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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES

DELEGATED LEGISLATION AND THE  
*ACTS INTERPRETATION ACT 1901* : A CASE STUDY

NINETY-SEVENTH REPORT

DECEMBER 1993

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**SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES**

**MEMBERS OF THE COMMITTEE**

Senator Mal Colston (Chairman)  
Senator Bill O'Chee (Deputy Chairman)  
Senator Brian Gibson  
Senator Stephen Loosley  
Senator Nick Minchin  
Senator Olive Zakharov

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## 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.
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## INTRODUCTION

The *Acts Interpretation Act 1901*, among other things, provides the legislative framework for the control of delegated legislation by Parliament. This control includes mandatory procedural and other safeguards which ensure that Parliament has the power to exercise its sovereignty over all forms of legislation, both Acts and legislative instruments made under Acts.

The sanctions for breaching these safeguards are suitably exemplary, an offending instrument being either completely void or ceasing to have effect upon the expiry of a specified period. Any administrative action taken in purported reliance on defective instruments is also of no effect.

This Report is a case study of the application of these safeguards to delegated legislation made under two important programs provided for in the *Higher Education Funding Act 1988* and the *States Grants (TAFE Assistance) Act 1989* and administered through the Department of Employment, Education and Training. The Report examines failures to comply with the requirements of the Acts Interpretation Act and the consequent effect on the validity and operation of the legislation made by the Department to effect the administrative details of the two programs. These effects were severe; in one of the programs, which operated on a calendar year basis, every instrument made during calendar years 1990, 1991 and 1992 and most made in 1993, were defective.

The Administrative Review Council, the statutory body responsible for advising the government on important aspects of administrative law, has recommended the repeal of present provisions of the Acts Interpretation Act dealing with delegated legislation and their replacement by a new scheme of safeguards which, if implemented, will provide even greater parliamentary control over delegated legislation. This Report, however, examines the operation of the safeguards which are currently available to the Parliament in relation to delegated legislation.

CHAPTER 1  
THE PARENT ACTS

Both the *Higher Education Funding Act 1988* and the *States Grants (TAFE Assistance) Act 1989* provided for important education programs, administered through the Department of Employment, Education and Training.

The *Higher Education Funding Act 1988* was assented to on 6 January 1989. The Second Reading Speech for the Bill for this Act advised that it gave effect to decisions announced in the 1988 Budget which substantially expanded funding for higher education in the 1989-91 Triennium. The speech further advised that the Government's strategy, expressed in these increases, was one of the most significant in the history of Australian higher education. The purpose of the increases was to provide more higher education opportunities, particularly for young Australians.

The Act provided for the Minister to make a number of kinds of disallowable legislative instruments. These were:

- (a) Declarations under s.4(2) amending the Table of institutions of higher education;
- (b) Determinations under s.15 of grants for expenditure for operating purposes;
- (c) Determinations under s.16 of grants for expenditure for limited operating purposes;
- (d) Determinations under s.24 of grants in respect of teaching hospitals;
- (e) Determinations under s.25 of grants in respect of drug and alcohol education in teaching hospitals;
- (f) Determinations under s.26 of grants for building projects;
- (g) Determinations under s.31 of grants for building projects;
- (h) Determinations under s.32 of grants for renovation projects;
- (i) Determinations under s.100 of grants for expenditure for operating purposes;
- (j) Determinations under s.101 of grants for expenditure for limited operating purposes.



In addition, the Act provided for the Minister to make numbers of legislative instruments which were not disallowable. Some of these legislative instruments were required to be gazetted, others were required to be included in an annual report to Parliament, while others were not required to be either tabled or gazetted.

Also, as with virtually all Acts apart from amending Acts, the Act provided that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters:

- (a) required or permitted by the Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act provided that the Minister may delegate any of his or her powers to an officer of the Department.

The Act was subsequently amended to provide for higher education funding for later years. Some of these amendments affected provisions relating to disallowable legislative instruments.

The *Higher Education Funding Amendment Act (No2) 1991*, which was assented to on 25 November 1991, provided for the Minister to issue disallowable Guidelines under s.26A for non-building capital projects.

The *Higher Education Funding Amendment Act (No2) 1992*, which was assented to on 11 December 1992, repealed Part 5 of the Principal Act, which included ss.100 and 101, under which disallowable instruments could be made. The *Higher Education Funding Legislation Amendment Bill 1993* provided for the Minister to issue disallowable Guidelines under proposed ss.34A(6) and (7) and 36A(2) for basic courses of study and accumulated student load.

#### *States Grants (TAFE Assistance) Act 1989*

The *States Grants (TAFE Assistance) Act 1989* was assented to on 19 December 1989. The Second Reading Speech for the Bill for this Act advised that it gave effect to the Government's Budget decisions on Commonwealth assistance for technical and further education. Its purpose was to provide the legislative basis for the distribution of Commonwealth funds for technical and further education in the States and Territories for 1990.

The Act was subsequently amended to provide for the distribution of these funds in 1991, 1992 and 1993.

The Act provided for the Minister to make two kinds of disallowable legislative instruments. These were:

- (a) Determinations under s.10 of grants for recurrent expenditure;
- (b) Determinations under s.13 of grants for capital expenditure.

The Act did not provide for regulations to be made. This omission was unusual.

The Act provided that the Minister may delegate any of his or her powers under the Act to an officer of the Department.

## CHAPTER 2

### THE REQUIREMENTS OF THE ACTS INTERPRETATION ACT 1901

The *Acts Interpretation Act 1901* provides the formal statutory basis for parliamentary control of delegated legislation. Parliament also has important non-statutory ways of scrutinising executive law making, including debates and questioning Ministers in Parliament and through the operations of committees. Nevertheless, action under the Act provides the only way in which Parliament may directly disallow a legislative instrument.

The *Acts Interpretation Act* further provides that delegated legislation which fails to comply with other specified requirements is of no effect. The Act does not provide, however, that all legislative instruments are subject to its provisions. Many other Acts expressly provide safeguards for delegated legislation specific to those Acts, but some which provide for legislative instruments lack such safeguards. The Administrative Review Council has recommended that all legislative instruments should be brought under a proposed new Act, which will expand and strengthen existing technical and procedural safeguards.

This Chapter describes in non-technical language the safeguards provided by the Acts Interpretation Act under which Parliament exercises its sovereignty over delegated legislation. The Appendix to this Report sets out verbatim the relevant provisions of that Act.

In this context Parliament means either House of the Parliament, although as the Governor-General pointed out when opening the Second Conference of Australian Delegated Legislation Committees in Parliament House in April 1989, in practice it is the Senate which exercises these safeguards.

The Acts Interpretation Act includes an entire Part XII, dealing with regulations. It also includes a general provision, section 46A, which provides a simple procedure for applying Part XII to other legislative instruments, regardless of their nomenclature. Variety of nomenclature is a feature of Commonwealth delegated legislation. Part XII of the Act includes sections 48, 48A, 48B, 49, 49A and 50.

Section 48 of the Act provides important procedural safeguards, which are the core of parliamentary scrutiny of delegated legislation. This section requires all regulations to be notified in the Commonwealth Gazette and to be tabled in each

House of the Parliament within fifteen sitting days of making. Regulations which are not so tabled cease to have effect on the expiry of the fifteen sitting days.

Section 48 also provides that within a further fifteen sitting days notice may be given of intention to disallow regulations up to fifteen sitting days after the notice.

If either House passes such a motion the regulations thereupon cease to have effect. Further, if within fifteen sitting days a notice to disallow regulations has not been dealt with by the House in which the notice was given, the regulations are deemed to have been disallowed. Other provisions of section 48 preserve and extend the right of Parliament to disallow regulations even though the House of Representatives has been dissolved or expired or the Parliament is prorogued. Disallowance of regulations has the same effect as repeal, and revives any regulations repealed by the disallowed regulations. Under section 48, an entire set of regulations may be disallowed, or any one or more sequentially numbered provisions either of that instrument itself or of such provisions inserted in a principal instrument.

Section 48 also provides that regulations commence on a specified date or, in the absence of a specified date, on gazettal. Regulations may not operate retrospectively, however, *if they would prejudice any person apart from the Commonwealth.*

Next, there is a group of three sections, sections 48A, 48B and 49, which ensure that the intention of a House to disallow regulations cannot be defeated by the regulations being made again while required to be tabled, while subject to a notice of motion of disallowance, or for six months after disallowance. Regulations made in contravention of any of these provisions are of no effect.

Section 49A restricts the ways in which regulations may incorporate other material. Section 50 provides for the preservation of rights and obligations acquired under repealed regulations.

In addition, section 4 of the Acts Interpretation Act provides that regulations may be made under provisions of an Act which has not yet come into effect, although such regulations cannot come into effect before the provisions under which they are made.

In summary, the Acts interpretation Act provides a comprehensive set of procedures under which Parliament exercises its supremacy over delegated legislation made by the executive. As noted earlier, the only important area where this control is lacking is those relatively few legislative instruments which are not subject to the Act or to a specific Act providing the same main safeguards as the Act.

**CHAPTER 3**  
**THE DELEGATED LEGISLATION**

*The Higher Education Funding Act 1988*

Between 6 January 1989, the date of assent to the Act, and 25 November 1993, the following 223 Determinations and Declarations, made under the Act, were tabled in the Senate. These are set out below under the year of citation, which is not necessarily the year of tabling.

For the 1989 series, 28 Determinations were tabled, made under sections 15, 16, 24, 25, 26, 31 and 32, and numbered T1/89 - T28/89.

For the 1990 series, 31 Determinations were tabled, made under sections 15, 16, 24, 25, 26, and 31, and numbered T1/90 - T4/90, T6/90 - T14/90, T16/90 - T19/90 and T31/90 - T44/90. One Declaration made under section 4 was also tabled, numbered T5/90.

For the 1991 series, 47 Determinations were tabled, made under sections 15, 16, 24, 26 and 31, and numbered T11/91 - T31/91, T33/91 - T56/91 and T58/91 - T59/91. One Declaration made under section 4 was also tabled, numbered T32/91.

For the 1992 series, 45 Determinations were tabled, made under sections 15, 16, 24, 26 and 31, and numbered T1/92 - T8/92 and T10/92 - T46/92.

For the 1993 series, between 1 January and 25 November, 72 Determinations were tabled, made under sections 15, 16, 24, 25, 26, 31 and 32, and numbered T1/93 - T68/93 and T70/93 - T73/93.

*The States Grants (TAFE Assistance) Act 1989*

Between 19 December 1989, the date of assent to the Act, and 25 November 1993, the following 136 Determinations, made under the Act, were tabled in the Senate. These are set out below under the year of citation, which is not necessarily the year of tabling.

For the 1990 series, 28 Determinations were tabled, numbered No TAFE 1/90 - No TAFE 26/90 and No TAFE 31/90 - No TAFE 32/90.

For the 1991 series, 40 Determinations were tabled, numbered No TAFE 1/91 - No TAFE 25/91 and No TAFE 28/91 - No TAFE 42/91.

For the 1992 series, 39 Determinations were tabled, numbered No TAFE 1/92 - No TAFE 39/92.

For the 1993 series, 29 Determinations were tabled, numbered No TAFE 1/93 - No TAFE 29/93.

## CHAPTER 4

### DEFECTS IN THE DELEGATED LEGISLATION

Numbers of instruments made under the *Higher Education Funding Act 1988* and the *States Grants (TAFE Assistance) Act 1989* were either void from the supposed time of making or subsequently ceased to have effect because of failure to comply with provisions of the *Acts Interpretation Act 1901* ("the Act").

#### *The Higher Education Funding Act 1988*

Of the twenty-eight Determinations tabled in the 1989 series, twenty-seven did not expressly provide for a date of effect. Therefore, under s.48(1)(b)(iv) of the Act, the date of effect should have been the date of gazettal. None of these Determinations, however, was gazetted. Consequently none came into effect, with the result that any payments made in reliance on the Determinations were made without valid authority.

In addition, s.48(1)(a) of the Act requires gazettal of all regulations regardless of date of effect. This failure to gazette was, therefore, another defect in the Determinations.

Of the twenty-nine Determinations tabled in the 1990 series, eight did not expressly provide for a date of effect. Although these eight were subsequently gazetted, payments were made in reliance on their provisions before gazettal. These payments had no legal authority.

In addition, nineteen Determinations were made but not tabled within fifteen sitting days of making, thus breaching s.48(1)(c) of the Act. Under s.48(3) of the Act these Determinations ceased to have effect from the expiry of those fifteen days.

Of the forty-eight Determinations tabled in the 1991 series, seven similarly did not expressly provide for a date of effect, with payments made before gazettal in reliance on their provisions. These payments had no legal authority. Also, ten other Determinations were made in this series but not tabled, with consequent invalidity.

There were similar defective payments in reliance on six of the forty-five Determinations, tabled in the 1992 series, which did not expressly provide for a date of effect.

Of the seventy-two Determinations in the 1993 series tabled between 1 January and 25 November, four were made in supposed reliance on section 4 of the Act, under which regulations may be made under provisions of an Act which have not yet come into effect. These four Determinations, however, were both made and expressed to come into effect before the relevant provisions of the parent Act received assent. In such a case regulations can be neither made nor come into effect. Therefore, these four Determinations were void.

Another Determination in the 1993 series purported to reduce a grant retrospectively with effect from the date of making, which was a date before gazettal. Under s.48(2) of the Act a regulation which disadvantages a person in this fashion is void.

Another Determination in the 1993 series did not provide for a date of effect and unauthorised payments were made before gazettal.

A number of Determinations in the 1993 series were made expressly to remedy defects in earlier Determinations made in the 1989, 1990, 1991, 1992, and 1993 series. This remedial action was retrospective. In the case of the 1989 series retrospectivity was more than four years, to 9 January 1989.

The form of the remedial action was either to revoke and remake the relevant earlier Determinations, or to provide retrospective commencement details to ensure that each Determination was valid or could operate validly.

#### ***The States Grants (TAFE Assistance) Act 1989***

None of the Determinations made under this Act in the 1990, 1991 or 1992 series was expressly provided with a date of effect and none was gazetted in those years. Nevertheless, payments were made in reliance on the Determinations. Such failure to gazette was a breach of the mandatory requirement in s.48(1)(a) of the Act. In addition, the payments made under all these Determinations lacked legal authority.

The position was remedied by ten separate Determinations, all made on 13 August 1993, which revoked every Determination made in 1990, 1991, and 1992 and made fresh Determinations with express retrospective effect of up to three and a half years. All these Determinations were then gazetted on 25 August 1993.

The eighteen Determinations made between 1 January and 8 June 1993 appear either to have not been gazetted or to have not provided for a date of effect with subsequent payments before gazettal. In any case, two fresh Determinations made on 9 June 1993 amended those eighteen earlier Determinations to provide a date of effect.



In addition, one 1993 Determination also reduced the amount of a grant retrospectively. The Determination was therefore void under s.48(2) of the Act. This was remedied by a subsequent Determination which revoked and remade the earlier instrument with effect from the date of gazettal.

## CHAPTER 5

### SCRUTINY BY THE COMMITTEE

The Standing Committee on Regulations and Ordinances scrutinised all the legislative instruments made under both the *Higher Education Funding Act 1988* and the *States Grants (TAFE Assistance) Act 1989*, to ensure compliance with its principles of parliamentary propriety and personal liberty. These principles are set out at the beginning of this and every other Report of the Committee.

The Committee's concerns with these instruments related to technical validity. For reasons of space, it is not possible to set out all of the Committee's correspondence with Ministers about these instruments. A selection of correspondence is, however, set out below. The letters illustrate the way in which the Committee deals with legislative instruments which may be technically invalid.

“30 April 1992

The Hon Peter Baldwin MP  
Minister for Higher Education  
and Employment Services  
Parliament House  
CANBERRA ACT 2600

Dear Minister

I refer to Determinations Nos. T11 and T12 made under s. 15 and s.16 of the *Higher Education Funding Act 1988*, considered by the Committee at its meeting of 30 April 1992.

The Committee is concerned about a possible discrepancy in the Explanatory Statements for the two instruments. The Explanatory Statement for Determination No. T11 advised that there were variations to the funding levels in the three Western Australian Universities. However, there was also an addition of \$94,000 to the financial assistance for operating expenses for Monash University, which is not explained. On the other hand, the Explanatory Statement for Determination No. T12 advised that its purpose is to correct the distribution of the reduction of funding for the change in overseas student policy between Monash University and the Victorian College of Pharmacy. This instrument reduces the amount of financial

assistance for the Victorian College of Pharmacy by \$94,000. The Committee asks whether it was intended that the s.15 increase to Monash University was intended to complement the s.16 reduction to the Victorian College of Pharmacy and, if so, whether this is justified under the provisions of the parent Act.

Yours sincerely

Patricia Giles  
Chair"

"29 July 1992

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

Dear Senator Giles

You wrote to me on 30 April 1992 about the Committee's concern at the possible discrepancy in the Explanatory Statements that accompanied Determination Nos. T11 and T12 made under sections 15 and 16 of the *Higher Education Funding Act 1988*, which were considered by the Committee at its meeting of 30 April.

I have been advised by my Department that the two determinations were made to adjust the *distribution of load between Monash University and the Victorian College of Pharmacy* following a change in overseas student policy made in 1990. The change in policy resulted in the cessation of subsidised overseas students intakes and all new overseas students became full-fee paying. The adjustment to both total and commencing student targets, over a transition period from 1990 to 1993, was necessary to reflect the end of subsidised student intakes. In making the initial adjustment the number of overseas students at the Victorian College of Pharmacy had been inadvertently included in the numbers for Monash University in anticipation of the amalgamation of the two institutions which, at that time, was awaiting the passage of legislation by the Victorian Parliament (the Legislation was passed in the Autumn Session of the Victorian Parliament although administrative arrangements for the amalgamation will not be completed until later in the year).

Determination No. T11 was made under section 16 of the HEFA which covers the *operating grants of institutions outside the Unified National System (UNS) (Victorian College of Pharmacy)* and Determination No. T12 was made under section 15 which covers the *operating grants of members of the UNS (Monash University)*.

Also included in Determination No. T12 was an adjustment affecting Distance Education Centres for a number of other institutions and the Explanatory Statement

supporting the Determination unfortunately only made reference to this matter, thereby not correctly explaining the purpose of the Determination. Apart from this omission the Determinations and Explanatory Statements are correct in all other respects and there is nothing in the legislation which would prevent this adjustment, which is of a routine nature, from being made. It was agreed with the Secretary of your Committee that a revised Explanatory Statement be provided direct to the Committee secretariat as it is not necessary to have the revised Statement formally tabled. I am attaching a copy of the revised Statement for your information.

I hope this explanation clarifies the matter and I apologise for any inconvenience caused to the Committee.

Yours sincerely

Peter Baldwin"

"6 September 1993

The Hon Ross Free MP  
Minister for Schools, Vocational Education  
and Training  
Parliament House  
CANBERRA ACT 2600

Dear Minister

I refer to Determinations Nos.TAFE 19/93, 20/93 and 26/93 made under provisions of the *States Grants (TAFE Assistance) Act 1989*, considered by the Committee at its meeting of 2 September 1993.

Determinations Nos.TAFE 19/1993 and 20/1993 amend every one of the 18 earlier 1993 Determinations by inserting retrospective provisions to commence the earlier Determinations and, in some cases, to amend references to the provisions under which the Determinations were made.

The Explanatory Statements which accompanied the Determination are very brief and do not explain why the Determinations were made. This is in contrast to similar Determinations under the *Higher Education Funding Act 1988*, which their Explanatory Statements advised were variously made because the Determinations were never gazetted, payments were made under them before gazettal, and there were tabling irregularities or prejudicial retrospectivity. The Committee would be grateful for your detailed advice on the reasons for the amendments to these 18 Determinations.

Determination No.TAFE 26/93 was made on 30 June 1993 and expressed to commence on that date. Among other things it reduces the grant for the Hornsby Child Care Centre. Therefore, the Committee would appreciate your assurance that

the Determination was gazetted on that day. If this was not the case the Determination would appear to breach s.48(2) of the *Acts Interpretations Act 1901*.

Yours sincerely

Stephen Loosley  
Chairman"

"6 October 1993

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

Dear Senator

I refer to your letter of 6 September 1993 in which you requested information relating to Determinations Nos. TAFE 19/93, 20/93 and 26/93 made under the provisions of the *States Grants (TAFE Assistance) Act 1989*.

The purpose of Determinations Nos. TAFE 19/93 and 20/93, as set out in the Explanatory Statement, was to overcome a shortcoming in Determinations Nos. TAFE 1/93 to 18/93 by giving them a date of effect. These Determinations had not been gazetted and payments were made under them before gazettal. Gazettal of Determinations Nos. 19/93 and 20/93 as well as Nos. 1/93 to 18/93 would rectify this problem.

In respect of Determination No. TAFE 26/93 you are correct in saying that unless this Determination was gazetted on the day it was made, 30 June 1993, it would appear to be in breach of s.48(2) of the *Acts Interpretation Act 1901*. This had been detected in the Department and further Determination No. TAFE 28/93 has been made, without a date of effect, in place of No. TAFE 26/93. Determination No. TAFE 28/93 came into effect on the date of gazettal, 22 September 1993.

Thank you and your Committee for bringing these matters to my attention.

Yours sincerely

Ross Free"

## CHAPTER 6

### CONCLUSION

This case study of the application of the *Acts Interpretation Act 1901* ("the Act") to delegated legislation made to implement two important programs provided for in the *Higher Education Funding Act 1988* and the *States Grants (TAFE Assistance) Act 1989* illustrates the comprehensive nature of the safeguards and technical requirements provided by Parliament in the Act and the care which executive law makers, in this case officials of the Department of Employment, Education and Training, must exercise when drafting, making and applying delegated legislation.

The legislative instruments made under these two Acts were defective in a number of ways.

Firstly, numbers of instruments were not gazetted. This is not only a breach of the Act but also a breach of the fundamental legal principle that the public should be formally notified of the making of legislation.

Secondly, numbers of instruments came into effect on the date of gazettal. This is, of course, not a breach of the Act and the instruments were subsequently gazetted. Before gazettal, however, payments were made in reliance on the legislative authority of these instruments. Consequently, these payments had no legal authorisation.

Thirdly, numbers of instruments were not tabled within fifteen sitting days of being made. This is a breach of the Act resulting in the instruments ceasing to have effect on the expiry of those fifteen days. Assuming that the instruments were gazetted, payments made in reliance on the instruments during the fifteen day period were valid, although any made after the required tabling period had no legislative authority.

Fourthly, numbers of instruments were made and expressed to come into operation before relevant provisions of the parent Act received assent; consequently those instruments had no effect. Under the Act it is possible to make delegated legislation under provisions of an Act which have not yet come into effect, but not under a supposed Act which has not received assent. Also, although delegated legislation may be made in reliance on provisions which are not yet in effect, such legislation cannot come into effect before the provisions under which it was made.

Fifthly, numbers of instruments purported to reduce with retrospective effect the amount of a grant to an institution. Under the Act such instruments, which retrospectively prejudice the rights of a person other than the Commonwealth, are of no effect.

As noted earlier, following recommendations of the Administrative Review Council, it appears likely that the present provisions of the Act relating to delegated legislation will be replaced by an entirely fresh Act, which will expand and strengthen the technical and procedural safeguards under which Parliament supervises and controls executive law makers. This case study has illustrated the breadth of operation of the presently existing safeguards. Nevertheless, the proposed changes are welcome, as they will further confirm the supremacy of Parliament over all forms of legislation.

## APPENDIX

### Relevant provisions of the *Acts Interpretation Act 1901*

Chapter 2 of this Report sets out in non-technical language the provisions of the *Acts Interpretation Act 1901* dealing with delegated legislation. This Appendix sets out those provisions verbatim.

#### Exercise of certain powers between passing and commencing of Act

“4. (1) Where an Act (in this section referred to as the Act concerned), being:

- (a) an Act enacted on or after the date of commencement of this section that is not to come into operation immediately upon its enactment; or
- (b) an Act enacted before the date of commencement of this section that did not come into operation on or before that date;

is expressed to confer power, or to amend another Act in such a manner that the other Act, as amended, will confer power, to make an appointment or to make an instrument of a legislative or administrative character (including rules, regulations or by-laws), then, unless the contrary intention appears, the power may be exercised, and anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment or instrument into effect, before the Act concerned comes into operation as if it had come into operation.

“(1A) Where:

- (a) an Act that is in operation (in this subsection called the “parent Act”) is expressed to confer power to make an instrument of a legislative or administrative character (including rules, regulations or by-laws); and
- (b) the Act, concerned is expressed to amend the parent Act in such a manner that the parent Act, as amended, will confer additional power to make such instrument;

then, unless the contrary intention appears:

- (c) the powers mentioned in paragraphs (a) and (b) may be exercised by making a single instrument; and



- (d) such an instrument is to be treated as made under subsection (1) so far as any provisions contained in it required an exercise of the additional power mentioned in paragraph (b).

“(2) An appointment made under subsection (1) takes effect:

- (a) on the day specified in the appointment, being a day that is not earlier than the day on which the Act concerned comes into operation; or  
(b) if a day is not specified in the appointment – on the day on which the Act concerned comes into operation.

“(2A) Where, because of some or all of its provisions (in this subsection called the “relevant provisions”), an instrument is made under subsection (1), each relevant provision takes effect, as declared in the instrument:

- (a) on a specified date that is not earlier than the date when the Act concerned comes into operation; or  
(b) from a specified time on a specified date that is not earlier than the date and time when the Act concerned comes into operation; or  
(c) on the date, or from the date and time, when the Act concerned comes into operation.

“(3) Where an Act is to come into operation on a date to be fixed by a Proclamation or other instrument, the Proclamation or other instrument may be made and published at any time after the enactment of the Act.

“(4) Where this section applies to an Act by reason of the fact that that Act is expressed to amend another Act in the manner referred to in subsection (1) and that other Act has not come into operation, this section has effect as if the references in subsections (1), (2) and (2A) to the coming into operation of the Act concerned were references to the coming into operation of the other Act as amended by that Act concerned.

“(5) In subsections (1), (1A), (2), (2A), (3) and (4) a reference to an Act shall be read as including a reference to any provision or provisions of an Act.

“(6) In the application of this section, in accordance with paragraph 46 (a) to rules, regulations or by-laws (including rules, regulations or by-laws made by virtue of this section), references in this section to the enactment of an Act shall be read as references to the making of rules, regulations or by-laws and references in this section to an Act other than the Act concerned shall be read as references to rules, regulations or by-laws.”...

#### Disallowable instruments

“46A. (1) Where a provision (in this subsection called the “enabling provision”) of a law confers power to make an instrument (however described) and the enabling provision or any other provision of the law expressly provides that the

instrument is a disallowable instrument for the purposes of this section, then, except so far as the law otherwise provides:

- (a) sections 48, 48A, 48B, 49 and 50 apply in relation to the instrument as if:
  - (i) references to regulations were references to the instrument;
  - (ii) references to a regulation were references to a provision of the instrument;
  - (iii) references to repeal were references to revocation;
  - (iiia) references in subsection 48 (7) to another regulation included references to a provision of another instrument made under the enabling provision; and
  - (iv) where the enabling provision is a provision of regulations – references to an Act were references to regulations;
- (b) section 49A applies in relation to the instrument as if:
  - (i) the instrument were regulations under an Act; and
  - (ii) the reference in paragraph (1) (a) to regulations included a reference to other instruments made under the enabling provision;
- (c) the instrument shall not be taken to be a statutory rule within the meaning of the *Statutory Rules Publication Act 1903*, but subsections 5(3) to (3C) (inclusive) of that Act apply in relation to the instrument as they apply in relation to statutory rules;
- (d) for the purposes of the application of subsection 5 (3B) of that Act under paragraph (c) of this subsection, the reference in that subsection to the Minister specified in that subsection shall be read as a reference to a Minister administering the enabling provision;
- (e) if the instrument is not an order made by or under the authority of a Minister, section 5 of the *Evidence Act 1905* applies in relation to the instrument as it applies in relation to such an order; and
- (f) if the enabling provision is a provision of regulations, the instrument shall be deemed to be an enactment for the purposes of the *Administrative Appeals Tribunal Act 1975*.

“(2) A reference in subsection (1) to a law is a reference to an Act or to regulations.”...

## PART XII – REGULATIONS

### Regulations

“48. (1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly:

- (a) shall be notified in the *Gazette*;
- (b) shall, subject to this section, take effect from:
  - (i) a specified date;
  - (ii) a specified time on a specified date;

- (iii) the date, or date and time, of commencement of a specified Act or a specified provision of an Act; or
  - (iv) in any other case – the date of notification; and
- (c) shall be laid before each House of the Parliament within 15 sitting day of that House after making of the regulations.

“(2) A regulation, or a provision of regulations, has no effect if, apart from this subsection, it would take effect before the date of notification and as a result:

- (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of notification would be affected so as to disadvantage that person; or
- (b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.

“(3) If any regulations are not laid before each House of the Parliament in accordance with the provisions of subsection (1), they cease to have effect.

“(4) If either House of the Parliament, in pursuance of a motion of which notice has been given within 15 sitting days after any regulations have been laid before that House, passes a resolution disallowing any of those regulations, any regulation so disallowed thereupon ceases to have effect.

“(5) If, at the expiration of 15 sitting days after notice of motion to disallow any regulation has been given in a House of the Parliament, being notice given within 15 sitting days after the regulation has been laid before that House:

- (a) the notice has not been withdrawn and the motion has not been called on ; or
- (b) the motion has been called on, moved and seconded and has not been withdrawn or otherwise disposed of;

the regulation specified in the motion shall thereupon be deemed to have been disallowed.

“(5A) If, before the expiration of 15 sitting days after notice of a motion to disallow any regulation has been given in a House of Parliament:

- (a) the House of Representatives is dissolved or expires, or the Parliament is prorogued; and
- (b) at the time of the dissolution, expiry or prorogation, as the case may be:
  - (i) the notice has not been withdrawn and the motion has not been called on; or
  - (ii) the motion has been called on, moved and seconded and has not been withdrawn or otherwise disposed of;

the regulation shall, for the purposes of subsections (4) and (5), be deemed to have been laid before that first mentioned House on the first sitting day of that first-mentioned House after the dissolution, expiry or prorogation, as the case may be.

“(6) Where a regulation is disallowed, or is deemed to have been disallowed, under this section or ceases to have effect by virtue of the operation of subsection (3), the disallowance of the regulation or the operation of subsection (3) in relation to the regulation, as the case may be, has the same effect as a repeal of the regulation.

“(7) Where:

- (a) a regulation (in this subsection referred to as the “**relevant regulation**”) is disallowed, or is deemed to have effect by virtue of the operation of subsection (3); and
- (b) the relevant regulation repealed, in whole or in part, another regulation that was in force immediately before the relevant regulation came into operation;

the disallowance of the relevant regulation or the operation of subsection (3) in relation to the relevant regulation, as the case may be, has the effect of reviving that other regulation from and including the date of the disallowance or the date on which the relevant regulation ceased to have effect by virtue of that operation of subsection (3), as the case may be, as if the relevant regulation had not been made.

#### Regulations not to be re-made while required to be tabled

“48A. (1) Where a regulation (in this section called the “**original regulation**”) has been made, no regulation the same in substance as the original regulation shall be made during the period defined by subsection (2) unless both Houses of the Parliament by resolution approve the making of a regulation the same in substance as the original regulation.

“(2) The period referred to in subsection (1) is the period starting on the day on which the original regulation was made and ending at the end of 7 days after:

- (a) if the original regulation has been laid, in accordance with paragraph 48 (1) (c), before both Houses of Parliament on the same day—that day;
- (b) if the original regulation has been so laid before both Houses on different days—the later of those days; or
- (c) if the original regulation has not been so laid before both Houses—the last day on which paragraph 48 (1) (c) could have been complied with.

“(3) A regulation made in contravention of this section has no effect.

#### Regulations not to be re-made while subject to disallowance

“48B. (1) Where notice of a motion to disallow a regulation has been given in a House of the Parliament within 15 sitting days after the regulation has been

laid before that House, no regulation the same in substance as the first-mentioned regulation shall be made unless:

- (a) the notice has been withdrawn;
- (b) the regulation is deemed to have been disallowed under subsection 48 (5);
- (c) the motion has been withdrawn or otherwise disposed of; or
- (d) subsection 48 (5A) has applied in relation to the regulation.

“(2) Where:

- (a) because of subsection 48 (5A), a regulation is deemed to have been laid before a House of the Parliament on a particular day; and
- (b) notice of a motion to disallow the regulation has been given in that House with 15 sitting day after that day;

no regulation the same in substance as the first-mentioned regulation shall be made unless:

- (c) the notice has been withdrawn;
- (d) the regulation is deemed to have been disallowed under subsection 48 (5);
- (e) the motion has been withdrawn or otherwise disposed of; or
- (f) subsection 48 (5A) has applied again in relation to the regulation.

“(3) A regulation made in contravention of this section has no effect.

“(4) This section does not limit the operation of section 48A or 49.

**Disallowed regulations not to be re-made unless resolution rescinded or House approves**

“49. (1) Where, in pursuance of section 48, either House of the Parliament disallows any regulation, or any regulation is deemed to have been disallowed, no regulation, being the same in substance as the regulation so disallowed, or deemed to have been disallowed, shall be made within 6 months after the date of the disallowance, unless:

- (a) in the case of a regulation disallowed by resolution – the resolution has been rescinded by the House of the Parliament by which it was passed; or
- (b) in the case of a regulation deemed to have disallowed – the House of the Parliament in which notice of the motion to disallow the regulation was given by resolution approves the making of a regulation the same in substance as the regulation deemed to have been disallowed.

“(2) Any regulation made in contravention of this section has no effect.

### Prescribing matters by reference to other instruments

“49A. (1) Where an Act authorises or requires provision to be made for or in relation to any matter by regulations, the regulations may, unless the contrary intention appears, make provision for or in relation to that matter by applying, adopting or incorporating, with or without notification:

- (a) the provisions of any Act, or of any regulations, as in force at a particular time or as in force from time to time; or
- (b) any matter contained in any other instrument or writing as in force or existing at the time when the first-mentioned regulations take effect;

but, unless the contrary intention appears, regulations shall not, except as provided by this subsection, make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

“(2) In this section, “regulations” means regulations or rules under an Act.

### Effect of repeal of regulations

“50. Where an Act confers power to make regulations, the repeal of any regulations which have been made under the Act shall not, unless the contrary intention appears in the Act or regulations effecting the repeal:

- (a) affect any right, privilege, obligation or liability acquired, accrued or incurred under any regulations so repealed; or
- (b) affect any penalty, forfeiture of punishment incurred in respect of any offence committed against any regulations so repealed; or
- (c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act or regulations had not been passed or made.”

*M. L. Cotton*