THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

REPORT ON

THE LEGISLATIVE INSTRUMENTS BILL 1994

House of Representatives Standing Committee on
Legal and Constitutional Affairs

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FOREWORD

The Committee is pleased to present this report on the Legislative Instruments Bill 1994.

The purpose of the Bill is to give effect to the major recommendations of the Administrative Review Council (ARC) in its report entitled '*Rule Making by Commonwealth Agencies*' (Report No. 35). The Report contains recommendations for improving the quality and accessibility of delegated legislation made under Commonwealth laws.

The Bill's most significant feature is the establishment of an electronic Register for all existing and future legislative instruments. If an instrument is not on the Register it will not be enforceable. The Register will improve access to the law contained in delegated legislation for all concerned.

The Bill also provides comprehensive arrangements for the making, notification and publication of legislative instruments that are significantly different to those that presently apply under the *Acts Interpretation Act 1901* and the *Statutory Rules Publication Act 1903.*

It deals with all Commonwealth legislative instruments as a single class. If there is uncertainty, it empowers the Attorney-General to certify whether an instrument is legislative in character or not.

The office of Principal Legislative Counsel is given statutory responsibility to ensure that legislative instruments are of a high standard from the point of view of their legal effectiveness, clarity and intelligibility to users.

The Bill provides that, as a general rule, legislative instruments that directly affect business must be subject to public consultation before being made.

The bulk of the evidence was in favour of the overall thrust of the Bill. However, the Committee is concerned about consultation and the automatic repeal of instruments (sunsetting). The Bill has not gone as far in relation to these issues as the ARC Report recommended. The Committee considers that this should be done, if not immediately, as soon as practicable.

The Bill addresses a wide range of concerns that, in most cases, have been expressed for a long time. The Committee urges the Parliament to pass the Bill with the changes recommended by the Committee with all expedition so that those concerns may be allayed as soon as possible.

Daryl Melham MP
Chair
9 February 1995

Standing Committee on Legal and Constitutional Affairs

Committee

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Secretary: Ms Judy Middlebrook

Legislative Instruments Bill Sub-committee

Mr Daryl Melham MP, Chair
Hon Michael Duffy MP
Mr Daryl Williams AM QC MP

Sub-committee Secretariat

Inquiry Secretary:	Mr Michael Wright
Research:	Mr Stephen Gisz
Support:	Ms Mearl Price
	Ms Vicki Somlyay

House of Representatives
Parliament House
CANBERRA ACT 2600
Telephone: (06) 277 2358

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Acronyms and abbreviations

ACOSS	Australian Council of Social Service
ACTCOSS	Australian Capital Territory Council of Social Service
AD(JR) Act	*Administrative Decisions (Judicial Review) Act 1977*
AGPS	Australian Government Printing Service
ARC	Administrative Review Council
ASC	Australian Securities Commission
BCA	Business Council of Australia
CD-ROM	Compact disc read only memory
DEET	Department of Employment, Education and Training
DHHS	Department of Human Services and Health
DIEA	Department of Immigration and Ethnic Affairs
DIR	Department of Industrial Relations
DIST	Department of Industry, Science and Technology
DSS	Department of Social Security
EU	European Union
LIP	Legislative Instrument Proposal
OLD	Office of Legislative Drafting
ORR	Office of Regulation Review
PLC	Principal Legislative Counsel
PSC	Public Service Commission
SCALE	Statutes and Cases Automated Legal Inquiry

Glossary

Backcapture	the registration of legislative instruments made before the commencement of the Legislative Instruments Act
Disallowable instruments	Commonwealth secondary legislation to which section 46A of the *Acts Interpretation Act 1901* applies
Gazette	*Commonwealth of Australia Gazette*
Instrument	a formal legal document
Legislative instrument	an instrument that is legislative in character
Primary legislation	enactment of a legislature
Register	the Federal Register of Legislative Instruments
Rule-maker	a person or body empowered to make secondary legislation
Secondary legislation	legislation made under a power conferred by primary legislation
Sunsetting	the automatic repeal of legislation

Chapter 1 Introduction

The chapter highlights the current state of affairs in relation to delegated legislation made by Commonwealth departments and agencies. At present, delegated legislation comes in a variety of forms, ranging from the traditional 'regulation' to newer forms such as 'codes of practice' and 'guidance notes'. Some delegated legislation is neither subject to parliamentary scrutiny nor published in a regular manner. Some of it is poorly drafted.

This chapter provides an overview of the Bill. It addresses many of the problems that exist in relation to the delegated legislation arena. The Bill gives effect to the major recommendations made by the Administrative Review Council in its report, Rule Making by Commonwealth Agencies. The Committee supports the thrust of the Bill. It also supports a review of the Bill by the Administrative Review Council in three years time.

1.1 History of the Bill

1.1.1 The Legislative Instruments Bill 1994 (the Bill) sets out a comprehensive regime for the making, publication and scrutiny of delegated legislation. It is the Government's response to the Administrative Review Council (ARC) Report Rule Making by Commonwealth Agencies' which makes recommendations for improving the quality and access of delegated legislation. The Bill was introduced into the Senate and read a first time on 30 June 1994.

1.1.2 On 25 August, 1994 the Selection of Bills Committee recommended that the Bill be referred to the Senate Standing Committee on Regulations and Ordinances for inquiry and report. The Senate agreed to this recommendation on the same day. That Committee presented its report to the Senate on 17 October 1994. The Committee endorsed the objectives of the Bill and generally supported its main principles. The Government's response to that report was tabled on 8 November 1994.

1.1.3 The Bill was read a second time in the Senate on 9 November 1994. Consideration of the Bill by the Senate in committee of the whole was deferred and the Government agreed that it would not proceed until the House of Representatives Standing Committee on Legal and Constitutional Affairs reported on the Bill. On 10 November 1994 the Attorney-General asked this Committee to report on the Bill. The Committee was also asked to report on the proposed Government amendments, some of which responded to recommendations of the Regulations and Ordinances Committee report, and any related matters.

1.1.4 This is the first time the Committee has been asked to consider a bill that has already been considered by a Senate Committee. The Attorney-General in referring the Bill to the Committee stated:

> Notwithstanding the Bill's consideration by the Senate Committee, the Shadow Attorney-General has raised the desirability of your Committee also examining the Bill, before its passage through the Senate. I have agreed that this is an appropriate course of action, since the Bill is a major legislative project which affects the making, publication and scrutiny of Commonwealth delegated legislation.

1.1.5 The Committee has taken a broader approach to the Bill than did the Senate Committee which has narrower terms of reference. The Committee has endeavoured to avoid duplication of work but this has not always been possible.

1.2 What is delegated legislation?

1.2.1 It has long been accepted that it is not practical for all legislation to be made by the Parliament itself. The practice arose for the Parliament to delegate its legislative powers to other persons and bodies. 'Delegated legislation' refers to the legislative instruments made by a body or person to whom a power to legislate has been delegated by the Parliament. Such instruments are also known as 'subordinate' or 'secondary' legislation.

1.2.2 The earliest example in England of an Act empowering the making of delegated legislation is the Statute of the Staple in 1385. Delegated legislation has formed a major part of Australia's legislation since colonisation. The Australian Senate established a committee in 1932 to scrutinise delegated legislation.

1.2.3 Today the practice of the Parliament delegating its legislative powers to non-parliamentary bodies such as statutory authorities, tribunals and courts, and of course, the Executive is widely accepted. Parliament has neither the time nor the resources to enact all legislation directly. Delegated legislation is used for matters that are not appropriate to include in Acts such as matters that are likely to be constantly changing. It is also considered preferable for matters of detail to be included in delegated legislation so as to avoid cluttering Acts.

1.2.4 Delegated legislation can take a variety of forms which will be considered in greater detail below. Some of the better known types include regulations, rules, by-laws, ordinances and proclamations. Regulations are the traditional form of delegated legislation and are used for legislation of general application. They are made by the Governor-General and drafted by the Office of Legislative Drafting (OLD).

1.2.5 It is not possible to provide the reader with a rigorous explanation of the distinctions between the various forms of delegated legislation. That is a large part of the problem. Delegated legislation has been drafted in one form or another with little science or reason involved in the selection of form. Where one department may have evolved a practise of using the statutory rules series, another might proclaim similar decisions in the form of guidelines.

1.3 Current regime – limitations on delegated legislation

1.3.1 There is a number of limitations on the power of the Commonwealth Parliament to delegate its legislative powers. These constraints on the making of delegated legislation have developed over the years to safeguard against abuses. The current framework of law and practice for the making, publication and scrutiny of delegated legislation consists of:

- the Senate Standing Committee for the Scrutiny of Bills that reports on the appropriateness of clauses in bills that delegate legislative powers
- the actual process for making some delegated legislation, including regulations, requires the preparation of an explanatory statement and involves Ministers and officers of departments and agencies
- the *Acts Interpretation Act 1901* requires regulations and certain other delegated legislative instruments ('disallowable instruments') to be tabled within 15 sitting days of their making and allows a further 15 days within which a motion of disallowance may be moved
- the *Statutory Rules Publications Act 1903* requires all statutory rules (these include regulations, rules or by-laws) to be numbered, printed and sold by the Government Printer
- the Senate Standing Committee on Regulations and Ordinances scrutinises delegated legislation for inappropriate provisions by reference to specified criteria
- judicial review of delegated legislation.

1.3.2 Two of these constraints require a more detailed examination. The parliamentary scrutiny regime under the Acts Interpretation Act applies to regulations and any other instrument that is designated as disallowable under its enabling legislation. Over recent years there has been substantial growth in the number of regulations and other disallowable instruments.

1.3.3 There has also been a large increase in the number of instruments that are legislative in character that are made each year that are not subject to tabling and disallowance. They take a plethora of forms including instructions, codes of practice, guidelines, circulars and practice notes. Such instruments typically empower persons or authorities to direct, determine, notify, order, instruct, declare, issue or publish. They are made by a variety of persons and bodies including ministers, secretaries to departments and heads of agencies. These instruments are not generally drafted by the OLD.

1.3.4 Under the Statutory Rules Publication Act only certain delegated legislation is required to be published by the Australian Government Publishing Service.

Legislative instruments that are disallowable for the purposes of paragraphs 46 A (1) (c) and (d) of the Acts Interpretation Act are not required to be published. This has made a lot of delegated legislation inaccessible.

1.3.5 The result is that there is a large number of legislative instruments that are not subject to parliamentary scrutiny and are not required to be published. There are also many different kinds of these instruments.

1.4 Problems with the current regime

1.4.1 The ARC in its Report Rule Making by Commonwealth Agencies highlighted a number of existing problems in the current regime. It was not surprising that these included:

- a proliferation in the number of delegated legislative instruments and the different kinds of instruments
- the poor quality of drafting of some delegated legislation
- the inaccessibility of some delegated legislation
- an element of chance in the application of the tabling and disallowance procedures of Parliament to delegated legislation.

1.4.2 The ARC was also critical of the lack of consultation requirements for making legislation and the absence of a 'sunsetting' regime. The Report made the following recommendations to address the problems it had highlighted:

- a new Act should be enacted to prescribe procedures for the making, publication and scrutiny of all delegated legislative instruments
- the OLD should be given responsibility to ensure that delegated legislation is prepared to an appropriate standard
- all delegated legislative instruments should be subject to parliamentary scrutiny by way of tabling and disallowance
- a register should be established in which all delegated legislative instruments should be published.

The ARC also recommended the introduction of mandatory public consultation for the making of all instruments and for all instruments to be subject to sunsetting.

1.5 Principal innovations of the Bill

1.5.1 The Bill gives effect to the ARC's recommendations that were intended to deal with the problems of the proliferation of delegated legislation, its inaccessibility, its poor drafting and the inconsistent application of parliamentary scrutiny.

1.5.2 The Bill will have the effect of integrating all delegated legislation of a legislative character into a single class, to be known as *legislative instruments* (regardless of how they are described by the Act under which they are made). The making, publication and parliamentary scrutiny of legislative instruments will largely be carried out in a uniform manner. The Bill will replace the existing regime operating under the Statutory Rules Publication Act and Part XII of the Acts Interpretation Act.

1.5.3 It also establishes a register of existing and future legislative instruments. Such instruments must be registered to be enforceable. The Register will be accessible to the public. At present, there is a diversity of ways, including notification and publication in the *Gazette*, to notify the public about the making of instruments of a legislative character.

1.5.4 The Bill establishes the office of Principal Legislative Counsel within the Attorney-General's Department (AGD) as the office responsible for ensuring delegated legislation is of a high standard.

1.5.5 The Bill departs from the recommendations in the ARC report in that it does not provide for consultation in relation to the making of all instruments nor does it provide for automatic sunsetting. It provides that there must be consultation for proposed legislative instruments that directly affect business. At present, consultation is, in most cases, at the discretion of the relevant Commonwealth agency or department. Instead of sunsetting it provides for the 'backcapture' of all delegated legislation - that is, existing delegated legislation must be entered on the Register but it need not be re-made.

1.6 Outline of the Bill

1.6.1 The Bill is divided into 6 Parts. The main features of each Part are described briefly below.

Part 1 - Preliminary

1.6.2 This Part of the Bill contains a number of definitions. In particular, clause 4 of the Bill defines a legislative instrument. The definition focuses on the legislative character of the instrument as the operative criterion.

Clause 7 provides that if it is uncertain whether an instrument is a legislative instrument, the Attorney-General may determine the matter by issuing a conclusive

certificate. The decision by the Attorney-General is not subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act).

Part 2 - Principal Legislative Counsel

1.6.3 Part 2 of the Bill establishes and sets out the responsibilities of the Principal Legislative Counsel (PLC)[1] in relation to legislative instruments. The PLC is required to ensure that all instruments that are drafted are of a high standard. Furthermore, the PLC is to maintain the electronic register established by Part 4 of the Bill and deliver all instruments to Parliament for tabling and scrutiny under Part 5 of the Bill.

Part 3 - Consultation

1.6.4 Under Part 3 of the Bill consultation may be required in relation to the making of a legislative instrument that directly affects business. If consultation is required, the relevant Commonwealth agency must seek submissions and prepare a Legislative Instrument Proposal (LIP). In some cases, the relevant Minister may decide to seek submissions only from specified organisations. In any other case submissions are to be sought from the public by advertisement. Clause 19 sets out the circumstances in which consultation is not required. Decisions under Part 3 are not subject to review under the AD(JR) Act. However, an explanatory statement which must include details on whether or not there has been consultation, is to be lodged with the PLC for tabling in the Parliament.

Part 4 - Register of Legislative Instruments

1.6.5 Part 4 of the Bill establishes the Federal Register of Legislative Instruments (the Register) and outlines the procedures for the establishment and maintenance of the Register.

1.6.6 The Register is to be divided into Parts A, B and C and the Index. Instruments made on or after the Bill commences must be registered under Part A, otherwise they are not enforceable. Instruments made before the Bill commences must be registered under Part B. These instruments must be registered by a certain date depending on when they were originally made, otherwise they cease to be enforceable. Registration of these pre-existing instruments is known as 'backcapturing'. Certain instruments connected with taxation revenue may be enforceable even if they are not registered.

1.6.7 Certificates issued by the Attorney-General under clause 7 are to be registered under Part C. The Index is the key to the Register and will contain relevant particulars identifying legislative instruments that have been registered.

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1 The Principal Legislative Counsel will be an officer of the Senior Executive Service in the Attorney-General's Department (see clause 12 of the Bill).

1.6.8 The Register is taken to be a complete and accurate record of the information contained in it. The Register is to be kept by computer and is to be available for inspection by the public in electronic form.

Part 5 - Parliamentary scrutiny

1.6.9 Part 5 deals with the parliamentary scrutiny of legislative instruments and is intended to replace existing arrangements under the Acts Interpretation Act. Under the current provisions of that Act 15 days are allowed for tabling. Under the new provisions legislative instruments must be tabled within six sitting days of the House after registration. It will also be possible for a House to resolve to defer consideration of a motion of disallowance for up to six months.

Part 6 - Other matters

1.6.10 Part 6 of the Bill amends other legislation and contains transitional and machinery provisions. In particular, sections 46 and 46A of the Acts Interpretation Act are repealed and replaced by new sections 46, 46A and 46B. New section 46B provides for the commencement, publication and parliamentary scrutiny of an instrument that is not a legislative instrument.

1.7 Proposed amendments to the Bill

1.7.1 As noted in 1.1.3 the Committee has also had referred to it amendments to be moved on behalf of the Government. The amendments consist of pages of amendments to the Bill.

1.7.2 The proposed Government amendments have largely been in response to a report by the Senate Standing Committee on Regulations and Ordinances on the Bill. The amendments were not considered by the Senate because of the Attorney-General's reference of the Bill to this Committee.

1.7.3 The Committee has taken the amendments into account in considering the Bill. Evidence on a number of the amendments has been received by the Committee.

1.8 Support for the Bill

1.8.1 The volume of delegated legislation is increasing and potentially is having a greater impact on all Australians. Developing appropriate instruments, subjecting them to parliamentary scrutiny and ensuring they are accessible to users is consequently more difficult. The Bill attempts to deal with these and other problems associated with delegated legislation by the Commonwealth.

1.8.2 The Committee supports the thrust of the Bill. Almost all evidence received by the Committee expressed support for the objectives of the Bill.

Recommendation 1

The Committee recommends that the Legislative Instruments Bill be passed by the Parliament following due consideration of the recommendations of this report.

1.9 Evaluation of the operation of the Legislative Instruments Act

1.9.1 In the second reading speech for the Bill the Government foreshadowed a review of the operation of the scheme set out in the Bill after a period of three years. It expects the Administrative Review Council to undertake this review.[2]

1.9.2 Professor Saunders expects the Bill to become one of key foundation Acts of the Australian administrative law review system.[3] Professor Hotop told the Committee it is essential that the high standards set by the existing Commonwealth legislation are maintained so that the federal system for the making, publication and parliamentary scrutiny, and ultimately judicial review, of delegated legislation is second to none.[4]

1.9.3 The Attorney-General's Department submitted that there is a commitment to a review being undertaken in three years time.[5] It indicated that a number of departments and agencies may be involved in the review.[6]

1.9.4 The Committee is aware that the Bill will have an effect on the operation of every Ministerial portfolio and on the administration of a great many Acts of the Parliament. It supports an external review of the operation of the legislation after it has been in operation for three years. This should be undertaken by the ARC or other body independent of government. It would be inappropriate for the review to be undertaken as an inter-departmental exercise. The Committee has in mind that the Attorney-General should report to Parliament on the results of the review.

2 *Senate Hansard*, 9 November 1994, p. 2693.

3 Professor CA Saunders, *Transcript*, p. S229.

4 Professor SD Hotop, *Transcript* p. 191.

5 Attorney-General's Department, *Submissions*, p. S213.

6 Mr Morgan, Attorney-General's Department, *Transcript*, p.213.

Recommendation 2

The Committee recommends that the Administrative Review Council or other body independent of government should review the Legislative Instruments Bill after three years' operation and that the Attorney-General report to Parliament on the results of the review.

Chapter 2 Commonwealth legislation by instrument: an overview

This chapter examines the development of delegated legislation within the Commonwealth bureaucracy. In considers in some detail the criteria for deciding the contents of delegated legislation parliamentary scrutiny of delegated legislation, including the role of scrutiny committees judicial review and publication of, and access to, delegated legislation.

2.1 Terminology describing legislative instruments

2.1.1 As noted in 1.1.1 secondary legislation is also known as subordinate legislation or delegated legislation. These descriptions emphasise important attributes of secondary legislation. The terms 'subordinate' or 'secondary' legislation highlight the fact that the legislation must be made under primary legislation and is subject to primary legislation. The term 'delegated legislation' draws attention to the making of the legislation by a delegate of the Parliament or by a delegate of the delegate of the Parliament. This subclass of delegated legislation is often referred to as subdelegated legislation.[7]

2.1.2 Secondary legislation, however described, is no less legislative in character than the primary legislation under which it is made. Individual examples of secondary legislation are also known as legislative instruments. This term is used in the Legislative Instruments Bill and will also be used in this report.[8]

2.1.3 In the earlier part of this century, the kinds of secondary legislation were much fewer than they are today. Provisions of the Acts Interpretation Act mention secondary legislation as specifically including rules, regulations and by-laws. Currently instruments of a legislative character made under Commonwealth Acts are also described as determinations, general orders and instructions, directions, declarations, codes of practice, technical standards, program standards, licence conditions, operational plans, plans of management, strategic plans, zoning plans,

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7 This distinction may be illustrated by the following example:
An Act may provide for the making of regulations. This can result in a Minister making orders that are legislative in character. Subsection 37(1) of the *Meat Inspection Act 1983* authorises the making of regulations that empower the Minister to make orders that are not inconsistent with the Act 'with respect to any matter for or in relation to which provision may be made by the regulations'. The Meat Inspection (Orders) Regulations are the regulations that empower that Minister to make orders. (Statutory Rules 1984 No. 115.

8 An Act may empower the making of instruments of an administrative character. 'Instrument' in this context means a formal legal document.

University Council statutes, policy directions, spectrum plans and frequency band plans.[9]

2.1.4 The growing total number of legislative instruments has been often observed. Since 1990, the following numbers of Statutory Rules and other instruments have been tabled in the Parliament:

Year	Number of Statutory Rules	Number of other instruments	Total number
1990	400	1024	1424
1991	416	1151	1567
1992	387	1228	1615
1993	351	1269	1620
1994	405	1200	1605

Source: Senate Standing Committee on Regulations and Ordinances.

2.1.5 A former senior officer in the Attorney-General's Department, Professor Lindsay Curtis, drew attention to the problem of the large number of forms of secondary legislation. This is in contrast to the earlier practice of using regulations made by the Governor-General as the basic form of delegated legislation and departing from this only in special circumstances.[10]

2.1.6 Professor Curtis asserted that the many forms that delegated legislation now takes means that the convenience of the bureaucracy has been allowed to transcend the convenience of the public. He also believes that while the Bill goes some way to redressing the balance, it does so by establishing registration machinery. This would not have been necessary if more discipline had been exercised by the Parliament over the making of subordinate legislation.[11]

2.1.7 The ARC recognised the importance of not letting this less than satisfactory position deteriorate even further by recommending that:

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9 Senator Vanstone, commented on the range, volume and impact of delegated legislation during the second reading speech on the Bill in the Senate saying '... no-one should underestimate the impact on people's daily lives of that very vast range and volume of delegated legislation. It is just enormous. *Senate Hansard*, 9 November 1994, p 2693. Senator Vanstone quoted an estimate of 115 as the number of types of delegated legislation.

Mr S Bourke of the Department of Employment, Education and Training told the Committee that the *States Grants (Primary and Secondary Education Assistance) Act 1992* has the potential for making in excess of 160 kinds of instruments. (*Transcript*, p. 91.)

10 *Transcript*, p. 142.

11 *Submissions*, p. S97.

(t)he Office of Parliamentary Counsel, in consultation with the Office of Legislative Drafting, should seek to reduce the number of classes of legislative instruments authorised by statute and to establish consistency in nomenclature. [12]

2.2 The purpose of secondary legislation

2.2.1 Legislative instruments contain much of the practical detail of legislation that would be impossible to include in the primary legislation under which it is made. They have a direct impact on peoples' lives.[13]

2.2.2 While secondary legislation may be criticised on the grounds of lack of effective access by the public and on other grounds, it is accepted that legislative instruments are necessary for the effective functioning of a modern state. The bases of this acceptance include:

- delegation of lawmaking can relieve Parliament of the burden of making all the legislation on a particular subject,
- delegation of lawmaking can confine the attention of Parliament to the governing principles and essential features of a particular legislative scheme, that is, the principles and features set out in the primary legislation made by Parliament,
- some matters in an overall legislative scheme need to be introduced or adapted within a time frame that cannot be accommodated in a crowded Parliamentary sittings program,
- some elements in a legislative scheme, although they could not be described as mere detail or inessential features, cannot be formulated in sufficient time to be dealt with in the primary legislation that introduces the scheme.

12 *Rule Making by Commonwealth Agencies*, recommendation 7, p. 28.

13 [they] frequently can have a more direct bearing on the daily lives of people than the Acts under which they are made. Regulations are used to set government fees and charges. They determine certain kinds of allowances for a large sector of the Australian workforce. They regulate public health and safety standards and declare prohibited exports and imports. They are used when a government decides, say, to ban smoking on aircraft, approve rates for nursing homes and private hospitals, determine State entitlements to Commonwealth education assistance grants, set diesel fuel rebate levels and court fees or declare defence practice areas. Regulations provide for all the details. For example ... Excise Regulations made under the *Excise Act 1901* specify the amount of money to be refunded to hoteliers or retailers who return surplus beer to breweries within a certain period. (*Delegated Legislation*, Politics Legal Studies Brief, Parliament House, Canberra.)

2.3 The criteria for primary and secondary legislation

2.3.1 In its report *Rule Making by Commonwealth Agencies*, the ARC has recommended criteria for matters that should only be dealt with in primary legislation. These matters are:

- significant matters of policy
- rules with significant impacts on individual rights and liberties
- taxes and significant fees and charges
- provisions creating offences for which the penalties are either incarceratory or pecuniary in excess of $1,000
- administrative penalties for regulatory offences
- procedural matters going to the essence of a legislative scheme
- amendment of primary legislation.[14]

2.3.2 The thrust of this recommendation was supported by this Committee in its report *Clearer Commonwealth Law*.[15] However, the division of material between primary and secondary legislation in accordance with criteria set out in primary legislation was not supported by the Committee. The Committee accepted that the operation of the criteria as guidelines would make the general principles to be observed clear while leaving sufficient flexibility to cope with contingencies foreseen by some Departments and agencies.[16]

2.3.3 In the absence of evidence to the contrary, it appears that these principles are generally observed. However, the operation of the principles will be affected by the nature of a legislative scheme to which it is applied and this provides some latitude for interpretation.

2.4 Scrutiny of non-parliamentary lawmaking

2.4.1 Most instruments in the Statutory Rules series are made by the Governor-General acting on the advice of the Federal Executive Council. An instrument is placed before Ministers forming a quorum of the Council by the Minister administering the Act under which the instrument is to be made. Before accepting

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14 Recommendation 2, p. 18.

15 Recommendation 20.

16 *Clearer Commonwealth Law*, p. 110.

the advice of the Executive Council, the Governor-General may test the purpose or content of the proposed instrument with the Ministers present. This may lead to the Council deferring consideration of the instrument until further information becomes available or the sponsoring Minister revises it. This is a form of scrutiny at the threshold of the making of some legislative instruments.

2.4.2 Notice of motion by either House of the Parliament to disallow a legislative instrument may be given within 15 days of the tabling of the instrument. If the motion to disallow is passed or otherwise disposed of within 15 sitting days, the instrument ceases to have effect. This is a powerful sanction, particularly in the light of sections 48A, 48B and 49 of the Acts Interpretation Act. Those sections prevent the remaking of an instrument that is still required to be tabled if it is the subject of a motion of disallowance or has been disallowed unless a period of six months has elapsed.

2.5 Senate Standing Committee for the Scrutiny of Bills

2.5.1 The Senate Standing Committee for the Scrutiny of Bills was established by resolution of the Senate on 19 November 1981. The terms of reference of that Committee include whether such Bills, by express words or otherwise:

- inappropriately delegate legislative powers, or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.[17]

Inappropriate delegation of power

2.5.2 In the Report on its operation during the 36th Parliament, the Senate Standing Committee for the Scrutiny of Bills gave the following examples of the issues that have arisen in relation to the inappropriate delegation of power:

- **Henry VIII clauses.** This is a provision in an Act that provides that an instrument made under a provision of the Act may amend or repeal a provision of the Act or of another Act. (Section 4AAAA of the *National Health Act 1953* is an example.) A variation of provisions of this kind is a power to modify by regulation an Act, or a provision of an Act. A modification is the addition, omission or substitution of a provision so that the Act applies in circumstances specified in the Act together with the modification. (Section 183 of the *Superannuation Act 1976* is an example.)

17 Senate Standing Order 24(1)(a)(iv) and (v).

- **Definition of an important term for the purposes of an Act by regulation.** The Committee has drawn attention to definitions in Acts that provide that the defined term has the meaning provided for in the regulations and considers that if that term is central to the operation of the Act its meaning should not be left to the regulations.

- **Setting of rates of levy.** The Committee prefers that the maximum rate, or a method of calculating a maximum rate, should be specified in primary legislation.

- **Ministerial guidelines.** If an Act provides for the making of guidelines that are in fact expressed to be binding, there seems to be little doubt that it should also provide for the instrument setting out the guidelines to be disallowable. The more interesting and problematical situation arises when guidelines are expressed by the enabling Act to be directory only, that is, not formally binding. The Committee requires that guidelines of this kind must be tabled. In addition, if there is the possibility, on the basis of past administrative practice that is known to the Committee, that guidelines that are on their face no more than directory will be treated as mandatory, the Committee may recommend that the guidelines should be subject to parliamentary disallowance.

- ***Proclamations to commence Acts after Royal Assent.*** A *Proclamation* to commence an Act (or a provision of an Act) is a legislative instrument. The Committee has expressed a preference for instruments of this kind to bring the Act or provision into effect within 6 months of Royal Assent. If this is not possible, the Committee looks for the reasons in the Explanatory Memorandum relating to the Bill for the Act. What is not acceptable to the Committee is an unspecified or open-ended period in which the Act or provision concerned is not brought into operation.

Insufficient scrutiny by Parliament

2.5.3 The Scrutiny of Bills Committee (amongst other things) is required to determine whether legislative power is subjected to sufficient parliamentary scrutiny. (see 2.5.1). The committee has made clear its view that if the power to make an instrument of a legislative character is delegated, any instrument made under the power must be subject to disallowance. This principle has been generally accepted.

2.5.4 However, the views of the Scrutiny of Bills Committee are not always accepted by the Parliament. For example, in Alert Digest No. 3 of 1993, the Committee noted that Part 29 of the Superannuation Industry (Supervision) Bill 1993 may be

considered an inappropriate delegation of legislative power.[18] These provisions gave an official the power to modify legislation without any oversighting role being given at the same time to Parliament and is a notable exception to general practice. The instruments under Part 29 of the *Superannuation Industry (Supervision) Act 1993* about which the committee expressed concern are legislative instruments that are not subject to disallowance.

2.6 Senate Standing Committee on Regulations and Ordinances

2.6.1 Since 1932 the Senate Standing Committee on Regulations and Ordinances has examined instruments tabled in the Senate. The Committee examines each instrument to ensure that it:

- is in accordance with the legislation under which it is made
- does not contain matter more appropriate for parliamentary enactment.[19]

2.6.2 In its Annual Report for 1993-94, the Committee gave illustrations of the fashion in which it interprets the principles set out above. In relation to the first of those principles, the Committee may be concerned with not only its technical invalidity[20], but also other aspects of technical impropriety. These may include:

- unreasonably retrospective operation of the instrument
- delegation of administrative authority inappropriately
- deficiencies of a drafting nature that do not go to the validity of the instrument
- lack of numbering or citation of the instrument.[21]

2.6.3 In relation to the second of the principles set out in paragraph 2.6.1, the Committee reiterated its view that the principle goes to the heart of parliamentary propriety. A matter which should be subject to all the safeguards of the parliamentary passage of a Bill should not be included in a legislative instrument.[22]

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18 The provision allowed the Insurance and Superannuation Commissioner to modify or exempt the application of specified provisions, both of the primary law and of the regulations, to a particular superannuation entity or class of superannuation entities without reference to, or reporting to, Parliament.

19 Annual Report 1993-94, p. 1.

20 The grounds for technical invalidity of an instrument are outlined in paragraph 2.7.2.

21 Annual Report 1993-94, pp. 18-22.

22 ibid., p. 9.

2.6.4 The Committee also scrutinises each legislative instrument tabled to ascertain whether the instrument:

- does not trespass unduly on personal rights and liberties
- unduly make the rights and liberties of citizens dependent on administrative decisions that are not subject to review of their merits by a judicial or other independent tribunal.[23]

2.6.5 Of course, a motion of disallowance may also be moved in either House of Parliament for policy reasons or on partisan grounds.

2.6.6 If the Committee is concerned about an instrument, or a provision of an instrument, the Chair of the Committee writes to the Minister concerned either requesting explanation of an aspect of the instrument or provision or requesting that a change be made. If a Minister delays in responding to the Committee, the Chair gives notice in the Senate that on a particular date within the period of 15 sitting days, he or she will move for the disallowance of the instrument or provision. When a satisfactory explanation or undertaking is received the notice is withdrawn.

2.7 Judicial scrutiny of non-Parliamentary lawmaking

2.7.1 In addition to the parliamentary scrutiny detailed above judicial review of legislative instruments may be undertaken.

2.7.2 Professor Pearce[24] has set out the principal grounds for judicial review of delegated legislation as:

- the formal requirements for making the legislation have not been followed
- the legislation deals with a subject that is not within, or exceeds, the scope of the enabling legislation
- the legislation is inconsistent with, or repugnant to, an Act or the general law
- the power to make the legislation has been exercised not for the purpose set out in the enabling legislation but for another purpose

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23 ibid., p. 1.

24 Pearce,D.C. *Delegated legislation in Australia and New Zealand* (1977, Butterworths Pty Ltd, Sydney), pp 93-94.

- the effect of the legislation is so unreasonable that it cannot be regarded as falling within the contemplation of the maker of the enabling legislation

- the meaning of the legislation is so uncertain that its effect cannot be ascertained

- the legislation does not deal itself with the subject concerned but subdelegates the power to another person or body.

2.8 Presentation and publication of, and access to, legislative instruments

2.8.1 Some of the legislative instruments with which this Report is concerned are published in series that are readily available for purchase individually or by subscription from the AGPS. Statutory Rules, the Ordinances of the non self-governing Territories (and regulations made under those Ordinances) are in this category.

2.8.2 They are drafted in the Office of Legislative Drafting (OLD) in the Attorney-General's Department by specialist legislative counsel and are presented in consistent formats. Each series is numbered consecutively on an annual basis. New instruments that change existing instruments employ uniform amending formulas. Consolidations of frequently amended or frequently used instruments are published. Instruments dealing with some subjects, for example, income tax or superannuation, are commercially published as well.

2.8.3 For these reasons, and because they have been in use over a long period, these familiar instruments are often held in public libraries, court libraries and law school libraries, by legal practitioners, government departments and public authorities. Some of these instruments are also accessible using electronic databases with on-line access.

2.8.4 However, for many of the newer kinds of instruments[25], including those that some commentators have referred to as 'secret legislation'[26], even if they are required to be tabled in both Houses of Parliament or published in full in the *Gazette*, there is not public availability that is equivalent to that described in paragraphs 2.8.1, 2.8.2 and 2.8.3.

2.8.5 Even if an instrument that is not in the Statutory Rules series has been published in the *Gazette* or tabled in Parliament, general access to an instrument for all practical purposes depends on the Department or agency that is responsible for administering the instrument making copies of it available to the interested public. A publisher may include instruments of this nature in a loose-leaf service, for

25 See paragraph 2.1.3 above.

26 Professor DC Pearce, *Transcript*, p. 67.

example public rulings within the meaning of section 14ZAAA of the *Taxation Administration Act 1953* are commercially published.

2.8.6 The standards of access, presentation and publication of legislative instruments are not equal to those for Acts. They are less than the standards expected by the Senate Standing Committee on Regulations and Ordinances.[27] Variable access, presentation and publication standards apply to the newer kinds of instruments mentioned in paragraph 2.8.4. The full extent of Commonwealth secondary legislation that is or was in force at a particular time is not easily ascertainable without a great deal of time and effort.[28]

2.9 Conclusions

2.9.1 Secondary legislation is a major source of Commonwealth law. It has an impact across most subjects on which Commonwealth primary legislation is in force.

2.9.2 Legislative instruments, unlike Acts, are not made by Parliament and are not usually subject to public consideration of their form or content before being made. Most legislative instruments are tabled in both Houses of Parliament and are subject to parliamentary scrutiny. Moreover, there is no provision for scrutiny by Parliament of some secondary legislation after it has been made.

2.9.3 Judicial review of secondary legislation is available but is essentially not concerned with the policy or merits of the provisions of the legislation concerned.

2.9.4 There is no requirement for general public consultation about proposed legislative instruments.

2.9.5 The absence of uniform, straightforward means of access to all Commonwealth secondary legislation is apparent. The absence of a mechanism for automatic repeal or review of legislative instruments once they have been made and are in force is also a feature of Commonwealth secondary legislation.

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27 Senate Standing Committee on Regulations and Ordinances, *Annual Report 1993-94*, p. 23.

28 Professor Curtis, *Submissions*, p. S143.

Chapter 3 Definition of a legislative instrument

The term 'legislative instrument' is defined in the Bill. The ARC recommended that it should not be defined. The chapter examines whether it should have been defined or not. The Committee concludes that it should be defined.

The chapter also examines the definition of 'legislative instrument' proposed by the Bill. It is an exhaustive definition that is intended to provide certainty of meaning. The Committee concludes that the definition should be broadened so that it is an inclusive definition.

Considerable attention is given to clause 7 of the Bill which allows the Attorney-General in cases of uncertainty to decide conclusively whether an instrument is a legislative instrument. It is proposed that these decisions should be subject to disallowance by Parliament, but not review under the Administrative Decisions (Judicial Review) Act 1977. The Committee concludes that the decisions of the Attorney-General should be subject to both.

3.1 Introduction

3.1.1 For the Bill to be effective it is important that all instruments of a legislative character fall within the ambit of the Bill. At the same time, it is important that departments and agencies are certain whether an instrument is legislative or not. This chapter examines how this is best achieved. It considers whether the term 'legislative instrument' should be defined, and if so, how it should be defined.

3.1.2 As a means of providing certainty in cases where it is not clear whether an instrument is legislative or not, clause 7 of the Bill provides that the Attorney-General may issue a conclusive certificate that an instrument is legislative. It has been suggested that this is an exercise of judicial power. It is proposed that the appropriate form of scrutiny of these decisions is parliamentary scrutiny, that is by way of disallowance. The Bill excludes these decisions from review under the AD(JR) Act. There is a view that the two forms of scrutiny can co-exist.

3.2 Provisions in the Bill relevant to the definition of a legislative instrument

3.2.1 Clause 4 provides a substantial definition of a legislative instrument. Subclause 4(1) includes the general requirements that the instrument be in writing and that an instrument must

- be made by virtue of a power delegated by Parliament
- determine or alter the content of the law

- directly or indirectly impose, vary or remove an obligation or right, or create a right
- be binding.

Subclause 4(2) provides that certain instruments are legislative instruments for the purposes of the Bill. These are the following instruments:

- Regulations
- Ordinances, or rules, regulations or by-laws under the ordinance
- Instruments required to be published under the *Statutory Rules Publication Act 1903*
- Disallowable instruments under section 46A or Part XII of the *Acts Interpretation Act 1901*
- Proclamations.

3.2.2 Subclause 4(3) provides that the instruments listed in Schedule 1 to the Bill are not legislative instruments. It also excludes an instrument that is made under legislation that specifically states that the instrument is not a legislative instrument for the purposes of the Bill.

3.3 Rules of Court

3.3.1 Clause 6 expressly excludes rules of court from being legislative instruments for the purposes of the Bill. However, the Bill does amend various Acts establishing Federal courts to provide a court specific regime based on the principles underlying the Bill (see clause 53 and Schedule 4).

3.4 Certificates issued by the Attorney-General

3.4.1 Clause 7 deals with the situation where a rule-maker is not certain whether an existing instrument or prospective instrument is legislative in character. It allows the Attorney-General to determine conclusively whether the instrument is a legislative instrument for the purposes of the Bill. A decision of the Attorney-General is not reviewable under the AD(JR) Act. Proposed government amendments to clause 7 provide for the power to be exercised personally by the Attorney-General and for the decision to be subject to disallowance by Parliament.

3.5 Nature of the definition of legislative instrument

subclause 4(2) includes particular instruments that may not readily fall within the subclause (1).[29] Professor Hotop told the Committee that the definition is exhaustive because subclause (1) sets out the criteria that must be satisfied for there to be a legislative instrument. If the criteria are not met the instrument is not legislative. He submitted that the definition is inclusive, but only in the sense that it is fairly broad. The Committee, in accordance with principles of statutory interpretation, agrees that the definition is exhaustive.

3.6 ARC proposal not to define a legislative instrument

3.6.1 In the second reading speech for the Bill, the Government stated that in its view the uncertainty that would have been created from not defining the term 'legislative instrument' would have resulted in significant legal proceedings to determine the ambit of the legislation, and that the approach taken in the Bill will relieve the community of that cost burden.[30] Mr Morgan told the Committee:

> In our consultations with departments and agencies in developing the policy, we attempted a number of different approaches to defining how a definition of a legislative instrument might occur. What we have here is the crystallisation of all of the competing views and something that we think is workable. We did look at approaching it in different ways, but we went this way because it provides greater certainty, at least in our view, that will be the result - greater certainty and ease of application.[31]

3.6.2 The ARC in its report *Rule Making by Commonwealth Agencies* recommended that the Legislative Instruments Act should apply to all delegated instruments that are legislative in character unless specifically excluded, and that the term 'legislative instrument' should not be defined in the Act. It also recommended that to assist agencies, the essential characteristics of legislative instruments should be set out in the Legislation Handbook.[32]

3.7 Assessment of ARC proposal

3.7.1 The ARC argued that the major advantage of this approach was that it would give the Legislative Instruments Act comprehensive coverage and it would create a simple scheme.[33] It acknowledged that because the distinction between legislative and administrative instruments is not always clear, some uncertainty may arise. The ARC stated that it did not expect this to cause 'significant practical difficulties' because in cases of doubt it was likely that agencies would seek to clarify the status

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29 Mr Morgan, Attorney-General's Department, *Transcript*, p.202.

30 *Senate Hansard*, 9 November 1994, p. 2693.

31 Mr Morgan, Attorney-General's Department, *Transcript*, p.109-110.

32 Recommendation 3, p.23.

33 *Rule Making by Commonwealth Agencies*, p. 22.

of instruments by exempting them from the Act.[34] In its submissions to the Committee, the ARC emphasised these arguments.[35]

3.7.2 Professor Saunders explained to the Committee that the ARC approach merely referred to the concept of an instrument as legislative in character and relied on that to complement the AD(JR) Act which refers to decisions of an administrative character. She indicated that the ARC considered it likely that a practice would arise fairly quickly whereby drafters of enabling legislation would identify legislative instruments as they do now when deciding if instruments should be disallowable by the Parliament.[36] Professor Hotop also favoured the approach recommended by the ARC.[37] He argued that the distinction between 'legislative' and 'administrative' had already been greatly elucidated by the Federal Court for the purposes of determining the ambit of the AD(JR) Act. Such litigation, at least to the same degree, was not likely to be replicated under the Bill.[38]

3.7.3 Mr Morgan argued that it was not appropriate to take the general approach of the AD(JR) Act but to be more specific.[39] Ms Baker also argued that it provided greater guidance to identify the essential elements of a legislative instrument rather than leaving them to be litigated. There was a need to give greater certainty to the meaning of the term 'legislative instrument' because if an instrument was classified incorrectly and not registered it would be unenforceable.[40]

3.7.4 Mr Argument was critical of the ARC's recommendation. He believed that the ARC was being 'more than a little optimistic' in suggesting that there would be few difficulties in practice for agencies to seek clarification of the status of an instrument by exempting it from the Bill. The ARC was also placing too much faith in the capacity of agencies to comply in a reasoned and accurate way with the requirements of the Bill because the validity of their instruments would be put at risk if they did not.[41] He supported the inclusion in the Bill of the definition. It accorded with a recommendation made by the Fourth Australasian and Pacific Conference on Delegated Legislation.[42] Professor Pearce who was a member of the ARC, and then engaged as a consultant to its report, *Rule Making by Commonwealth Agencies*,

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34 ibid., p. 23.

35 ARC, *Submissions*, p. S68.

36 Professor Saunders, *Transcript*, p. 229.

37 Professor Hotop, *Submissions*, p. S 185.

38 ibid.

39 Mr Morgan, Attorney-General's Department, *Transcript*, p.203.

40 Ms Baker, Attorney-General's Department, *Transcript*, p. 204.

41 Mr Argument, *Submissions*, p. S30.

42 ibid., p. S31.

submitted that the approach taken in the Bill was appropriate and preferable to the ARC suggestion.[43]

3.7.5 The Committee accepts that it can be difficult to determine whether an instrument is legislative or administrative in character. For this reason it is in favour of the Bill containing a definition.

3.8 Uncertainty and the definition of legislative instrument

3.8.1 Mr Dyer questioned whether the definition would reduce or increase uncertainty as to what the Bill covers. He raised the following issues:

- clause 4(2)(c)(ii) may be so broad as to include any Commonwealth instrument of a legislative character
- although the definition may make it clearer that certain instruments do not constitute legislative instruments, this could achieved just as effectively by the use of an inclusive list, without a definition
- it is questionable whether more detailed prescription (such as clause 4 provides) actually increases certainty. The Corporations Law simplification program would suggest it may not
- clause 4 may make it easier by providing grounds to seek review of certificates issued under clause 7, thereby reducing the certainty which it is intended to provide.

3.8.2 Mr Dyer recommended that clause 4 be simplified, for example by deleting subclause (1) and modifying the remainder. He also recommended that the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee for Regulations and Ordinances should be given the function of specifying which powers in legislation give rise to 'legislative instruments'.[44] This would provide a high degree of certainty at least in relation to 'new powers'.[45]

3.8.3 Evidence was also received from a number of Commonwealth departments and agencies expressing concerns about the certainty of the definition. The Department of Employment, Education and Training (DEET) submitted that there was doubt in the department about the adequacy of the definition. Of particular concern was the application of paragraph 4(1)(b). DEET suggested that guidelines for use by non-

43 Professor Pearce, *Submissions*, p. S 6.

44 Mr Dyer, *Submissions*, pp. S84-85.

45 ibid., p. S85.

lawyers would be advantageous.[46] Mr Bourke told the Committee that DEET had been working with the Attorney-General's Department to establish principles so that it is clear whether an instrument is legislative or not.[47] Ms Baker agreed that it would be useful to establish such principles, but indicated that the process had just begin.[48] The Public Service Commissioner (PSC) submitted that would probably need to seek the advice from the Attorney-General's Department in relation to the application of the Bill to a number of types of instruments.[49]

3.8.4 The Australian Securities Commission (ASC) argued that the Bill has an arbitrary application to Class Orders without a sound policy rationale. The ASC has power under the Corporations Law to modify its application to certain persons or bodies by issuing Class Orders. The application of the Bill is uncertain because only some of the instruments made under its Class Orders powers will be of sufficient generality to fall within the scope of the definition. It would lead to commercial uncertainty.[50]

3.9 Broadening the definition of legislative instrument

3.9.1 Professor Hotop submitted that the inclusion in the Bill of an exhaustive definition such as clause 4 (see paragraph 3.5.1) runs the risk that it will not catch all the instruments of a legislative character that were intended to be caught. Given that a significant body of 'quasi- legislation' (including administrative rules, guidelines, and policies) is already beyond the intended scope of the Bill, it is essential that all other forms of delegated legislation are caught.[51] He told the Committee:

> making the definition exhaustive runs the risk of closing the door and not catching all forms of legislative instrument that were intended to be caught.[52]

3.9.2 He submitted that this was best achieved by following the ARC recommendation and adopting a general definition analogous and complementary to the definition of the expression 'decision to which this Act applies' in section 3(1) of the AD(JR) Act. The effect of this would be that all delegated instruments of a

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46 DEET, *Submissions*, p. S35.

47 Mr Bourke DEET, *Transcript*, pp. 91-92.

48 Ms Baker Attorney-General's Department, *Transcript*, p. 92.

49 PSC, *Submissions*, p. s182.

50 ASC, *Submissions*, pp. S 93-95.

51 Professor Hotop, *Submissions*, p. S185.

52 Professor Hotop, *Transcript*, p.234.

legislative character would be caught, unless expressly excluded.[53] Under this approach the definition would simply provide that a legislative instrument is an instrument of a legislative character.

3.9.3 However, Professor Hotop agreed with the Attorney-General's Department that the guidance provided by the current definition was very useful. He explained that this could be achieved by making the description of 'legislative instrument' in paragraphs (b) to (d) of the definition indicative rather than exhaustive[54]. He stated:

> if those general words were there as a starting point and then, of course, the more specific instances followed, you might have the best of both worlds in the sense that you have a reasonably specific set of provisions as to what should be registered, what is a legislative instrument, but you do not close the door off completely so that you avoid the risk of not catching instruments that really were intended to be caught.[55]

3.9.4 He did not expect by 'leaving the door open' there would be much, 'if any' litigation flowing from it.[56] Professor Saunders indicated that this was 'quite close to the ARC's approach', but more comprehensive.[57] The Attorney-General's Department did not agree that the definition should be altered in this way.[58]

3.9.5 Professor Hotop also submitted that paragraph (c) should be broadened to include express reference to imposing a liability, creating a power and affecting a privilege or an interest. Alternatively, and this was his preference, paragraph 4 (1) (c) could be deleted altogether. The essential characteristics of a legislative instrument are set out in paragraphs 4 (1) (b) and (d).[59]

3.9.6 Mr Perton's evidence is relevant in this regard. He contrasted the 'open definition' in the Victorian Subordinate Legislation Act (only local laws and court rules are excluded from the definition of statutory rule) with the definition in the Bill that is narrowed by tests. He pointed out that an instrument could alter the law and be binding, but because it did not alter rights, (see clause 4(1)(c)) it would not fall within the definition.[60]

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53 Professor Hotop, *Submissions*, p. S185.

54 Professor Hotop, *Transcript*, p. 205.

55 ibid., p. 204.

56 ibid.

57 Professor Saunders, *Transcript*, p.233.

58 *Transcript*, p.204.

59 Professor Hotop, *Submissions*, p. S185.

60 Mr Perton MLA, *Submissions*, p. S80.

3.10 Conclusions

3.10.1 The Committee concludes from the evidence that there is some doubt as to whether the definition has achieved the certainty of meaning that it was intended to achieve. Furthermore, the Committee accepts that an exhaustive definition such as clause 4 runs the risk that it will not catch all legislative instruments that were intended to be caught, and this is undesirable. The Committee considers that the definition should be altered to ensure that this does not happen, but at the same time it should provide guidance as to the characteristics of a legislative instrument.

3.10.2 The Committee considers that this is best achieved by adopting the suggestion put forward by Professor Hotop and that was supported by Professor Saunders, namely to provide for a general definition analogous and complementary to the definition of the expression 'decision to which this Act applies' in section 3(1) of the AD(JR) Act. At the same time the definition should list the conditions in paragraphs 4(1)(b) to (d) as being indicative of a legislative instrument. These conditions would provide guidance to departments and agencies, but would not limit the definition. In conjunction with these changes, paragraph (1)(c) should be expanded to include imposing a liability, creating a power or affecting a privilege or interest. Subclause 4(2) would remain in substance unaltered. The Committee does not believe this approach will lead to significant litigation.

3.10.3 The Committee also considers that if these change are made it will be desirable to provide that a legislative instrument does not include an instrument of administrative character within the meaning of the AD(JR) Act. This would provide practical guidance to departments and agencies and make it perfectly clear that legislative instruments do not include administrative instruments.

Recommendation 3

The Committee recommends:

the definition of 'legislative instrument' in clause 4 of the Legislative Instruments Bill should be amended to provide that a legislative instrument is an instrument in writing of a legislative character that is or was made in the exercise of a power delegated by the Parliament; and

the definition should retain proposed paragraphs 4(1)(b) to (d) of the definition, but only as indicia of a legislative instrument; and

the definition should expand paragraph 4(1)(c) to include imposing a liability, creating a power and affecting a privilege or interest; and

the definition should provide that it does not include an instrument of a administrative character within the meaning of the *Administrative Decisions (Judicial Review) Act 1977.*

3.11 Guidelines and principles of interpretation

3.11.1 The Committee accepts the evidence that supports the development of guidelines and principles of interpretation to assist agencies and departments in applying the definition.

Recommendation 4

The Committee recommends that guidelines and principles of interpretation should be developed by the Attorney-General's Department in conjunction with other agencies and departments to assist them in applying the definition of legislative instrument in the Legislative Instruments Bill.

3.12 Certificates issued by the Attorney-General under clause 7

3.12.1 Under clause 7 of the Bill, the Attorney-General is given the power to make conclusive determinations about whether or not an instrument is legislative. There is no scope for the Parliament to review the decision and the power to make a determination is expressly excluded from review under the AD(JR) Act.

3.12.2 Government amendments propose to make a conclusive certificate issued by the Attorney-General a disallowable instrument for the purposes of section 46B of the Acts Interpretation Act that is it is subject to disallowance by Parliament. The Attorney-General will also be required to exercise the power personally, ie the power can not be delegated.

3.13 Further issues regarding clause 7

Character of clause 7 – judicial or administrative

3.13.1 Mr Morgan told the Committee, as he did the Senate Standing Committee on Regulation and Ordinances, that it was the view of the Attorney-General's Department that the instrument made by the Attorney-General under clause 7 was administrative in character and not judicial.[61]

3.13.2 Senator Spindler argued that clause 7 confers quasi-judicial powers on the Attorney-General in breach of chapter 3 of the Constitution.[62] Professor Hotop maintained that it is not judicial.[63] Professor Curtis indicated the problem could be resolved by changing the definition of legislative instrument to include an instrument certified by the Attorney-General to be legislative and to exclude an instrument certified by the Attorney-General to be not a legislative instrument .[64] The Attorney-General's Department submitted that this was a possibility, but indicated that, unlike clause 7, it would not be limited to situations of uncertainty and would also remove parliament's power to scrutinise the decisions of the Attorney-General.[65]

3.13.3 The Committee is inclined to the view that the power of the Attorney-General is administrative in character and not judicial. The Attorney-General is certifying whether an instrument is legislative, that is whether the provisions of the Act apply or not. The Attorney-General is not determining an issue of law between litigants.

Parliamentary scrutiny of clause 7 certificates

3.13.4 The Committee notes that the proposed government amendments will provide for the decisions of the Attorney-General to be made subject to disallowance by Parliament. The Committee is concerned whether this is the best form of scrutiny of these decisions. It notes that the Bill excludes review under the AD(JR) Act.

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61 Mr Morgan Attorney-General's Department, *Transcript*, p. 24.

62 Senator Spindler, *Submissions*, p. S199; *Transcript*, p.237.

63 Professor Hotop, *Submissions*, p. S185.

64 Professor Curtis, *Submissions*, p. S102.

65 Attorney-General's Department, *Submissions*, p. S192.

3.13.5 Mr Morgan told the Committee that the Attorney-General's Department expects clause 7 to be used only in a 'very few cases'.[66]

3.13.6 Professor Pearce told the Committee that the approach proposed by the Government (to rely on Parliamentary scrutiny) is a pragmatic effort to keep the courts out of the legislative arena and has some attraction as an alternative measure to judicial intervention.[67] Mr Morgan indicated it was simply a means whereby the Parliament could scrutinise whether the power it gave to the Executive (the Attorney-General) was being exercised correctly.[68] Professor Pearce agreed with this assessment.[69]

3.13.7 Ms Davies told the Committee that judicial scrutiny was costly to the individual and likely to occasion considerable delay compared to the parliamentary scrutiny.[70] Mr Dyer submitted that judicial review may be sought to delay the making of legislative instruments. If this was the justification for limiting judicial review, then it is desirable to have some form of scrutiny by the Parliament.[71] A number of witnesses supported making certificates issued by the Attorney-General disallowable, but did not support exclusion of review under the AD(JR) Act.[72]

3.13.8 The Committee agrees that the decisions of the Attorney-General under clause 7 should be subject to parliamentary scrutiny. The Committee considers that it is necessary to examine subclause 7(5) before deciding whether excluding review under the AD(JR) Act is appropriate.

3.14 Conclusive nature of clause 7 certificates and review under the AD(JR) Act

3.14.1 A number of witnesses questioned whether judicial review had been completely excluded in relation to certificates issued by the Attorney-General. Subclause 7(5) provides that the Attorney-General's certificate is, 'for all purposes conclusive' of the question whether the instrument is legislative.

3.14.2 Professor Hotop submitted that privative clauses, such as that contained in subclause 7(5), are contrary to the ethos of 'the new administrative law'. He did not support the inclusion of the subclause in the Bill. In his view a certificate would not

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66 *Transcript*, p. 244.

67 Professor Pearce, *Transcript*, p. 47.

68 Mr Morgan Attorney-General's Department, *Transcript*, p. 49.

69 Professor Pearce, *Transcript*, p. 47.

70 Ms Davies Attorney-General's Department, *Transcript*, p. 50.

71 Mr Dyer, *Submissions*, p. S84.

72 Professor Hotop, *Submissions*, p. 185; Professor Saunders, *Transcript*, p. 245; Senator Spindler, *Submissions*, p. S199.

be absolutely conclusive since it would be subject to review by the High Court in its original jurisdiction conferred by s.75(v) of the Constitution. Furthermore it was arguable that subclause 7(5) would not exclude review by the Federal Court in exercise of its jurisdiction under section 39B of the Judiciary Act.[73]Mr Dyer also submitted that such decisions could be reviewed by the High Court and arguably the Federal Court. He submitted that it made no sense to exclude review under the AD(JR) Act if these other options for review were available.[74]

3.14.3 Mr Morgan agreed that the High Court and the Federal Court could review decisions made by the Attorney-General under clause 7. Judicial review by the High Court is constitutionally entrenched by the Constitution and can not be limited by legislation. However, there was little point in excluding review under section 39B of the Judiciary Act because a person could commence proceedings in the High Court and then move the matter to the Federal Court. There were other legislative schemes that excluded review under the AD(JR) Act and did not exclude review under section 39B of the Judiciary Act. It was important to maintain consistency. [75]

3.14.4 Mr Morgan submitted that review under the AD(JR) Act is a much more cost effective and more flexible mechanism for people to challenge administrative decisions.[76] He told the Committee that the Government did not want to have this easier form of review available to the public. The appropriate mechanism was for parliamentary scrutiny.[77] Although decisions of the Attorney-General are administrative in character in the view of the Department, the Bill treats them as legislative by providing for them to be registered and to be disallowed by the Parliament. For this reason it was considered appropriate to exclude review under the AD(JR) Act, even though other forms of judicial review were possible.[78] Professor Saunders did not accept this argument and indicated that in the past the ARC had also not accepted it.[79] She also indicated that currently many regulations are subject to parliamentary scrutiny and at the same time subject to review under the AD(JR) Act.[80]

3.14.5 The Committee accepts that parliamentary scrutiny and review under the AD(JR) Act are not incompatible. As a matter of legal principle, the Committee believes that review under the AD(JR) Act should only be excluded if there are compelling reasons. It does not accept the arguments advanced by the Attorney-

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73 Professor Hotop, *Submissions*, p. S 186.

74 Mr Dyer, *Submissions*, p. S 84.

75 Mr Morgan Attorney-General's Department, *Transcript*, p. 130.

76 ibid.

77 ibid., p. 244.

78 Attorney-General's Department, *Submissions*, p. S213.

79 Professor Saunders, *Transcript*, p.145.

80 ibid., 243.

General's Department that it is necessary to exclude AD(JR) Act, otherwise the effectiveness of parliamentary scrutiny will be diminished.

3.14.6 The Committee notes the evidence from the Attorney-General's Department that it expects there to be 'very few cases' where it will be necessary to rely on clause 7.[81] If in any of those few cases the Attorney-General's decision is in some way objectionable, the Committee would expect that proper parliamentary scrutiny will, in most instances, result in the problem being rectified. It this is not what occurs, review under the AD(JR) Act of the Attorney-General's decision should be available in addition to the more difficult forms of judicial review.

3.14.7 The Committee notes that review by the High Court is available and review by the Federal Court under section 39B of the Judiciary Act has not been excluded. Little seems to be gained by excluding review under the AD(JR) Act except to make it more cumbersome for people to challenge the decisions of the Attorney-General under clause 7.

3.14.8 The Committee considers the whole procedure of certification by the Attorney-General where there is doubt about whether an instrument is legislative, is unusual and should receive close attention at the time of the ARC review. The Committee is inclined to accept the clause 7 option for the time being so long as decisions made under it are subject to review under the AD(JR) Act.

Recommendation 5

The Committee recommends that a decision by the Attorney-General to give a certificate under clause 7 of the Legislative Instruments Bill be reviewable under the *Administrative Decisions (Judicial Review) ACT 1977.*

3.15 Omission of subclause 7(5)

3.15.1 The Committee considers that if Recommendation 4 is accepted, subclause 7(5) will serve no purpose. The certificates of the Attorney-General are not conclusive because they are subject to review under the AD(JR) Act.

81 *Transcript,* p. 244.

Recommendation 6

The Committee recommends that subclause 7(5) of the Legislative Instruments Bill should be omitted if a decision by the Attorney-General to give a certificate under clause 7 of the Legislative Instruments Bill is to be reviewable under the *Administrative Decisions (Judicial Review) ACT 1977.*

3.16 Relationship between the Bill and the AD(JR) Act

3.16.1 Mr Robertson indicated that the relationship between the Bill and the AD(JR) Act was not clear. He stated:

> are they [the Bill and the AD(JR) Act] meant to stand side by side independently or are they meant to interlock in some way?...For example, you went along as an aggrieved person to the Federal Court and you wished to challenge a determination ... say a determination fixing fees, ... can the respondent in such a case say... 'Look, this determination ... has been registered under the Legislative Instruments Act and/or it is the subject of a certificate by the Attorney-General under section 7. ...it's on the register, therefore it is legislative, therefore you can't attack it under Judicial Review Act.[82]

3.16.2 Mr Robertson suggested to the Committee that in relation to instruments the subject of a certificate issued by the Attorney-General the phrase 'for all purposes' suggested more than for the purposes of the Act.[83]

3.16.3 Professor Hotop explained that in his view the Bill and the AD(JR) Act were complementary, but not overlapping, and to that extent mutually exclusive. An instrument is either administrative, in which case it is under the AD(JR) Act, or legislative, in which case it is under the Bill. They are mutually exclusive, on the basis that there can be no overlap.[84] Mr Morgan indicated that the Attorney-General's Department were also of the same view.[85] The Attorney-General's Department submitted that whether or not a decision to make a legislative instrument is reviewable under the AD(JR) Act has nothing to do with the Bill.[86] Professor Saunders indicated that for the purposes of the AD(JR) Act a jurisprudence would emerge fairly quickly about what was legislative and what was not and that this would automatically spill over. It was probably not necessary for the Bill to address the issue.[87]

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82 Mr Robertson, ARC, *Transcript*, pp. 104-105.

83 Mr Robertson, ARC, *Transcript*, p. 105.

84 Professor Hotop, *Transcript*, p. 259.

85 Mr Morgan, Attorney-General's Department, *Transcript*, p. 259.

86 Attorney-General's Department, *Submissions*, p. S153.

87 Professor Saunders, *Transcript*, p.246.

3.16.4 The Committee accepts that an instrument is either legislative or administrative in character and to that extent the Bill and the AD(JR) Act are mutually exclusive . This is reflected in the recommendations made in this chapter. The Committee does not consider that it is necessary to resolve the matter in any more detail for the purposes of this report.

Chapter 4 Consultation in making legislative instruments

This chapter examines whether it is appropriate for the Bill to limit consultation to the making of instruments that directly affects business. The ARC recommended that there should be consultation in relation to the making of all legislative instruments. The bulk of the evidence received by the Committee supported consultation for all legislative instruments. The Committee concludes that there should be consultation for all legislative instruments as soon as possible.

An examination is also made of the exemptions to consultation proposed by the Bill. A good deal of evidence has been critical of the breadth of the exemptions. The ARC recommended only limited exemptions. The Committee concludes that some of the exemptions that go beyond those recommended by the ARC are not acceptable.

Decisions in relation to consultation are excluded from review under the Administrative Decisions (Judicial Review) Act 1977. The Committee concludes that these decisions should be subject to review under that Act.

4.1 Introduction

4.1.1 The Bill recognises the value of consultation with relevant individuals and organisations at the planning stage of secondary legislation. It attempts to balance this objective with the practical necessity of making secondary legislation in a way that is expeditious and as cost-effective as possible. These two principles are not always easy to implement in tandem and may, at times, be in conflict.

4.1.2 The Bill represents an attempt to balance the two principles of consultation and practicality. It does this by narrowing the principle of consultation to secondary legislation directly affecting business. The major issue in the evidence concerning consultation was whether the right balance has been achieved and whether consultation should extend beyond the limits imposed by the Bill.

4.2 Provisions in the Bill relevant to consultation

4.2.1 Part 3 of the Bill (clauses 15 to 21) deals with consultation. There are also provisions in other Parts of the Bill that are relevant to an examination of this issue, in particular clauses 32 and 46.

4.2.2 Clause 16 sets out the legislative instruments for which there must be consultation. These are instruments that are:

- proposed to be made on or after 1 July 1995

- made under legislation directly affecting business
- not exempted from consultation under clause 19.

The rule-maker must consult by seeking submissions before the instrument is made.

4.2.3 Schedule 2 sets out the Acts which are regarded as directly affecting business. Examples of such Acts include the *Trade Practices Act 1974, the Motor Vehicle Standards Act 1989* and *the Patents Act 1990.* Clause 21 provides that Schedule 2 may be amended by regulation.

4.2.4 Clause 17 allows the relevant Minister to decide that certain organisations represent the interests of all those likely to be affected by a proposed instrument. If the Minister makes such a decision, submissions need only be sought from those organisations (see subclause 18(4)). If the Minister decides that there are no such organisations, submissions must be sought by public advertisement (see subclause 18(5)).

4.3 Legislative Instrument Proposals

4.3.1 Clause 18 provides that, if submissions are to be sought, the rule-maker must prepare a Legislative Instrument Proposal summarising the proposal for the legislative instrument and its objectives. The Legislative Instrument Proposal must also contain:

- an analysis of other means for achieving the objectives
- a broad indication of the relative costs and benefits to the Government and the public of the proposal and the other means of achieving the objectives
- a statement of the reasons for the preferred approach.

4.3.2 Subclause 18 (7) provides that 21 days are to be allowed for the making of submissions. The Attorney-General may reduce this period if there are special circumstances.

4.4 Exemptions from consultation

4.4.1 Clause 19 excludes instruments from consultation in certain circumstances. Under paragraph 19(1)(a) an instrument will be exempt if the rule-maker is satisfied of one of the following grounds:

- the instrument is made pursuant to an international agreement

- the instrument gives effect to a decision announced in the Budget
- the instrument is required urgently
- the instrument implements a Government policy that has already been subject to significant public consultation
- notice of the instrument would allow certain persons to gain an advantage over those who do not have notice of it
- comparable consultation requirements have already been carried out
- the instrument is not likely to directly affect business
- the instrument is of a minor machinery nature.

4.4.2 The rule-maker must record in writing the decision to exempt an instrument and also set out the reasons for the decision (see subclause 19(2)). Paragraph 19(1)(b) allows the Attorney-General to exempt an instrument from consultation if it is in the public interest to do so.

4.4.3 Clause 20 provides that a failure to carry out the consultation procedures does *not affect the validity or enforceability of a legislative instrument.*

4.4.4 Decisions under Part 3 are not subject to review under the AD(JR) Act. However, under clause 32 the rule-maker must prepare an explanatory statement explaining the purpose and operation of the legislative instrument, including details relating to consultation. The explanatory statement is to be tabled in the Parliament under section 46.

4.5 Proposals for general consultation

4.5.1 In the second reading speech for the Bill, the Minister stated that because of the burden in undertaking consultation, it should apply in the first instance only to legislative instruments made under specific legislation that affects business.[88]

4.5.2 The ARC in its report *Rule Making by Government Agencies* recommended that there should be public consultation in relation to the making of all legislative instruments subject to express limited exceptions.[89] The ARC submitted that undertaking consultation may add to the cost of enacting instruments. However, rules that had been exposed to the community before they were made were less likely to need amendment. The cost of undertaking consultation should be

88 *Senate Hansard*, 9 November 1994, p. 2693.

89 Recommendation 9, p. 38.

considered in the light of these potential longer-term savings.[90] Professor Pearce submitted that there was no particularly good reason for the limitation being adopted except 'a certain temerity on the part of those involved in the law making process'. He told the Committee that the ARC's investigation revealed that problems flowing from a failure to consult are just as likely to arise with non-business legislation.[91] Professor Hotop submitted that initial burdens and costs are, in the longer term, outweighed by savings in these areas flowing from the higher quality and greater legitimacy of legislation that has been subjected to consultation.[92]

4.5.3 The Australian Council of Social Service (ACOSS) argued very strongly that consultation should not be limited to matters that directly affect business, but that there should be a general consultation requirement. ACOSS submitted that at present all major business groups are routinely consulted in relation to any matter affecting business. By requiring consultation only for business matters, the implication is that business interests are more important than all others. ACOSS did not accept this and found it offensive.[93]

4.5.4 There are strong justifications for a general consultation requirement:

- it improves the quality of the final product
- it is an important part of developing finely tuned rules that administer government programs
- it utilises expertise that may be lacking in government
- it legitimises delegated legislation by bringing those involved in the legislation making process closer together
- it gives a voice to those affected by legislation in a much more efficient and fair way than if they had to seek review by a court
- it is necessary to prevent 'regulatory capture', that is 'cosy' regulatory structures being developed between government and those who are routinely consulted.[94]

4.5.5 ACOSS noted that it was difficult to regard the consultation requirement (generally an advertisement with a duty to consider submissions) as a real burden. It is more likely that the real concern is that of control - 'the fear that increased

90 ARC, *Submissions*, p. S69.

91 Professor Pearce, *Submissions*, p. S6.

92 Professor Hotop, *Submissions*, p. S186.

93 ACOSS, *Submissions*, p. S133.

94 ibid., p. S134.

participation lessens control'. ACOSS also saw no benefit in reviewing the consultation regime in three years because the costs and benefits of the broader regime could not be assessed. It makes more sense to introduce the broad regime and to evaluate that.[95] ACTCOSS endorsed the submissions made by ACOSS.[96]

4.5.6 SoftLaw Community Projects submitted that limitation was 'very undesirable'. A consultation regime for social policy areas such as social security and student assistance is equally if not more important than for business areas.[97] Professor Curtis criticised the Bill for excluding consultation in relation to social welfare matters.[98] By way of contrast, the Department of Social Security (DSS) submitted 'exemption of instruments made under the *Social Security Act 1991* from the consultation requirements is particularly appropriate'.[99]

4.5.7 Mr Snell described the consultation requirements as short sighted and noted that it continued the effective disenfranchisement of citizens from involvement in the regulatory environment which affects them directly.[100] Mr O'Brien stated it would be more satisfactory if consultation was required for all legislative instruments. A universal consultation process applies in the United States of America at the federal level.[101] Professor Saunders described the limitations on consultation as the least satisfactory part of the Bill.[102] Senator Spindler told the Committee the refusal to consult on non-business matters passed up a critical opportunity to improve the standard of delegated legislation.[103]

4.6 New South Wales and Victorian legislation

4.6.1 Considerable evidence was received by the Committee in favour of consultation requirements similar to those contained in the *Subordinate Legislation Act 1989* (Subordinate Legislation Act (NSW)) and the Subordinate Legislation Act 1994 (Subordinate Legislation Act (Vic)).[104] In both New South Wales and Victoria

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95 ibid., p. S135.

96 ACTCOSS, *Submissions*, p. S166-168.

97 SoftLaw Community Projects, *Submissions*, p. S171.

98 Professor L Curtis, *Submissions*, p. S103.

99 DSS, *Submissions*, p. S140.

100 Mr R Snell, *Submissions*, p. S142.

101 Mr D O'Brien, *Submissions* , p. s17.

102 Professor Saunders, *Transcript*, p. 231.

103 Senator Spindler, *Transcript*, p. 238.

104 Mr Perton MLA, *Transcript*, pp. 149-150; Mr Cruickshank MLA, *Transcript*, p. 222; Mr D O'Brien, *Submissions*, p. S17; Professor Hotop, *Submissions, p. S 185.*

consultation is not limited to subordinate legislation dealing with a particular subject matter.

4.6.2 Attorney-General's Department submitted that comparisons with these Acts served a limited purpose. Neither the Victorian nor the New South Wales Act covers the full range of subordinate legislation to which the Bill applies. Furthermore, the exemptions were such as to limit the consultation requirements more than what initially seemed apparent.[105]

4.6.3 In New South Wales section 4 of the Subordinate Legislation Act (NSW) places an obligation on the responsible Minister, when proposing a statutory rule (principal or amending), to comply as far as is reasonably practical with the guidelines in Schedule 1. The guidelines require a preliminary evaluation of all proposed rules to be carried out which must include adequate consultation. Under section 5 a formal external assessment, by way of regulatory impact statement and consultation program, is only required in the case of principal statutory rules that are not subject to an exemption. The responsible Minister must carry out that assessment as far as is reasonably practical.

4.6.4 A statutory rule is defined in the Subordinate Legislation Act (NSW) as a regulation, by-law, rule or ordinance that is made, or required by law to be approved or confirmed by, the Governor. Proclamations and orders do not fall within the definition of statutory rule. Schedule 4 also provides for exemptions from the entire operation of the Act.

4.6.5 In Victoria, consultation is also carried out in conjunction with the publication of a regulatory impact statement. Under section 6 of the Subordinate Legislation Act (Vic) the responsible Minister must consult with other Ministers whose areas of responsibility may be affected by the proposed statutory rule, and with any sector of the public on which an appreciable economic or social burden may be imposed by the rule. The consultation is required to be carried out in accordance with guidelines yet to be made by the Premier. Under section 10 a regulatory impact statement must be prepared for each proposed statutory rule unless an exception certificate or exemption certificate is issued in relation to it.

4.6.6 A statutory rule is defined under the Subordinate Legislation Act (Vic) as any regulation made by the Governor in Council, any regulation which is subject to approval or disallowance by the Governor in Council, any rule of a court or tribunal, any instrument prescribed by the regulations under the Act to be a statutory rule or deemed by another Act to be a statutory rule. Regulations made by local authorities are expressly excluded. Regulations made under the (Subordinate Legislation Act (Vic)) may exempt an instrument that is not legislative in character from the definition of a statutory rule.

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105 Mr Morgan, Attorney-General's Department, *Submissions*, p. S148.

4.6.7 The Committee considers that the evidence received in relation to the consultation regimes operating in both Victoria and New South Wales is important. It is evidence that is favourable to consultation requirements in relation to all subordinate instruments. One particular subject has not been singled out as more important than any other.

4.7 Evidence in favour of limited consultation

4.7.1 Mr Morgan told the Committee that there was considerable opposition from departments to the consultation process. For most agencies it involves a significant departure from their current arrangements and it requires a significant investment in additional resources.[106] Professor Saunders accepted that the basis on which the Bill got up at all was that consultation was limited.[107]

4.7.2 The Department of Employment, Education and Training (DEET) submitted that it has in place effective consultative arrangements in place for various programs administered by the Department, although it is not required by legislation to do so. If consultation was required for all instruments it could create problems because there would be little scope for flexibility as there is under the non-statutory arrangements.[108]

4.7.3 The Department of Immigration and Ethnic Affairs (DIEA) submitted that it is supportive of the consultation requirements proposed by the Bill and already often undertakes consultation similar to that required by the Bill.[109] It estimated the additional consultation costs at up to $32,000 per round of consultations prior to making or amending relevant legislative instruments. If there was a general consultation requirement this could increase sevenfold.[110] The Department of Human Services and Health (DHSH) submitted that it already consults widely on policy to enable interested groups to participate in decisions which affect them. The Bill will extend and formalise this process. The Department indicated that the additional costs associated with the consultation requirements proposed by the Bill were justified to achieve the aim of greater community involvement.[111]

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106 Attorney-General's Department, *Transcript*, p. 28.

107 Professor Saunders, *Transcript*, p. 231.

108 DEET, *Submissions* p. S36.

109 DIEA, *Submissions*, p. S112.

110 ibid., p. S115.

111 DHSH, *Submissions*, p. S138.

4.8 Should consultation start with business matters?

4.8.1 Mr Dyer submitted that, if it was thought necessary to trial consultation, instruments directly affecting business may not be the best choice. He argued business matters are likely to be subject to informal consultation already; if consultation causes delay the consequences may be worse than in non-business areas and judicial review may be sought deliberately to cause delay. In his opinion the consultation requirements should be confined to instruments that do not impose a substantial burden, cost or disadvantage on any sector of the public.[112] The Australian Securities Commission (ASC) submitted that the consultation requirements set out in the Bill may, in practice, cause delays in the decision making process that would be significantly detrimental to business.[113]

4.8.2 Professor Pearce submitted it is important to get the idea of consultation accepted at the Commonwealth level and if it is desired to start in the business area, it is 'probably wise' not to change the Bill in this regard. Mr Morgan told the Committee that as part of the greater review of and consultation in respect of issues affecting business outlined in *'Working Nation: programs and policies'* it was possible to piggyback on that system being developed.[114]

4.9 Conclusion

4.9.1 The Committee has been impressed by the very large number of submissions and the cogent arguments contained in those submissions in favour of a general consultation requirement. It accepts, as did the Senate Standing Committee on Legal and Constitutional Affairs in its report *Costs of Justice*[115] and the Access to Justice Advisory Committee in its report *Access to Justice*[116], that the benefits that will flow from a general consultation requirement will outweigh the costs of the process.

4.9.2 In *Clearer Commonwealth Law* the Committee recommended that the Legislation Handbook be amended to state that agencies and departments should consult on all proposed subordinate legislation subject to limited exceptions.[117] A number of departments gave evidence that they already consult widely, but not as extensively as they would need to if a general statutory consultation requirement were in place. The Committee considers that it is now preferable that there be a

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112 Mr B Dyer, *Submissions*, pp. S86-87.

113 ASC, *Submissions*, p. S93.

114 Attorney-General's Department, *Transcript*, p. 28.

115 Paragraph 2.80, p. 45.

116 Paragraph 21.20, p.467.

117 Recommendation 1, p. 24.

statutory obligation to consult in relation to all proposed legislative instruments subject to express exceptions.

4.9.3 However, the Committee acknowledges that for a general statutory consultation requirement to be effective it is crucial that it be accepted by all departments and agencies before it comes into force. The Committee believes that to achieve this it is probably sensible to start with business given the consultation that already takes place and the other developments in that area. It is concerned about the likely resource implications for Commonwealth agencies and departments if they are required to consult generally without adequate time to prepare for it.

Recommendation 7

The Committee recommends that mandatory public consultation requirements be put in place in relation to the making of all legislative instruments as soon as possible.

4.9.4 The Committee is of the view that the ARC has an important role to play in ensuring a general statutory consultation requirement is put in place. The review by the ARC should be conducted on the basis that mandatory consultation will be introduced. The ARC review should focus on the how the mandatory consultation requirements are to be implemented. The ARC should specifically examine what changes will need to be made to the Act to achieve this. The general consultation regime should include any changes that arise out of the review of consultation by the ARC in relation to business matters.

Recommendation 8

The Committee recommends that the review of the legislation by the Administrative Review Council should proceed on the basis that mandatory consultation will be introduced and should also focus on how it will be implemented.

4.10 Legislative Instrument Proposals

4.10.1 Considerable evidence was received by the Committee in relation to the adequacy of Legislative Instrument Proposal (see paragraph 4.3.1). Under the Victorian and New South Wales legislation a Regulatory Impact Statement serves a similar purpose to a legislative instruments proposal.

4.10.2 The requirements of a LIP under the Bill and a Regulatory Impact Statement under the state Acts are fairly similar. All require a statement of the objectives of the proposed instrument, details of other options by which those objectives may be achieved and some kind of an assessment of the costs and benefits of the proposed instrument and those other options.

4.10.3 However, there are some important differences. The Bill requires the LIP to contain only a broad indication of the relative costs and benefits of the proposed legislative instrument.

4.10.4 In New South Wales, under section 5 and Schedule 2 of the Subordinate Legislation Act (NSW), the assessment of the costs and benefits are to include economic and social costs and benefits, both direct and indirect, and costs and benefits relating to resource allocation, administration and compliance. Further, these costs and benefits should be quantified, wherever possible. If this is not possible, the anticipated impacts of the proposed action and each alternative should be stated in way that permits a comparison of the costs and benefits. In Victoria the assessment of the costs and benefits must also include an assessment of the environmental impact. There is no requirement for costs to be quantified in Victoria.

4.10.5 Mr Cruickshank criticised the Bill because it contained no guidelines as to the content of the required cost benefit analysis and there was no requirement for quantification of that analysis.[118] Mr Gardini was also critical of the lack of detail required for the cost benefit analysis of the LIP. He indicated that the Business Council of Australia was in favour of detailed regulatory statements. In the United Kingdom, agencies are required to prepare detailed compliance cost assessments for every proposed regulation that could affect business. In the European Union (EU), new regulatory proposals must be accompanied by an assessment of their impact on business before presentation to the European Council. He argued that if Commonwealth legislative instruments were not subject to the same scrutiny, Australia would not be able to achieve the same regulatory competitiveness.[119]

4.10.6 The Committee considers that the principal aim of the LIP is to ensure that the costs and benefits of a proposed legislative instrument are fully outlined so that the rule-maker and the public can be satisfied that the benefits exceed the costs. The Committee doubts whether 'a broad indication of the relative costs and benefits of the proposed action and the alternatives' as set out in paragraph 18(2)(c) is adequate for this purpose. The Committee consequently makes the following recommendations.

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118 Mr Cruickshank, *Submissions*, p. S77.

119 Mr Gardini BCA, *Transcript*, p. 6.

Recommendation 9

The Committee recommends that clause 18 of the Legislative Instruments Bill 1994 be amended to provide for an assessment of the relative costs and benefits to the Government, and the affected public, of the proposed legislative instrument and of any other means of achieving the same objective.

The assessment should include an assessment of the social, economic and environmental costs and benefits, both direct and indirect, and of the costs and benefits relating to resource allocation, administration and compliance costs.

Recommendation 10

The Committee recommends that the assessment of the costs and benefits required under a Legislative Instruments Proposal under clause 18 of the Legislative Instruments Bill should be quantified wherever possible.

If this is not possible, the anticipated impact of the proposed action and of each alternative should be set out in a way that permits a comparison of the costs and benefits.

4.11 Certification by Minister

4.11.1 Under section 10 of the Subordinate Legislation Act (Vic) the responsible Minister must obtain independent advice on the adequacy of the regulatory impact statement. The Minister must also certify as to the adequacy of it and that the Act and the guidelines have been complied with. A copy of the certificate is to be given to the Scrutiny of Acts and Regulations Committee.

4.11.2 The Committee considers that there should be a similar requirement in the Bill because it would improve Ministerial responsibility in relation to legislative instruments and assist the Parliamentary scrutiny process (see also chapter 7).

Recommendation 11

The Committee recommends that the Legislative Instrument Bill should be amended to provide that the responsible Minister:

- must obtain independent advice on the adequacy of the Legislative Instrument Proposal under clause 18
- must also certify as to the adequacy of it and that the Act and the guidelines (if any) so far as they relate to a Legislative Instrument Proposal have been complied with.

The Minister should attach a copy of the certificate to the explanatory statement prepared under clause 32 of the Bill.

4.12 Consultation only with specific groups and public advertisements

4.12.1 Professor Pearce submitted that there was a danger that, if the Minister decides under clause 17 to consult only with certain organisations, these organisations could come to be regarded as the guardians of the public interest. Because there is no requirement in these circumstances to advertise publicly in relation to the proposed legislative instrument, members of the general public would not be given an opportunity to comment on legislation before it is made. He argued that it would be wise to require public notification by advertisement in all cases.[120] Evidence was received from a number of persons supporting Professor Pearce's arguments.[121]

4.12.2 Mr Morgan agreed that the problem could be overcome if clause 18 was amended to provide for public advertisements in all cases.[122]Attorney-General's Department's submitted this would have significant cost implications for agencies and be likely to encounter strong opposition from elements of the bureaucracy.[123]

4.12.3 The Committee considers that it is very important that the community have the opportunity to be involved in the consultation process. This is best achieved by public advertisements in all cases. The Committee is of the view that any additional

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120 Professor Pearce, *Submissions*, p. S7.

121 Mr Robertson, ARC, *Transcript*, p. 103; Mr Dyer, *Submissions*, p. S86; Professor Curtis, *Submissions*, p. S101; Ms Welsman, *Submissions*, p.S174; Office of Regulation Reform (Victoria), *Submissions*, p. S179; ALRC, *Submissions*, p. S207.

122 Attorney-General's Department, *Transcript*, p. 63.

123 Attorney-General's Department, *Submissions*, p. S148.

short term costs to departments and agencies will be offset by the longer-term benefits flowing from widespread consultation with the community.

Recommendation 12

The Committee recommends that clause 18 of the Legislative Instrument Bill be amended to provide for public notification by advertisement in all cases where consultation is required by the Bill.

4.12.4 Professor Pearce argued that clause 17 was not necessary at all. He maintained that it was merely good government to consult with relevant organisations and it was not necessary for a provision in the Bill to tell the Minister to do this.[124] The Committee considered that it served a useful purpose because it required the Minister to identify people who must be consulted. Advertisements may not be picked up by everybody.

4.12.5 However, the Committee is concerned that clause 17 as it is currently drafted may allow the Minister to exclude other organisations from the consultation process once the Minister has identified an organisation that represents the interests of all those likely to be affected. The Administrative Review Council, in its report *Rule Making by Commonwealth Agencies*, did not recommend that the Minister be given a power to identify certain organisations that have to be consulted.[125]

Recommendation 13

The Committee recommends that clause 17 of the Legislative Instruments Bill be amended to make it clear that, even if the Minister identifies certain organisations that are to be consulted, the Minister is still required to consult with other relevant organisations.

4.13 Undertaking the consultation process

4.13.1 The Bill does not specify the manner in which the consultation process is to be carried out. Subclause 18(8) requires the rule-maker to consider any submissions that are made in relation to a proposed legislative instrument. There is no requirement for public hearings.

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124 Professor Pearce, *Transcript*, p. 64.

125 pp.30-43.

4.13.2 Mr Morgan submitted that the Bill gives the rule-maker sufficient flexibility to conduct a public hearing if the rule-maker thought it necessary. He argued there was a danger that if public hearings were mandatory people may not make submissions. It would be possible through the use of guidelines to encourage departments and agencies to use public hearings when necessary.[126]

4.13.3 The Business Council of Australia (BCA) submitted that it supported the ARC recommendation there should be public hearings for sensitive legislative proposals.[127] Professor Pearce explained to the Committee that the earlier Victorian legislation had guidelines about the method of consultation.[128]Some of the requirements have been incorporated into the Subordinate Legislation Act (Vic) and new guidelines have been issued under that Act.

4.13.4 The Attorney-General's Department submitted that clause 18 could be amended to provide that if at any time up to the 14 days after the closing date for submissions it becomes apparent that a proposed instrument is controversial or sensitive, then the Minister must consider whether a public hearing is appropriate and make a written decision. An amendment to clause 31 to include the decision in the explanatory statement would enable Parliament to scrutinise the decision when the explanatory statement is tabled under clause 46. The 14 day time limit within which the Minister must make a decision would reduce delays if the public hearings were held.[129]

4.13.5 The Committee is concerned that the Bill is silent about the need for public hearings. It accepts that it is open to the rule-maker to decide if a public hearing is necessary. However, the Committee considers that it is preferable that the Bill should deal expressly with the need for public hearings.

Recommendation 14

The Committee recommends that clause 18 of the Legislative Instruments Bill be amended to provide that if at any time up to 14 days after the closing date for submissions it becomes apparent that a proposed instrument is controversial or sensitive, then the Minister must consider whether a public hearing is appropriate and make a written decision.

Clause 32 of the Bill should also be amended to include the decision in the explanatory statement and, if a public hearing is held, details of the hearing.

126 Attorney-General's Department, *Transcript*, p. 26.

127 BCA, *Submissions*, p. S36.

128 Professor Pearce, *Transcript*, p. 65.

129 Attorney-General's Department, *Submissions*, p. S149.

4.14 Guidelines for consultation

4.14.1 The Committee is concerned that the Bill does not specify how any other aspect of the consultation process is to be carried out. The Committee considers that it would be useful to give some guidance to the public as to how the consultation process is to be undertaken. The Committee notes that extensive guidelines have been issued under the (Subordinate Legislation Act (Vic)) in relation to the consultation process.[130]

Recommendation 15

The Committee recommends that guidelines about the method of consultation be developed for use in conjunction with the Legislative Instruments Bill.

4.15 Exemptions from consultation

4.15.1 A good deal of evidence was received that was critical of the broad nature of the exemptions from consultation contained in clause 19. The explanatory memorandum for the Bill gave no reasons for adopting the exemptions.

4.15.2 The BCA submitted that clause 19 provided too great a scope for the rule-maker and the Attorney-General to exclude the consultation procedures.[131] Mr Gardini argued that the exemptions are very broad and that they do not appear in similar State legislation.[132] He suggested that there was the potential for abuse[133] and that it could be deleted.[134] Mr Morgan submitted that there was accountability to the Parliament for any abuse of an exemption.[135]

4.15.3 Mr Cruickshank argued that the breadth of exemptions in paragraph 19 (1)(a), particularly subparagraphs (ii), (iv), (v) and (vii), will tend to defeat the purpose of the Bill.[136]

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130 Mr Perton MLA, *Transcript*, p. 157.

131 BCA, *Submissions*, p. S75.

132 Mr Gardini, BCA, *Transcript*, p. 13.

133 ibid, p. 14.

134 ibid., p. 15.

135 Attorney-General's Department, *Transcript*, p. 26.

136 Mr Cruickshank, *Submissions*, p. S77.

4.15.4 However, the Committee did receive evidence in support of the exemptions. The DHSH submitted that the exceptions in clause 19 were necessary for efficient program administration.[137] DEET was also satisfied with the range of exemptions.[138]

4.16 Exemptions from consultation recommended by the ARC

4.16.1 The ARC recommended in its report *Rule Making by Commonwealth Agencies* that there should be only limited exceptions to consultation, including:

- where the instrument is of a minor machinery nature, including savings and transitional provisions, and it does not fundamentally alter the existing arrangements
- where the Attorney-General certifies that an Act empowering the making of delegated legislation provides for consultation comparable to that required by the Legislative Instruments Act
- where advance notice of a particular legislative rule would enable individuals to gain advantage that would otherwise not accrue;
- where the Attorney-General certifies that the public interest requires that consultation should not be undertaken in a particular case
- where the instrument provides for an increase or decrease in fees or charges and the increase or decrease does not exceed the amount set by the Budget
- where the instrument relates to certain rules of court.[139]

4.17 Exemption from consultation under New South Wales and Victorian legislation

4.17.1 The exemptions in both the Victorian and New South Wales legislation are of a limited nature. In New South Wales the exemptions are:

- the responsible Minister certifies that, on the advice of the Attorney-General or Parliamentary Counsel, the statutory rule relates to one of the following:

  matters of a machinery nature

137 DHSH, *Submissions*, p. S138.

138 Mr Bourke, *Transcript*, p. 98.

139 Recommendation 9, pp. 38-39.

- direct amendments or repeals, savings or transitional provisions
- NSW legislation that is part of a uniform Commonwealth-State scheme of legislation
- international or Australian standards or codes of practice where a cost benefit assessment has already been made
- the proposed principal statutory rule does not impose an appreciable burden, cost or disadvantage on any sector of the public

- the Attorney-General certifies that the public interest requires that a regulatory impact statement should not be made
- the responsible Minister certifies that the proposed rule is to be made by a statutory agency and in the circumstances it is not practicable to comply with the regulatory impact statement requirement.

4.17.2 In Victoria clause 8 of the Subordinate Legislation Act provides that a Regulatory Impact Statement (including consultation) is not required if the responsible Minister certifies:

- that the proposed statutory rule is for a fee increase which does not exceed the annual rate approved by the Treasurer
- that it is a rule which relates only to a court or tribunal
- that it prescribes an equalisation factor for the purposes of the *Land Tax Act 1958*
- that it is a regulation made for the purposes of including or excluding a statutory rule from the ambit of the Act.

The exception certificate must be given to the Scrutiny of Acts and Regulations Committee and laid before each House of the Parliament.

4.17.3 Clause 9 provides for exemptions if the responsible Minister certifies:

- that the proposed statutory rule would or not impose an appreciable burden on a sector of the public
- that the rule is required under a national uniform legislation scheme
- that the rule is of a fundamentally declaratory or machinery nature

- that the rule deals with administration or procedures between Departments

- that notice of the rule would render the rule ineffective or would unfairly advantage or disadvantage any person likely to be affected by the rule.

The exemption certificate must specify reasons for the exemption. Provision is also made for the Premier to certify that there are special circumstances which require that in the public interest the proposed statutory rule should be exempt. In such cases the statutory rule must be made to expire within 12 months. The exemption certificate must be given to the Scrutiny Committee and laid before each House of the Parliament.

4.18 General comments on exemptions in clause 19

4.18.1 The Committee acknowledges that the exemptions contained in clause 19 go beyond the limited exemptions recommended by the ARC. The exemptions contained in the Victorian and New South Wales Acts are quite narrow. However, the appreciable burden exception was not recommended by the ARC nor is it contained in the Bill. This exception broadens considerably the scope for exemptions under the Victorian and New South Wales Acts.

4.18.2 Apart from the exceptions for certain Budget decisions and rules of court (not relevant see paragraph 8.6), the recommendations made by the ARC have been included in the Bill at subparagraphs 19(1)(a)((v)(vi) and (viii) and paragraph 19(1)(b). The Committee agrees that these exceptions are necessary and should not be deleted from the Bill.

4.18.3 However, the Committee considers that because of the importance of consultation to the public interest paragraph 19(1)(b) should be amended to provide that instruments exempted from consultation under that paragraph should remain in force for only 12 months. This is the case in Victoria. This limitation was not recommended by the ARC.

Recommendation 16

The Committee recommends that clause 19 of the Legislative Instruments Bill should be amended to provide that instruments exempted under paragraph (1)(b) should remain in force for only 12 months.

4.18.4 The Committee now considers on an individual basis the other exemptions contained in the Bill that were not recommended by the ARC.

4.19 Exemptions from consultation because of international agreements

4.19.1 Subparagraph 19(1)(a)(i) provides that consultation is not necessary where an obligation is imposed on the Commonwealth under an international agreement to make a legislative instrument. Senator Kemp submitted that the exclusion appeared to assume that there can be no question of community consultation because the Commonwealth is bound to make the legislative instrument. This was contrary to recent Government statements about Australia's obligations under international treaties and the maintenance of Australia's sovereignty.[140]

4.19.2 The National Farmers Federation was also critical of the treaty exception. It was inconsistent with a joint statement on 21 October 1994 by the Minister for Foreign Affairs and the Attorney-General. The statement recognised the important domestic impacts of treaties by announcing enhanced consultative arrangements for parliamentarians interested in prospective treaties being negotiated by the Government.[141] Senator Spindler was also critical of this exemption.[142]

4.19.3 Neither the Victorian nor the New South Wales Acts contain this exception, although in practice it is less likely to be an issue in State jurisdictions. The ARC did not recommend such an exception.

4.19.4 The Committee considers that in giving effect to Australia's international obligations it is important that the community be consulted.

Recommendation 17

The Committee recommends that subparagraph 19(1)(a)(i) of the Legislative Instruments Bill be omitted.

4.20 Budget decisions exempt from consultation

4.20.1 Subparagraph 19(1)(a)(ii) provides that consultation is not necessary if the legislative instrument gives effect to a decision in the Budget. The ARC recommended that there should be an exception for instruments that provide for an increase or decrease in fees or charges set by the Budget. The Victorian Act contains an exception similar to that recommended by the ARC.

140 Senator Kemp, *Submissions*, p. S43.

141 National Farmers Federation, *Submissions*, p. S2.

142 Senator Spindler, *Submissions*, p. S200.

4.20.2 Ms Baker submitted that Budget decisions are not made in a vacuum but are part of an overall budgetary scheme and it was consequently not appropriate to reopen them.[143] Mr Bourke also submitted that there was no scope for post Budget decision consultation.[144] Mr Morgan submitted that if a budget decision is made to increase pensions by $4.50, there is no use having consultation about it.[145] The Attorney-General's Department submitted that consultation in relation to an instrument giving effect to a Budget decision is unlikely to lead to any change in the decision. Consultation would result in an unnecessary burden, delay and expense for little or no gain. It also submitted that, although the implementation of a Budget decision may be more open to change, it may be difficult to differentiate between an instrument implementing a Budget decision and one giving effect to such a decision. The Department argued that the political process is the appropriate forum for examination of a Budget decision.[146]

4.20.3 Professor Saunders indicated that some of the other exemptions may be wide enough to exempt matters that could be exempted under the Budget exemption.[147]

4.20.4 The Committee is aware that consultation may occur as part of the Budget decision making process. The Committee accepts that once certain budget decisions have been announced in the Budget it is unrealistic to have that decision subjected to a consultation process. However, the Committee notes that many budget decisions are not mere increases in fees or charges. The Committee considers that there is considerable scope for consultation in relation to legislative instruments that give effect to these Budget decisions, just as there is for instruments that implement Budget decisions. The Committee notes the distinction between an instrument giving effect to a Budget decision and an instrument implementing such a decision is not always clear. The Committee agrees with the recommendation made by the ARC that only a limited range of instruments relating to Budget decisions should be exempted from consultation.

Recommendation 18

The Committee recommends that subparagraph 19(1)(a)(ii) of the Legislative Instruments Bill should be amended to include only legislative instruments that provide for an increase or decrease in fees or charges and the increase or decrease does not exceed the amount set by the Budget.

143 Ms Baker Attorney-General's Department, *Transcript*, p. 100.

144 Mr Bourke DEET, *Transcript*, p. 99.

145 Mr Morgan, Attorney-General's Department, *Transcript*, p. 113.

146 Attorney-General's Department, *Submissions*, p. S210.

147 Professor Saunders, *Transcript*, p. 246.

4.21 Exemptions from consultation on grounds of urgency

4.21.1 Subparagraph 19(1)(a)(iii) exempts an instrument that is required for reasons of urgency, including reasons related to the prudential supervision of insurance, banking or superannuation or the regulation of financial markets. However, the provision does not limit the reasons of urgency to these matters. It expressly provides that the generality of the phrase 'reasons of urgency' is not to be limited to the matters that are listed.

4.21.2 Mr Gardini argued that many instruments could arguably be regarded as urgent in a legislative sense.[148]The Committee acknowledges that there is the potential in a busy legislative program for the provision to be utilised so as to ensure that instruments are put in place within the Government's timetable at the expense of adequate consultation. The exemption was not recommended by the ARC. It is not contained in either the Victorian or New South Wales legislation.

4.21.3 The Committee considers that the reasons of urgency should be limited to those matters listed in the subparagraph.

Recommendation 19

The Committee recommends that subparagraph 19(1)(a)(iii) of the Legislative Instruments Bill be amended to limit the reasons of urgency to those matters listed in that subparagraph.

4.22 Exemption where consultation has already occurred

4.22.1 Subparagraph 19(1)(a)(iv) exempts an instrument from consultation if the instrument implements a Government policy whose details have already been the subject of significant public consultation.

4.22.2 The Office of Regulation Reform (Victoria) submitted that 'significant consultation' in relation to ill defined proposals and without the benefit any cost/benefit information was not an adequate replacement for 'informed' and 'meaningful' consultation provided for under the Bill.[149]

4.22.3 The Committee notes the comments made by the Office of Regulation Reform. The Committee as a general rule does not consider that further consultation

148 Mr Gardini (BCA), *Transcript*, p. 13.

149 Office of Regulation Reform, *Submissions*, p. S180.

is necessary if there has been significant public consultation similar to that which would have occurred under the Bill.

Recommendation 20

The Committee recommends that subparagraph 19(1)(a)(iv) of the Legislative Instruments Bill should be amended to provide for an exemption from consultation if significant public consultation similar to that which would have occurred under the Bill has already taken place.

4.23 Instruments not likely to directly affect business exempt from consultation

4.23.1 Subparagraph 19(1)(a)(vii) exempts an instrument from consultation if it is not likely to directly affect business. The Department of Industry Science and Technology (DIST) submitted that there may not be sufficient expertise in some rule-making agencies to determine accurately the impact of the instrument on business. The exemption should not be utilised unless the rule-maker gains the agreement of a specialist regulation review agency, the Office of Regulation Review in the Industry Commission. This approach would provide greater transparency in the process and reduce significantly the risk of inefficient regulation and business criticism of the Bill.[150]

4.23.2 The Attorney-General's Department submitted that the proposed Legislative Instruments Handbook could be amended to include a requirement that a rule-maker should consult with the Office of Regulation Review before relying on the exception. The Office of Regulation Review supports this proposal.[151]

4.23.3 The Committee believes that requiring the rule-maker to consult would act as a safeguard against a rule-maker failing to identify a possible effect on business. The Committee, not being aware of the contents of the Legislation Instruments Handbook, considers that it is probably preferable that the requirement is located in the Bill.

Recommendation 21

The Committee recommends that the Legislative Instruments Bill should be amended to provide that a rule-maker should consult with the Office of Regulation Review in the Industry Commission if the exemption in subparagraph 19(1)(a)(vii) is to be relied upon. Details of this should be included in the explanatory statement under clause 32 of the Bill.

150 DIST, *Submissions*, p. S105.

151 Attorney-General's Department, *Submissions*, p. S198.

4.24 Review of exemptions from consultation by the ARC

4.24.1 The Committee does not consider that the Bill should contain any more exemptions to consultation. If the consultation requirements were extended, additional exemptions may be required. The Committee is of the view that the need for the exemptions should be focused on as part of the review to be undertaken by the ARC of the Act. If as a result of the review it becomes apparent that exemptions are not being used, or are being relied upon too heavily, it will be necessary to amend clause 19 accordingly.

4.25 Interpretation of clause 19

4.25.1 The Committee was concerned that clause 19 could be interpreted in such a way that if a proposed instrument includes one provision that comes within an exemption set out in paragraph (1)(a), the whole instrument would also be exempt from consultation. Ms Baker agreed that this was a possibility.[152] The Attorney-General's Department submitted that under the provision the rule-maker had to be satisfied that the instrument fell within one of the exemptions. This required the consideration of the instrument as a whole. The Department indicated that because of the wide range of situations covered by subparagraphs 19(a)(i) to (vii) it may be difficult to draft a provision explicitly stating this principle.[153]

4.25.2 The Committee accepts the evidence of the Attorney-General's Department. If a rule-maker interpreted clause 19 in this way, which is clearly not within the spirit of the consultation process, so that consultation was not carried out it when it should have been it would be grounds for disallowing the instrument. The Committee is satisfied that the Parliamentary scrutiny process will be a sufficient deterrent to rule-makers in this regard.

4.26 Decisions relating to consultation - review by the courts and parliamentary scrutiny

4.26.1 There is no reason in principle that decisions in relation to consultation should not be subject to judicial review, including review under the AD(JR) Act. The Bill has excluded review under the AD(JR) Act. However, under clause 32 the rule-maker must prepare an explanatory statement explaining the purpose and operation of the legislative instrument. In particular, the explanatory statement must contain details as to how the consultation was carried out and, if it was exempted, information relating to the exemption, including the reasons for it (see paragraphs 32(2)(a) and (b)).

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152 Attorney-General's Department, *Transcript*, p. 133.

153 Attorney-General's Department, *Submissions*, p. S191.

4.26.2 The explanatory statement is to be tabled in the Parliament under section 46. A failure to consult as required is likely to attract criticism in the course of Parliamentary scrutiny, and could be regarded as sufficient reason for disallowance.

4.26.3 Mr Dyer argued that decisions under Part 3 could be reviewed by the High Court under 75(iii) or (v) of the Constitution and by the Federal Court under section 39B of the Judiciary Act. Mr Dyer pointed out that the jurisdiction of the High Court is constitutionally entrenched and this may have been the reason for not excluding the equivalent jurisdiction of the Federal Court under section 39B. Nonetheless, excluding review under the AD(JR) Act, but keeping review under section 39B seemed to create a complicated 'halfway house'.[154] Mr O'Brien submitted that there was no need for the exclusions from review under the AD(JR) Act of decisions under Part. It makes not sense to exclude from the scope of that Act decisions which remain amenable to review by use of the prerogative writs.[155] Professor Hotop opposed in principle the exclusion of review under the AD(JR) Act.[156]

4.26.4 Mr Morgan agreed that the High Court and the Federal Court could review decisions made in relation to consultation. He submitted that review under the AD(JR) Act is a much more cost effective and more flexible mechanism for people to challenge administrative decisions. However, there was little point in excluding review under section 39B of the Judiciary Act because a person could commence proceedings in the High Court and then move the matter to the Federal Court. There were other legislative schemes that excluded review under the AD(JR) Act and did not exclude review under section 39B of the Judiciary Act. It was important to maintain consistency. The bureaucracy would think that the Attorney-General's Department had created a system that was advantageous to itself and more importantly it would send a message that exclusion of review under section 39B of the Judiciary Act may be available in a more general sense.[157]

4.26.5 The Committee has considered a similar issue in relation to clause 7 of the Bill (see 3.14). Again the Committee can see no compelling reasons to exclude review under the AD(JR) Act. This appears to be another attempt to make it more difficult for people to seek judicial review of decisions made under the Bill.

Recommendation 22

The Committee recommends that decisions under Part 3 of the Legislative Instruments Bill be reviewable under the *Administrative Decisions (Judicial Review) Act 1977.*

154 Mr B Dyer, *Submissions*, p. S84.

155 Mr O'Brien, LCA, *Submissions*, p. S16; *Transcript*, p.77.

156 Professor Hotop, *Submissions*, p. S186.

157 Mr Morgan, Attorney-General's Department, *Transcript*, p. 130.

4.27 Alterations to Schedule 2

4.27.1 Schedule 2 to the Bill lists the Acts that provide for legislative instruments that directly affect business. It is an inclusive list. Clause 21 of the Bill provides that Schedule 2 may be amended by regulation to include other Acts in the Schedule.

4.27.2 Mr O'Brien described this as a cumbersome way to provide for an inclusive list. He was concerned it may be difficult for legal advisers and other individuals to be certain that they have an up-to-date copy of the Schedule.[158] ACTOSS submitted that the approach used in Schedule 2 (inclusive list) runs the risks of omissions, and the separation between 'business' and 'non-business' in the Bill was artificial.[159] Professor Saunders submitted that this approach means that the Schedule will require continuous updating and this would require discipline on the part of the drafters and the Parliament itself.[160] Mr Morgan submitted that access to an up-to-date Schedule would be available through SCALE (refer chapter 6).[161] He agreed that it was desirable for the list, possibly within 3 or 4 years, to be exclusive and not inclusive.[162]

4.27.3 The Committee does not favour the amendment of Acts by way of regulation. However, it provides for greater flexibility to amend the Schedule than if it can only be done by way of an amending bill. This is important given that the Schedule is an inclusive list. Nonetheless the Committee hopes that Schedule 2 will primarily be amended by way of amending bill. It also suggests that consideration be given to developing an exclusive list as soon as possible.

4.28 Clause 20

4.28.1 Clause 20 provides that a failure to comply with consultation requirements does not affect the validity or enforceability of the relevant legislative instrument.

4.28.2 Mr Perton indicated that under the Victorian legislation it was possible for the courts to declare a regulation invalid if the proper procedure was not followed.[163] Professor Hotop submitted that a failure to consult would almost certainly be the subject of adverse comment in the course of parliamentary scrutiny

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158 Mr D O'Brien, *Submissions*, p. S16; *Transcript*, p.80.

159 ACTCOSS, *Submissions*, p. S166-168.

160 Professor Saunders, *Transcript*, p.231.

161 AGD, *Transcript*, p. 81.

162 ibid., p. 83.

163 Mr Perton MLA, *Transcript*, p.153.

and may lead to disallowance. He considered that this was an adequate potential sanction.[164]

4.28.3 The Committee agrees that parliamentary scrutiny is an adequate potential scrutiny.

164 Professor Hotop, *Submissions*, p. S?.

Chapter 5 Backcapture: the alternative to sunsetting

The Bill provides for the registration of all existing instruments by a certain date. If instruments are not registered, they cease to be enforceable. This process is known as 'backcapturing'. A number of states in Australia have in place a 'sunsetting regime', that is legislation ceases to have effect on a specified day or after it has been in force for a designated period of time.

The chapter examines whether backcapturing is an appropriate alternative to sunsetting. The Committee concludes that it is not practical at the moment to introduce a sunsetting regime for all legislative instruments. It would be appropriate to do so as soon as possible.

The Committee concludes that as part of the backcapturing program it may be appropriate to provide for registration of consolidations of legislative instruments in limited circumstances.

5.1 Introduction

5.1.1 Delegated legislation needs to be periodically reviewed to ensure that it is still achieving its objectives and that it has not with the passage of time become outdated. The current procedures for the making and scrutiny of delegated legislation do not contain a mechanism to provide for such a review.

5.1.2 Several States have adopted a 'sunsetting' regime as the means of achieving a regular review and updating of delegated legislation. The Bill proposes an alternative scheme that provides for the registration of all existing instruments by a certain date. This process is known as 'backcapturing'. A law revision unit has also been established within the Office of Legislative Drafting (OLD). The chapter examines the relative merits of sunsetting and backcapturing.

5.2 Description of sunsetting

5.2.1 Sunsetting is the practice of providing for legislation to cease to have effect on a specified day or after it has been in force for a designated period of time. Sunsetting serves two purposes, namely identifying the legislation that is in existence and cleaning up provisions of old legislation. A sunsetting regime applies to the secondary legislation of five States.[165]

165 New South Wales, Victoria, Queensland, South Australia and Tasmania.

5.2.2 The ARC in its report, *Rule Making by Commonwealth Agencies*, recommended that all legislative instruments should be sunsetted.[166] The Access to Justice Advisory Committee in its report, *Access to Justice*, recommended in accordance with the ARC recommendation that the Commonwealth introduce a scheme for the sunsetting of all delegated legislation on a 10 year basis providing the cost was not too high.[167] In *Clearer Commonwealth Law*, this Committee recommended that the Attorney-General should develop a sunsetting program to promote regular rewriting of all subordinate legislation and introduce a bill to provide a legislative basis for the program.[168]

5.3 Description of backcapture

5.3.1 Backcapture[169] is the registration under Division 4 of Part 4 of the Bill of legislative instruments that are in existence when the Bill commences. If a legislative instrument is not registered in accordance with the following deadlines it will cease to be enforceable:

- an instrument made in the period 1 January 1990 to 30 June 1995 must be registered before 1 March 1996
- an instrument made in the period 1 January 1980 to 31 December 1989 must be registered before 1 September 1996
- an instrument made before 1 January 1980 must be registered before 1 September 1997.

5.3.2 If an instrument is lodged with the Principal Legislative Counsel for backcapture but is not in fact registered before the relevant day the instrument ceases to be enforceable.

5.3.3 There is an important qualification to the registration timetable. If, after the Bill commences, an unregistered legislative instrument is amended, that instrument must be registered within 28 days after the amendment is made. If the unregistered instrument is not registered within that period it will cease to be enforceable.

5.3.4 The intended result of the backcapture process is that by 1 September 1997 all Commonwealth secondary legislation that is then in force will have been identified and registered. However, unlike sunsetting, the backcapturing program

166 Recommendation, p. 60.

167 Action 21.3, p.473.

168 Recommendation 27, p. 140.

169 The term 'backcapture' is not actually used in the Bill.

does not provide for registered instruments automatically to cease to have effect after a certain period of time.

5.4 Assessment of sunsetting and backcapture

Evaluation of sunsetting necessary

5.4.1 In the second reading speech for the Bill, the Government noted the practice of sunsetting has been used in other jurisdictions in the states, but that an evaluation of the benefits of the practice has not been undertaken. The Government decided that until such an evaluation had been undertaken it would be premature to enact as resource intensive a practice as sunsetting.[170]

5.4.2 Mr Morgan told the Committee:

> Whilst the department [Attorney-General's Department] would be quite happy to have sunsetting, it is a real problem to other departments. I suppose it is a real problem in our branches and our own divisions, but probably more to other departments. The consequence is that we have an interim solution ... to look at the sunsetting as an exercise and see whether we should move down the track in the future.[171]

5.4.3 Professor Pearce criticised the Government's decision to require an evaluation of sunsetting before adopting it. It is not possible to demonstrate the benefits of sunsetting without engaging in that action. It is the sort of argument that was used to oppose the adoption of the administrative review mechanisms in the 1970s.[172] He submitted:

> Some matters can not be proved in advance --or at least not to the satisfaction of those who see it as their role to oppose the spending of public funds for the benefit of members of the public.[173]

5.4.4 He accepted that backcapturing could be regarded as a part way step to an ultimate sunsetting regime.[174]

5.4.5 Mr Gardini told the Committee the failure to adopt the sunsetting procedure is a major omission. The main reason for the non-adoption of this procedure is based on the argument that no evaluation of it has been undertaken. While this may be a sound reason for not proceeding with sunsetting, it is rather ironic that each year hundreds of subordinate instruments are made without any proper evaluation.[175]

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170 *Senate Hansard*, 9 November 1994, p. 2693.

171 *Transcript*, p.34.

172 Professor Pearce, *Submissions*, p. S7.

173 ibid.

174 Professor Pearce, *Transcript*, p.36.

175 Mr Gardini, BCA, *Transcript*, p. 5.

Bureaucratic opposition to sunsetting and support for backcapture

5.4.6 Mr Morgan told the Committee that there was considerable opposition to sunsetting from Commonwealth departments and agencies. He stated:

> As a department and as a fostering agency for this legislation, we are ourselves, committed to a proposal which deals with sunsetting. Its achieveability at the present time was not possible within the bureaucratic system.[176]

5.4.7 The Department of Human Services and Health submitted that the resources required for sunsetting would be substantial. The Department was not convinced that the benefits of sunsetting would justify the expenditure. It submitted that backcapturing of instruments will achieve many of the beneficial effects of sunsetting whilst containing costs. Backcapturing was a powerful incentive to remake instruments which are poorly drafted and do not reflect current policy.[177]

5.4.8 Mr Morgan told the Committee that backcapturing will achieve similar objectives to sunsetting. Backcapturing will ensure that delegated legislation is available to the public. Delegated legislation must be placed on the Register otherwise it ceases to be enforceable. He indicated that if the resource intensive sunsetting regime[178] had been adopted there would have been difficulties in getting instruments registered within an appropriate time frame.[179]

5.4.9 Mr Morgan also explained that, in conjunction with the backcapture program, a law revision unit had been established within OLD to review the ongoing need for the legislation that had been registered.[180]

5.4.10 Professor Saunders indicated that most of the goals that the ARC sought to achieve through sunsetting may be partly achieved by backcapturing.[181] The ARC acknowledged that the sunsetting of Commonwealth legislative instruments will be likely to have significant resource implications.[182] Professor Pearce told the Committee that he had doubts about whether backcapturing was considerably less resource intensive than sunsetting.[183]

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176 *Transcript*, p. 200.

177 DHHS, *Submissions*, p. S139.

178 Under a sunsetting regime, the instruments need to be remade because the existing instruments automatically cease to have effect at a particular time.

179 *Transcript*, pp. 33-34.

180 ibid. . p.33-34.

181 Professor Saunders, *Transcript*, p. 23.

182 *Submissions*, p. S69.

183 Professor Pearce, *Transcript*, p.38.

Evidence in favour of sunsetting

5.4.11 The Committee received a good deal of evidence in favour of sunsetting. Mr Victor Perton MLA advised the Committee that sunsetting reduced the total volume of secondary legislation. It also led to a marked diminution in the annual volume of Victorian subordinate legislation.[184] Mr Argument submitted that sunsetting would concentrate the minds of rule-makers a lot more carefully and, as a result, a lot of useless delegated legislation might be knocked off the statute books.[185]

5.4.12 Professor Saunders told the Committee that sunsetting forces a rethink of the necessity for old legislative instruments and a new scrutiny of delegated rules to see whether they live up to modern standards.[186] Professor Hotop submitted a sunsetting regime would enhance the quality and legitimacy of delegated legislation. It would ensure that the continued appropriateness of secondary legislation is considered periodically and that higher drafting standards are observed in the re-writing process. He suggested that it would be regrettable if the Commonwealth legislation did not provide for a sunset program which matched the least burdensome and resource-intensive sunset program adopted by the States.[187]

5.4.13 Mr O'Brien submitted that in not adopting a sunsetting regime an opportunity was missed to make 'a real assault on outdated and obscure' instruments. He queried whether the sunsetting process would be as resource intensive as some departments and agencies claimed.[188] Mr Cruickshank MP submitted that in New South Wales sunsetting was effective.[189]

5.5 Conclusions

5.5.1 The Committee accepts that there is bureaucratic reluctance to the immediate introduction of a sunsetting regime. It also accepts that backcapturing will achieve some of the same objectives as sunsetting and that backcapturing is a part way step towards an ultimate sunsetting regime. The Committee notes the view expressed by Mr Morgan in this regard:

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184 *Transcript*, p. 155.

185 Mr Argument, *Transcript*, p. 18.

186 Professor Saunders, *Transcript*, p. 232.

187 Professor Hotop, *Submissions*, p. S187.

188 Mr O'Brien, *Submissions*, p. S17.

189 Mr Cruickshank MP, *Submissions*, p. S 77.

> I am satisfied that we will have sunsetting as an exercise and as a requirement before too long. I am not saying three years, or four years, or five, but before too long.[190]

5.5.2 The Committee has received a good deal of evidence in favour of sunsetting. In its report, *Clearer Commonwealth Law*, the Committee recommended the introduction of a sunsetting regime. A number of other detailed reports have also favoured the adoption of a sunsetting regime (see appendix 4). Having considered all of this, the Committee is convinced of the merits of sunsetting as soon as possible.

Recommendation 23

The Committee recommends that a sunsetting regime be introduced in relation to all existing and future legislative instruments as soon as possible.

5.6 Registration of consolidations

5.6.1 The Bill does not provide for the registration of consolidations of legislative instruments. A consolidation contains the text of the original instrument in which are compiled all amendments made to it up to the date of preparation of the consolidation. A consolidation is not made by a rule-maker as a legislative instrument. Consolidations are compiled by AGPS and by commercial publishers for sale. In addition, departments, agencies, the OLD and other users of legislation compile consolidations for various purposes.

5.6.2 As envisaged in the Bill, the Register is to include each individual piece of legislation going back to the original. In other words, it is the electronic equivalent of individual Statutory Rules that together amend an original set of Statutory Rules.

5.6.3 A consolidation, even if it is published by AGPS is not the authoritative source of the text of the legislation. The Bill reflects the present position by making no provision for the registration, and therefore authentication, of consolidations.

5.6.4 Amendments to legislation are made by linking the amending text to the text being amended. If one link in the chain is missing, for example, because it was overlooked during the process of backcapture, a later link in the textual chain may have nothing to which to refer. As a result, the text of the legislation as amended may be defective.

5.6.5 If there is a missing instrument in the chain, one option for the rule-maker is to repeal and remake all instruments in the chain as a new instrument. A remade

190 *Transcript*, p.219.

instrument may need to include transitional and saving provisions[191]. Saving and transitional provisions may be necessary to bridge the gaps between an instrument that has been repealed and the instrument that replaces the repealed instrument. The gaps to be bridged are those aspects of the operation of the scheme of the new instrument that differ from those of the old instrument but for which some relationship, for example continuity, is required with those of the old instrument. Examples of saving and transitional provisions are Chapter 23 of the Patents Regulations[192] and the Migration Reform (Transitional) Regulations[193].

5.6.6 Savings and transitional provisions can be difficult to interpret and apply.[194] Provisions of this kind are also often difficult to draft. The registration of a consolidated instrument would avoid the need in some cases for new transitional or savings provisions for the purposes of backcapturing the instrument.

5.6.7 Professor Pearce submitted that in the rush to meet registration deadlines, or simply because an amendment is tucked away in an omnibus amending instrument, there could be failure to identify all amendments. Many original instruments were made over 60 years ago and the difficulty of identifying all amendments increases with time. He submitted that departments may think that it is wiser to remake their legislation because they will not be confident that they can register all relevant instruments. An alternative approach would be to allow the registration of a consolidation of the legislation as the authoritative version of the text. Under a sunsetting regime these uncertainties would be avoided.[195] The DEET indicated that it had difficulty in locating some instruments under old programs.[196]

5.6.8 The Attorney-General's Department submitted that if consolidations were allowed to be registered it could result in the Register not accurately reflecting the current state of the law. Many instruments that do not form part of the Statutory Rule Series have only been consolidated on an informal basis. It is not intended to change the effect of the law by the backcapturing process and registration of an inaccurate consolidation may have such an effect.[197]

5.6.9 The Committee appreciates the difficulty that some departments and agencies may have in this area. There is of course the option to remake the instrument that can not be located or identified, although this may involve complicated transitional

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191 Clause 57 of the Bill is a transitional provision.

192 Statutory Rules 1991 No. 71.

193 Statutory Rules 1994 No. 269.

194 Speagle, D. and Dowling, M., 'The 1990 Patents Act: Unfinished Reform', *Australian Intellectual Property Journal*, August 1993, p. 178.

195 *Submissions*, p. 14.

196 *Submissions*, pp. 37-38.

197 Attorney-General's Department, *Submissions*, p. S196.

provisions. The Committee notes the concerns expressed by the Attorney-General's Department in relation to the accuracy of consolidations.

Recommendation 24

The Committee recommends that consideration be given to amending the Legislative Instruments Bill to allow the registration of a consolidation of a legislative instrument as part of the backcapturing process if the Principal Legislative Counsel is satisfied that the consolidation is accurate and the rule-maker can establish that it is preferable to remaking the instrument.

5.7 Rewriting of backcaptured instruments

5.7.1 The Government has established a law revision unit in OLD to rewrite outdated or unnecessary regulations once they have been identified, after backcapture or otherwise.[198]

5.7.2 The Attorney-General's Department has advised the Committee that the following criteria may need to be considered when assessing priorities for the revision and rewriting of legislative instruments:

- is the instrument concerned currently heavily used
- does the legislation affect many people
- is the legislation difficult to use because of its language and presentation
- is the legislation fragmented, that is, has it been frequently amended with no or few consolidations
- is a consolidated version readily available
- are there policy reasons that support the rewriting of the legislation[199]

5.7.3 The Attorney-General's Department expressed the view that it seems probable that instruments that are not currently part of the Statutory Rules series would satisfy these criteria ahead of instruments that are Statutory Rules. It expects that

198 As foreshadowed in *Working Nation: programs and policies*, p. 37.

199 *Submissions*, p. S150.

these criteria may be further developed over time.[200] The Attorney-General's Department submitted that because of the delay with the Bill and because the Register had not been established OLD had not discussed 'programs' of law revision with any agencies.[201]

5.7.4 Professor Pearce supported periodic reporting to Parliament in relation to the law revision and review programs of departments and agencies. He submitted that the Parliament has to assume the role and responsibility in relation to delegated legislation in its broader sense. The Bill already provides for uniform scrutiny of legislative instruments and makes almost all Commonwealth secondary legislation subject to disallowance. In the view of Professor Pearce, a regular reporting arrangement would complement the parliamentary scrutiny and disallowance function. Reporting either six-monthly or annually would be a suitable reporting arrangement.[202]

5.7.5 The Committee considers that the successful operation of the law revision unit is clearly essential if the Government's law revision program is to be effective.

Recommendation 25

The Committee recommends that departments and agencies should include in their annual reports statements of their review and revision programs for legislative instruments.

5.7.6 Statements of this nature would provide the basis for public accountability.

200 ibid.

201 Attorney-General's Department, *Submissions*, p. S149.

202 *Transcript*, p. 69.

Chapter 6 Access to legislative instruments

This chapter examines the extent to which access to legislative instruments will be enhanced by the Bill. The Committee concludes that extracts from the Register authorised by the Principal Legislative Counsel should be available through government bookshops.

The chapter examines the importance of the Index to accessing the Register. The Committee concludes that the Index is crucial to accessing the Register and recommends that it should be in a user friendly form. The Attorney-General should also have to report to the Parliament if the Index has not been updated as required.

The chapter examines the means by which the public will have access to the Register and SCALE. The Committee concludes that the largest possible number of locations across Australia should be provided for public access to the Register and SCALE.

6.1 Introduction

6.1.1 The Bill supports the principle that people should have an effective means of knowing the content of laws affecting them. This principle was advocated in the Administrative Review Council report and the Bill reflects relevant recommendations in that report.[203] Access to legislative instruments may involve access to the printed text of the instruments and, increasingly, access to an electronic copy of that text. The quality of access to legislation is an indicator of equality of access to justice.

6.1.2 Under the current regime a new legislative instrument must be notified or published in full, in the *Gazette*. The Bill provides for the establishment of the Federal Legislative Register of Legislative Instruments (clause 22). It is intended that publication in the Register will replace publication in the *Gazette*.[204] Entry on the Register is through lodgment of the instrument with the Principal Legislative Counsel. The Principal Legislative Counsel then arranges for entry of the instrument in the Register. The Register is divided into Parts A, B, and C and an Index.

6.1.3 Clause 25 provides that the Register will be computerised. While this may appear to be a problem from the point of view of user access, clause 26 also provides that the Principal Legislative Counsel must ensure that the public can inspect the Register. A major premise of the Bill is that electronic access is an efficient, inexpensive way of distributing legislation in an up to date form, particularly to remote areas.

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203 *Rule Making by Commonwealth Agencies,* pp. 61-67.

204 Ms Baker, *Transcript,* p. 145.

6.1.4 Some access to printed copies of instruments will be retained in the new scheme. Where hard copies of instruments are now available this will continue beyond 1 July 1995 if the demand exists.[205] In addition the Index to the Register will be published and will be available in hard copy from AGPS either by subscription or from government bookshops.[206]

6.1.5 The Attorney-General's Department informed the Committee that 'in most cases information about the contents of instruments will be available sooner than they are now' and that 'one of the advantages of the proposed scheme is the speed with which the Index and copies of instruments will be available throughout Australia.[207]

6.1.6 The Bill repeals and replaces Part XII of the Acts Interpretation Act. Section 48 in that Part deals with aspects of the publication and scrutiny of regulations and most other disallowable instruments. The Bill also repeals and replaces the Statutory Rules Publication Act. That Act, and regulations made it, presently provide for aspects of the presentation of the Statutory Rules series.

6.2 Electronic publication and print publication

6.2.1 Parts A, B and C of the Register will hold scanned images of documents. It will have the following characteristics:

- any instrument registered (including graphics contained in the instrument) will be a facsimile, rather like a photocopy of the original
- all signatures, amendments in handwriting and other marks on the instrument, including evidence of its making, will be reproduced on the image
- the image will be a true copy of the instrument lodged for registration.

6.2.2 Use of this technology provides protection against error and tampering that is not available in text-based databases and allows for very quick registration.[208]

6.2.3 A parallel database of the text of instruments will be kept on the legal database, Statutes and Cases Automated Legal Inquiry (SCALE). It will be prepared from electronic versions of the instruments provided by rule-makers under clause

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205 Attorney-General's Department, *Submissions*, p. S192.

206 ibid.

207 *Submissions*, p. S192-93.

208 *Submissions*, p. S196.

35 of the Bill. Responsibility for the accuracy of the electronic copy rests with the rule-maker.[209]

6.3 On-line access through SCALE

6.3.1 Many users of the Register will get their information from SCALE – the database maintained on the Attorney-General's Department computer mainframe. Direct access to SCALE is available through:

- dedicated high-speed lines (Attorney-General's Department itself, other agencies in the Attorney-General's portfolio and AGPS)
- other, not necessarily dedicated, high-speed lines (other Commonwealth, and State and Territory, Departments and agencies)
- the dial-up facility provided by Telecom's AUSTPAC service or by similar providers (other subscribers)
- on-line through the AGPS (public access points).

6.3.2 If a user wishes to obtain a copy of an instrument from the database, he or she will be given the choice of a non-authoritative copy taken from a SCALE text file or an authoritative copy taken from the image on the Register. The difference between the prints will be in the time taken (image printing is slower) and the possibility of error (the image is more secure).[210]

6.3.3 The Attorney-General's Department has informed the Committee that SCALE will be enhanced. For example, it is intended that the enhanced SCALE will have an interface that is familiar to users of Windows computer software.[211]

6.3.4 The Attorney-General's Department and the agencies within the portfolio have free access to SCALE. Many dial-up SCALE users also have free access. These include law schools, university law libraries, legal aid commissions and community legal information centres. Public access to SCALE through AGPS bookshops is also free. For other uses there are two levels of charges for dial-up subscribers to SCALE (exclusive of telephone call charges):

- $105 per connect hour for government bodies

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209 ibid.

210 Ms Baker from the Attorney-General's Department told the Committee that 'capturing on image means capturing them exactly as they are. It can be done very quickly and very efficiently'. *Transcript*, p. 136.

211 Attorney-General's Department, *Submissions*, p. S 193-194.

- $125 per connect hour for other subscribers.

These charges are *pro rata* for less than a connect hour.[212]

6.4 Limitations of electronic access

6.4.1 Evidence before the Committee reflected concern about a scheme which relies heavily on electronic access to secondary legislation. One witness noted that concerns

> ... include the significant fact that it will require a degree of computer skills, in addition to simple literacy, to use it. Whereas a high proportion of citizens are literate, and are therefore capable of using the [present arrangements], not all of those people possess the required degree of computer literacy.[213]

6.4.2 Even for those who are computer literate, access to computers which can connect with the Index of the Register or SCALE is a problem. There appears to be some doubt about whether there will be on-line access through public libraries.[214] The Attorney-General's Department have pointed out that the present access would still exist.[215] As access to information about secondary legislation is a weakness of the present system, this is not greatly reassuring.

6.5 Print publication

6.5.1 While recognising the advantages of electronic publication on which the Bill is in effect based, the Committee believes that all Commonwealth secondary legislation should be printed:

- by the Government Printer on demand at AGPS bookshops
- by the Government Printer in anticipation of demand for purchase by subscription or over the counter at the bookshops.

6.5.2 With the repeal of the Statutory Rules Publication Act[216], there will no longer be a category of statutory instruments called 'Statutory Rules'. At present, the only legislative instruments that are stocked completely by AGPS bookshops are

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212 *Submissions*, p. S 151.

213 Mr Griffiths, Managing Director, Capital Monitor Pty Ltd, *Submissions*, p. S 127.

214 *Transcript*, pp. 143 – 45.

215 Mr Mackay, *Transcript*, p. 145.

216 See paragraph 6.1.6.

Statutory Rules. However, the Committee believes that printed copies of **each** kind of legislative instrument should be able to be printed on demand over the counter and available on subscription.

6.5.3 The Committee reiterates the view expressed in *Clearer Commonwealth Law* that

> The cost of electronic access and the special skills needed to operate systems for electronic access mean that not everyone will be able to gain access to legislation electronically. Printed legislation is likely to be more accessible for many people for many years to come.[217]

6.6 Conclusions – access to electronic and printed versions of instruments

6.6.1 The Committee has considered the possibility of making a recommendation which would have the effect of creating two authoritative versions of the Register – electronic and printed.[218] The practical difficulties and economic cost of this is probably too high, although it is an option that could be considered at the review of the legislation in three years time.

6.6.2 An alternative favoured by the Committee is that copies of instruments which are in high demand could be extracted from the Register or SCALE. If extracted from the Register and printed by, or with the authority of, the Government Printer, the extract would be authoritative.

Recommendation 26

The Committee recommends that extracts from the Federal Register of Legislative Instruments authorised by the Government Printer should be available through government bookshops and from the Principal Legislative Counsel.

6.7 Non-government printing

6.7.1 The Committee considers that extracts from the Register and SCALE should be able to be printed by bodies other than the government printer both from public access points and privately.[219] What is printed in these circumstances will not have the evidentiary status of what is printed by the Government Printer or the Principal Legislative Counsel.

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217 *Clearer Commonwealth Law*, p. 194.

218 This was suggested by Mr Richard Griffiths, Managing Director of Capital Monitor Pty Ltd, *Submissions*, p. S128.

219 ibid.

6.7.2 In its report *Clearer Commonwealth Law*, the Committee found that private publishing enterprises, or joint ventures involving both the public and private sectors, can provide legislation to the public. The Committee supports the publication of legislative instruments with additional features such as annotations (and cross-references to related legislation) if there is a market.[220]

6.7.3 The Committee continues to support the provision of electronic access to Commonwealth secondary legislation with extra features in both electronic form or hard copy by private publishers under arrangements with the Commonwealth.

6.8 The importance of the Index to the Register

6.8.1 The Index for which provision is made in the Bill appears to the Committee to be a key to enhancing access to the Register. The Bill provides[221] that the Principal Legislative Counsel is to be responsible for the creation and maintenance of the Index. It appears to the Committee that the manner in which the Index is presented and the 'user-friendliness' of the public interface with the computer-based Register are critical to the success of the scheme of the Bill so far as access is concerned.

6.8.2 However further consideration needs to be given to the Index component of the Register. The Bill provides for an Index to the material contained in the other parts of the Register, that is, Parts A, B and C. That Index is not to be confused with the index to each long piece of principal legislation or reprint that this Committee recommended in its report *Clearer Commonwealth Law*[222].

6.8.3 The Index[223] will contain information about registered instruments and registered certificates issued by the Attorney-General under clause 7 of the Bill, including:

- the identifying number of each registered legislative instrument and each registered certificate
- the name of the legislation, and the particular provision, under which the instrument is made or to which the certificate is relevant
- the time and date of registration
- a brief description of the subject matter of the instrument

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220 p. 194.

221 Subclause 40(1).

222 Recommendation 33, p. 158.

223 See Division 6 of Part 4 of the Bill.

- a reference to any document incorporated in the instrument by reference.

6.8.4 The Index is to be updated continuously and will, like the other Parts of the Register, be available on-line.[224] It will also be available on CD-ROM (compact disk read only memory). Whatever the medium, the Committee believes that the Index should be presented in the most communicable form that is possible.

6.8.5 The Index should also be available in hard copy for purchase on demand or by subscription from the Australian Government Publishing Service on a daily or weekly basis. An obvious, and therefore desirable, existing publication in which to include the Index is the *Gazette*.

6.8.6 The Committee is of the view that the Index should be disseminated as widely as possible. Commercial law publishers may be interested in including the Index in loose-leaf administrative law services or legal digests. The Committee notes that the range of possible publications in which the Index could be published is large.

6.8.7 SoftLaw Community Projects operates a non-profit community legal technology. SoftLaw Community Projects believes that it is important that the Index has a clear conceptual base that is developed specifically within a framework of computer-based index technology.[225]

6.8.8 In order to ensure that the form of the Index is as helpful as possible, the Committee believes that its design and presentation should be approached without being constrained by the current form and presentation of the *Gazette*. For example, the weekly compilation of the Index published in a *Gazette*, should include a means of ready reference to the contents of the Index included in the *Gazette*, or in other words, an index to the Index.

6.8.9 Any publication of the Index should be prefaced with a clear description of how to use a computer terminal and a modem to gain access both to the Register and to versions of legislative instruments in SCALE. This should be written with non-users of computers in mind. The Attorney-General has advised the Committee that a Legislative Instruments Handbook will be developed by OLD in consultation with the Parliament as well as other Commonwealth Departments and agencies to complement and give guidelines on the operation of the Legislative Instruments Act. It is expected that the proposed Legislative Instruments Handbook will be available in loose leaf A4 format and on CD-ROM.[226] The proposed Handbook should also include the description of how to access the Register and SCALE.

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224 *Submissions*, p. S195.

225 *Submissions*, p. S171.

226 Letter to the Chairman of the Committee dated 20 December 1994.

Recommendation 27

The Committee recommends that:

- the format of the Index to the Federal Register of Legislative Instruments should be designed in such a way as to present the Register in the most understandable way possible
- the Index should be available on a daily or weekly basis and should be published in the *Gazette* and in as many other publications as practicable
- the Index should be prefaced in any publication in which it appears by a clear description (written with non-users of computers in mind) of how to use a computer terminal and a modem to access the Register and SCALE
- this description should be included in the proposed Legislative Instruments Handbook.

6.9 Keeping the Index up to date

6.9.1 The importance of the Index for access to secondary legislation should be recognised by provisions for keeping the Index current. The Committee considers that the Attorney-General should be required to notify Parliament if, within a reasonable period after registration of an instrument, the Index has not been updated and the update published in print form. Similar provisions presently apply under subsections 5(3A), (3B) and (3C) of the Statutory Rules Publication Act 1903 in relation to failure to make copies of Statutory Rules available for sale within a reasonable time.

Recommendation 28

The Committee recommends that if, within a reasonable period after registration of a legislative instrument, the Index to the Federal Register of Legislative Instruments has not been updated and the update published in print the Attorney-General should table in each House of the Parliament, within six sitting days of the end of that period a statement explaining the delay.

6.10 Public access points

6.10.1 The Committee is concerned that there should be wide access to legislative instruments that are in the Register or on SCALE. To that end, the Committee believes that every possible opportunity should be sought by Attorney-General's Department and AGPS for making access available to the public for inspection of the Register and SCALE by means of computer terminals located throughout the country.

6.10.2 Locations such as the offices of the Australian Government Solicitor, AGPS bookshops, Australian Securities Commission business centres, courts, public libraries and Commonwealth Government offices are places at which citizens may find collections of *Gazettes*. They are therefore also the places where a citizen might expect to be able to access the system replacing the *Gazette* for the purposes of notifying and publishing Commonwealth secondary legislation.

6.10.3 However, access from other outlets (for example, community legal centres) should be actively pursued. They should be located in places that are open to the public as of right. Otherwise, the range of possible locations for terminals are limited only by the imaginations of the officers concerned in Attorney-General's Department and AGPS.

6.10.4 A member of the public should not have to pay to inspect the Register or SCALE at a public access point. To provide access, the public access point will need only a computer (it does not have to be a powerful one, most home computers will do the job), a modem and the operating software supplied with the computer and modem. There will be no further costs to the public access point other than the cost of a local phone call. Some public libraries may already be connected to other databases (such as InfoOne) that connect to SCALE.[227]

6.10.5 The Australian Library and Information Association ('ALIA') estimates the number of public libraries in Australia as about 1300. A survey conducted by ALIA late in 1994 indicated that of those, 117 currently had access to Internet, and therefore to SCALE. Ninety-seven of those libraries are in NSW, as almost every public library in that State is part of a network that allows connection with InterNet. An equivalent network in Victoria is expected to be operational shortly, and by the end of 1995 a similar situation is expected to exist in the other States and Territories.[228]

6.10.6 The Committee believes that an up to date list of public access points should be maintained by Attorney-General's Department. The list should set out on a State, Territory and regional basis the addresses and telephone numbers of public access points. The list should be published in the proposed Legislative Instruments

227 *Submissions*, p. S195.

228 *Submissions*, p. S195.

Handbook, in the Attorney-General's Department annual report and in the *Gazette* on a weekly basis. If possible, the list should also be published in any other publication that includes the Index to the Register.

6.10.7 The Attorney-General's Department has advised the Committee that it is already involved in training and the publication of materials to assist users in preparation for the commencement of the Bill.[229]

6.10.8 There is concern[230] about levels of computer skill deficiency in the community that may be an impediment to access to Commonwealth secondary legislation under the new arrangements. The Committee is of the view that Attorney-General's Department should prepare a training package targeting especially staff at public access points. The package should be designed to give instruction in the use of the computer programs for accessing the Register and SCALE. The Committee believes that these staff will perform a crucial intermediation role between intending users and the databases.

Recommendation 29

The Committee recommends that:

- the largest possible number of locations across Australia should be provided for public access to the Register and SCALE
- up to date listing of public access points should be maintained and published regularly as widely as possible
- the staff at public access points should receive training that will equip them to provide assistance to Register and SCALE users.

229 *Transcript*, p. 186.

230 *Transcript*, p. 143

Chapter 7 Parliamentary Scrutiny

This chapter examines the provisions of the Bill that provide for parliamentary scrutiny of legislative instruments. The Committee concludes that the tabling and disallowance provisions, which are similar to existing arrangements, are satisfactory.

The chapter also examines a number of specific issues relating to parliamentary scrutiny. The Committee concludes that documents incorporated by reference should be register and tabled unless they are large-volume documents, in which case they should be made available to the Parliament for inspection. The Committee also concludes that the deferred disallowance provisions should be strengthened and the partial disallowance provisions should be made clearer.

Consideration is given to expanding the terms of reference of the Senate Standing Committee on Regulations and Ordinances.

The chapter also focuses on the parliamentary scrutiny of non-legislative instruments.

7.1 Introduction

7.1.1 It has long been accepted that secondary legislation should be tabled in each House of Parliament and may be disallowed by either House. The Bill adopts this principle and provides for the tabling and disallowance of all legislative instruments, except for certain intergovernmental instruments. The general parliamentary scrutiny regime proposed by the Bill to this extent is not controversial.

7.1.2 The chapter does examine a number of specific issues that are relevant to parliamentary scrutiny, including incorporation of material by reference, deferred disallowance, partial disallowance and the role of the Senate Standing Committee on Regulations and Ordinances.

7.2 Provisions of the Bill relevant to Parliamentary scrutiny

7.2.1 Part 5 of the Bill (clauses 44 to 52) deals with parliamentary scrutiny of legislative instruments. This Part replaces thee current arrangements contained in Part XII of the Acts Interpretation Act. Unlike Part XII which applies only to regulations and 'disallowable instruments', the scrutiny provisions in Part 5 applies to all legislative instruments. The only exception are instruments made in relation to intergovernmental schemes and bodies where uniformity between Commonwealth and State jurisdictions is required (see subclause 48(5)).

7.3 Tabling of instruments

7.3.1 Clause 45 provides that all registered legislative instruments are to be laid (tabled) before each House of Parliament within six sitting days of the House after

registration. This is designed to ensure that scrutiny of instruments is timely. Under the current arrangements, fifteen days are allowed for tabling. The PLC is responsible for delivering the instruments to the Parliament. Under the current regime, departments and agencies are usually responsible for this. Subclause 45(3) provides that if the requirements of the clause are not met the instrument ceases to have effect.

7.3.2 Clause 46 also requires any explanatory statement prepared under clause 32 accompanying the legislative instrument to be tabled.

7.3.3 A document may be incorporated into a legislative instrument by reference to the document in the legislative instrument (see clause 10). If Parliament wishes to scrutinise the incorporated document, clause 47 requires a document that has been incorporated by reference to be made available for inspection.

7.4 Disallowance of instruments

7.4.1 Clause 48 sets out the various methods by which a legislative instrument will be disallowed. Either House of the Parliament may give a notice of motion of disallowance within fifteen sitting days of the instrument having been tabled.

7.4.2 A legislative instrument generally comes into force on the day it is made. If an instrument is subsequently disallowed, clause 49 provides that it ceases to have effect from the date of disallowance. As a result, anything done in accordance with an instrument during the period between the making of the instrument and its disallowance is not affected.

7.4.3 Clauses 50 and 51 limit the circumstances in which a legislative instrument that is subject to disallowance, but that has not been disallowed, may be remade in similar or identical terms. If a legislative instrument has been disallowed, clause 52 provides it can not as a general rule be remade for six months.

7.5 Parliamentary scrutiny generally

7.5.1 The Bill adopts and extends the tabling and disallowance provisions under Part XII of the Acts Interpretation Act so as to apply to almost all legislative instruments. It reduces the tabling period from 15 days to a period of six days after registration. The Bill retains the disallowance procedure in favour of the approval procedure as was recommended by the ARC.[231] Under the disallowance procedure, an instrument once made is effective until disallowed. Under the approval procedure, an instrument does not come into effect until a resolution affirming it has been passed by both Houses of Parliament.

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231 ARC, *Rule Making by Commonwealth Agencies*, recommendation 16, p. 46.

7.5.2 The Committee did not receive any evidence that was critical of the general parliamentary scrutiny regime proposed by the Bill. Professor Hotop submitted that, although he favoured greater use of the approval procedure, he was persuaded by the ARC's arguments in favour of retaining the disallowance procedure as the norm. He indicated that in any event subclause 8(3) of the Bill ensures that, if legislation provides for the approval procedure, the taking effect of instruments made under it will be in accordance with that procedure.[232] Mr Argument described the incorporation of the tabling and disallowance provisions of the Acts Interpretation Act as a 'sensible idea'.[233]

7.6 Particular issues relevant to Parliamentary scrutiny

7.6.1 The Committee did receive evidence in relation to a number of issues relevant to parliamentary scrutiny, namely incorporation of material by reference (clause 47); deferred disallowance (subclause 48(4)); exemption of intergovernmental instruments (subclause 48(5)); partial disallowance and the role of the Senate Standing Committee on Regulations and Ordinances. The Committee now examines each of those issues.

7.7 Incorporation of material by reference

7.7.1 Clause 47 provides that a House of Parliament may require a document that has been incorporated by reference into a legislative instrument (see clause 10) to be made available to it for inspection. This gives the Parliament the opportunity to scrutinise the incorporated document. The Bill also requires the Index to the Register to contain a reference to any incorporated document (see subparagraph 40(4)(a)(vi)).

7.7.2 In its report *Rule Making by Commonwealth Agencies*, the ARC was concerned that it can be difficult to know what the law is if a document has been incorporated by reference and is not easy to find, for example, if it is a document made by a private organisation. The ARC recommended that the text of any document (including changes to the text), other than Acts, incorporated by reference into a legislative instrument should have no effect unless published in the Register.[234]

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232 Professor Hotop, *Submissions*, p. S187.

233 Mr Argument, *Submissions*, p. S32.

234 Recommendation 29, p. 67.

7.7.3 Professor Pearce submitted that the Bill fell far short of the ARC recommendation and does not deal with the problem of access to the law to which the ARC recommendation was directed.[235] He stated:

> The whole point of the Register was to be a complete statement of the law and if another instrument which is not made by the government but made by some other organisation is incorporated into a legislative instrument and thereby becomes part of the law it ought to be available to the public.[236]

7.7.4 Mr Morgan told the Committee that it was impractical in some cases to provide for the registration and tabling of particularly bulky documents, such as aircraft manuals. Consequently, the Bill did not adopt the ARC recommendation but opted for an expedient solution as provided for by clause 47.[237] The Attorney-General's Department agreed with the Committee that so far as clause 47 was concerned the exception appeared to be dictating the rule.[238]

7.7.5 Ms Baker gave evidence that tabling in electronic form could help solve the problem but only if the department or agency had the document itself in electronic form. The department or agency may not have created the incorporated document and may not have it in electronic form.[239]

7.7.6 The Attorney-General's Department suggested one approach to the problem that balances the Committee's concerns and the practical problems that exist in relation to very bulky documents. It would require the registration and tabling of all documents incorporated by reference, with exceptions in appropriate circumstances:

> Clauses 29, 30, 36 and 37 could be amended to include a registration requirement for documents incorporated by reference. Clause 45 would then apply to require tabling of the incorporated material and this would necessitate clause 47 being redrafted to provide an exception to tabling of large-volume materials. However, such a definition would be arbitrary.[240]

7.7.7 The Attorney-General's Department subsequently submitted that the resource and cost implications of a general tabling provision would be substantial, and may not be an efficient use of resources. As an alternative it submitted that one solution would be to indicate in the explanatory statement (see clause 32), or the legislative

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235 Professor Pearce, *Submissions*, p. S8.

236 *Transcript*, p. 52.

237 Mr Morgan (Attorney-General's Department), *Transcript*, p. S 53.

238 Attorney-General's Department, *Submissions*, p. S144 ; *Transcript* p.57.

239 Ms Baker (Attorney-General's Department), *Transcript*, p. S 56.

240 Attorney-General's Department, *Submissions*, p. S145.

instrument itself, from where a document incorporated by reference could be obtained.[241]

7.7.8 The Committee does not believe that the proposal to indicate where a copy of the incorporated document can be obtained addresses the concerns expressed by the ARC. The Committee notes that the earlier proposal advanced by the Attorney-General's Department is largely consistent with the ARC recommendation, namely that documents incorporated by reference should be registered and tabled. The Committee accepts that there will need to be an exception to this in relation to large-volume materials.

Recommendation 30

The Committee recommends that the Legislative Instruments Bill should be amended to provide for the registration of documents, other than Acts and other legislative instruments, incorporated by reference into a legislative instrument and for the tabling of such documents. Any changes to the incorporated document should also be registered. An exception should apply in relation to large-volume materials which should be made available to the Parliament for inspection on request.

7.8 Copyright issues relating to the registration and tabling of material incorporated by reference

7.8.1 The Attorney-General's Department submitted that making copies of material incorporated by reference for tabling in the Parliament or inclusion in the electronic Register (see Part 4 of the Bill) or the making of further copies to meet public demand will raise certain copyright issues under the *Copyright Act 1968*. Under section 183 of that Act, the Commonwealth is given a statutory licence to use the copyright of others provided the use is for the purposes of the Commonwealth. Material copied for the purposes of tabling in the Parliament or inclusion in the Register would fall within the exception. However, the Attorney-General's Department submitted that, if the Commonwealth made the material available on an electronic service and a member of the public made a copy for his or her own use, it would be difficult to characterise that as being for the purposes of the Commonwealth.[242]

7.8.2 The Attorney-General's Department submitted that it would be administratively cumbersome and time consuming to rely on section 183 of the Copyright Act. A preferable solution would be to incorporate an exception to infringement of copyright in the Bill. It would permit reproduction of private

241 Attorney-General's Department, *Submissions*, p. S191.

242 Attorney-General's Department, *Submissions*, p. S146.

copyright materials that have been incorporated in Australian law for tabling in Parliament or inclusion in the Register.[243]

Recommendation 31

The Committee recommends that legislation be introduced to provide an exception to infringement of copyright, to permit reproduction of private copyright materials that have been incorporated into a legislative instrument, for tabling in Parliament or inclusion in the Register established under Part 4 of the Legislative Instruments Bill.

7.8.3 The Attorney-General's Department also submitted that some material that is produced would constitute valuable commercial property and copyright owners may seek to be paid for their reproduction under section 183. Some agencies such as the Australian Standards Association, would lose significant revenue by the availability of free access to prints from the Register.[244] In a later submission, the Attorney-General's Department submitted that, on examining the matter more closely, the concerns expressed in relation to the Australian Standards Association were overstated. The Department indicated that the extent to which documents were incorporated by reference by agencies and other departments was unclear, as was the detriment for the body by whom the incorporated document was produced. [245]

7.8.4 The Committee notes the concerns expressed by the Attorney-General's Department. The Committee accepts that more information is required from departments and other agencies. It does not agree with the large scale use of incorporation of documents by reference. If this is occurring it should cease. In relation to the financial detriment issue, the Committee expects that a commercial solution could be arrived out once the problem (if any) is identified.

7.9 Deferred disallowance (subclause 48(4))

7.9.1 Under the existing system, if the Senate Standing Committee on Regulations and Ordinances has concerns about a particular instrument, these concerns are taken up initially with the responsible Minister. In most cases the Minister gives an undertaking to correct the instrument.

7.9.2 Subclause 48(4) of the Bill provides an alternative means of achieving the same result, that is correction of an objectionable instrument. It enables a House to

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243 ibid.

244 Attorney-General's Department, *Submissions*, p. S146 ; Mr Morgan, Attorney-General's Department, *Transcript*, pp. 117-118.

245 Attorney-General's Department, *Submissions*, p. S190.

defer consideration of a disallowance motion for up to six months to enable the Minister to rectify the problem with the instrument.

7.9.3 Mr Morgan gave evidence that the Senate inquiry into the Bill had expressed concern about the approach taken in subclause 48(4). He indicated that the Attorney-General's Department and the Government would not be 'too upset' if the approach is changed. It would be possible to amend the subclause to provide for the motion of disallowance to be passed and then deferred for a period of up to six months to enable the Minister to rectify the problem. If the problem was rectified, the motion of disallowance could be removed or overturned. This approach achieves the same result. [246]

7.9.4 Senator Spindler submitted that a delay in some instances will help Parliament to make better decisions, while, in others, it may weaken its resolve. For this reason he supported a provision that allowed a disallowance motion to be passed but for its effect to be deferred. Senator Spindler indicated to the Committee that this is what the ARC proposed.[247]

7.9.5 The Committee considers that the approach suggested by Mr Morgan and supported by Senator Spindler would send a much stronger initial message to the relevant Minister, namely that the instrument will cease to operate unless rectified. Under subclause 48(4) of the Bill consideration of the motion for disallowance is merely deferred for a specified period.

Recommendation 32

The Committee recommends that subclause 48(4) of the Legislative Instruments Bill should be amended to provide for a notice of motion for disallowance to be passed and for its operation to be deferred for a period of up to six months.

7.10 Intergovernmental instruments exempt from disallowance

7.10.1 Certain instruments facilitating intergovernmental schemes and bodies are currently not subject to disallowance by Parliament. Subclause 48(5) provides that if instruments of this kind are made after the Bill commences they also will not be disallowable. Ms Davies told the Committee that it was not appropriate to change the situation in relation to schemes that were already in place under existing

246 Mr Morgan, Attorney-General's Department, *Transcript, p.33.*

247 Senator Spindler, *Submissions* p. S201.

legislation.[248] However, the Bill does not provide that instruments made under new legislation (legislation made after the Bill commences) are exempt from disallowance.

7.10.2 Mr Bourke submitted that the Bill should provide that instruments facilitating intergovernmental schemes and bodies made under new legislation are exempt from disallowance.[249] The Attorney-General's Department submitted that it would not be appropriate to provide an exemption from disallowance for all legislative instruments made under future legislation. Rather, future legislation should address this issue in relation to the particular instruments for which it provides when it is being established.[250]

7.10.3 The Committee agrees that it is appropriate that the Bill maintains the status quo in relation to intergovernmental instruments that are currently exempt from disallowance and are made under existing legislation. Such instruments made after the Bill commences should also be exempt from disallowance. In relation to future legislation, the Committee accepts the position advocated by the Attorney-General's Department, namely that each new piece of legislation should specifically provide whether intergovernmental instruments to made under the legislation are to be disallowable or not.

7.11 Partial disallowance

7.11.1 The Committee notes that proposed Government amendments to clause 48 provide for the disallowance of a 'provision of a legislative instrument'. The original clause 48 provided only for the disallowance of an entire legislative instrument. The amendment will avoid having to disallow an entire instrument when only some of it is objectionable.

7.11.2 Ms Baker confirmed the amendments were drafted on the assumption that ' provision' means some discrete and self-contained part of an instrument that can be severed quite neatly and stands alone, such as a subregulation. She indicated that the Bill deliberately avoided use of the words 'part of an instrument' because there was a recognised argument that it would allow the Parliament to disallow a single word, such as 'not', and totally change the purpose of the provision. The view of the Attorney-General's Department was that 'provision' means a grammatically complete provision.[251] Professor Hotop suggested that this was not clear and questioned whether it was generally understood.[252]

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248 Ms Davies, Attorney-General's Department, *Transcript*, p. 96.

249 Mr Bourke, DEET, *Transcript*, p. 95.

250 Attorney-General's Department, *Submissions*, p. S153.

251 Ms Baker, *Transcript*, p. S195.

252 Professor Hotop, *Transcript*, p.194.

7.11.3 Senator Spindler did not agree with the Attorney-General's Department desire to limit disallowance to discrete parts of an instrument. He submitted that it should be possible to disallow part of an individually numbered regulation. He suggested that 'provision' could be defined to include any word, figure, drawing or symbol.[253] Mr Morgan told the Committee that defining 'provision' may create certainty, but may also have a detrimental effect. By relying on it something could be removed which was not desirable.[254]

7.11.4 The Attorney-General's Department submitted that there is no workable solution by way of attempts to define the word 'provision'. An alternative approach is to insert a 'taken to have been disallowed' provision in the Bill.[255]

7.11.5 The Committee agrees with the purpose of the proposed government amendments. The Committee accepts that it would be problematical to attempt to define 'provision' and considers that the alternative solution suggested by the Attorney-General's Department is too complicated. The Committee notes that although the meaning of the word 'provision' is not clear on its face, it has a generally accepted legal meaning.[256]

7.12 Role of Scrutiny Committee

7.12.1 The existence of a specialist parliamentary committee examining delegated legislation is essential to an effective parliamentary scrutiny process. This function is presently carried out by the Senate Standing Committee on Regulations and Ordinances.

7.12.2 The Scrutiny Committee scrutinises delegated legislation to ensure:

- that it is in accordance with the statute
- that it does not trespass unduly on personal rights and liberties
- 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

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253 Senator Spindler, *Submissions*, p. S201.

254 Mr Morgan, *Transcript*, p. 198.

255 Under this alternative "if by reason of the disallowance of only part of an instrument, the remaining parts would have effects different from those which they would otherwise have had, those other parts are also taken to have been disallowed. Attorney-General's Department, *Submissions*, p. S211.

256 ibid.

- that it does not contain matter more appropriate for parliamentary enactment.

7.12.3 The ARC recommended that the terms of reference of the Scrutiny Committee be expanded to include failure by an agency to carry out consultation requirements.[257]

7.12.4 Mr McCulloch submitted that the operation of the Senate Standing Committee on Regulations and Ordinances would be crucial to the success of the Bill.[258] In Victoria, under section 20 of the Subordinate Legislation Act, the Scrutiny of Acts and Regulations Committee may report on substantial non-compliance with consultation procedures. In New South Wales, under section 9 of the Regulation Review Act, the Regulation Review Committee may report on regulations that are not in accordance with the Subordinate Legislation Act.

7.12.5 The Committee considers that it would be advantageous to expand the terms of reference of the Senate Regulations and Ordinances Committee to include a failure by a rule-maker to consult in accordance with the provisions of Part 3 of the Act.

Recommendation 33

The Committee recommends that consideration should be given to expanding the terms of reference of the Senate Standing Committee on Regulations and Ordinances to include failure by a rule-maker to consult in accordance with the provisions of Part 3 of the Legislative Instruments Bill.

7.13 Parliamentary scrutiny of non-legislative instruments

7.13.1 Schedule 4 to the Bill proposes amendments to the Acts Interpretation Act to provide for the commencement, publication and parliamentary scrutiny of instruments that are not legislative instruments.

7.13.2 The Committee was concerned that the introduction of the procedures for the making of legislative instruments in the Bill may lead agencies and departments to develop administrative policies or guidelines so as to avoid compliance with the Act. Mr Morgan explained to the Committee that regardless of how an instrument was described, it would fall within the ambit of the Bill if it was legislative in character.[259]

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257 ARC, *Rule Making by Commonwealth Agencies*, recommendation 18, p.48.

258 Mr McCulloch, *Submissions*, p. S88.

259 Mr Morgan, Attorney-General's Department, *Transcript*, p.208.

7.13.3 Professor Curtis told the Committee that just as departments had used ministerial determinations and the like to avoid the restraints of the regulation making process, there is likely to be the same tendency with this Bill. He suggested that the answer rested with those who scrutinise the legislation.[260] Mr Argument was of the opinion that it 'might happen' and suggested that agencies and departments needed to be educated about what was 'right and proper'.[261] Professor Saunders told the Committee that the situation could not be very much worse than it is.[262]

7.13.4 The Committee notes that the provisions in the Acts Interpretation Act are relevant to this issue. These provisions will only apply if the legislation under which the non-legislative instruments are made provides that the instruments are disallowable. Parliament will have an important role to play in scrutinising future legislation to ensure that instruments have been correctly characterised as non-legislative and therefore outside the ambit of the Legislative Instruments Act. It will also need to determine whether there are special reasons why such instruments, although not legislative, should be subject to disallowance by the Parliament.

7.13.5 Both Professor Hotop[263] and Professor Saunders[264] suggested that this was something that should be looked at as part of the review of the legislation. The Committee agrees that this should form part of the ARC review of the Act.

7.13.6 The Committee has concerns about another aspect of non-legislative instruments. There is in existence a wide range of instruments, that are not strictly legislative in character, but that are applied in practice with legislative effect. Professor Pearce told the Committee there are determinations by the Commissioner of Taxation and on their face they certainly look like they are not a legislative instrument because they are directed to only one particular transaction or one particular person who is engaging in an activity. However, the Commissioner having made a ruling in relation to a particular company, then applies it to a number of other companies. He submitted 'the effect of the ruling is really like a piece of legislation'.[265]

7.13.7 The Committee notes Schedule 1 of the Bill provides that public rulings within the meaning of section 14ZAA of the *Taxation Administration Act 1953* are not legislative instruments. Consequently, they are not required to be registered and will not be accessible to the public through the Register. Such rulings are applied as if they had legislative effect in the manner outlined by Professor Pearce.

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260 Professor Curtis, *Transcript*, p. 147.

261 Mr Argument, *Transcript*, p. 20.

262 Professor Saunders, *Transcript*, p.252.

263 *Transcript*, p.207.

264 ibid., p.252.

265 Professor Pearce, *Transcript*, pp.48-49.

7.13.8 If non-legislative instruments are applied as if they are legislative, there is a case for them to be available to the same extent that they would be if they were legislative. The Committee is of the view that the ARC could consider this matter as part of its review of the Bill.

Chapter 8 Other matters

Some issues that were not the subject of a great deal of evidence and which have not been dealt with in earlier chapters, are considered in this chapter. They include specific subject matters such as university legislation and court rules as well as technical matters such as default commencement provisions for legislative instruments.

8.1 Introduction

8.1.1 This Chapter addresses a number of miscellaneous issues. Although none of the issues are substantial enough to warrant a separate chapter, some of them such as university legislation and court rules are very important matters.

8.1.2 Some of the issues have been the subject of the subject of recommendations in other reports relating to legislative instruments that have not been reflected in the Bill or accepted by the Government as amendments to the Bill or for implementation on an administrative basis.

8.2 University legislation

8.2.1 At present the Bill applies to all statutes, rules and orders made under the *Australian National University Act 1991* ('the ANU Act'). As a result, those statutes, rules and orders are subject to parliamentary disallowance.

8.2.2 Professor Pearce was very critical of this aspect of the Bill. He submitted that to permit the disallowance of university legislation relating to courses is to provides the opportunity for a majority in the parliament to dictate the scope of intellectual inquiry - 'a power that one usually associates with totalitarian states'.[266] He told the Committee:

> the ability to be able to teach what the university thinks is appropriate to teach is a fundamental of any university ... if this is subject to disallowance, then it is possible for the rules that set out a new course to be met by objection within the Parliament because it is not the sort of thing the university ought to be teaching.[267]

8.2.3 The Committee accepted this argument. The Committee notes that the Senate Standing Committee on Regulations and Ordinances recommended that university legislation affecting the content of academic courses should be excluded from the

266 Professor Pearce, *Submissions*, p. S8.

267 *Transcript*, pp. 58-59.

general terms of the Bill.[268] The Government did not accept that recommendation.[269]

8.2.4 At the request of the Committee officers of the Attorney-General's Department, the Australian National University ('ANU') and the University of Canberra (UC) agreed to discuss the issue in an attempt to reach a solution. An agreement was reached for a limited exemption specifically directed to the protection of academic freedom. In the case of ANU, that agreed exemption related to university statutes made under section 50 of the ANU Act that empower the making of rules and orders on academic course requirements, and those rules and orders themselves. In the case of UC, the exemption related to its equivalent instruments.[270]

8.2.5 The Committee can see no reason why similar instruments of any other university established under Commonwealth primary legislation in the future should not also be treated in the same way.

Recommendation 34

The Committee recommends that legislative instruments of the Australian National University and of the University of Canberra relating to the content of academic courses should not be subject to disallowance under the Legislative Instruments Bill.

8.3 Timing of registration

8.3.1 Subclauses 30(2) and 37(4) of the Bill provide for the registration of legislative instruments by the Principal Legislative Counsel in Parts A and B of the Register. However, the Bill does not provide for priority to be given to the registration of instruments in accordance with the time of lodgment of the instruments with the Principal Legislative Counsel.

8.3.2 Evidence has been given to the Committee that expresses concern about aspects of the timing of registration:

> A difficulty could arise in relation to payments...that need to be made immediately after the relevant instruments are made. For example, under the *States Grants (Primary and Secondary Education Assistance) Act 1992* payments are time-critical... . Because of the need

268 Senate Standing Committee on Regulations and Ordinances, Ninety-ninth Report, p. 6.

269 *Senate Hansard*, 9 November 1994, p. 2567.

270 Attorney-General's Department, *Submissions*, p. S147.

> to make payments immediately upon registration of an instrument, it is essential for this Department to know at once whether an instrument has been registered.[271]

8.3.3 The Australian Maritime Safety Authority submitted that the Principal Legislative Counsel should be obliged to register instruments within a specified period, say five working days.[272]

8.3.4 Under the Bill, the rule-maker will need to advise the Principal Legislative Counsel if an instrument that is lodged for registration is time-critical. The Principal Legislative Counsel will then advise a rule-maker who lodges a time-critical instrument for registration of the time of registration.

8.3.5 Because many instruments are **not** time-critical, their registration may be deferred until the registration of any time-critical instrument has taken place. This would not be possible if the Bill required instruments lodged for registration to be registered in the order of lodgment.

8.3.6 The Committee is of the view that the present flexibility in relation to timing of the registration of legislative instruments that the Bill allows should be maintained.

8.4 Australian Capital Territory Ordinances

8.4.1 Subclause 4(3) of the Bill and item 9 of Schedule 1 to the Bill together provide that the laws of the self-governing Territories are not legislative instruments for the purposes of the Bill. This exemption recognises the limited sovereignty of the self-governing Territories.[273]

8.4.2 Professor Curtis submitted that, as a consequence of item 9 of Schedule 1, ordinances of the Australian Capital Territory made by the Governor-General under section 12 of the *Seat of Government (Administration) Act 1910*, and rules, regulations and by-laws made under those ordinances, are not legislative instruments for the purposes of the Bill. He could see no reason in principle why these ordinances, and legislative instruments made under these ordinances, should be treated differently to other legislative instruments made under Commonwealth Acts.[274] The Attorney-General's Department agreed that it was not appropriate to exclude from the coverage of the Bill such ordinances and instruments.[275]

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271 DEET, *Submissions*, p. S39.

272 *Submissions*, p. S109.

273 Australian Law Reform Commission, *Submissions*, p. S208.

274 Professor Curtis, *Submissions*, pp. S102-103.

275 Attorney-General's Department, *Submissions*, p. S191.

8.4.3 The Committee accepts that there is no reason in principle why instruments that are laws of the Territory made by the Governor-General as a delegate of the Commonwealth Parliament should be treated differently from other legislative instruments made under Commonwealth primary legislation.

Recommendation 35

The Committee recommends that Australian Capital Territory Ordinances made by the Governor-General under section 12 of the *Seat of Government (Administration) Act 1910*, and instruments made under those Ordinances, should be legislative instruments for the purposes of the Legislative Instruments Bill.

8.5 Instruments connected with the collection of revenue

8.5.1 Under subclause 43(2) of the Bill, the Attorney-General can, in effect excuse a failure by the Commissioner of Taxation to register an instrument if:

- it is connected with the collection of revenue by the Commissioner
- the Attorney-General certifies that he or she is satisfied that the Commissioner was unaware of the need to register the instrument
- it was reasonable for the Commissioner to be so unaware.

8.5.2 The Committee has a number of concerns about this provision. One witness wondered about what sort of circumstances would make it reasonable for the Commissioner to be unaware of his or her obligations under the Bill.[276] On the one hand, the provision appears to reflect the importance of revenue collection responsibilities of the Commissioner of Taxation. On the other hand, it makes no similar concession to the Comptroller-General of Customs or indeed to any other person or body with significant revenue collection responsibilities.

Recommendation 36

The Committee recommends that subclause 43(2) of the Legislative Instruments Bill should be omitted

276 Mr S Argument, *Submissions*, p. S33.

8.6 Rules of Court

8.6.1 The ARC recommended that the regime provided by the Bill should apply to the rules of federal courts.[277] In the second reading speech for the Bill the Government stated that it did not accept this recommendation on the grounds that supervision of the rule-making powers of the courts by the Executive risks interference with the independence of the judiciary and offending the doctrine of the separation of powers. The courts accept that the principles of the legislation should apply to them. Accordingly, in Schedule 4 to the Bill the various Acts governing the operation of the courts are amended to set up court-specific regimes based on the scheme of the Bill.[278]

8.6.2 The Committee received a good deal of evidence supporting the approach adopted in the Bill as a sensible compromise between ensuring that the basic principles embodied in the Bill apply to the various Rules of Court and not being seen to interfere with the independence of the judiciary.[279] The Committee considers it to be a very important issue and endorses the approach taken in the Bill.

8.7 Less specific provision for the Register

8.7.1 Evidence was given to the Committee that the Bill should not require the Register to consist of scanned images of registered instruments but instead should set out the purposes to be achieved by registration. Under this proposal, the Register would be established by the Principal Legislative Counsel and maintained in a way which best serves those purposes with available technology. Under the proposal, the Principal Legislative Counsel would also undertake the preparation of periodic management plans for the Register. These management plans would be tabled in each House of the Parliament but would not be subject to disallowance.[280]

8.7.2 The Committee accepts that making less specific provision for the Register would have the benefit of not freezing the Bill around the technology of today. However, the scheme of the Bill has been developed in parallel with the Attorney-General's Department specifications for tenders for supply of the computer hardware and computer operating systems for the Register.[281] Therefore the Committee expects that the products supplied in accordance with those specifications will be compatible with the form of the Register prescribed under the Bill.

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277 *Rule Making by Commonwealth Agencies*, Recommendation 30, p.77.

278 *Senate Hansard*, 9 November 1994, p. 2693.

279 ARC, *Submissions*, p. S69; Professor Hotop, *Submissions*, p. S188; Professor Saunders, *Transcript*, p.233.

280 Professor Curtis, *Submissions*, p. S97.

281 ibid., p. S192.

8.7.3 The Bill will be reviewed after it has been in operation for three years and the Committee considers that its provisions dealing with the form of the Register should be reviewed at that time. The review will ensure that those provisions do not prevent the best technology that becomes available in the future from being employed for the purposes of the Register.

8.8 Clause 8 of the Bill and proposed subsection 46B(2) of the *Acts Interpretation Act 1901*

8.8.1 Under clause 8 of the Bill, a legislative instrument takes effect in the absence of any day or time specified, or otherwise identified, in the instrument, at midnight in the Australian Capital Territory next following the time of registration of the instrument. Whether the instrument has a retrospective effect is gauged by reference to the **time of registration** of the instrument

8.8.2 The commencement of disallowable instruments of an administrative character is governed by proposed paragraph 46B(2)(d) of the *Acts Interpretation Act 1901.* This provides that an instrument of that kind will commence on 'the day of notification' of the instrument in the *Gazette.* As a result, whether the instrument has a retrospective effect is gauged by reference to **commencement** of the instrument.

8.8.3 The Committee considers that these differences are confusing, particularly where instruments of each kind are made under the same power, and does not understand the basis for the distinction that is made by the Bill.

Recommendation 37

The Committee recommends that the commencement provisions for legislative and non-legislative disallowable instruments that do not specify their own commencing days or times should be consistent, at least to the extent that they should result in the commencement of both kinds of instruments at the end of a particular day.

8.9 Proposed section 46B of the *Acts Interpretation Act 1901*

8.9.1 The Committee notes that under the present section 46A of the *Acts Interpretation Act 1901* where an instrument is made a disallowable instrument, certain other provisions of the Act apply to it 'except so far as the law otherwise provides'. The proposed new section 46B of that Act contains no such power to modify the provisions that will apply to disallowable instruments.

8.9.2 The Committee considers that the flexibility of the present arrangements should be preserved.

Recommendation 38

The Committee recommends that proposed section 46B of the *Acts Interpretation Act 1901* should allow for the enabling legislation under which a non-legislative disallowable instrument is made to modify the application of section 46B to the instrument.

8.10 Acts that amend legislative instruments

8.10.1 The Committee notes that it is possible for Acts to repeal and amend legislative instruments. The Register does not provide for registration of such Acts and consequently the Register may become inaccurate. The Committee suggests that the Department give consideration to this matter.

Daryl Melham, MP
Chair
February 1995

Appendix 1

Details of Public Hearings

Canberra, 13 December 1994

Business Council of Australia

Mr Robert Gardini

Appeared in personal capacity

Mr Stephen Argument

Attorney-General's Department

Ms Jean Baker, Principal Legislative Counsel, Legislative Drafting
Mr Richard Morgan, Senior Government Council, Family & Admin Law Branch
Mr Roger Mackay, Acting Senior Legislative Counsel, Law Revision Unit
Ms Amanda Davies, Acting Principal Counsel, Family and Administrative Law Branch

Australian National University

Professor Dennis Pearce, Faculty of Law

Law Council of Australia

Mr Dennis O'Brien, Administrative Law Committee

Department of Employment, Education and Training

Mr Stephen Bourke, Acting Assistant Secretary, Legal Branch
Mr Ted Powley, Senior Officer Grade B, Legal Branch

Administrative Review Council

Mr Alan Robertson

Canberra, 19 January 1995

Attorney-General's Department

Ms Jean Baker, Principal Legislative Counsel, Legislative Drafting
Mr Richard Morgan, Senior Government Council, Family & Admin Law Branch
Mr Roger Mackay, Acting Senior Legislative Counsel, Law Revision Unit
Ms Amanda Davies, Acting Principal Counsel, Family and Administrative Law Branch

Appeared in personal capacity

Professor Lindsay Curtis
Mr Victor Perton MLA

Department of Human Services and Health

Mr John Carroll, Assistant Secretary, Legal Services Branch
Ms Susan Akhurst, Director of the Special Projects Section, Legal Services Branch

Department of Industry, Science and Technology

Mr Martin Gallagher, Acting Assistant Secretary, Business Environment Branch
Mr Antony Brugger, Acting Assistant Director, Business law Policy Section

Department of Immigration and Ethnic Affairs

Ms Robyn Bickett, Director, Legal Policy
Mr Andrew Metcalfe, Assistant Secretary, Legal Framework Branch

Canberra, 1 February, 1995

Appeared in personal capacity

Professor SD Hotop
Mr Adrian Cruickshank, MLA
Professor CA Saunders
Senator SE Spindler

Attorney-General's Department

Ms Jean Baker, Principal Legislative Counsel, Legislative Drafting
Mr Richard Morgan, Senior Government Council, Family & Admin Law Branch
Mr Roger Mackay, Acting Senior Legislative Counsel, Law Revision Unit
Ms Amanda Davies, Acting Principal Counsel, Family and Administrative Law Branch

Appendix 2

List of Submissions

Submission No.	Individual/Organisation	Date of Submission	Page
1	Mr Robert Hadler Director-Environment and International National Farmers' Federation	2/12/94	S 001
2	Mr Dennis Pearce Professor of Law The Australian National University	30/11/94	S 005
3	Mr Dennis Pearce Professor of Law The Australian National University **(Supplementary Submission to No.2)** **Exhibit 13/12/94**	5/12/94	S 013
4	Mr D O'Brien Minter Ellison Morris Fletcher	5/12/94	S 015
5	Mr Stephen Argument	6/12/94	S 018
6	Mr Stephen Bourke Acting Assistant Secretary Department of Employment Education and Training		S 034
7	Senator Rod Kemp Shadow Minister for Administrative Services the A.C.T. and Public Administration Senator for Victoria	8/12/94	S 043
8	Mr Alan Robertson Administrative Review Council	9/12/94	S 066
9	Mr Martin Soutter Assistant Director Business Council of Australia	12/12/94	S 072

Submission No.	Individual/Organisation	Date of Submission	Page
21	Mr Richard Griffiths Managing Director Capital Monitor	6/01/95	S 127
22	Mr Glenn Rees Aboriginal and Torres Strait Islander Commission	5/01/95	S 129
23	Ms Betty Hounslow Director Australian Council of Social Service	9/01/94	S 131
24	Ms Mary Murnane Deputy Secretary Department of Human Services and Health	10/01/95	S 137
25	Mr Ross Divett Acting Secretary Department of Social Security	10/01/95	S 140
26	Mr Rick Snell Lecturer	10/01/95	S 141
27	Mr Richard Morgan Senior Government Counsel Attorney-General's Department	13/01/95	S 143
28	Mr Peter Core Secretary *Department of Industrial Relations*	13/01/95	S 155
29	Professor Lindsay Curtis **(Supplementary Submission to No.17)**		S 096
30	Mr Allan Anforth Director ACT Council of Social Service, Inc.	19/01/95	S 165
31	Mr Peter Sutherland Director Softlaw Community Projects	12/01/95	S 171
32	Ms Sandra J. Welsman Barrister-at-Law	21/01/95	S 174
33	Mr R Deighton-Smith Director Department of Business and Employment		S 178

Appendix 3

List of exhibits

Exhibit Number	Exhibit
1	Liberating Enterprise to Improve Competitiveness. September 1992 **Presented by Robert Gardini, (Business Council of Australia), 13 December 1994**
2	Consultation and Regulatory Analysis in Agency Rule Making **Presented by David McCulloch, 14 December 1994.**
3	Parliament of NSW, Regulation Review Committee, *Future Directions for Regulatory Review in NSW*, Report No. 23, November 1993. **Presented by Adrian Cruickshank MP, 15 December 1994**
4	Parliament of NSW, Regulation Review Committee, *Legislation for the Staged Review of NSW Statutory Rules* , Report July 1989. **Presented by Adrian Cruickshank MP, 15 December 1994**
5	Parliament of NSW, *Regulation Review Committee.* **Presented by Adrian Cruickshank MP, 15 December 1994**
6	Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Report upon an Inquiry into the Operation of the Subordinate Legislation Act 1962*, November 1993. **Presented by Victor Perton MLA, 20 December 1994.**
7	Parliament of Victoria, Subordinate Legislation Bill **Presented by Victor Perton MLA, 20 December 1994.**
8	Courses and Degrees Statute **Presented by Philip Selth (ANU), 19 January 1995**
9	Parliament of Victoria, Subordinate Legislation Act 1994 Guidelines under Section 26 **Presented by Victor Perton MLA, 19 January 1995**

10 Parliament of Victoria, The Subordinate Legislation Act 1994, Outline of the differences between the Subordinate Legislation Act 1962 and the new subordinate legislation Act 1994
Presented by Victor Perton MLA, 19 January 1995

11 Parliament of Victoria, Parliament Committees Act 1968, Government response to report of Scrutiny of Acts and Regulations Committee on the Subordinate Legislation Act 1962.
Presented by Victor Perton MLA, 19 January 1995

Recommendations in previous reports not accepted by the Government — Appendix 4

Since 1992 there have been 4 major reports dealing with issues that affect the making and publication of Commonwealth legislation. All to some extent deal with legislative instruments. These reports are:

- *Rule Making by Commonwealth Agencies* (Administrative Review Council, May 1992)
- *The Cost of Justice Second Report: Checks and Imbalances* (Senate Standing Committee on Legal and Constitutional Affairs, August 1993)
- *Clearer Commonwealth Law* (House of Representatives Standing Committee on Legal and Constitutional Affairs, September 1993)
- *Access to Justice: an action plan* (Access to Justice Advisory Committee, May 1994).

The Report of the Administrative Review Council (ARC) was concerned with improving the legislative process as it concerns legislative instruments. It is that report on which the Legislative Instruments Bill is largely based. The Bill substantially implements the recommendations made in the report. The other reports were concerned with Commonwealth legislation generally but each made recommendations that were specific to legislative instruments. It is notable that the ARC recommendations were generally supported in the other reports.

In this light, it is fair to say that the whole matter of the Commonwealth secondary legislative process has received significant attention. For this reason, it does not appear to be worthwhile to traverse in this Report ground that has already been covered in other reports and adopted in the Bill or, to the knowledge of the Committee, otherwise accepted by the Government.

However, all the recommendations of those reports relating to legislative instruments have not been reflected in the Bill or accepted by the Government as amendments to the Bill or for implementation on an administrative basis. Those recommendations are set out below.

A. Rule Making by Commonwealth Agencies (Administrative Review Council)

- ***Recommendation 3:*** *[That] a definition of legislative instrument should not be set out in the Bill but that the essential characteristics of legislative instruments should be set out in the Legislation Handbook.*

- ***Recommendation 6**: [The Explanatory Statement prepared in relation to a legislative instrument] should include a statement on how each instrument was prepared, including whether the instrument was drafted:*

  - *by the Office of Legislative Drafting*
  - *by the agency and settled with the Office of Legislative Drafti ng*
  - *by the agency pursuant to arrangements approved by the Office of Legislative Drafting.*

- ***Recommendation 9**: The Legislative Instruments Act should provide for mandatory public consultation before **any** delegated legislative instrument is made... .*

- ***Recommendation 22**: [The Bill] should require the text of any document applied, adopted or incorporated by reference to be tabled with the delegated legislation. Failure to table the incorporated document with the legislative instrument should mean that the incorporating provision should cease to have effect. [That] document should be scrutinised to allow the Parliament to determine whether the provision allowing for the application, adoption or incorporation should be disallowed.*

- ***Recommendation 23**: All existing instruments of a legislative character and all instruments subject to the Bill should be sunsetted [in accordance with a timetable set out in the Report].*

- ***Recommendation 29**: Under [the Bill], the text of any document, other than an Act, applied, adopted, or incorporated in a legislative instrument by reference should have no effect until published in the Legislative Instruments Register. Changes to any material, apart from Acts and other legislative instruments, applied, adopted or incorporated from time to time should be [registered] and to the extent that they are not, they should be unenforceable.*

- ***Recommendation 31**: Where possible, the procedures recommended in [the ARC report] for making, publication and review of delegated legislation should apply to legislative instruments made under intergovernmental schemes for nationally uniform regulation.*

B. The Cost of Justice Second Report: Checks and Imbalances (Senate Standing Committee on Legal and Constitutional Affairs):

- ***Recommendation 11***

  ...

  - *a system of prior notification be implemented where [any] subordinate legislation is contemplated*

  - *all subordinate legislation be regularly consolidated and indexed to enable it to be easily located.*

C. Clearer Commonwealth Law (House of Representatives Standing Committee on Legal and Constitutional Affairs):

- ***Recommendation 9:*** *that the consultation process should be undertaken in all cases. The Bill sets out procedures for consultation in relation only to proposed legislative instruments that directly affect business,*

- ***Recommendation 10:*** *a recommendation in the same terms as recommendation 6 of the Administrative Review Council report Rule Making by Commonwealth Agencies.*

- ***Recommendation 27.*** *The Attorney-General should develop a sunset program to promote regular re-writing of all subordinate legislation and introduce a Bill to provide a legislative basis for the program.*

- ***Recommendation 45.*** *The Office of Legislative Drafting should establish and maintain a public-access database of the text of the explanatory statement tabled in Parliament with each subordinate legislative instrument.*

D. Access to Justice: an action plan (Access to Justice Advisory Committee):

- ***Action 21.3.*** *The Commonwealth should, in accordance with the recommendations made by the Administrative Review Council, introduce a scheme for the sunsetting of all delegated legislation on a 10 year rotating basis to ensure that delegated legislation is of a high quality, and up to date if it is required at all.*

- ***Action 21.4.*** *The Commonwealth should provide additional resources to parliamentary scrutiny committees to ensure that they are capabl e of fulfilling their functions as the volume of legislation, both prima ry and delegated, increases.*

In its ninety-ninth report, the Senate Standing Committee on Regulations and Ordinances also made several recommendations and suggestions in relation to the Bill that have apparently not been accepted at this stage by the Government.

- ***Clause 21 of the Bill.*** *The Senate Committee recommended that the provisions of the Bill that provide for parliamentary disallowance of legislative instruments should not apply to some delegated legislation that is made by the governing bodies of universities incorporated under Commonwealth primary legislation. The Senate Committee recommended that university legislation dealing with the content of academic courses should not be subject to disallowance.*

- ***Clause 8 of the Bill and proposed subclause 46B(2) of the Acts Interpretation Act 1901.*** *Under clause 8 of the Bill, a legislative instrument takes effect in the absence of any day or time specified, or otherwise identified, in the instrument, at midnight in the Australian Capital Territory next following the time of registration of the instrument. However, the commencement of disallowable instruments of an administrative character is governed by proposed paragraph 46B(2)(d) of the Acts Interpretation Act 1901. This provides that an instrument of that kind will commence on 'the day of notification' of the instrument in the Gazette. The Senate Committee appears in its report to have endorsed the suggestion that this distinction is confusing and unnecessary.*

- ***Other matters relating to proposed subclause 46B(2) of the Acts Interpretation Act 1901*** *. Under the present section 46A of the Act, where an instrument is made a disallowable instrument, certain other provisions of the Act apply to it 'except so far as the law otherwise provides'. Those provisions govern, among other things, the commencement, retrospectivity, tabling and disallowance of instruments. The present provision allows, for example, a regulation to be made making an instrument made under it a disallowable instrument and to modify the application of the commencement provisions of the Acts Interpretation Act in relation to that instrument. The proposed new section 46B of the Act contains no such power to modify the provisions that will apply to disallowable instruments. The Senate Committee appears in its report to endorse the suggestion that that power should be included in the proposed new section.*

- ***Clause 27.*** *The Senate Committee recommended that clause 27 of the Bill should be extended to include copies of instruments that are extracted from the Register and made available by the Principal Legislative Counsel.*

- ***Clause 50.*** *This provision would prevent the making of a legislative instrument that is the same in substance as a registered instrument while the instrument is on the table of a House of the Parliament. The Senate Committee suggests in its report that the effect of the clause*

could be avoided by remaking each of the provisions in the instrument as a separate legislative instrument.

- ***Powers of Senate Committee when the Senate is not sitting*** *The Senate Committee suggests in its report that the Senate should be able, through that committee, to exercise effective control over legislative instruments when the Senate is not sitting and that this power could be considered for inclusion in the legislation in a review of its operation.*