fisheries Notice No. NPF 9

4.15 On 21 August 1991 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Notice to effect legislative intent. This undertaking was implemented by **Fisheries Notice No. NPF 16**, of 19 March 1992.

Fisheries Notices Nos. NPF 11 and 12

4.16 On 21 August 1991 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Notices to correct reference errors. This undertaking was implemented by **Fisheries Notice No. NPF 16**, of 19 March 1992.

Fisheries Notices Nos. NPF 13 and 14

4.17 On 21 August 1991 the Minister for Primary Industries and Energy, the

Hon Simon Crean MP, undertook to amend the Notices to clarify legislative intent and correct reference errors. This undertaking was implemented by Fisheries Notice No. NPF 16, of 19 March 1992.

Fisheries Notice No. NPF 19

4.18 On 30 December 1992 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Notice either to remove discretions not subject to review or to insert criteria to govern their operation. This Notice was revoked by Fisheries Notice No. NPF 26, of 26 March 1993.

Fisheries Management Regulations Statutory Rules 1992 No.20

4.19 On 27 May 1992 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to require notification of rights and to correct reference errors. This undertaking was implemented by the Fisheries Management Regulations (Amendment), Statutory Rules 1992 No.455, of 22 December 1992.

Jury Exemption Regulations (Amendment) Statutory Rules 1992 No.123

4.20 On 17 July 1992 the Attorney-General, the Hon Michael Duffy MP, undertook to amend the Regulations to effect legislative intent. This undertaking was implemented by the Jury Exemption (Statutory Rules 1992 No.123) Regulations (Amendment), Statutory Rules 1992 No.289, of 8 September 1992.

Locally Engaged Staff Determinations 1992/18, 1992/22, 1992/27 and 1992/31

4.21 On 15 December 1992 the Minister for Industrial Relations, Senator the Hon Peter Cook, advised that the Determinations had been amended to validate the incorporation of overseas law. This undertaking was implemented by Locally Engaged Staff Determination 1992/38, of 14 December 1992. An associated undertaking to amend the Public Service Act has not yet been implemented.

Marine Orders, Part 26 Equipment - Communication Issue 2 Order No.2 of 1992 Marine Orders, Part 26 Equipment - Communication Issue 1 Order No.4 of 1992

4.22 On 17 June 1992 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to provide a Note in the body of Marine Orders indicating that particular decisions are reviewable by the AAT. This undertaking was implemented by Marine Orders, Part 26 Equipment - Communication Issue 1, Order No.12 of 1992, and Marine Orders, Part 26 Equipment - Communication Issue 2, Order No.13 of 1992, of 16 October 1992.

Migration Regulations (Amendment) Statutory Rules 1992 No.311

4.23 On 30 November 1992 the Minister for Immigration, Local Government and Ethnic Affairs, the Hon Gerry Hand MP, undertook to amend the Regulations and the Act to remove a power to delegate. This undertaking was implemented in respect of the Regulations by the Migration Regulations (Amendment), Statutory Rules 1992 No.451, of 22 December 1992. The undertaking in respect of the Act has not yet been implemented.

900 MHz Band Plan Statutory Rules 1992 No.47

4.24 On 13 October 1992 the Minister for Transport and Communications, Senator the Hon Bob Collins, undertook to amend the Plan to indicate that the General Notes to the Plan are intended as a guide to decision-makers when making decisions under the Act. This undertaking was implemented by the 900 MHz Band Plan (Amendment), Statutory Rules 1993 No.39, of 25 February 1993.

Notice under ss.267 and 280 of the *Telecommunications Act 1991*

4.25 On 23 February 1993 the Minister for Transport and Communications, Senator the Hon Bob Collins, undertook to number future instruments. This undertaking was implemented by Notice No.7 of 1993 under s.267 of the *Telecommunications Act 1991*, of 31 March 1993.

Nursing Homes Patients Classification Principles 1992 (PC 1/1992) made under s.40AFA(3) of the *National Health Act 1953*

4.26 On 18 September 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, advised that an invalid delegation had been revoked. This undertaking was implemented by the Nursing Homes Patients Classification Principles 1992 (PC 2/1992) made under s.40AFA(3) of the *National Health Act 1953*, of 17 September 1992.

Occupational Health and Safety (Commonwealth Employees) Regulations Statutory Rules 1991 No.266

4.27 On 11 December 1991 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Regulations to provide for AAT review, prescribe notices issued by investigators and correct drafting oversights. This undertaking was implemented by the Occupational Health and Safety (Commonwealth Employees) Regulations (Amendment), Statutory Rules 1993 No.5, of 22 January 1993.

Overseas Defence Determination 1991/61

4.28 On 30 September 1991 the Minister for Industrial Relations, Senator the

Hon Peter Cook, undertook to amend the Determination to define a specific area where service would qualify a member for payment of an allowance. This undertaking was implemented by **Defence Determination 1993/5**, of 19 February 1993.

Public Service Determination 1991/102

4.29 On 21 May 1992 the Minister for Industrial Relations, Senator the Hon Peter Cook, advised that the Determination had been amended to correct inaccuracies in the Tables of Allowances. This undertaking was implemented by **Public Service Determination 1992/137**, of 8 May 1992.

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

4.30 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, remove a strict liability offence and remove a reversal of the usual onus of proof. This undertaking was implemented by the **Aboriginal and Torres Strait Islander Regional Council Election Rules (Amendment), Rules No.1 of 1992**, of 7 October 1992.

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

4.31 On 4 December 1990 the Minister for Finance, the Hon Ralph Willis MP, undertook to amend the Regulations to improve drafting. This undertaking was implemented by the **Superannuation (Eligible Employees) Regulations (Amendment), Statutory Rules 1992 No.429**, of 17 December 1992.

Telecommunications (Applications and Fees) Regulations Statutory Rules 1991 No.359

4.32 On 2 July 1992 the Minister for Transport and Communications, Senator the Hon Bob Collins, advised that the citation of the Regulations had been amended. This undertaking was implemented by the **Telecommunications Regulations (Amendment), Statutory Rules 1991 No.425**, of 12 December 1991.

Television Licence Fees Regulations (Amendment) Statutory Rules 1991 No.79

4.33 On 2 September 1991 the Minister for Transport and Communications, the Hon Kim Beazley MP, undertook to amend the Regulations to provide for AAT review. This undertaking was implemented by the **Television Licence Fees Regulations (Amendment), Statutory Rules 1992 No.448**, of 17 December 1992.

Therapeutic Goods Regulations (Amendment) Statutory Rules 1992 No.89

4.34 On 29 July 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook provide for AAT review of a discretion. This undertaking was implemented by the **Therapeutic Goods Regulations (Amendment), Statutory Rules 1992 No.332**, of 20 October 1992.

Training Guarantee (Outstanding Trainer) Regulations Statutory Rules 1991 No.309

4.35 On 18 February 1992 the Minister for Employment, Education and Training, the Hon John Dawkins MP, undertook to amend the Regulations to meet the Committee's concerns regarding discretionary decisions. This undertaking was implemented by the **Training Guarantee (Outstanding Trainer) Regulations (Amendment), Statutory Rules 1992 No.322**, of 9 October 1992.

Training Guarantee (Wool Industry) Regulations Statutory Rules 1991 No.308

4.36 On 18 February 1992 the Minister for Employment, Education and Training, the Hon John Dawkins MP, undertook to amend the Regulations to meet the Committee's concerns regarding strict liability offences and definitions. This undertaking was implemented by the **Training Guarantee (Wool Industry) Regulations (Amendment), Statutory Rules 1992 No.426**, of 17 December 1992.

24 Hour Registered Nurse and Small Nursing Homes Additional Funding Principles 1992 being 24SH 1/1992 made under s.48B(1)(a) and (b) of the *National Health Act 1953*

4.37 On 18 September 1992 and 13 October 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Principles to remove an invalid power and to make a discretion subject to AAT appeal. This undertaking was implemented by **24 Hour Registered Nurse and Small Nursing Homes Additional Funding Principles 1992 being 24SH 3/1992 made under s.48B(1)(a) and (b) of the *National Health Act 1953***, of 16 December 1992.

VHF High Band Frequency Band Plan (148 to 174 MHz) Statutory Rules 1991 No.354 VHF Mid Band Frequency Band Plan (70 to 87.5 MHz) Statutory Rules 1991 No.355

4.38 On 24 March 1992 the Parliamentary Secretary to the Minister for Transport and Communications, the Hon Warren Snowdon MP, undertook to amend the Plans to indicate that the General Notes to the Plans are intended as a guide to decision-makers when making decisions under the Act. This undertaking was

implemented by the VHF Mid Band Frequency Band Plan (70 to 87.5 MHz) (Amendment), Statutory Rules 1992 No.37 and the VHF High Band Frequency Band Plan (148 to 174 MHz) (Amendment), Statutory Rules 1992 No.38, of 25 February 1993.

CHAPTER 5
MINISTERIAL UNDERTAKINGS NOT YET
IMPLEMENTED

5.1 Below are Ministerial and other undertakings, given to amend legislation to meet the concerns of the Committee, which had not been implemented at 30 June 1993, the end of the reporting period. Some have been implemented since that date.

Air Navigation Regulations (Amendment)
Statutory Rules 1991 No.193

5.2 On 8 October 1991 the Minister for Transport and Communications, the Hon Kim Beazley MP, undertook to amend the Regulations to correct reference errors.

Australian Sports Drug Agency Regulations
Statutory Rules 1991 No.19

5.3 On 21 June 1991 the Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to correct reference errors.

Banking (Statistics) Regulations
Statutory Rules 1989 No.357

5.4 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.

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

5.5 On 2 October 1992 the Attorney-General, the Hon Michael Duffy MP, undertook to amend the Regulations to correct a drafting oversight.

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

5.6 On 27 May 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Act and delegated legislation to provide for review of discretions. The Committee agreed to wait until the Australian Law Reform Commission's review into child care is completed.

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

5.7 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

5.8 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.

**Customs (Prohibited Exports) Regulations (Amendment)
Statutory Rules 1992 No.412**

5.9 On 21 May 1993 the Minister for Science and Small Business, Senator the Hon Chris Schacht, undertook to amend the Regulations to restrict the level of delegation.

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

5.10 On 22 August 1991 the Minister for Arts, Tourism and Territories, the Hon David Simmons MP, undertook to amend the Ordinance to provide for public officials to carry and produce identity cards.

**Export Inspection (Charges Collection) Regulations (Amendment)
Statutory Rules 1992 No.251**

5.11 On 12 November 1992 the Minister for Resources, the Hon Alan Griffiths MP, undertook to amend the Regulations to correct reference errors.

Federal Airports (Amendment) By-Laws No.2 of 1992

5.12 On 6 November 1992 the Minister for Shipping and Aviation Support, Senator the Hon Peter Cook, undertook to remake invalid By-Laws.

**Federal Airports Corporation Regulations
Statutory Rules 1992 No.255**

5.13 On 15 October 1992 the Minister for Shipping and Aviation, Senator the Hon Peter Cook, undertook to amend the Regulations to correct reference errors.

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

5.14 On 3 June 1992 the Minister for Primary Industries and Energy, the Hon

Simon Crean MP, undertook to amend the Regulations to correct a drafting oversight.

**Freedom of Information (Miscellaneous) Provisions Regulations (Amendment)
Statutory Rules 1991 No.321**

5.15 These Regulations, which provided for a conclusive exemption certificate to remain in force for five years, were disallowed by the Senate on policy grounds on 24 March 1992, with the result that such certificates remained in force indefinitely. On 29 April 1992 the Attorney-General, the Hon Michael Duffy MP, undertook to consult with other agencies to ascertain the best way to resolve the matter.

**Great Barrier Reef Marine Park Regulations (Amendment)
Statutory Rules 1992 No.69**

5.16 On 29 June 1992 the Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon Ros Kelly MP, undertook to amend the Schedules to specify the common as well as the scientific names of marine creatures.

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

5.17 On 5 November 1992 the Parliamentary Secretary to the Minister for Health, Housing and Community Services, the Hon Gary Johns MP, undertook to amend the Regulations to limit the delegation of discretions.

**Leases Ordinance 1992
Jervis Bay Territory Ordinance No.1 of 1992**

5.18 On 11 May 1993 the Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, undertook to amend the Ordinance to provide for AAT review and to limit delegation.

**National Parks and Wildlife Regulations (Amendment)
Statutory Rules 1992 No.319**

5.19 On 10 February 1993 the Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to extend the time for impounded animals to be claimed; and to provide for tabling and disallowance of legislative instruments.

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

5.20 On 3 September 1991 the Minister for Justice, Senator the Hon Michael Tate, undertook to provide for the tabling and possible disallowance of the Guidelines.

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

5.21 On 1 October 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Principles to provide for review of discretions.

Public Service Act 1922

5.22 On 15 December 1992 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Act to validate the incorporation of overseas law.

Public Service Determination 1992/30

5.23 On 24 July 1992 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Determination to correct a drafting oversight.

Remuneration Tribunal Determination No.23 of 1988

5.24 On 19 January 1993 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to consider amending the tabling requirements for Determinations made under the *Remuneration Tribunal Act 1973* following a review of the present procedures.

Rules under the *Federal Court of Australia Act 1976*
Statutory Rules 1990 No.414

5.25 On 8 July 1991 the Chief Justice of the Federal Court undertook to amend the Rules to correct a drafting oversight.

South East Fishery (Individual Transferable Quota) Management Plan 1991
Plan of Management No. SEF1 (No.11 of 1991)

5.26 On 27 May 1992 the Minister the Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Plan to correct references.

Statutory Rules series

5.27 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.

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

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

CHAPTER 6

LETTER FROM SENATOR LOOSLEY TO THE PRIME MINISTER

6.1 Following the 13 March 1993 general election Senator Loosley, on behalf of the Committee, wrote to the Prime Minister and all other Ministers about cooperation between the Committee and Ministers, with the object of continuing to ensure a high technical standard of Commonwealth delegated legislation. The letter, set out below, illustrates the relationship between the Committee and the Executive.

"7 April 1993

The Hon Paul Keating MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

I am writing as the Chairman of the Standing Committee on Regulations and Ordinances, which scrutinises non-policy aspects of Commonwealth delegated legislation to ensure that it complies with high standards of personal liberties and parliamentary proprieties.

The Committee has been assisted in its work by the cooperation which it has received from Ministers. This assistance has involved undertaking to amend delegated legislation to remove defects to which the Committee has drawn attention, and to explain related issues. The efforts of the Committee, assisted by this cooperation, have resulted in a generally high technical standard of Commonwealth delegated legislation. This standard is one of the hallmarks of a Government.

The Committee would be grateful if you could draw this letter to the attention of your Office and your Department and ask if the existing high level of cooperation could be maintained.

Yours sincerely

Stephen Loosley
Chairman"

6.2 On 21 April 1993 the Committee received the following reply from the Special Minister of State. It is typical of the replies from Ministers.

"Prime Minister
Canberra
21 April 1993

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

Dear Senator Loosley

Thank you for your letter of 7 April 1993 seeking continued high levels of cooperation between Ministers, Departments and your Committee.

I am pleased to assure you that the Prime Minister's portfolio has a well developed appreciation of the valuable contribution made to the quality of delegated legislation by the scrutiny exercised by your Committee. The portfolio fully recognises the desirability of close cooperation with the Committee and will strive to maintain the high standards of the past.

Yours sincerely

Frank Walker QC MP
Special Minister of State"

CHAPTER 7

DELEGATED LEGISLATION PROVIDING SUPERANNUATION FOR COMMONWEALTH EMPLOYEES: STATEMENT BY SENATOR LOOSLEY

7.1 On 27 May 1993, on behalf of the Committee, Senator Loosley made a statement in the Senate on delegated legislation providing superannuation for Commonwealth employees. The statement brought the Senate up to date with developments in this area since the Committee's *Ninety-First Report*, which examined the numerous and diverse instruments which provided for such superannuation.

Senator Loosley, 27 May 1993, Senate Weekly Hansard, p.1405

7.2 "On 24 June 1992 the Standing Committee on Regulations and Ordinances tabled its *Ninety-First Report*, a Report on scrutiny by the Committee of delegated legislation made under Acts providing superannuation for Commonwealth employees. That Report examined delegated legislation made to effect the operation of the new scheme of Commonwealth superannuation, introduced on 1 July 1990. The Report noted that in the 18 months after that date executive law makers made 105 different legislative instruments in 29 separate series under the parent Acts which established the new scheme and continued the existing scheme. The theme of the Report was the diversity and volume of these instruments and the importance of delegated legislation in contemporary Australian public administration.

7.3 "The purpose of this statement is to bring the Report up to date and to examine further the theme of diversity and volume, from a perspective of 12 months after the Report.

7.4 "As noted in the Report, the new scheme operated through the *Superannuation Act 1976*, the *Superannuation (Productivity Benefit) Act 1988*, the *Superannuation Act 1990* and the *Superannuation Benefits (Supervisory Mechanisms) Act 1990*. All of these Acts provided for delegated legislation, as did the *Superannuation Legislation Amendment Act 1990*, which amended the *Superannuation Act 1976*, the *Superannuation (Productivity Benefit) Act 1988*, and two minor Acts.

7.5 "During 1992 all of these Acts, apart from the *Superannuation Legislation Amendment Act 1990*, were amended. The *Superannuation Act 1976* was amended by four separate Acts. However, only the *Superannuation Amendment Act 1992* directly provided for additional delegated legislation. Some of these provisions were unusual. For instance, new s.155C(2) of the *Superannuation Act 1976* provided:

"(2) If regulations made for the purposes of subsection (1) are inconsistent with a provision of this Act, the regulations prevail and that provision, to the extent of the inconsistency, is of no effect."

7.6 "Also, new ss.110SC and 110SD provided for specified disallowable determinations to be statutory rules for the purposes of the *Statutory Rules Publication Act 1903*. These are beneficial provisions which will ensure high standards of presentation and access for such determinations.

7.7 "As well as being amended by the four Acts, the *Superannuation Act 1976* was also modified by nine separate sets of regulations amending seven separate principal regulations.

7.8 "The 1992 amendments of the other three Acts, the *Superannuation (Productivity Benefit) Act 1988*, the *Superannuation Act 1990* and the *Superannuation Benefits (Supervisory Mechanisms) Act 1990*, did not directly provide for additional delegated legislation.

7.9 "The high volume of delegated legislation made under these Acts in the 18 months between 1 July 1990 and 31 December 1991 was continued during calendar year 1992. In those 12 months the Governor-General and the Minister made 77 separate instruments under the four Acts.

7.10 "Under the *Superannuation Act 1976* the Governor-General and the Minister made 47 disallowable legislative instruments, of which 29 were statutory rules in 13 separate series. Of these 29 statutory rules, 21 were sets of regulations, seven were determinations and one was a declaration.

7.11 "Under the *Superannuation (Productivity Benefit) Act 1988* the Minister made seven statutory rules in three separate series, all of which were declarations.

7.12 "Under the *Superannuation Act 1990* the Minister made nine statutory rules in three separate series, all of which were declarations. The Minister also made two amending deeds.

7.13 "Under the *Superannuation Benefits (Supervisory Mechanisms) Act 1990* the Minister made 12 determinations, in one series, none of which were statutory rules.

7.14 "In summary, of the 77 instruments made under the four parent Acts in 1992, 45 were made as statutory rules and, of these, 21 were made as regulations. The other eight statutory rules included seven determinations and one declaration. The 45 statutory rules were made in 19 separate series. The 32 instruments not made as statutory rules were made in five separate series.

7.15 "In the Report the Committee emphasised the volume and diversity of instruments made to effect the new scheme. This volume and diversity continued

throughout 1992.

7.16 "The volume of delegated legislation made in 1992 was even higher, on a proportionate basis, than it was in 1990 and 1991. The result was that in the first two and half years of the new superannuation scheme, from 1 July 1990 to 31 December 1992, executive law makers made 182 separate disallowable instruments, or more than one for each week of that time.

7.17 "The diversity of the delegated legislation is obvious from the earlier descriptions in this statement. For instance, as noted earlier, the 45 instruments made as statutory rules included 19 separate series.

7.18 "In the Report the Committee reported that the legislative instruments required to operate this one new program illustrated the importance of delegated legislation. The numbers and types of this legislation were an example of the flexibility available to the executive to fill in the administrative details of a scheme established by statute. The Committee also reported that this was an example of the appropriate use of delegated legislation, providing for large numbers of administrative changes over a period. It seemed clear that the scheme could not have been brought into operation as effectively without this legislative option.

7.19 "The delegated legislation made in the 12 months after the Report confirmed and reinforced these conclusions. The Committee scrutinised all this additional legislation, concluding that it did not breach its high standards of parliamentary propriety and personal rights. The Committee believes that its *Ninety-First Report*, together with this statement, is an instructive case study of the appropriate and necessary use of delegated legislation as one of the most important and effective techniques of contemporary Commonwealth public administration."

CHAPTER 8

REGULATIONS IMPOSING UNITED NATIONS SANCTIONS: STATEMENT BY SENATOR LOOSLEY

8.1 On 27 May 1993, on behalf of the Committee, Senator Loosley made a *statement in the Senate on the imposition by delegated legislation of United Nations sanctions*. The statement noted that both the second reading speech and the Explanatory Memorandum for the Charter of the United Nations Amendment Bill 1993, sponsored by the Minister for Foreign Affairs, Senator the Hon Gareth Evans, mentioned with approval the *Ninety-Third Report* of the Committee, which examined the imposition of United Nations sanctions.

Senator Loosley, 27 May 1993, Senate Weekly Hansard, p.1404

8.2 "On 16 December 1992 the Standing Committee on Regulations and Ordinances tabled its *Ninety-Third Report*, a Report on scrutiny by the Committee of regulations imposing United Nations sanctions. That Report examined 19 sets of regulations which effected Australia's implementation of United Nations sanctions against Iraq, Kuwait, Libya and Yugoslavia.

8.3 "The Committee reported on a number of aspects of the regulations. These included concerns about personal rights affected by the sanctions, including the right to travel and to carry on a business, and the right to have adverse decisions of public officials reviewed by an independent tribunal. The Committee was *anxious to ensure that delegated legislation imposing sanctions did not operate harshly or unfairly, or was subject to unreviewable arbitrary decisions by officials*. After correspondence with Ministers the Committee was reassured on these points. This was largely because the sanctions were integrated into existing administrative and legislative structures with which the Committee was familiar. Indeed, a number of existing review provisions had been included at its suggestion.

8.4 "In accordance with its terms of reference, the Committee also considered whether the details of sanctions were so sensitive or important that they should have been provided for in a Bill, which would be subject to all the safeguards and rigours of parliamentary passage. Here also, the Committee concluded that the regulations did not breach its high standards of parliamentary propriety. The reason for this was the uncommon nature of the power under which the regulations were made.

8.5 "This power was derived not from express provisions of a parent Act, under which delegated legislation provides administrative or technical details of a scheme established by that Act. Instead, the regulations implemented general obligations imposed on Australia by international law. In virtually all cases, the

power to make delegated legislation is set out clearly in an Act. Indeed, in the absence of clear and express power in a parent Act the Committee would question the validity of an instrument. However, in the present case the Committee accepted the advice in the good quality Explanatory Statements which accompanied each of the 19 sets of regulations which implemented sanctions, that Australia was obliged to comply with Security Council resolutions. Therefore, the question of parliamentary enactment did not arise. The regulations filled in the details of existing legal duties.

8.6 "In these circumstances the Committee endorsed the use of regulations rather than an Act to carry out Australia's legal obligations. In fact, the use of delegated legislation even appeared preferable to that of an Act. For instance, the regulations merely provided administrative details of an existing legal framework, which was a classic example of the appropriate use of delegated legislation. Also, the nature of Australia's obligations required a quick and flexible legislative response, which was also a classic role of delegated legislation. In this context, sanctions could not only be imposed more quickly by regulation, but also the fine details could be amended more quickly than by Act. Finally, the Committee was advised that Australia's obligation to comply with United Nations sanctions was mandatory. In these circumstances, regulations appeared more suitable than an Act.

8.7 "It was in the context of the *Ninety-Third Report* that the Committee noted the introduction in the Senate on 6 May 1993 of the Charter of the United Nations Amendment Bill 1993, sponsored by the Minister for Foreign Affairs, Senator the Hon Gareth Evans. This Bill proposed amendments of the principal Act to provide for regulations to implement Australia's obligations under the United Nations Charter more comprehensively than was possible under existing legislation. The Minister advised the Senate that strict new sanctions against Yugoslavia required by Security Council Resolution 820 of 17 April 1993 could not at present be implemented. For instance, it was not possible to freeze funds held in Australia by companies based in Yugoslavia. The Minister advised that the central provision in the Bill was to provide for regulations which were necessary or convenient to apply measures adopted by the Security Council. While outlining this central part of the Bill, the Minister referred in a positive way to the *Ninety-Third Report* of the Committee. The Explanatory Memorandum for the Bill also favourably mentioned the Committee.

8.8 "The Minister further advised that the new legislation would supplement, rather than replace, the existing regulations. Also, any regulations made under the proposed Act would be subject to the usual parliamentary scrutiny, including possible disallowance. Persons aggrieved by a decision to make particular regulations could claim that their making was neither necessary nor convenient to apply measures adopted by the Security Council.

8.9 "This statement of the Minister about regulations being necessary and convenient neatly expressed a fundamental requirement of delegated legislation, which is that it should be in accordance with the parent Act. Also, the power to make regulations which is expressly provided in principal Acts is almost invariably

drafted as prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. However, it has been unusual for delegated legislation to be declared or acknowledged to be invalid because it is neither necessary nor convenient. Also, the present Bill does not expressly provide for regulations to be necessary or convenient. Nevertheless, the Committee regards the statement, repeated in the Explanatory Memorandum, as expressing the legal position.

8.10 "The Bill provides almost entirely for the power to make regulations and with associated matters. The importance of its subject matter for Australia's international relations, together with the effect it will have on personal lives, emphasises the indispensable place of delegated legislation in the Commonwealth legislative system."

CHAPTER 9

AUSTRALIAN POSTAL CORPORATION REGULATIONS: STATEMENT BY SENATOR BISHOP

9.1 On 3 November 1992, Senator Bishop made a statement to the Senate on the *Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No.132*. The statement, together with material incorporated in *Hansard*, is an illustrative case study of the operations of the Committee.

Senator Bishop, 3 November 1992, Senate Weekly Hansard, p.2055

9.2 "Three regulations contain provisions that extend the circumstances under which the employees of the Australian Postal Corporation may disclose information for several purposes, including disclosure to ASIO and law enforcement bodies of the Commonwealth, a State or a Territory. They also provide for the trial of a system in Queensland which, if successful, may lead to the introduction of a national change of address service whereby, as the explanatory statement notes, on the written election of a person, the person's new address is given to mailers in possession of the person's former address.

9.3 "The Committee had a number of concerns about the regulations and, therefore, decided that it should hear evidence from the officers from the Department of Transport and Communications. The matters which concerned the Committee included the need for and width of the powers provided in the regulations; the incorporation of the wide provisions in regulations rather than in the principal Act; and whether the Privacy Commissioner had been consulted in respect of regulations. On 16 September, the last day for giving notice, the Committee gave notice of disallowance of the regulations for 12 sitting days after that day to enable it to examine matters further in the light of evidence given.

9.4 "Having further considered the evidence, the Committee advised the Minister that, unless its concerns were met, it would bring forward the notice of motion to disallow the regulations to the first week of sittings in October. In the meantime it wrote to the Privacy Commissioner seeking his comments on the matters of concern to it. The Minister then agreed to repeal and remake the regulations, to limit the period of the trial of the national change of address scheme and to narrow its operation. The circumstances in which information may be released to ASIO and law enforcement agencies would also be limited, preparatory to the introduction of a Bill in the Autumn sittings next year so that Parliament could debate the whole issue.

9.5 "Although this response substantially met our concerns, the Committee asked for further clarification of several matters because of the sensitive issues of

personal rights involved. The Minister provided this information and also undertook to provide a sunset clause for the ASIO and law enforcement provisions. While the Committee did consider leaving its disallowance motion in place until these undertakings were fulfilled, section 48B of the *Acts Interpretation Act 1901* provides that regulations the same in substance as existing regulations may not be made while a notice of disallowance is on the *Notice Paper*. However, the Committee understands that the new regulations will be made within a number of days.

9.6 "In relation to the broader matter, the Committee draws particular attention to the general comments made by the Privacy Commissioner to the Department of Transport and Communications concerning the sheltering by certain departments behind the lowest common denominator provisions governing disclosure under the Privacy Act. The Committee foreshadows that it will be giving close attention to the principles raised by the Privacy Commissioner as they affect Commonwealth administration and the operations of the Committee, and it will report to the Senate in due course. As usual, I seek leave to incorporate in *Hansard* its correspondence with the Minister and letters from the Privacy Commissioner which will show our concerns and the cooperation received from the relevant Minister, Mr Bob Brown. I add for the record that again the Regulations and Ordinances Committee is a truly bipartisan committee of the Senate and, indeed, is always concerned with people's rights."

The documents read as follows:

"20 August 1992

The Hon Bob Brown MP
Minister for Land Transport
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to the Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No.132, considered by the Committee at its meeting of 20 August 1992.

The regulations extend the circumstances under which employees of the Australian Postal Corporation may disclose information, including disclosure to the Australian Security Intelligence Organisation, relating to the enforcement of criminal law, enforcement of a Commonwealth law imposing a pecuniary penalty, the protection of the public revenue or relating to certain personal circumstances.

The Explanatory Statement advises that the disclosures, which involve breaches of privacy, are consistent with Information Privacy Principle (IPP) 11 contained in s.14 of the *Privacy Act 1988*. Because of the sensitivity of the matter, the Committee would appreciate further advice on these possible disclosures, and whether all other procedures required by the Privacy Act have been followed. We would also be grateful for advice on whether the Privacy Commissioner was directly consulted

before the present regulations were made.

Because of the importance of this matter, the Committee would be grateful if suitable officers from the Department could attend its next meeting on 10 September 1992 at 8.30 am in Committee Room 156 in Parliament House, to brief it on the regulations. The Department should confirm arrangements by contacting Ms Janice Paul on 2773799.

Yours sincerely

Patricia Giles
Chair"

"9 September 1992

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

Dear Senator Loosley

I refer to the letter of 20 August 1992 from the former Chairman of the Senate Standing Committee on Regulations and Ordinances requesting advice on amendments to the Australian Postal Corporation Regulations relating to the disclosure of information.

The amendments to the regulations were approved by the Executive Council on 1 June 1992. The Regulations seek to extend the circumstances where an employee of Australia Post may disclose information to authorised ASIO officers, where necessary for the enforcement of criminal law, for the imposition of a pecuniary penalty by the Commonwealth, or to protect the public revenue, or where an individual person has consented to disclosure in the circumstances concerned.

I have attached detailed briefing which addresses the specific concerns raised by the Senate Standing Committee. Officers from my Department will be available to attend the Standing Committee meeting on 10 September 1992 to brief Committee members on the regulations.

Yours sincerely
Bob Brown"

**"AUSTRALIAN POSTAL CORPORATION REGULATIONS (AMENDMENT)
STATUTORY RULES 1992 No 132**

Current Legislation

Subsection 92 (1) of the *Australian Postal Corporation Act 1989* makes it the duty of an Australia Post employee not to disclose any fact or document relating to:

- the contents of postal articles; or
 - postal or telecommunications services provided by Australia Post; or
 - the affairs or personal particulars (including any address) of another person;
- that has come to the employee's knowledge as a consequence of the person's employment with Australia Post.

Subsection 92(2) creates exceptions to subsection 92(1), which enable an employee of Australia Post to disclose any facts or documents:

- in the performance of his or her duties; or
- as a witness summonsed to give evidence or produce documents in a court of law; or
- under the requirements of a law of the Commonwealth; or
- in prescribed circumstances.

Section 70 of the *Crimes Act 1914* makes it an offence for an employee of Australia Post to disclose a fact or document which comes to the employee's knowledge by virtue of his or her employment and which it is the employee's duty not to disclose.

The need for regulations to create further exceptions

The regulations were prepared to enable the disclosure of information in the following circumstances:

- to an authorised officer of ASIO in connection with ASIO's functions; or
- where it is reasonably necessary for the enforcement of the criminal law, of Commonwealth laws imposing a pecuniary penalty, or for the protection of the public revenue; or
- where the fact or document relates to the affairs or personal particulars (including any address) of another person and:

the other person is reasonably likely to have been aware that such information is usually disclosed in those circumstances; or

the other person has consented; or

disclosure is necessary to lessen a serious threat to life or health.

One of the issues that led to the making of the regulations concerned the need for details about holders of post office boxes to be able to be disclosed for law enforcement purposes when those boxes are used for the purpose of defrauding consumers or the Commonwealth.

An example of the latter has been the use of post office boxes as contact addresses by persons illegally operating radio transmitters, or failing to pay their transmitter licence fees. The regulations will enable Australia Post to provide address details concerning such persons when it is reasonably necessary to do so to enforce offences under the *Radiocommunications Act 1983*.

A second issue prompting the making of the regulations concerned Australia Post's proposed National Change of Address Scheme. This scheme will provide for an Australia Post customer's new address to be given to mailers who are in possession of the customer's former address. The scheme will only apply with the express consent of the customer. The scheme will also only apply to mailers who subscribe to the scheme. The scheme is being trialed in Queensland. Australia Post advises that since the introduction of the new change of address form in Queensland in July 1992 around 90% of applicants have authorised the release of their new address.

Additionally, 40% of applicants have requested Australia Post to pass on their new address to Priority Address Notification subscribers listed on the form, ie Commonwealth Bank, Credit Union Australia, Queensland Teachers Credit Union, RACQ and Suncorp. The Queensland trial is expected to run for 6 to 9 months. The trial can only proceed because the regulations that have been put in place allow the disclosure of address information.

The width of the exceptions under the regulations

Regulation 20(a) enables disclosure to an authorised officer of ASIO in connection with ASIO's functions. This exception, which enables disclosure for national security purposes, is in the same terms as the exception in paragraph 88(3)(c) of the *Telecommunications Act 1991*.

Regulation 20(b) enables disclosure where it is reasonably necessary for the enforcement of the criminal law, Commonwealth laws imposing a pecuniary penalty, or protection of the public revenue. This provision is in the same terms as Information Privacy Principle 11(1)(e) in section 14 of the *Privacy Act 1988* and paragraph 88(3)(g) of the *Telecommunications Act*.

Regulation 20(c) enables disclosure where a fact or document relates to the affairs or personal particulars (including any address) of another person and:

the other person is reasonably likely to have been aware that such information is usually disclosed in those circumstances; or

the other person has consented; or

disclosure is necessary to lessen a serious threat to life or health.

This provision is in similar terms to IPP 11(1)(a), (b) and (c) respectively in section 14 of the Privacy Act and paragraph 88(3)(e) of the Telecommunications Act.

The Attorney-General's Department has advised that the regulation is legally consistent with the Privacy Act.

Were any limitations to the width of the power contemplated?

The provisions of the proposed regulations are permissive, enabling disclosure of facts or documents only in the circumstances set out.

In practice, disclosure of information under these regulations will be additionally limited by Australia Post's own internal policies. For example, under the National Change of Address Scheme, disclosure of information will occur only with the express prior consent of the individual concerned.

Australia Post is subject to the Privacy Act as it is a Commonwealth agency. The internal policies will themselves be subject to the requirements of the Information Privacy Principles (eg information storage and security systems required under IPP 4) and the jurisdiction of the Privacy Commissioner. Under IPP 2, where Australia Post collects information, it will be required to ensure that the individual is aware of its usual disclosure practices with respect to such information. It is intended that this notification would include notification of permitted disclosures for which consent is not required such as disclosures under paragraphs 20(b)(i), (ii) and (iii) and paragraphs 20(c)(i) and (iii).

Why are the exemptions included in regulations rather than in an enactment?

When the Australian Postal Corporation Act was enacted, the Parliament included a specific power in paragraph 92(2)(d) to enable further exceptions to the anti-disclosure provision to be specified in regulations. Presumably this was done in recognition that not all the circumstances in which the public interest would require disclosure could be identified in advance and that there should be the flexibility to include further exceptions as required.

However, if the Committee is of the view that it is more desirable that the exceptions be included in the Act rather than the regulations, the Government will give consideration to the possibility of amending the Act to do so. Something similar

occurred when the Telecommunications Act was rewritten last year. Regulations made under the *Telecommunications Act 1989* in the same terms as regulation 20 of the Australian Postal Corporation Regulations were incorporated into section 88 of the 1991 Act.

Was the Privacy Commissioner consulted on the regulations?

The Privacy Commissioner was consulted in the drafting of the regulations. The Commissioner raised two concerns with the proposed amendments:

whether the Information Privacy Principle 11 disclosure exceptions are sufficient for defining the level of secrecy that should attach to the mail; and

whether the exceptions have the effect of ousting the oversight role of the Privacy Commissioner.

In relation to the first concern, this Department took the view that the appropriate balance for the disclosure provision for Australia Post was that agreed to by the Parliament when it adopted the Privacy Principles in the Privacy Act. At the practical level, we do not see scope for the erosion of privacy protection arising from the regulation.

The Privacy Commissioner's concern about protecting the secrecy of mail is primarily dealt with by provisions other than section 92. In particular, subregulation 3(1) of the Australian Postal Corporation Regulations prohibits opening of a postal article other than in accordance with the regulations. The regulations only allow the opening of mail in a narrow range of circumstances, such as:

opening an undeliverable article to obtain information to deliver it; or

opening an article to repair it; or

where there are reasonable grounds for believing the article contains contraband or dutiable items.

The disclosure regulations are expected to operate mainly in relation to address information. The disclosure regulations will not affect the existing restrictions on the opening of mail.

The second concern was that the amendments may have the effect of ousting the jurisdiction of the Privacy Commissioner. This Department has received advice from the Attorney-General's Department on this point. That Department has advised that if information is disclosed contrary to regulation 20, the disclosure would be inconsistent with IPP 11(1)(d) (that is, disclosure would not be disclosure "required or authorised by or under law") and thus it would be a matter that the Privacy Commissioner could investigate if a complaint were made by the individual concerned. The making of this regulation thus does not affect the Privacy Commissioner's jurisdiction with respect to Australia Post.

In addition, as has been noted above, Australia Post employees will be required to follow internal guidelines. The Privacy Commissioner will have jurisdiction to ensure that those internal guidelines provide an appropriate protection for individual privacy.

In this regard, Australia Post has been consulting with the Privacy Commissioner on the establishment and implementation of the trial National Change of Address Scheme. In addition, the Privacy Commissioner has been invited by Australia Post to participate in an analysis of the trial results of the National Change of Address Scheme when implemented.

The Minister conveyed the specific concerns of the Privacy Commissioner to the Chairman of Australia Post on 24 June 1992. In particular, the Minister drew attention to the need for Australia Post employees to have regard to the Information Privacy Principles in implementing the regulations. A copy of this letter is attached."

"14 September 1992

The Hon Bob Brown MP
Minister for Land Transport
Parliament House
CANBERRA ACT

Dear Minister

I refer to correspondence about the Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No. 132, concerning disclosure of information.

The Committee appreciates the ready assistance provided by your officers in making a briefing paper available to, and appearing before, it last Thursday. The Committee, however, has considerable concern about the scope of the regulations, a concern which was not allayed by the evidence given and the subsequent receipt of comments to the Department of Transport and Communications by the Privacy Commissioner.

The Committee intends to examine the matter further at its next meeting, and I shall be in touch with you again following its deliberations. In the meantime, on behalf of the Committee, I shall give notice of disallowance on 16 September to preserve its position while it continues to scrutinise the regulations.

Yours sincerely

Stephen Loosley
Chairman"

"17 September 1992

The Hon Bob Brown MP
Minister for Land Transport
Parliament House
CANBERRA ACT

Dear Minister

I refer again to correspondence about the Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No. 132, concerning disclosure of information. In particular, I refer to my letter of 14 September 1992, which indicated that the Committee intended to examine the matter further at its next meeting and foreshadowed a protective notice of disallowance.

I now advise that the notice was given on 16 September, for 12 sitting days after that day, to preserve the Committee's position. An extract of the relevant Hansard is enclosed for your information.

The Committee, having considered the matter at its meeting of 17 September, as planned, has concluded that the questions it has raised are too serious to await the expiry of the days it has allowed before a motion may be moved and the fulfilment of the promise made at its hearing of 10 September that a proposal would be put to Government to include the matters of concern in principal legislation to enable full Parliamentary debate.

It understands, of course, that the Australian Postal Corporation needs legislative authority for the trial of the proposed National Change of Address Scheme. It has, therefore, asked me to seek from you an assurance that the present regulations will be repealed, and new regulations made to provide for that purpose only, such regulations to operate for the duration of the trial period.

If your assurance that the new regulations will be made as a matter of urgency, together with an expected timetable for their making, is not forthcoming by Tuesday, 6 October 1992, on behalf of the Committee I shall seek the leave of the Senate to bring forward the notice of disallowance to 7 October, to enable the Senate to give consideration to disallowing the regulations in question. As you will be aware, no regulations the same in substance as regulations which have been disallowed may be made within 6 months of such disallowance unless a permissive resolution is passed by the disallowing House.

In order to assist you in your deliberations on the matter, I enclose for your information:

- (a) proof *in camera* evidence which the Committee took from officers of your Department in respect of the regulations.

The Committee has authorised the release of this evidence to you and to such

officers of your Department as you may require to advise you on this matter. The Committee reminds you that the evidence may not be divulged to any other person without further authorisation from the Committee;

- (b) a letter to Mr G.C. Evans, Secretary to the Department of Transport and Communications, from Mr Kevin O'Connor, Privacy Commissioner, to which I referred in my letter of 14 September; and
- (c) a letter from the Committee to Mr O'Connor.

Yours sincerely

Stephen Loosley
Chairman"

"6 October 1992

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

Dear Senator Loosley

I refer to your letters of 14 and 17 September 1992 informing me of the notice by the Senate Standing Committee on Regulations and Ordinances to disallow the Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No. 132, concerning the disclosure of information.

I note that the Committee has expressed concern over the breadth of the circumstances under which disclosure of name and address information by Australia Post employees may be permitted.

I am able to provide the Committee with an assurance that the present regulations will be repealed and a new regulation made that will enable Australia Post to continue its trial of the proposed National Change of Address Scheme in Queensland for a limited period.

The proposed amendments would repeal regulation 20 of the Australian Postal Corporation Regulations. A new provision would prescribe more narrowly the circumstances under which an Australia Post employee is permitted to disclose name and address information under the National Change of Address Scheme. I would propose that the amended regulation be drafted along the lines of the attached drafting instructions to the Attorney-General's Department. The Privacy Commissioner's Office will be fully consulted in the drafting of the regulations and has already advised that the Privacy Commissioner has no in-principle concerns with

the text of the proposed new regulation 20.

It is my intention that the new regulations will be submitted to the Executive Council meeting scheduled for 19 October 1992.

You will be aware that the legislative program for the Budget sittings is full. It is likely that the earliest time that amendments to the *Australian Postal Corporation Act 1989* could be brought to Parliament is the Autumn sittings of 1993. I propose that the new regulation will permit the trial scheme to operate until 30 September 1993. This would enable the results of the trial scheme to be fully evaluated in consultation with Privacy Commissioner, and to enable further regulations or legislation to be enacted, if the Privacy Commissioner is satisfied that the operation of the trial has provided adequate protection for privacy interests. This approach would also ensure that Australia Post would not suffer financial detriment if the trial scheme were ultimately to be extended on a national basis. The Office of the Privacy Commissioner has indicated that it would have no objection to an extension of the evaluation period for the National Change of Address Scheme.

In relation to disclosures to officers from the Australian Security Intelligence Organisation and disclosures for the purposes of criminal law enforcement, it is recognised that the effect of regulation 20 is wider than intended. Following repeal, I propose that it be replaced with a provision which addresses what are understood to be the Committee's concerns.

The Government considers there to be a clear distinction between the disclosure of information relating to address information or ownership of post office boxes, and the disclosure of the content or substance of mail. It is therefore proposed that a new regulation be made which will authorise the disclosure of information (other than the contents of mail). The Privacy Act complaint procedures would apply to disclosures made under this provision. Further legal advice confirming this position is currently being prepared by the Attorney-General's Department.

It is intended that a further provision be included to enable the disclosure of the contents of mail to law enforcement agencies, only where authorised under the requirements of a Commonwealth law, or pursuant to the issue of a search warrant under State or Territory law, or under the ASIO Act.

The proposed provisions are considered important to ensure continuity in authorising the access of ASIO and law enforcement agencies to information necessary for the enforcement of Commonwealth law, until legislation can be brought forward into the Autumn sittings of Parliament.

I trust that the proposed amendments will meet the Committee's concerns.

Yours sincerely

Bob Brown"

"Attachment 1

*Australian Postal Corporation Act 1989 : Regulations
Drafting Instructions*

On 1 June 1992 the Executive Council gave assent to regulations made under section 92(2) of the Australian Postal Corporation Act that extended the circumstances where an employee of Australia Post may disclose information to enable disclosure to ASIO, law enforcement bodies and in certain other circumstances.

The Senate Standing Committee on Regulations and Ordinances has given a notice of disallowance to take effect from 7 October unless new regulations are made (copy of the letter of 17 September is attached).

To give effect to the Committee's decision, regulation 20 should be repealed.

A new regulation 20 should be substituted which provides that subsection 92(1) of the Australian Postal Corporation Act does not apply in relation to a disclosure made by a person:

where the disclosure is of the name or address of another person; and

the other person has given specific prior consent to the disclosure in the circumstances concerned; and

the disclosure is made for the purposes of the trial National Change of Address Scheme being conducted by Australia Post; and

the disclosure takes place during the period that the trial is being conducted in Queensland from 1 July 1992 to 30 September 1993.

Such a provision would enable Australia Post to continue to operate its trial National Change of Address Scheme in Queensland under Regulations until such period as legislation can be brought forward into the Autumn sittings of Parliament to enable the results of the scheme to be assessed in consultation with the Office of the Privacy Commissioner."

"8 October 1992

The Hon Bob Brown MP
Minister for Land Transport
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 6 October 1992 on aspects raised by the Committee of the Australian Postal Corporation Regulations (Amendment), Statutory Rules 1992 No.

132. Because of your expeditious response, the Committee did not need to take the action in the Chamber foreshadowed in its letter of 17 September, and was thus able to give further consideration to the matter at its meeting of 8 October.

The Committee has noted the drafting instructions attached to your letter, which appear to meet its requirements, subject to the following clarifications:

- (a) The Committee would appreciate further advice on the proposal to extend the trial of the National Change of Address Scheme in Queensland from 31 January 1993 to 30 September 1993. This is dealt with to some extent in paragraph 6 of your letter, but we would like more information about the reasons for the proposal for the scheme now to finish not before the Autumn sittings 1993 commence, but rather well into the Budget sittings 1993.
- (b) We would also be grateful for your assurance that the expression "specific prior consent" in the drafting instructions for the NCOA Scheme is intended to bear its plain meaning and that it is not intended to require people to "opt out" of the trial. We share the same concerns about this as the Privacy Commissioner.

The Committee assumes that it is these instructions, and the attendant draft, which have been referred to and accepted by the Privacy Commissioner, as mentioned in paragraph 4 of your letter. The Committee notes, however, that the drafting instructions do not reflect the matters raised in paragraphs 7, 8, 9 and 10 of your letter, dealing with disclosure other than for the NCOA Scheme.

As you are aware, the Committee's primary concern as discussed with your officers at the hearing of 10 September was the inclusion of such broadly-based provisions in delegated rather than primary legislation. The Committee notes that these were also the concerns of the Privacy Commissioner. It was the Committee's intention at that time that only the provisions relating to the continuation of the NCOA Scheme should be the subject of new regulations and that all other matters be included in primary legislation to be dealt with during the Autumn sittings. The Committee is thus unclear as to the intentions conveyed in paragraphs 7 to 10 to your letter, and as to whether these matters too have been laid before the Privacy Commissioner for consideration. Our unease was increased by the comments in the letter which appeared to indicate that information about addresses or ownership of post office boxes was less important than the contents of mail. The Committee is concerned that this view may not demonstrate an awareness of the potential for such information to give rise to domestic violence or other criminal violence, and expresses its disquiet.

As you are aware, the Committee continues to have a notice of disallowance on the Notice Paper. It appreciates that there may be some difficulty in re-making the regulations to accord with the drafting instructions while the notice is still in place. However, given the concerns the Committee has about the possible additions or amendments to the regulations, the Committee intends to take no action to withdraw the notice until the above matters are clarified. On behalf of the

Committee, I therefore ask that you respond to the matters raised not later than Tuesday afternoon, 13 October 1992, to enable it to consider the matter at its next meeting.

Yours sincerely,

Stephen Loosley
Chairman"

"13 October 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 8 October 1992 concerning disclosure of address information under the Australian Postal Corporation Regulations.

The Committee has sought clarification on a number of matters related to Australia Post's Queensland trial of the National Change of Address (NCOA) Scheme and disclosure of information for law enforcement purposes.

As I indicated in my letter of 6 October 1992, the earliest that amendments to the *Australian Postal Corporation Act 1989* could be made would be the 1993 Autumn sittings of Parliament.

If the regulations were to be sunsetted on 31 January 1993, there would be a minimum gap of two to three months (perhaps more if current legislative priorities alter significantly, or if the Autumn 1993 sittings were interrupted) before the passage of primary legislation.

Australia Post advises that if this were the case, it would suffer financial detriment because it would be unable to provide continuity of service to individual customers and to its corporate clients participating in the trial scheme. Australia Post's has a significant investment (around \$1 million) in training and network system configuration that would be reduced in value if the trial process was halted prematurely. In addition, the employment of thirteen casual staff would be terminated if the trial concluded in January 1993, with the prospect of a further five staff requiring redeployment.

In addition, because the new regulation will make clear that positive consent by an individual is required, Australia Post advises that the NCOA form will need to be modified for the trial period. (The use of the term "express consent" used in the drafting instructions, is intended to bear its plain meaning and is not intended to require people to "opt out" of the trial). There will thus need to be a further period of evaluation in view of the new form, and to enable consultation with the Privacy Commissioner on the effectiveness of the trial.

A sufficient period of time therefore needs to be provided so that any modifications can be properly assessed. I understand that the Office of the Privacy Commissioner has indicated that the operation of the trial to 30 September 1993 provides a reasonable trial period in which to assess the service. The extension of the trial to 30 September 1993 does not preclude legislation being introduced and passed earlier.

In relation to disclosure of address information for law enforcement purposes, I note the Committee's concerns in relation to the privacy implications of proposed disclosure of information for law enforcement purposes. The issues raised in paragraphs 7 to 10 of my letter of 6 October relating to disclosure of information for law enforcement purposes were canvassed with the Office of the Privacy Commissioner. The views of the Privacy Commissioner will be sought in the drafting of the proposed regulations. I note however, that the proposal is consistent with the exceptions set out in the Information Privacy Principles relating to criminal law enforcement and protection of public revenue.

In my view, it can be argued that a distinction should be made between the disclosure of the contents of mail and other information such as the ownership of post office boxes. However, in terms of intrusion into individuals' private dealings, I note and appreciate the Committee's concern about the need to control strictly the release of information about addresses or ownership of post office boxes. The Privacy Act complaint procedures would apply to disclosures made under this provision.

In particular, it is important to note that any disclosure would only be authorised to authorities with responsibility for criminal and related law enforcement, as well as to ASIO. I am advised that section 93A of the Australian Security Intelligence Organization Act 1979 removes disclosure by all Commonwealth agencies to ASIO from the operation of the Privacy Act 1988. Proposals for disclosure to ASIO are therefore consistent with the Privacy Act. I understand that the Privacy Commissioner does not oppose this view.

In addition, I am advised that the Privacy Commissioner will have supervision over the disclosure of information including the contents of mail (which will only be disclosed where authorised under the requirements of a Commonwealth law or a search warrant). I also note that the agencies likely to make use of this provision have strict internal and often legislatively based disciplinary controls over the unauthorised use and disclosure of information.

The Australian Federal Police (AFP) and ASIO have advised that access to this information is essential in assisting in the identification of people in groups involved in criminal or national security related activities. One obvious application in the Commonwealth area is in the investigation of drug trafficking. In relation to State and Territory authorities such a disclosure provision could also be extremely useful in investigating for example, paedophile groups exchanging information about the availability of children and child pornography.

The Privacy Commissioner will be consulted on the drafting of the proposed regulation. The matters set out in paragraphs 7 to 10 of my 6 October letter have already been raised with him.

I intend that the proposed regulations include requirements that each disclosure be recorded and that the disclosed information be treated confidentially by the agency to which it is released. In addition, I propose that a sunset clause be included in any regulations authorising access to information for law enforcement purposes, while primary legislation is developed. Because the legislation will need to be developed in consultation with State and Territory authorities I would propose that the regulations be made for a 12 month period to allow time for adequate consultation.

Representatives from the law enforcement and national security agencies have offered to provide in camera evidence to the Committee, should this be considered useful. It should be noted that law enforcement matters relate primarily to the portfolio responsibilities of the Attorney-General and the Minister for Justice, and I would propose to seek their views before such witnesses could be made available to the Committee.

Yours sincerely

Bob Brown"

Correspondence with the Privacy Commissioner

"17 September 1992

Mr Kevin O'Connor
Privacy Commissioner
GPO Box 5218
SYDNEY NSW 2001

Dear Commissioner

The Committee has been examining the Australian Postal Regulations (Amendment), Statutory Rules 1992 No. 132, concerning disclosure of information. The Committee had such concerns about the regulations that it asked officers of the department of Transport and Communications to appear before it, to explain the reasons for making them. A proof transcript of the *in camera* hearing, which the Committee has

authorised for release to you and the relevant officer or officers of the Commission, is enclosed for your consideration. The Committee reminds you that the evidence may not be divulged to any other person without further authorisation from the Committee.

You will note, from page 61 of the transcript, that the departmental officers offered to provide a copy of your advice to the Committee, in response to questions about the level of consultation with you. The Committee has further noted, after receiving a copy of your letter of 7 July, that you made strenuous criticisms of the already extant regulations, criticisms which, as you will observe from the matters the Committee raised with the officers, were shared by the Committee.

Yesterday, the Committee gave a protective notice of disallowance, to enable it to give further consideration to the regulations and to consult you about them. I enclose the relevant *Hansard* extract for your information. The Committee would appreciate any comments you may have but, specifically, it would be interested to establish from you:

- (a) when and how you discovered the existence of the regulations;
- (b) when you received the request for advice in respect of the regulations, referred to in the first paragraph of your letter; and
- (c) whether as yet you have been in touch with the relevant Minister. If so, when, and is it possible for your advice to be made available to the Committee?

As the Committee wishes to resolve the matter during the next sitting week, commencing 6 October, your urgent advice would be appreciated.

I have forwarded a copy of this letter to the Minister for Land Transport, the Hon Bob Brown, with whom the Committee is corresponding on the matter.

Yours sincerely

Stephen Loosley
Chairman"

"25 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.

As to the three questions that you raise:

"(a) when and how you discovered the existence of the regulations;

My office was notified on 26 May 1992 by the Department that it was considering amending the regulations. It provided its draft text. It requested comment by the next day, 27 May. Preliminary comments were provided as requested; and a detailed response was given on 7 July. Both letters are enclosed.

My office received no further advice from the Department as to whether it intended to proceed with its draft regulations. So, I was a little surprised to discover that the regulations had in fact been tabled.

"(b) when you received the request for advice in respect of the regulations, referred to in the first paragraph of your letter;

See my answer to (a) above.

"(c) whether as yet you have been in touch with the relevant Minister. If so, when, and is it possible for your advice to be made available to the Committee?

No, I did not proceed to contact the relevant Minister. I might have done so had I been aware that the regulations were proceeding.

I should add that I received, on 14 September, a letter dated 10 September from the Department making further comments in respect of my letter of 7 July 1992. I also enclose a copy of that letter.

I have now received from the Department a copy of its proposed revised draft regulation, designed to enable the national Change-of-Address trial occurring in Queensland to continue. I will be indicating to the Department that I have no difficulty with the proposed text of the regulation. I will also be indicating to the Department that I do have difficulty with the view that the customer "consent" to

the disclosure is adequately met by the relevant clauses contained in the address form currently in use. For information I attach a copy of the form currently in use with the clauses about which I am concerned marked.

I have, on a number of occasions, expressed my concern to Australia Post over its reliance on presumed consent which can be withdrawn through an "opt-out" facility which requires the individual to write "do not authorise". If it is thought that such an arrangement is sufficient to constitute "consent" for the purposes of this regulation, then I may wish to put proposals for tightening of the regulation.

If you wish to contact my office to discuss this issue the relevant officer is Mr Nigel Waters, Head, Privacy Branch, (telephone 02 229 7665).

Yours sincerely

Kevin O'Connor
Privacy Commissioner

cc Department of Transport and Communications
Australia Post"

Mal Colston
Chairman

December 1993

APPENDIX 1
CLASSIFICATION OF LEGISLATIVE INSTRUMENTS
UNDER THE HEADING "MISCELLANEOUS"
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APPENDIX 2

DISALLOWABLE INSTRUMENTS TABLED IN THE SENATE 1992-93

During the year 1992-93 there were 1652 disallowable legislative instruments tabled in the Senate. Of these, 408 were included in the statutory rules series, which are easily accessible to users, being part of a uniform series which is consecutively numbered, well produced, available on ADP, indexed and eventually included in annual bound volumes. However, the other 1244 instruments are generally less accessible, possessing few of the advantages of statutory rules. These other series are listed as follows:

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Commonwealth Funds Management Ltd Act 1990 determinations, s.38

Corporations Act 1989 accounting standards, s.32

Currency Act 1965 determinations, s.13A

Customs Act 1901 instruments of approval, s.4A

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Interstate Road Transport Act 1985 determinations, s.43A

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