The Legislative Instruments Bill 1996 [No. 2]

The Legislative Instruments Bill 1996 [No. 2] was introduced into the House of Representatives on 5 March 1998 by the Attorney-General and passed that House on 12 March 1998. This Bill comprises the earlier Bill as amended and passed by the House on 11 September 1996, and amendments by the Senate and agreed to by the House, and further amendments made by the House and agreed to by the Senate.
The Bill was introduced into the Senate on 30 March 1998. The Bill was passed with amendments on the 14 May 1998 and returned to the House of Representatives on 14 May 1998. The House of Representatives has not yet considered the Senate amendments.

Senate Regulations and Ordinances Committee Report – A Breach of the Committee's Principles

The Senate Standing Committee on Regulations and Ordinances (the Committee) has taken the unusual step of reporting to the Parliament that it considers that regulations are deficient in respect of independent external merits review.

The Committee tabled a report on this matter in the Senate on 22 October 1997 (Hansard 7767-7768). That document notes that it is disappointing for the Committee to have to report an instance where the Committee has not received a satisfactory response in respect of its concerns about external review. The report then outlines the history of the correspondence in the matter.

The document read as follows:

> One of the terms of reference of the Standing Committee on Regulations and Ordinances is to ensure that delegated legislation does not 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. Administrative discretions have an immediate impact upon individuals and business firms and it is essential that these decisions made by Ministers and departmental bureaucrats should be subject to external review. Such review improves the quality of administration by concentrating the minds of decision makers on the fact that their actions are subject to review of their merits by an independent external body.
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> Every year the Committee raises with Ministers many instances where delegated legislation provides for administrative decisions with no apparent merits review provided for either in the enabling Act or in the legislative instrument itself. The Committee is gratified that it usually receives good cooperation from Ministers in this scrutiny....
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> Given the general high level of cooperation from Ministers it is disappointing for the Committee to have to report an instance where the Committee has not received a satisfactory response in respect of its concerns about external review.
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> This matter, which has had a long gestation period, originated in the Committee's scrutiny of the Trade Practices Regulations (Amendment), Statutory Rules 1993 No. 21, which provided for fees payable for applications under the enabling Act for authorisation of agreements and covenants affecting competition, privacy and secondary boycotts, exclusive dealing conduct and mergers and for the notification of exclusive dealing conduct. The regulations also provided that the then Trade Practices Commission may decide that a concessional fee was payable in certain circumstances. Five of the fees were $7,500 reduced with a concession to $1,500 and one fee was $2,500 reduced

with a concession to $500. There was no apparent AAT or other external review of this commercially valuable discretion and the Committee wrote to the Minister. In reply, the Assistant Treasurer advised the Committee that external review was inappropriate because the decision was a technical one, the Trade Practices Commission was the best body to determine those technical issues and the costs and delay of independent review would outweigh any benefit. This was not a particularly satisfactory reply, because many technical decisions are subject to AAT or other independent external review. Indeed, technical decisions in many cases are particularly suited to review. Nevertheless the Committee accepted the advice but decided to include the matter in the Annual Report.

The President of the Administrative Review Council [the ARC], quoting the Committee's Annual Report, then wrote to the Minister for Justice advising that, in the view of the ARC, the decisions relating to concessional fees should be subject to review. The Committee also wrote again to the Assistant Treasurer, referring to the ARC advice, asking that the regulations be amended to provide for external review. The Minister for Justice also wrote to the Assistant Treasurer suggesting merits review of the decisions by the Trade Practices Tribunal. The Assistant Treasurer replied to the Minister, with a copy to the Committee, advising that he did not favour merits review by either the AAT or the TPT.

By this time the 1996 Federal election had been held and the government had changed. Scrutiny of the regulations, however, continued. The Committee operates in a strictly non-partisan way and addresses only personal rights and parliamentary propriety, avoiding policy issues. For these reasons its work continues despite changes in governments. In the present case there were also major changes to the enabling legislation, with the Trade Practices Commission becoming the Australian Competition and Consumer Commission and the Trade Practices Tribunal replaced by the Australian Competition Tribunal (ACT). The Committee, however, continued to pursue the matter.

The Committee then wrote to the Attorney-General, with copies to the Assistant Treasurer and the President of the ARC, noting that the ARC is a statutory agency with the function, among other things, of making recommendations to the Minister on review of administrative decisions, and asking for confirmation that the Attorney-General accepted the present recommendation of the ARC. The Attorney-General replied that he favoured review by the ACT. The Committee then wrote again to the Assistant Treasurer asking that the regulations be amended to provide for review.

The Assistant Treasurer advised that, while he appreciated the importance of external merits review in improving the transparency and scrutiny of Commonwealth administrative decisions, merits review can increase the cost and complexity of regulation. These considerations need to be balanced against each other. The Assistant Treasurer further advised that in this case review would not be simple or trivial, with normally more than a week of hearings with decisions taking at least two months. Also, the right of review could provide an opportunity for applicants to use the fee decision in order to challenge the ACCC view on market definition for strategic purposes unrelated to the application in question. Further, external review involves costs to the government as well as to the applicant and the total costs would be greater than the differential between the concessional fee and the full fee. Finally, preparing an amendment of the regulations would be time consuming and involve significant resources.

The Committee then wrote to the Assistant Treasurer indicating that it was disappointed that he did not propose to amend the regulations. The Committee suggested that, given the unanimity of view between the Committee, the ARC and the Attorney-General, there was a strong case to

provide for review. The Assistant Treasurer replied that he could assure the Committee that he had taken careful account of its concerns but remained of the view that those particular decisions should not be subject to external merits review. The Assistant Treasurer further advised that, should circumstances change and a need for merits review arise, he would be happy to reconsider the matter. The Attorney-General also wrote to the Assistant Treasurer, noting that the matters which he raised in opposition to external review were individually and cumulatively matters of significance. However, the Attorney-General could not agree that these factors weighed heavily against external merits review. The Attorney-General advised that similar arguments could be advanced for avoiding external review of many other administrative decisions, including ones of greater economic or political significance. The Attorney-General advised that he regretted that the Assistant Treasurer had not accepted his advice on this occasion.

The matter must now stand for the time being. It is, as I say, disappointing that the regulations cannot be amended and that the Committee must report to the Senate that the regulations are deficient in respect of independent external merits review. Nevertheless, the Committee notes that its concerns were endorsed by the President of the Administrative Review Council and by the Attorney-General and the Committee is grateful for this. The Committee will continue to monitor any amendments of the principal Regulations with a view to correcting this breach of its principles.

Report of the Law Reform Committee of the Victorian Parliament on Regulation Efficiency Legislation

The Report of the Law Reform Committee of the Victorian Parliament on Regulation Efficiency Legislation (October, 1997) examines the use of legislation directed towards making government regulatory processes more efficient.

An alternative compliance regime is described in the Report as a mechanism for a person to meet regulatory objectives using means other than those prescribed in the relevant subordinate legislative instrument. In granting an alternative compliance mechanism, the government does not exempt a business from the regulations; rather, business may propose and government may approve an alternative arrangement which departs from the prescriptive details of the regulation to meet the objectives of the regulations.

The Report notes that, historically, the scope of the concept of Regulatory Efficiency Legislation has always been confined to subordinate legislative instruments. The Committee decided that extending the concept to primary legislation was not warranted because the concept evolved out of the system for control of subordinate instruments, because much of the complaint about over-regulation is directed at subordinate legislative instruments and because the Committee believed that there would be objections in principle to allowing an individual or business to be exempted from primary laws by way of an alternative compliance regime.

The Report notes the context of regulatory reform, including developments in the OECD, Canada and the USA, competition policy reform in Australia, mutual recognition and the report of the Small Business Deregulation Task Force. The Report also looks at existing models for regulatory efficiency legislation, including the accredited licensee system under the Victorian *Environment Protection Act 1970*, third party certification schemes under Building legislation and the compliance and enforcement module of the National