THE TASMANIAN SUBORDINATE LEGISLATION COMMITTEE— LIFTING THE SCRUTINY VEIL BY DEGREES

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Regulations are the sinews of modern government, the legal instruments that connect abstract government policies with the day-to-day activities of commerce and private life. To put it more precisely, regulations make government decisions operational, and hence perform a key role in the governing process.[1]

I INTRODUCTION

Parliamentary Scrutiny Committees for delegated legislation are now an established part of the legislative process in all Australian jurisdictions. The meandering journey that led to these committees occupying such a comfortable institutional niche has been told elsewhere.[2] Academic attention devoted to the area of delegated or subordinate legislation has ebbed and waned over different generations. A survey of administrative law textbooks of different eras reveals the appearance and disappearance of delegated legislation as a subject worthy of serious attention.[3] The 20 year

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[1] John F Morrall quoted in W T Stanbury, *Reforming the Federal Regulatory Process in Canada 1971-1992,* Minutes and Proceedings and Evidence of the Sub-Committee on Regulations and Competitiveness—House of Commons Issue No.23, December 1992, 10.
[2] Dennis C Pearce, *Delegated Legislation in Australia and New Zealand* (1977). This has now been superseded by Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (2nd ed, 1999).
[3] See David G Benjafield and Harry Whitmore, *Principles of Australian Administrative Law* (3rd ed, 1966), chap 6 'Delegated Legislation'. By the time of Harry Whitmore and Mark Aronson's *Review of Administrative Action* (1978), delegated legislation had become a secondary topic of 'Ultra Vires'. In the

uncontested reign of Dennis Pearce's text *Delegated Legislation* epitomized the marginal position of the topic.

Paradoxically, the day to day occupation of administrative lawyers often takes place in the murky and often incomprehensible twilight zone of delegated legislation. A typical offence by a fisherman client would more likely be a breach or infringement of a much amended, arbitrary and confusing fishing regulation than a classical academic case study of natural justice or jurisdictional error. Geoffrey Palmer has called for a reform in the focus of public law teaching.[4] This reform would encourage lawyers to learn, as students and later as professionals, to navigate the operations of parliamentary scrutiny committees and to gain an appreciation for the value of pre-emptive intervention in the rule-making processes to avoid potential problems for clients. The desire for national scheme legislation has also highlighted the important need to analyse and evaluate the role and efficacy of scrutiny committees in supervising delegated legislation.

In recent years innovations, in the practices and processes relating to the formulation and operation of delegated legislation in many jurisdictions, have justified a closer examination of this area of administrative law. Any study in this area is confronted by the difficulty that terminology can be confusing and perplexingly different across jurisdictions.[5] As David Hamer notes, the study of delegated legislation or regulatory process reform will never become the rallying cry of a mass movement:

> It would be idle to pretend that parliamentary control of delegated legislation is a burning issue in the community or that most voters would even know what delegated legislation is, and for these reasons it is difficult to find members of any of the parliaments prepared to take much interest in the matter. Nevertheless it is of great importance; uncontrolled delegated legislation offers a fertile field for executive despotism and bossy interference by bureaucrats. Delegated laws often have much more impact on the lives of ordinary citizens than do most acts of parliament.[6]

This paper examines the operations of the Tasmanian Subordinate Legislation Committee and attempts to provide a research baseline for future studies. The study is an initial exploration of the operational and legislative restraints on an Australian

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1990s text books started including sections on delegated legislation under a series of different topics—see Margaret Allars, *Introduction to Australian Administrative Law* (1990). One of the best examples is the transition of delegated legislation in Roger Douglas and Melinda Jones' *Administrative Law: Cases and Materials* from a topical coverage akin to Allars' in the 1993 edition to the allocation of a separate chapter on delegated legislation (Chapter 8) in the 1996 edition.

[4] Sir Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (1992) 31-3.

[5] Stanbury, above n 1, 11-12. See also Stephen Argument, 'Parliamentary Scrutiny of Quasi-legislation,' *Papers on Parliament* No 15, Department of the Senate, Canberra, May 1992.

[6] David Hamer, *Can Responsible Government Survive in Australia?* (1994) 148.

scrutiny committee performing its supervisory role within the legislative process in the late 1990s.[7]

Stephen Argument has highlighted the lack of research into Australian delegated legislation committees and the absence of comparative assessment of the work of these various scrutiny committees.[8] He also concludes that because the committees are so different from each other in terms of operation and approach qualitative comparison is difficult.[9]

In line with Argument's thesis that the last 20 years has produced fundamental changes in the operating environment of Australian delegated legislation committees,[10] this paper concludes that the Tasmanian Committee has failed in a number of ways to respond effectively to these changes. This failure is not unique to the Tasmanian Committee nor is the failure total in all aspects of its operations.

The Tasmanian Committee was presented with an ideal opportunity with the passage of the *Subordinate Legislation Act 1992* to be the leader in parliamentary oversight and monitoring of delegated legislation. On the eve of the Hilmer reforms[11] and moves towards setting in place principles for scrutiny of national scheme legislation, the 1992 reforms equipped the Tasmanian Committee with the powers and framework to be an effective scrutiny committee. This paper details how an internal agency agenda, especially by Treasury and the Hydro Electricity Corporation, and the advent of the Hilmer competition reforms, however, led to a severe modification of the powers and framework originally set out in the 1992 legislation. Treasury, and in particular its Regulatory Review Unit, has become the gatekeeper for determining the necessity, shape, content and requirements for delegated legislation. The Tasmanian Committee has been shunted to a secondary and more perfunctory role.

A key component of this paper is its reliance on research and findings made by undergraduate law students from the University of Tasmania, who have been involved in the innovative Public Law Active Research Project.[12] The project, inspired by the writings of Geoffrey Palmer[13] and John Goldring,[14] is an experiment

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[7] Note that chap 10, 'Paliamentary Review: Tasmania' in Dennis Pearce, *Delegated Legislation in Australia and New Zealand* (1977) 66 was the last systematic and extensive study published about the Tasmanian committee.

[8] Stephen Argument, 'Apples and Oranges—A Comparison of the Work of Various Australian Delegated Legislation Committees' (1999) 21 *AIAL Forum* 34.

[9] Ibid 41.

[10] Pearce and Argument, above n 2, 87.

[11] Report by the Independent Committee of Inquiry into a National Competition Policy (the 'Hilmer Report').

[12] Details of this project are outlined in Rick Snell, 'The First Steps in Understanding the Impact of Administrative Law on Public Administration at the State Level: The Tasmanian Story' in Linda Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (1997) 237. Further details of the Public Law Active Research Project can be found at the following websites: University of Tasmania, <http://www.comlaw.utas.edu.au/users/rsnell/Teaching/portfolio/project.html> and <http://www.comlaw.utas.edu.au/law/active/>.

[13] See Palmer, above n 4.

in administrative law teaching practice in Australia. The project applies the ideas of deep learning, action learning and action research across a group of undergraduate and postgraduate units. The key to the Public Law Active Research Project is that it provides students with an opportunity to mix field research with classroom and library learning. Students are encouraged to formulate a research project that involves direct contact with legally qualified and non-legally qualified public sector participants. Throughout the research process students are encouraged to work together, to collaborate with or rely upon the research of previous students (kept in a special research collection) and via a series of formal and informal, compulsory and optional mechanisms to seek feedback from teaching staff.

This paper draws on the research and findings of several of these papers that have examined various aspects of the operations of the Tasmanian Subordinate Legislation Committee between 1993-1998. Some of the results were obtained by interviews conducted with Committee members, Parliamentary officers, lobbyists, public servants and observations of the Committee in operation. Throughout this period the findings of the research papers were circulated to those interviewed and reexamined by students in subsequent years. Whilst the research was undertaken by undergraduate students, the research methodology, supervision and approach more accurately resembled a postgraduate research process.[15]

The student research papers provide a rough snapshot of the operations of an Australian delegated legislation committee in the mid 1990s. They thus contribute to the limited existing knowledge about these core parliamentary scrutiny committees. Whilst the criteria against which the performance of the Committee was examined are not sharply defined or universally accepted, the use of these findings does allow for a higher degree of performance assessment than previously available.

The paper then looks briefly at a case study involving the deregulation of the aerial spraying industry in Tasmania. It demonstrates how difficult it is for the Committee to resist an agency determined to implement national competition reforms via regulations. Furthermore the study depicts how the combination of restricted resources, membership uncertainty about the Committee's roles and functions and manipulation by agencies of the timing of Gazette notices can restrict effective scrutiny of delegated legislation.

This paper uses the terms 'reform of the regulatory process' or 'process reform' to identify the changes in the process by which subordinate legislation, or regulations, are made, amended, modified and existing regulatory schemes updated or replaced. The Tasmanian reforms covered in paper have largely consisted of efforts to improve the quality of new regulations as opposed to any efforts to 'modify the sub-

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[14] See John Goldring, 'Administrative Law Teaching and Practice' (1986) 15 *Melbourne University Law Review* 486.

[15] The student research projects referred to in this paper were of a high standard for undergraduate papers and received marks of 70 per cent or better. The projects have been directly referred to in this paper as the authors believe it is important and necessary to directly acknowledge the insights and analysis developed by the student researchers.

stantive effect of existing regulatory regimes.'[16] As Stanbury eloquently acknowledges:

> The phrase regulatory reform is both wonderfully evocative and highly elastic. It is not hard to find several rather different uses of the term ... the liberalization of economic or industry-specific regulation ... so as to rely more on competition. ... The phrase also includes total deregulation, which means that virtually all of the state mandated economic controls (notably price, entry, exit, conditions of service) are removed and social control is effected through competition. ... Others have used the term to refer to actions strengthening existing regulatory regimes. ... Last, but not least, the phrase regulatory reform has been used to refer to change in the regulatory process.[17]

Whilst this paper traverses some of the same terrain as that canvassed by the trailblazing Victorian Law Reform Committee report on Regulatory Efficiency Legislation it does not seek to address the issue of alternative compliance mechanisms.[18]

The initial interest of Peter O'Keefe[19] and Stephen Argument,[20] supplemented by the work of the Administrative Review Council[21] and the effort by successive Commonwealth governments towards implementing a series of reforms involving legislative instruments have complemented developments at state level around Australia.[22] Yet despite these endeavours, the process and understanding of the regulatory process remains almost invisible. As Stanbury observed in relation to the position in Canada:

> Regulation is one of the most important governing instruments in the arsenal of means by which government of all types seek to implement public policy. Yet, despite the briefly-visible efforts under the banner of 'regulatory reform' or 'deregulation' in the second half of the 1980s, the regulation-making process remains obscure to virtually all Canadians. Efforts to improve this process have also been little noticed. Its visibility stands in sharp contrast to the processes by which the federal government creates and enacts its expenditure budget and to the process by which it makes into law hundreds of pieces of subordinate legislation some of which imposes huge costs on society.[23]

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[16] Stanbury, above n 1, 14.
[17] Ibid 13.
[18] See Law Reform Committee, Victorian Parliament, *Regulatory Efficiency Legislation*, Report October 1987 and Discussion Paper May 1997.
[19] Peter O'Keefe, Commonwealth of Australia, *Spoilt for a Ha'p'worth of Tar: How Bureaucratic Lawmaking can Undermine the Ideals of Civil Liberty*, Papers on Parliament No.1, Department of the Senate, Canberra, April 1988.
[20] Argument, above n 5.
[21] Administrative Review Council, Rule-making by Commonwealth Agencies, Report 35 1992.
[22] For a good coverage of this reform process in one state see Western Australia, Joint Standing Committee on Delegated Legislation, *The Subordinate Legislation Framework in Western Australia*, Parl Paper 16 (1995).
[23] Stanbury, above n 1, 10.

II SUBORDINATE LEGISLATION IN TASMANIA

A *Background*

The Tasmanian Subordinate Legislation Committee (the Committee) was established, towards the end of a long and slow Australian reform process (see Table 1), by the *Subordinate Legislation Committee Act 1969* as a joint committee comprising three members each from the Legislative Council and the House of Assembly. The Committee's operations largely reflect an attitudinal approach anchored in the parliamentary operations of the 1960s—namely, a treatment of the scrutiny task as serious but with little attention to the resources and features needed to create an effective scrutiny environment.

Table 1: Establishment of Australian Scrutiny Committees

Jurisdiction	Year
Commonwealth	1931
South Australia	1938
Victoria	1956
New South Wales	1960
Tasmania	1969
Northern Territory	1969
Queensland	1975
Western Australia version 1[24]	1976
Western Australia version 2	1987

The Committee's function is to examine regulations (defined in s 2 as 'a regulation, rule or by-law that is made under an Act and is required by law to be laid before both Houses of Parliament, but does not include rules of court made by the judges, or by a majority of them, under the authority of an Act'). Section 8 of the Committee Act provides that the functions of the Committee are:

> (1)(a) to examine the provisions of every regulation, with special reference to the question whether or not:

[24] In 1976 the Western Australian Parliament set up a statutory committee, the Legislative Review and Advisory Committee, charged with scrutiny of subordinate legislation—see *Legislative Review and Advisory Committee Act 1976*. In 1987 the Western Australian Parliament established a parliamentary committee—the Joint Standing Committee on Delegated Legislation.

(i) the regulation appears to be within the regulation-making power conferred by, or in accord with the general objects of, the Act pursuant to which it is made:

(ii) the form or purport of the regulation calls for elucidation;

(iii) the regulation unduly trespasses on personal rights and liberties;

(iv) the regulation unduly makes rights dependent on administrative decisions and not on judicial decisions; or

(v) the regulation contains matters that, in the opinion of the Committee, should properly be dealt with by an Act and not by regulation;

(ab) to examine whether the requirements of the Subordinate Legislation Act 1992 have been met[25]; and

(b) to make such reports and recommendations to the Legislative Council and the House of Assembly as it thinks desirable as the result of any such examination.

The Committee has the normal power of such a committee to recommend disallowance of a regulation. The Tasmanian Parliament has chosen, like most Australian parliaments, a negative resolution procedure. This means that delegated legislation becomes operational from the time of its appearance in the Gazette and has to be disallowed by one of the houses of parliament within 15 sitting days rather than requiring a scrutiny committee to recommend that delegated legislation become operational.

However, when Parliament is not sitting, the Committee has additional powers (under s 9) to prevent the continued operation of any regulations which it considers undesirable prior to both Houses' consideration of its report. In this situation the Committee corresponds directly with the agency responsible for the regulation. On receipt of a copy of the Committee's report on a particular regulation, the agency must amend or rescind the regulation as recommended by the Committee. The Committee has the power to suspend the operation of the regulation if the agency refuses to comply with its recommendation. The suspension operates until both Houses of Parliament have considered the Committee's report. Pearce noted the uniqueness of this provision in his 1977 study.[26]

The Committee automatically receives copies of regulations and other material relevant to its deliberations. It receives copies of regulations directly from the Government Printer after gazettal. Where a Regulatory Impact Statement (RIS) has

[25] The Act contains mandatory consultation and sunsetting provisions. Agencies must prepare a Regulatory Impact Statement ('RIS') for legislation likely to have a significant impact on the public (s 5). Section 11 provides for a staged automatic repeal of all existing regulations over a 10 year period. Agencies are required to comply with the RIS process when remaking sunsetted regulations.

[26] Pearce, above n 7, 72.

been prepared, the relevant Minister's office forwards a copy to the Committee. The Local Government Office sends copies of Municipal by-laws and a briefing on the by-laws.

If the Committee considers that it requires more information on a particular regulation, it writes to the responsible agency requesting an explanation or summons a representative of the agency to give evidence. Until the early 1990s the Committee retained a private lawyer who examined all regulations before the Committee made its final determination. Since that time the Committee has not required any detailed research prior to its meetings. As Hamer has argued, this lack of independent advice can be critical, as

> it will be almost impossible to reach unanimity, and subsequent support in the parliament will probably not be forthcoming, for governments are by no means always co-operative in disallowing their own regulations. Some of them seem to regard the disallowance of a regulation as almost a vote of no confidence.[27]

In the mid 1980s a number of State governments initiated a series of process reforms to remove outdated regulations and to more effectively evaluate the efficacy of proposed delegated legislation. In Victoria, the *Subordinate Legislation Act 1962* was amended in 1985 to incorporate a staged repeal process for existing subordinate legislation and a requirement for regulatory impact statement to be prepared. New South Wales introduced similar reforms with its *Subordinate Legislation Act 1989*. Lastly, Queensland introduced a *Regulatory Reform Act 1986* which provided a mechanism for the review and revocation of outdated subordinate legislation but did include any impact assessment requirement. Tasmania's reform, in contrast, did not begin until 1992.

B *The* Subordinate Legislation Act 1992*: Parliamentary Initiative Trumped by Bureaucratic Counter-attack*

The reform process in Tasmania was initiated from outside the bureaucracy. The Tasmanian reforms went from an uncritical reception by the Government of the day to an extensive revamping to alleviate the concerns of several state agencies. The 1992 reforms offered the Tasmanian Parliament a chance to create an effective parliamentary environment for scrutiny of delegated legislation.

In a rare Tasmanian parliamentary initiative, an Upper House member, Mr John Stopp, assisted by a retired Parliamentary Counsel, drafted and introduced a private members bill that became *the Subordinate Legislation Act 1992*. The primary intention was to ease the burden of regulation on the Tasmanian community, especially the business sector. A secondary objective was to give the Subordinate Legislation Committee greater ability to determine the effectiveness, efficiency and necessity

[27] Hamer, above n 6, 155.

for subordinate legislation.[28] This legislative initiative was designed to bring the Tasmanian regulatory reform process into line with the developments in NSW, Victoria and Queensland in the 1980s.

In an era when legislative reform is normally generated by Government agencies (in the main), parliamentary committees, or until their recent closure in several states, institutional law reform organisations, the 1992 regulatory reform effort in Tasmania was unusual. It was the initiative of a parliamentary Upper House conservative who relied on first hand experience and anecdotal evidence rather than an empirically orientated research program to propose a set of modifications to the regulatory process. Nevertheless a series of discussions were held, by the bill designers, with regulation review units in other states.[29] The intention of the 1992 Act was to place before the Subordinate Legislation Committee a higher quantity and quality of information about the necessity for each piece of subordinate legislation, to satisfy the Committee that new regulations met the requirements of s 8 of the 1969 Act and to provide a greater opportunity for interested parties, especially business associations, to comment on the shape, objectives and necessity of new regulations. In addition the 1992 Act, via a mandatory sunsetting regime, initiated a comprehensive overhaul and updating of all existing regulatory schemes in Tasmania.

The 1992 Act provided, amongst other items, for the complete repeal of all existing subordinate legislation over a ten year period, such that if existing subordinate legislation is to continue to have effect it must be re-made in accordance with the requirements of the Act. It also introduced a 10 year sunset period for all new and re-made subordinate legislation and required RISs for all new subordinate legislation (with some limited exceptions), prior to it being submitted to the Governor for approval.

In the legislative context of Tasmania such a mandatory sunsetting regime was both revolutionary and long overdue. The regulatory processes of Tasmania had, in a number of key areas, long been plagued by a regulatory version of chaos theory. In some quarters of commercial life it was necessary to compile a compendium of startling complexity to ascertain the current rules applying to day to day operations. For example, a study of the *Sea Fisheries Regulations (1962)* reached the following conclusion:

> The *Sea Fisheries Regulations (1962)* are arguably one of the State's most amended and least decipherable pieces of legislation in the State. It has been described by the Government [in a media handout] as 'hard to read, confusing, and almost impossible to obtain in fully amended form.' If one was to find a fully amended set of regulations, then they might find them equally unsatisfactory. As Hobart Magistrate Mr. Wright was heard to comment in open court the regulations resemble some sort of 'bus ticket collection'. Even the

[28] *Subordinate Legislation Act 1992 - Administrative Handbook*, 7.
[29] Regulation Review Unit, *The Subordinate Legislation User's Guide*, Department of Treasury and Finance, Tasmania, 1996, 5.

> 'in-house' copy furnished by the Department of Primary Industries and Fisheries to the Law Society of Tasmania [as the result of a Freedom of Information request] leaves a lot to be desired. Printed on A4 paper, it is scarred by innumerable alterations and hand written amendments.[30]

The passage of this Bill, designed to radically reshape the regulatory process met surprisingly little opposition or roused little overt concern from government agencies. In part the Government had no desire to thwart the pet project of a key Upper House member. Additionally the 1992 Act was seen to implement a number of the Government's stated objectives for micro-economic reform, especially in the area of cutting red tape. Finally, the 1992 Act received the strong support of Treasury because it offered an opportunity, for Treasury via a new Regulation Review Unit, to oversee the future development of subordinate legislation in Tasmania.[31] As Peter McKay, leader for the Government in the Upper House noted:

> I believe that the Micro Economic Reform Committee in the Department of Treasury and Finance is supporting the enclosed Bill in its present form. ...There is no doubt in my mind that the Liberal Government would be supportive of the general principles behind Mr Stopp's bill however after perusing the draft Bill I believe it imperative that a detailed analysis be done of the cost implications to the Government of implementing the measures outlined.[32]

In December 1992, the Tasmanian Parliament passed the *Subordinate Legislation Act 1992* with its implementation to await proclamation. Over several months in 1993 a series of drafting delays, arguments over resourcing (especially of the Parliamentary Counsel's office) and then pressure from key economic agencies, especially the Hydro Electricity Commission (HEC), led to the bureaucratic derailment of the *Subordinate Legislation Act 1992*. The reasons for and the extent of this derailment of 'process reform' was not to be made public knowledge until after the passage of the *Subordinate Legislation Amendment Act 1994* (see below).

The unproclaimed 1992 Act encountered several sources of difficulty that caused the Government to accept bureaucratic advice not to implement the *Subordinate Legislation Act 1992* as it was originally approved. The concerns raised were three: the administrative burden the Act would impose on Agencies and Authorities; the

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[30] Selina McCrickard and Andrew Mead, 'Just When You Thought It Was Safe To Go Back Into The Water: Subordinate Legislation and its Application to the State's Sea Fishery' (Advanced Administrative Law, University of Tasmania, 1996) (student paper on file with authors).

[31] Letter dated 12 August 1993 from Mr Dan Norton, Secretary Department of Premier and Cabinet, to Mr Challen, Secretary of Department of Treasury and Finance acknowledges the responsibility for the *Subordinate Legislation Act 1992* going to the Treasury. Document obtained under Freedom of Information. Letter dated 13 April 1992 from the Secretary of Treasury, Mr M Vertigan to Mr A Tilt, Chief of Staff of the Premier's Office, outlines Treasury's support for the proposed subordinate legislation bill and preference for supervision of regulatory reform to be undertaken by 'a small unit located within Treasury.' Document obtained under Freedom of Information.

[32] Letter dated 27 March 1992 from Mr Peter McKay, Leader for the Government in the Legislative Council (Upper House) to the Premier Mr Groom. Document obtained under Freedom of Information.

effect the commencement of the Act would have on the future workload of the Office of the Parliamentary Counsel; and the effect it would have on the commercial activities of certain Government Business Enterprises.

Behind the scenes the final critical nail in the coffin for John Stopp's Bill was the delays any proclamation of the 1992 Act would have on proposed tariff increases by the HEC. Last minute intervention by the HEC prevented the *Subordinate Legislation Act 1992* from being proclaimed by the Tasmanian Governor on advice of the Executive Council in late June 1993. With that delay the final fate of the 1992 legislation became intertwined with the development of National Competition Policy when the recommendations of the Hilmer Report was released in August 1993.

On the 10 June 1993 the Secretary of Treasury was arguing that his Department 'has proceeded to the point where it requires the proclamation of the *Subordinate Legislation Act 1992*.'[33] On 22 June 1993 the Chief Parliamentary Counsel was in contact with Treasury to arrange for the publication of a special Gazette for the 'notification of the 3 statutory rules required in connection with the abovementioned commencement. ... Accordingly the special Gazette will have to be published on the 30th of this month.'[34] By 9 July 1993 the Secretary of Treasury was writing to the Chairman of the Subordinate Legislation Committee outlining that the *Subordinate Legislation Act 1992* 'is expected to be proclaimed in August or September of 1993.'[35] By September 1993 the Subordinate Legislation Committee were expressing concerns about the proclamation of the *Subordinate Legislation Act 1992*. The Secretary of the Committee wrote:

> On 1st September I wrote to Mr D W Challen expressing the Committee's concern at the delay in proclaiming the *Subordinate Legislation Act 1992* and the fact that the last communication received was dated 9 July. ... The proclamation date has gone from 1st July, 1st of August and 1st September and now there appears no date at all.[36]

Meanwhile, within the HEC alarm bells had started to ring, in relation to the proclamation of the *Subordinate Legislation Act 1992*. A letter from the General Manager of the HEC warned that proposed new tariffs could be delayed by up to three months and that such a delay 'would cause a direct reduction in revenue of $1.475

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[33] Letter dated 10 June 1993 from Mr D Challen, Secretary Department of Treasury and Finance to Mr D Norton, Secretary Department of Premier and Cabinet. Document obtained under Freedom of Information.

[34] Memo dated 22 June 1993. Document obtained under Freedom of Information.

[35] Letter dated 9 July 1993 from Mr D Challen, Secretary Department of Treasury and Finance to Mr H Hiscutt, Chairman, Subordinate Legislation Committee. Document obtained under Freedom of Information.

[36] Letter dated 21 September 1993 from Secretary, Subordinate Legislation Committee to the Premier. Document obtained under Freedom of Information.

million and a further impact on the 5% surcharge.'[37] In an internal HEC briefing paper it was noted that

> The *Subordinate Legislation Act 1992* ... is expected to be proclaimed on 1 September 1993. It has the potential to:
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> - extend the duration of the Commission's tariff setting process by three months or more and demand an increased allocation of resources;
> - severely restrict the Commission's ability to remove the inequities in our tariff structure.[38]

The 25 June letter from the HEC General Manager was used to mount a case, at the very last moment, by the Secretary of the Department of Premier and Cabinet and the Chief of Staff of the Premier's Office, to cancel the decision to proclaim the *Subordinate Legislation Act 1992* on 1 September 1993.[39] From that date a series of amendments to various aspects of the 1992 Act were worked on, behind the scenes, by Treasury and other agencies. By October 1993 concerns about the application of the 1992 Act were developed to cover several areas, including:

- Unacceptable delays in tariff setting;
- Lost opportunities for timely implementation of pricing strategies designed to meet the demands of a competitive market;
- Public conveyance of commercially sensitive information through the assessment of alternative options, as required through the Regulatory Impact Statement;
- Protracted public discussion with special interest groups, with potentially damaging consequences for the Government; and
- A loss of flexibility in restructuring tariffs to eliminate inequities and to remove possible cross-subsidisation.[40]

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[37] Letter dated 25 June 1993 from Mr G Longbottom, General Manager HEC, to Mr D Norton, Secretary Department of Premier and Cabinet. Document obtained under Freedom of Information.

[38] Internal Briefing Paper for Minister for Energy (for Discussion on Thursday 5 August 1993). Earlier, and relatively unchanged, versions of this briefing paper were made on 14 and 16 July 1993. Documents obtained under Freedom of Information.

[39] Minute to the Premier No. 1062 File No 3570 dated 28 June 1993. On the minute it is noted that the Premier, on 29 June 1993, withdraw the submission to the Executive Council to proclaim the Act on 1 September 1993: Document obtained under Freedom of Information.

[40] Letter dated 22 October 1993 from Treasurer to Mr M Aird re the *Subordinate Legislation Act 1992*. Document obtained under Freedom of Information.

Delay in proclamation had also dramatically cut the lead time for agencies to acquire skills and expertise to commence reviewing subordinate legislation made prior to 1 January 1954 and for the necessary public consultation to occur prior to the first stage of automatic appeal on 1 September 1994.[41] All of this effectively led to another attempt via a new piece of legislation—the *Subordinate Legislation Amendment Act 1994*.

C *The* Subordinate Legislation Amendment Act 1994— *A Shift in Scrutiny from Parliament to Treasury*

The passage of the *Subordinate Legislation Amendment Act 1994* through the Tasmania Parliament eventually saw the final proclamation, several months later, of the now very heavily amended *Subordinate Legislation Act 1992*.[42] The 1994 amendments transferred the institutional gatekeeper function away from the Subordinate Legislation Committee to the Regulatory Review Unit in Treasury. Previously agencies devoted resources and attention to ensuring a safe passage of delegated legislation through the largely pro forma but nevertheless necessary requirements of the Committee. Since 1995 this changed to meet the wishes, expressed and perceived, of the Regulatory Review Unit. The Subordinate legislation Committee has been relegated to a secondary rubber stamping or simple parliamentary accreditation role.

The Government's official line was that the amendments constituted a raft of improvements on the original 1992 Act which ranged from simple housekeeping measures to amendments that would

> result in a review process that is much more focused than was the case under the existing legislation. ... the resources of Agencies will be concentrated in those areas where the detailed consideration of proposed subordinate legislation will have the most significant benefit for the Tasmanian community.[43]

The 1994 amendments made a number of significant changes which included:

- Giving the Treasurer the authority, by notice in the Gazette, to broaden or narrow the definition of subordinate legislation;
- Guidelines on the preparation etc of subordinate legislation would now be determined by the Treasurer, notified in the Gazette, as opposed to those set out in Schedule 1 of the Subordinate Legislation Act 1992;
- Regulatory Impact Statements would now only be required if the Secretary of Treasury decided, by issuing a conclusive certificate, that any proposed subordinate legislation would impose a significant burden, cost or disadvantage on

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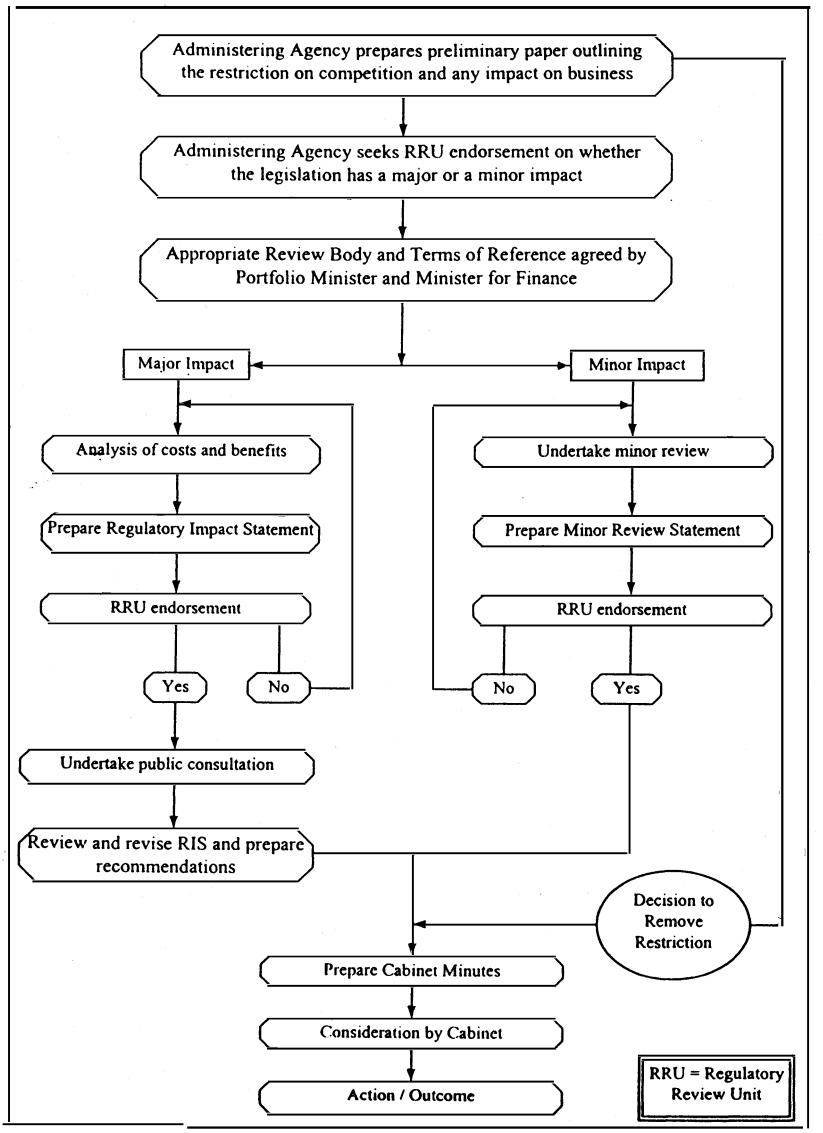
[41] Letter dated 22 October 1993 from Treasurer to Mr Aird.
[42] By Statutory Rule in March 1995.
[43] *Subordinate Legislation Amendment Bill 1994* Fact Sheet. Document obtained under Freedom of Information.

any sector of the public. This was in contrast to the 1992 Act which automatically required an RIS if there was 'a burden, cost or disadvantage on any sector of the public';

- Delayed the revocation of pre 1954 subordinate legislation until 1 January 1996; and
- Allowed the Governor to postpone revocation by 12 months.

Figure 1: Review Process for Existing Legislation that Restricts Competition



The passage of the 1994 amendments, as Figure 1 demonstrates, has seen the Regulatory Review Unit become the key institutional gateway for agencies to navigate through to win final approval for any subordinate legislation. Previously the administering agency would co-operate with Parliamentary Counsel in regards to the drafting of subordinate legislation, then seek Cabinet, Executive Council or the Governor's approval, if required, and finally publish the announcement in the Gazette. Any scrutiny or requirement to justify the subordinate legislation would then be undertaken by the Subordinate Legislation Committee.

After the 1994 amendments a number of agencies dramatically curtailed their creation of subordinate legislation and/or spent considerable time and effort to have their proposals considered as having minor impact to qualify for the 'minor impact path' shown in Figure 1. A number of officers in various agencies have confirmed that the scrutiny and determinations of the Regulatory Review Unit were the prime, and more often than not, sole consideration in their decisionmaking.[44]

D *Performance of the Subordinate Legislation Committee Since 1994*

Attempts to assess the performance of Australian delegated legislation committees have been rare and given limited attention. Several hurdles confront those who undertake such a task. First and foremost is the simple difficulty that the various Australian committees operate so differently that it is hard to make any sensible, qualitative comparisons.[45] Secondly is the limited assessment work upon which to draw information, ideas and analysis.[46] Thirdly, is the often scant official recording of the work of scrutiny committees, although the standard and content of annual reports and special reports has improved in a number of jurisdictions over the past decade. Fourthly, there is a lack of consensus as to the criteria upon which to assess a delegated legislation committee's performance.

Several University of Tasmania student research projects have been undertaken between 1993 – 99 as a preliminary exercise in detailing and evaluating the operations of the Tasmanian Subordinate Legislation Committee.[47] The finding of these

[44] Personal communication with Tasmanian government officers.

[45] See Argument, above n 8, 41.

[46] See Dennis C Pearce, 'Legislative Quality Control by Scrutiny Committees – Does it Make Administration Better?' (Paper presented at the Second Conference of Australian Delegated Legislation Committees, Cnberra, 26 – 8 April 1989) and B Wood, 'Scrutiny: What a Performance! Scrutiny Committees and Performance Indicators' (Paper presented at the Sixth Australasian and Pacific Conference on Delegated Legislation and Third Australasian and Pacific Scrutiny of Bills, July 1997).

[47] See Aggie Marek and Alia Lum, 'Evaluation of the Current Subordinate Legislation Committee and Study of the Relationship Between the Committee and Various Government Departments' (Principles of Public Law, University of Tasmania, 1996); Angela Conway, 'The Operation of the Subordinate Legislation Committee in Tasmania' (Principles of Public Law, University of Tasmania, 1993); Kate Groom, 'The Operation of the Subordinate Legislation Committee and the Amendments to the *Subordinate Legislation Act*' (Principles of Public Law, University of Tasmania, 1994); Madiyem Layapan and

projects are outlined below. Whilst the commitment of Committee members and the general performance indicators (number of regulations examined, times Committee have sat, etc) suggest that the Committee is performing adequately, the following six problem areas were identified in the student projects: (i) impact on committee workload as a result of agency delay in the regulation-making process; (ii) knowledge and experience of Committee members; (iii) resources issues; (iv) relationship with Treasury re Regulatory Impact Statements; (v) sunsetting; and (vi) performance of the Committee. These will be discussed in turn.

1 *Impact on Committee Workload*

Marek and Lum found that the number of regulations made annually had decreased since the passage of the *Subordinate Legislation Act 1992*.[48] They attributed this to the Act's requirements relating to consultation and sunsetting, and concluded that as a result a backlog of regulations is building up which may overload the Committee in the future. In part this curtailment is related to the expanded and important role given to the Regulatory Review Unit in Treasury. McNeill observed how the 'gatekeeper' role of the Regulatory Review Unit encouraged the Education Department in its new Act to use the label 'guidelines' for what had been treated under the previous Act as delegated legislation, so as to avoid the necessity to gain approval from the Regulatory Review Unit.[49]

Interviews conducted by Marek and Lum in 1996 and by authors of this paper confirm that agencies have initially reacted to the new arrangements set up by the *Subordinate Legislation Act 1992* and *Subordinate Legislation Amendment Act 1994* by reducing their production of new regulations. These perceptions of a reduction are confirmed by an examination of the actual amount of subordinate legislation entered onto the Statute books each year (see Table 2). An interesting trend is the decrease each decade of the amount of subordinate legislation being produced. The Tasmania 'process reforms' of the mid 1990s seems to have only slightly accelerated this trend. This decline in regulations is in stark contrast to the New Zealand experience.[50]

Table 2: Tasmanian Subordinate Legislation between 1970-1999

Kimani Boden, 'Delegated Legislation in the Education Department of Tasmania' (Principles of Public Law, University of Tasmania, 1993); Thomas Hoerner, 'An Administrative Law Critique of the Tasmanian Parliamentary Standing Committee on Subordinate Legislation: Its Legislation, Evaluation, and Justice' (Principles of Public Law, University of Tasmania, 1995); Ian McNeill, 'Subordinate Legislation and the New Education Act' (Principles of Public Law, University of Tasmania, 1995); Darren Vance, 'An Evaluative Study of the Laws Governing Tasmanian Subordinate Legislation and the Parliamentary Standing Committee on Subordinate Legislation in Tasmania' (Principles of Public Law, University of Tasmania, 1996). All of these student papers are on file with the authors.

[48] Marek and Lum, above n 47, 1.

[49] See McNeill, above n 47.

[50] See Sir Geoffrey Palmer, 'Deficiencies in New Zealand Delegated Legislation' (1999) 30(1) *Victoria University of Wellington Law Review* 1.

1970s	Regulations	1980s	Regulations	1990s	Regulations
70	231	80	302	90	273
71	334	81	330	91	264
72	324	82	246	92	228
73	241	83	281	93	298
74	315	84	311	94	247
75	347	85	291	95	194
76	324	86	316	96	236
77	358	87	284	97	197
78	346	88	264	98	187
79	278	89	217	99	151
Total	**3098**	**Total**	**2842**	**Total**	**2275**
Decade Average	**310**	**Decade Average**	**284**	**Decade Average**	**228**

The decline in the production of subordinate legislation in Tasmania may be associated with a move by government agencies to label subordinate legislation something other than 'regulations', 'rules' or 'by-laws'. There is some evidence that this is occurring in Tasmania,[51] but further study is needed. The Joint Standing Committee on Delegated Legislation in Western Australia has also expressed concern with this possibility, noting

> [t]he Committee has, in the course of investigating matters relating to subordinate legislation, discovered rules made by agencies which the agencies have considered are administrative rules but which the Committee considers are subordinate legislation. As the agency considers them to be administrative rules they have not been *Gazetted* or tabled in Parliament.[52]

2 *Knowledge and Experience of Committee Members*

Commentators have sometimes argued that Subordinate Legislation committees tend to be less partisan in their operations than other Parliamentary committees.[53]

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[51] See McNeil's study of the *Education Act*, above n 47.
[52] Western Australia, *The Subordinate Legislation Framework in Western Australia*, above n 22, 9.
[53] See John E Kersell, *Parliamentary Supervision of Delegated Legislation: The United Kingdom, Australia, New Zealand and Canada* (1960) 165.

The Western Australian Committee notes that it is 'proud of and carefully guards its ability to function with apolitical impartiality.'[54] Marek and Lum's interviews with Tasmanian Committee members suggest that this is accurate of the operations of the Tasmanian Committee, although one of the members acknowledged that personal opinions often coincide with the 'party line'.[55] Argument has alluded to the impact that the parliamentary environment may have on the operations of delegated legislation committees.[56]

The terms of reference in the 1994 Act require the Committee to focus on specific criteria, rather than the general policy behind a regulation. As a result, Committee reports are generally unanimous[57] and tend to avoid overt political divisions.[58] However, it seems that newer Committee members are not always clear about this limitation on their role.[59] Another aspect of partisanship noted by Hamer is the self-regulation imposed by Opposition members of the Committee who have an eye out for the future:

> The Opposition do not want to rock the boat too much, because they are waiting to get into power. They do not want too nosy a Joint Committee on Statutory Instruments with too many powers, and therefore do nothing about it. When the parties change round, the Opposition again do nothing about it because they are waiting to get back into Government.[60]

New Committee members in Tasmania receive no training about the role and functions of the Committee beyond the provision of a copy of the Act and a summary about the Committee. Some new members felt that this contributed to confusion about their responsibilities as Committee members, resulting in time wasted debating the scope of the Committee enquires.[61] Marek and Lum proposed the use of an induction meeting for new members to address this problem and to ensure the effective use of committee time.[62]

3 *Resources Issues*

The proper resourcing of Parliamentary Committees and Parliament in general has been an emerging issue in the 1990s. For example, the West Australian *Commission on Government* stressed that '[f]or a standing committee system to operate effectively, the system must have adequate resources.'[63] The *Commission on Govern-*

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[54] Western Australia, *The Subordinate Legislation Framework in Western Australia*, above n 22, 16.
[55] Marek and Lum, above n 47, 3 (referring to interviews with Judy Jackson MHA (ALP) and Peg Putt MHA (Green)).
[56] Argument, above n 8, 34.
[57] Marek and Lum, above n 47, 4.
[58] A point made by Palmer, above n 50, 7.
[59] See Marek and Lum, above n 47, 4.
[60] Hamer, above n 6, 157. Hamer was quoting an unnamed delegate at the third Commonwealth Conference on Delegated Legislation.
[61] Marek and Lum, above n 47, 4.
[62] Ibid, 5.
[63] Western Australia, *Commission on Government*, Report No. 2 (1995) 195.

ment argued that these joint committee resources should include qualified and trained staff, a well resourced parliamentary library, information technology support, funding and adequate time.

It seems that Tasmanian members rarely spend much time examining regulations prior to meetings.[64] Time consuming research is often required to understand a proposed regulation, including reference to the parent Act and any related regulations. As a result of the lack of available resources, Committee members generally focus on controversial issues.[65] Therefore, regulations that have longer term but less obvious impacts or deficiencies attract less scrutiny compared to regulations that come to the attention of a particular interest group or constituency.

Marek and Lum argue that this is problematic, as it suggests that the Committee does not thoroughly consider each regulation against the criteria in the Act.[66] An earlier study suggested that additional staff would remedy this problem.[67] Attention is often given to the presence or absence of an independent legal advisor to delegated legislation committees but more important is the general question of resourcing to allow for several tasks to be completed, including the accessing of legal advice, seeking of community and professional input, carrying out audits of existing delegated legislation, monitoring of sunsetting clauses, production of reports, and as Argument suggests, making committee material available especially via the internet.[68]

The preparation of independent briefs on each regulation should ensure that Committee members have a good basis to conduct a proper review of all delegated legislation coming before them. Marek and Lum note that preparation of the relevant brief will be assisted where an RIS is required, but may be more useful where the Committee does not have the benefit of a RIS.[69] The *Commission on Government* (WA) noted that:

> Another constraint on the efficacy of the JSCDL [Joint Standing Committee on Delegated Legislation] is the lack of compliance by government departments and agencies in providing the Committee with sufficient information with which to examine proposed regulations. These bodies are often tardy in providing the information, resulting in the Committee having to put on a protective notice of motion of disallowance, simply because they have not been afforded the opportunity of properly scrutinising the proposed rules.[70]

In 1994 Kate Groom concluded that the role of the Tasmanian Committee was largely that of an 'overseer' and that there was a lack of consultation between the

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[64] See Marek and Lum, above n 47, 4.
[65] Ibid.
[66] Ibid.
[67] Hoerner , above n 47.
[68] See Argument, above n 8, 40.
[69] Marek and Lum, above n 47, 6.
[70] Western Australia, *Commission on Government*, above n 63, 262.

legislation initiators and Committee members.[71] Thomas Hoerner noted that the Committee and its Secretary felt that the cordial and respectful working relationship between the Committee and agencies meant that there was little problem with the supply of adequate information to the Committee.[72] However, other evidence suggests that the low operational scrutiny threshold of the Committee may account for the apparent high level of compliance by Tasmanian agencies compared to their Western Australian counterparts. The Department of Community and Health Services has an eight-page 'Procedures for the Making of Regulations' manual that covers 24 steps in the process but only mentions the Subordinate Legislation Committee once. One Tasmanian Agency legal officer with several years experience, noted that '[t]he Committee has rejected very few regulations in its history. On two occasions the Committee has asked for elaboration of the intent etc. and on one occasion I appeared before [them] to explain the intent and define some of the terms for them.'[73]

This confirms Hamer's observation that all the state parliamentary committees scrutinising delegated legislation seem to adopt a modus operandi which sees their main function not as disallowing regulations but negotiating with government departments to correct defective legislation.[74] He argues in relation to this modus operandi that while such an approach has virtue, an effective committee must also have bite as well as bark, and the lack of successful disallowance motions in three of the state parliaments provides little confidence that there is effective parliamentary control.[75]

In many ways the Tasmanian Committee has continued a long tradition of polite and non-confrontational supervision of the regulatory process. The conclusion written by Pearce in 1977 about the Tasmania Committee is just as relevant 22 years later:

> The committee is obviously an active body and its members take their job most seriously. It is interesting to note that the committee does not see its role in quite the same light as do the other delegated legislation committees in Australian parliaments. The other committees, except perhaps that in Victoria, direct their inquiry more towards whether the power of disallowance should be invoked. The Tasmanian committee, in pursuing a role of general supervisor of subordinate legislation, undoubtedly performs an invaluable service that can be regarded quite properly as an important function of the legislature. Whether the committee should take a more active role in bringing regulations regarded as deficient to the attention of the parliament, thereby enabling disallowance action to be taken, is very much a question of approach. It would seem that the Tasmanian committee, like its Victorian

[71] Groom, above n 47.
[72] Hoerner, above n 47.
[73] Response dated 22 October 1996 to a survey sent by Marek and Lum, above n 47.
[74] Hamer, above n 6, 155.
[75] Ibid.

> counterpart, achieves as much by suggestion and persuasion as would be obtained if a more destructive role were assumed.[76]

The level, type and quality of activity undertaken by a scrutiny committee will be closely associated with its access to support staff and in particular legal advisers.[77] For a number of years the Tasmanian Committee operated using a private lawyer on retainer. For cost reasons this practice was dispensed with in the early 1990s. Since that time the Tasmanian Committee has had to carefully peruse each individual statutory rule and then agree that the rule ought to be looked at by the Crown Law Office. The importance of having qualified staff perform this screening function was highlighted by Professor Pearce:

> It is not really practicable to expect a member of a committee, even though he be a lawyer, to undertake the time-consuming task of carefully perusing the [numerous] pieces of delegated legislation that are produced each year, reading them into the existing legislation if they are amending instruments, checking them against their empowering Acts, etc. This is something that should be done for the committee by a legal adviser who should be paid for his assistance. It does not seem appropriate that the adviser should be a governmental officer because conflicts of interest can too readily arise. ... Alternatively, as is the position in the United Kingdom, a legally trained member of the parliamentary staff could provide the requisite assistance to the committee.[78]

4 *Relationship with Treasury and RISs*

Whilst not an issue over which the Committee has any control, the transfer of responsibility for certain provisions of the *Subordinate Legislation Act 1992*, from the Committee to Treasury, has had an important impact on the Committee.[79] This development does not alter the Committee's role in relation to its traditional scrutiny criteria contained in s 8(1)(a) of the *Subordinate Legislation Committee Act 1969*. Instead, its impact is limited to the new criteria relating to the *Subordinate Legislation Act 1992*. Arguably, therefore, the split of responsibilities with Treasury does not diminish the Committee's role. This is debatable, however.

The 1994 amendments to the *Subordinate Legislation Act 1992* transferred a number of responsibilities to Treasury and Finance and excluded the Committee's consideration of those matters. The first is that the amendments prevent the Committee from considering whether an RIS should have been prepared for a particular regulation by giving the Treasury responsibility to determine whether a regulation will have a significant impact on the public or not. Section 5 empowers the Secre-

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[76] Pearce, *Delegated Legislation in Australia and New Zealand*, above n 2, 73.
[77] See Western Australia, *Twenty-Third Report*, Joint Standing Committee on Delegated Legislation (1997) 2-4.
[78] Pearce, *Delegated Legislation in Australia and New Zealand*, above n 2, 83-4.
[79] See generally, *Tasmanian Subordinate Legislation Act 1992—Administrative Handbook* [3.4.2].

tary of the Department of Treasury and Finance to certify that a proposed instrument would not have a significant impact on the public. This determines whether an RIS is necessary or not, as an RIS is only required where an instrument will have a significant impact on the public (s 5(1)). In other jurisdictions, where an RIS is used, it is the scrutiny committee which has the responsibility of requesting an RIS from the appropriate body.

Secondly, where an RIS has been prepared, the amendments require the Secretary to certify that it complies with the requirements of Schedule 2 and that the nature and extent of proposed consultation is appropriate (s 5(1D)). The Act specifies that the degree of consultation should be balanced with the degree of impact that the regulation would have on the public, or consumers, or relevant groups within the community.[80] This does not preclude the Committee from considering compliance with the requirements of the Act in relation to an RIS. However, it emphasises the primary role of the Treasury, rather than the Committee, in relation to supervision of the RIS process. In practice, this may translate into Committee members taking the Treasury certificate on faith and not subjecting the RIS to rigorous scrutiny, especially given the limited resources of the Committee.

Thirdly, s 6 gives the Treasury wide powers to exempt a regulation from the RIS and consultation processes where the Secretary considers that it would be in the public interest. This again splits power over subordinate legislation between the Committee and the Treasury.

Fourthly, the amendments prevent the Committee from considering certain regulations. Section 9 requires documents to be sent to the Subordinate Legislation Committee when subordinate legislation is made. However, the definition excludes those instruments defined as subordinate legislation (instruments of a legislative character made under the authority of an Act and declared by the Treasurer under sub-s (2) to be subordinate legislation for the purposes of this Act).[81] It is possible that a legislative instrument could fall within the definition of subordinate legislation contained in the Committee Act but be excluded from the Committee's consideration. On the face of the Act it is difficult to see why an instrument of legislative character declared by the Treasurer to be subordinate legislation would be inappropriate for scrutiny by the Committee.

Another interesting amendment is the insertion of s 3A empowering the Treasurer to issue guidelines controlling the preparation of subordinate legislation. The Act expressly provides that these guidelines are not statutory rules, preventing the Committee from scrutinising such guidelines and providing input into the very heart of the regulatory process.

Given the important role of a Treasury Department in regulation review and regulation impact processes, some of these amendments are sensible and justifiable. The Committee does not have the resources to administer the RIS process, nor would it

[80] Ibid [10 – 11].
[81] See *Subordinate Legislation Amendment Act 1994* (Tas) s 3.

be appropriate for it to do so. However, is difficult to see why Treasury's responsibility for the RIS process should preclude the Committee's consideration of its decisions or limit its scrutiny of all subordinate legislation against the relevant criteria. Such allocation of power to Treasury is not given in other Australian jurisdictions, and such unusual limitations are not placed on the powers of committees to request an RIS. This unique system is hampering the Tasmanian committee's ability to conduct its scrutiny as effectively as its counterparts in other jurisdictions.

The current procedures associated with Regulatory Impact Statements in Tasmania largely concentrate on the production of a Cost Benefit Analysis for the purposes of the Regulatory Review Unit, as opposed to providing information to the Subordinate Legislation Committee. Unlike their counterparts in Western Australia, Tasmanian agencies rarely supply the Committee with explanatory memorandum.[82] This certainly does not allow the Committee to determine the final promulgation of a rule based on evidence and need. As the United States Supreme Court has observed:

> [T]here can now be no doubt that implicit in the decision to treat the promulgation of rules as a 'final' event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgment was exercised.[83]

5 *Sunsetting*

Most Australian jurisdictions have now introduced legislation providing for automatic repeal of delegated legislation. Some of these Acts are of recent vintage, such as the *Tasmanian Subordinate Legislation Act 1992*, and there has been little empirical research into their operation.[84] Most Acts provide for exemption from the sunset process and allow for regulations to be 'rolled over' in certain circumstances without requiring impact assessment. Section 11(5) of the Tasmanian Act allows the Governor by order to postpone the sunset date for subordinate legislation for not more than 1 year. It seems that s 11(5) can only be used once, as any order extending the sunset date must be made before the date on which the subordinate legislation is due to expire. This appears to limit the extension period to one year from the original sunset date.

Marek and Lum argue that reliance on the extension mechanism may lead agencies to put off remaking subordinate legislation. They argue that this delay may lead to an overload of regulation-making approaching the one year anniversary of a sunset

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[82] See Western Australia, *The Subordinate Legislation Framework in Western Australia*, above n 22, 35-7.

[83] *Home Box Office Inc v FCC* 567 F 2d 9, 54 (DC Cir, 1977) (citations omitted).

[84] Western Australia, *The Subordinate Legislation Framework in Western Australia*, above n 22, 40.

date, placing a heavy burden on agencies and the Committee.[85] The operation of the sunsetting regime is likely to provide a fertile subject for empirical research in years to come. The operation of the sunsetting regime is likely to provide a fertile subject for empirical research in years to come. A survey of the Government Gazette between 1 January 1995 and 1 March 1998 revealed that after the passage of the first three key sunset dates (1 January 1996, 1997 and 1998[86]), only about 14 pieces of subordinate legislation due to be repealed were given a 12 month extension under the *Subordinate Legislation Act 1992*. This seems to counter the suggestion by Marek and Lum that agencies would frequently resort to an extension of the sunsetting process.

6 *Performance of the Committee*

Marek and Lum found anecdotal evidence that the Committee's approach to scrutinising particular regulations has been ad hoc and inconsistent.[87] The level of interest and attention paid to the scrutiny of delegated legislation could be attributed to a combination of an individual member's knowledge and expertise in certain subject areas, whether they had been lobbied by a constituent regarding a regulation, and the members' interest in an issue. It seems that the Committee expends more time and effort on controversial delegated legislation. Whilst this is not surprising, Marek and Lum questioned whether the Committee might be trespassing into scrutiny of policy issues rather than issues of regulatory process.[88] Committee members admitted that their interest in a matter affected the extent of their scrutiny of subordinate legislation.[89] Hoerner has argued that there also tends to be a heavy scrutiny of Council by-laws because many Upper House members of the Committee are from local government backgrounds.[90]

Despite the suggestion of inconsistency, it seems that the Committee and its operations are generally viewed in a positive light by agencies and those who deal regularly with the Committee. However, there is a suggestion that some agencies consider Treasury the major player in the subordinate legislation field.[91] Whilst the preparation of an RIS may relieve the Committee from undertaking its own research or consultation when applying its terms of reference, it does not alter its responsibility to scrutinise the legislation according to those criteria. This has had some impact on the Committee's workload, resulting in a reduction in meetings from weekly to fortnightly since 1996. However, it would be a mistake to conclude that the introduction of the RIS process lessens the importance of the Committee's scrutiny role. Such a view would be a misconception. The extent of the Commit-

[85] See Marek and Lum, above n 47, 12.
[86] Repealing all current regulations made before 1 January 1968—see s 11(2) *Subordinate Legislation Act 1992* (Tas).
[87] See Marek and Lum, above n 47, 14.
[88] Ibid 15.
[89] Ibid.
[90] Hoerner , above n 47.
[91] See Marek and Lum, above n 47, 17.

tee's role has not really altered as the implementation of RIS's from Treasury has merely provided the committee with another instrument (albeit an extremely useful one) with which to conduct the scrutiny. With respect to subordinate legislation, Treasury and the Subordinate Legislation Committee perform different functions with a different focus. Both roles are important in the proper development and scrutiny of delegated legislation.

Other observers of the Tasmanian scrutiny process are more critical of the apparent casual approach of the Committee. Hamer sharply notes that '[i]n Tasmania the committee works in an extremely leisurely fashion, usually not attempting to make a report before the disallowance period has expired, and relying on the goodwill of government to make any necessary changes.'[92] The net impact of the amendments made by the *Subordinate Legislation Amendment Act 1994*, a lack of resources, relative exclusion from the information source of an RIS (or detailed explanatory memorandums) have resulted in the leisurely and ad hoc approach critiqued by Hamer. Observers of the Tasmanian experience are struck by the relative absence of both formal reports[93] and comparative statistics on yearly performance[94] and no systematic monitoring of sunsetting or the effectiveness of its scrutiny procedures. Many of these problems can be observed in sharp relief through an actual case study involving the aerial spraying industry in Tasmania.

III APPLYING A BLOWTORCH TO A PAPER TIGER: A CASE STUDY OF REGULATORY PROCESS FAILURE

Pearce noted that the Tasmanian Committee does not regard the amount of subordinate legislation disallowed as an appropriate evaluation of its efficacy.[95] Regulations, rules and by-laws are by virtue of s 47 of the *Acts Interpretation Act 1931* required to be laid before each House of Parliament within the first 10 sitting days of the House, after their notification or publication in the Gazette. Either House can, within 15 sitting days, disallow those regulations, and they cease to have effect from the date of their disallowance, except as regards anything done under their authority prior to their disallowance.

The Subordinate Legislation Committee, except when the Parliament is not sitting, can only make a report to Parliament recommending disallowance. Since 1932 approximately 37 regulations have been disallowed by the Tasmanian Parliament. After the commencement of operations of the Subordinate Legislation Committee in

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[92] Hamer, above n 6, 155.
[93] See Hoerner, above n 47. Compare this to the position in Western Australia where the Joint Standing Committee on Delegated Legislation had prepared 23 reports to August 1997 including its comprehensive 1995 report *The Subordinate Legislation Framework in Western Australia* (above n 22).
[94] See Western Australia, *Twenty-Third Report*, above n 77.
[95] Pearce, *Delegated Legislation in Australia and New Zealand*, above n 2, 73.

1969, approximately 23 regulations have been disallowed.[96] It is interesting to note that in this post-1968 period, seven regulations (on a diverse range of topics) were disallowed in a five month period in 1991.

A recent case study illustrates how the factors previously mentioned in this paper, such as the approach taken by the Committee, the lack of independent legal advice, other resource constraints, agency determination to implement micro-economic reforms and the limitations of a negative resolution procedure can combine to produce undemocratic results. Whilst not quite reaching the depths noted by O'Keefe, the outcome of the case study reflects his observation that '[b]ureaucracy is the term usually applied to a system of government, the control of which is so completely in the hands of officials that their power jeopardises the liberties of ordinary citizens.'[97] The key issues covered by this case study include the crucial regulatory process questions about whether such reforms ought to occur via Parliamentary changes to the Traffic Act, as opposed to departmental changes to the regulations, and to what extent should consideration be given to the rights and interests of existing licence holders.

The story begins in the 1980s. The Tasmanian Department of Transport decided to regulate the aerial spraying industry in Tasmania by use of the *Traffic (Public Vehicle) Regulations*.[98] These regulations required aircraft used for aerial spraying to hold a public vehicle licence under the provisions of the *Traffic Act 1925*. The Department, in order to ensure a viable market for aerial spraying operators and at the same time avoid controversy over unsafe spraying operations, set up a regulatory regime which effectively prevented new operators from competing with the two dominant aerial spraying enterprises.

In 1994, responding to new demands and the micro-economic reform agenda set in motion by the Hilmer Report and National Competition Policy, the Transport Department launched a review into aerial spraying. The Burton Report concluded that aerial spraying ought to be deregulated and that the *Traffic Act 1925* was totally inappropriate for the licensing of aircraft of any kind. In addition the Report concluded that the appeal processes under the Public Vehicle Licensing Tribunal imposed unnecessary and excessive legal costs and encouraged unwieldy administrative procedures.[99]

The Department in the 1980s had created a virtual monopoly in the area of aerial spraying by its regulatory framework. In the mid 1990s it decided to dismantle that framework via a simple gazettal of Statutory Rule 108 (see Table 3). After the

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[96] Not all of these regulations were disallowed due to an adverse report by the Subordinate Legislation Committee. In some cases the disallowance motion came from parliamentarians, especially Legislative Councilors (Upper House) who had been lobbied by interest groups upset by a new regulation. Hamer has observed how 'individual members of the upper house ... sometimes take pre-emptive action'—see Hamer, above n 6, 155.

[97] O'Keefe, above n 19, 1.

[98] *1967* (Tas).

[99] See David A Burton, Tasmania, *Procedures under the* Traffic Act 1925 *for Public Vehicle Licensing of Agricultural Aircraft* (25 July 1994).

release of the Burton Report, the Transport Minister gave a number of commitments to consult with stakeholders before implementing any of the recommendations:

> It is my intention to establish an intra-government advisory group to quickly but thoroughly examine the wider implications of the report. ... The advisory group will report back to the Government on the most appropriate means of implementing the recommendations of the report and achieving a review and/or overhaul of the *Traffic Act 1925* and the *Traffic Regulations 1967*. ... It will be necessary then, to enter into wider industry consultation with the objective of gaining acceptance for meaningful transport reform.[100]

> The Chairman said that given the nature of the provider and user industry concerns, along with the wider issues of statutory and regulatory procedures, he has decided that early in the New Year he will take to Cabinet a proposal that the Government pursue transport reform commencing with an examination of the Act and Regulations. He said that the process for that examination will be conducted by an appropriately established and empowered group, separate from Government, but with access to relevant Agencies.[101]

Between the meeting of the Tasmania Transport Industries Advisory Council in December 1994 and the special Friday Gazettal of Statutory Rule 108,[102] the aerial spraying operators received no other indications that government policy or intentions had changed. Statutory Rule 108 simply exempted all aircraft involved in aerial spraying from the need to be licensed as a public vehicle effective from 1 October 1995.[103]

In its meeting of 17 October 1995 the Subordinate Legislation Committee, after receiving extensive lobbying from the existing operators and various opinions on the legality and merits of the implementation of Statutory Rule 10 determined that the rule was ultra vires, and resolved to withdraw it immediately. This rare showing of both bark and accompanying bite would no doubt please Hamer[104] and did produce headlines such as 'Blunder holds up aerial spraying deregulation.'[105] More disconcerting was the Departmental view that the instruction to withdraw was merely a request to rewrite the regulation. It transpired during the hearing that the Transport Minister had warned the committee that the regulations had been framed along the lines mapped out by previous by-laws which themselves might have been

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[100] Mr Ian Braid, Minister for Transport and Works (Tas) *Re Burton Inquiry* Press Release, 21 August 1994, 1.

[101] Chairman, Ian Braid, Transport Minister, Official Minutes of the 22nd Meeting of the Tasmanian Transport Industries Advisory Council, 13 December 1994.

[102] Normally, the Tasmania *Government Gazette* is issued on Wednesdays. It was later discovered that the automatic sending of delegated legislation to the Subordinate Legislation Committee did not extend to special editions of the *Government Gazette*.

[103] *Traffic (Public Vehicles) Amendment (Agricultural Aircraft Exemption) Regulations 1995*, r 108.

[104] See Hamer, above n 6, 155.

[105] Peter Collenette, 'Blunder Holds Up Aerial Spraying Deregulation' *The Examiner* (Hobart), 21 October 1995, 2.

illegal under the *Transport Act*.[106] Within a few days of the Subordinate Legislation Committee meeting, the Department of Transport announced a committee headed by Mr Burton to review Public Vehicle Licensing in Tasmania. The Review was to look at the current situation and identify changes that may be required to legislation and regulations. The initial public consultations were to be conducted in Hobart, Devonport, Burnie and Launceston between 6 – 9 November 1995.

Whilst this was a fairly rapid round of initial public consultation there was nothing to indicate that aerial spraying would be treated any differently from all other possible changes to regulations and legislation being looked at by the Committee of Review. Yet in another special edition of the Government Gazette and on the last day of the 1995 Parliamentary session, Statutory Rule 129—a slighted amended version of Statutory Rule 108—appeared. In a circular to all aircraft license holders in Tasmania (see Table 3) the Commissioner of Transport drew attention to all interested parties to the immediate deregulation of aerial spraying, stating that

- aircraft which are used only for aerial spraying, spreading or seeding will not require a public vehicle licence;
- aircraft which are used both for aerial spraying, spreading or seeding as well as other work, will require a public vehicle licence for that other work; and
- aircraft licences which currently have a restriction which prevents their use for aerial spraying, spreading or seeding will have the restriction removed.[107]

The Subordinate Legislation Committee held a special meeting on 8 January 1996 and passed the following resolution:

> Statutory Rule No. 129 Traffic (Public Vehicles) Amendment (Agricultural Aircraft Exemption) Regulations (No.2) 1995;
>
> (1) That the Minister be advised that the Committee is unhappy with the way the implementation of the Regulations was handled, particularly with regard to consultation with, and the lead time for, affected parties.
>
> (2) That the Committee request the Minister to closely monitor the Regulations over the next 12 months to ensure no-one is disadvantaged.
>
> (3) That the Regulations be reported as examined.[108]

Although it could be argued that several aspects of this case study demonstrate the efficacy and power of the Subordinate Legislation Committee (especially the withdrawing of Statutory Rule 108), at the end of the day a persistent government agency revealed the Committee to be largely a paper tiger. This assessment is not based on the achievement of deregulation of aerial spraying in Tasmania but that the

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[106] Ibid.

[107] Circular to 'Aircraft License Holders and Other Interested Persons', from Tasmanian Commissioner for Transport dated 20 November 1995.

[108] Letter to Mr John Jones from the Secretary Parliamentary Standing Committee on Subordinate Legislation dated 9 January 1996.

Committee was unable to prevent an agency operating to achieve what O'Keefe described as 'the inevitable requirement of the executive, and the bureaucracy that serves it, to reduce if not subvert rights, personal and parliamentary, in the interests of power and efficiency.'[109]

Table 3: Chronology of events in the deregulation of aerial spraying in Tasmania

Event	Date
Burton Inquiry Report delivered to Government	25 July 1994
Burton Report released publicly	21 August 1994
Ministerial Press Release promising consultation	21 August 1994
Meeting of the Tasmanian Transport Industries Advisory Council	13 December 1994
Statutory Rule 108 Gazetted	29 September 1995
All aerial spraying aircraft exempt form licensing	1 October 1995
Subordinate Legislation Committee instructs Minister to withdraw Statutory Rule 108	17 October 1995
Committee of Review into Public Vehicle Licensing established and arranges for initial public consultations	6-9 November 1995
Statutory Rule 129 Gazetted	15 November 1995
Last parliamentary session for 1995	15 November 1995
Transport Circular advising all Aircraft licence holders that regulations amended	20 November 1995
Subordinate Legislation Committee considers Statutory Rule 129	9 January 1996

IV COPING WITH EXTERNAL FACTORS

How can some of these problems with subordinate legislative committees be improved? A number of external factors affect the operations of delegated legislation committees and can be used to aid future decision making. Two in particular deserve a brief mention. The first relates to the scrutiny principles for National Scheme legislation, because this will be an area in the future which will place the

[109] O'Keefe, above n 19, 7.

greatest demand upon delegated legislation committees. The second is the enigma of judicial review of subordinate legislation. Theoretically parliamentary scrutiny and judicial review operate as a tag team to insert some control and moderation into what many have seen as an executive paradise in which the use of delegated legislation is a necessary means of efficiently implementing its power.[110] Also, as another possible approach, this section ends with a brief outline of a pilot scheme that was conducted in 1997 to assist the Tasmanian Committee to offset some of the problems highlighted during the course of this paper.

A *Scrutiny Principles for National Scheme Legislation*

The developments outlined below, whilst radically different in character, have the capacity to significantly affect the work of the Committee. A Position Paper on the *Scrutiny of National Schemes of Legislation* and a Discussion Paper by the Western Australian government both recognise that national schemes of legislation have effectively excluded Parliaments from the scrutiny process.[111] The Position Paper proposes a number of options to address this perceived problem based around the development of adopting and implementing uniform scrutiny principles. One of these options proposes a three week timetable for the examination of national scheme subordinate legislation according to four new principles.[112] Three of these principles are already contained in s 8(1) of the Act, but one relating to social and economic impact is new. This is not a matter which the Committee would otherwise be required to consider, as the *Subordinate Legislation Act 1992* provides that a regulatory impact statement is not required for matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory.

If the Position Paper is implemented as proposed, the Committee will not only have to come to terms with the application of the new scrutiny principle, but will have to do so within an extremely limited timeframe. The Position Paper proposes a 14 day timetable for preparation of a joint Scrutiny Committee report on national scheme subordinate legislation, with responsibility for the preparation of the report rotating between the Committees. Even where the Tasmanian Committee does not have

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[110] Palmer, 'Deficiencies in New Zealand Delegated Legislation', above n 50, 2.

[111] See Western Australia, *Twenty-Third Report*, above n 77 and Commonwealth, *Scrutiny of National Schemes of Legislation—Position Paper*, Working Party of Representatives of Scrutiny of Legislation Committees, 1996.

[112] The Position Paper proposes that all scrutiny committees adopt the following terms of reference for the examination of national scheme subordinate legislation:
whether the subordinate legislation is in accordance with the provisions of the Act under which it is made and whether it duplicates, overlaps or conflicts with other regulations or Acts;
whether the subordinate legislation trespasses unduly on personal rights and liberties;
whether, having regard to the expected social and economic impact of the subordinate legislation, it has been assessed according to the *Principles and Guidelines for National Standards Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies* or other equivalent guidelines; and
whether the subordinate legislation makes rights, freedoms or obligations unduly dependent upon administrative decisions which are not subject to appropriate external review.

report preparation responsibility, the teleconference of Subordinate Legislation Advisers is proposed for four days after receipt of the draft legislation, forcing quick consideration of the scheme. This timetable is a proposal only, and may well be subject to modification, but it demonstrates the time constraints which may apply in future to Scrutiny Committees' consideration of national scheme legislation. The implementation of the Position Paper appears to have stalled since 1997.[113]

B *Judicial Review as a Supplement to Scrutiny*

Judicial review has remained a key theoretical control over the volume and scope of subordinate legislation but in practice remains a 'backwater of administrative law'.[114] The Joint Standing Committee on Delegated Legislation noted that the scope for judicial review of subordinate legislation is limited by the rules of standing, costs and the technicalities of prerogative writs in states like Western Australia and Tasmania.[115] Professor David Williams has charted the development of the concept of judicial restraint or 'benevolent interpretation' of subordinate legislation. In effect it appears that the courts are reluctant to overturn subordinate legislation which had already received 'tacit consent' via the scrutiny procedures of Parliament.[116] However, this reluctance will be no barrier where it can be demonstrated that a regulation is clearly ultra vires.[117]

Whilst there has been a steady trickle of significant cases, Palmer's view that the 'contribution of the courts in New Zealand to checking the use of the regulation making power in recent years has not been great' could easily be applied to the position in Australia.[118]

C *Student Research Proposal*

In 1997, the Public Law students at the University of Tasmania participated in a pilot program providing research assistance to the Subordinate Legislation Committee. This provided the Committee with an opportunity for informal, free research into regulations with which it had a particular concern. Although the Committee has the option to gather its own legal and specialist advice it has rarely pursued this option in the 1990s. The pilot project was developed in consultation with the Committee and encompassed the preparation of briefing notes applying the scrutiny criteria contained in s 8(1) of the *Subordinate Legislation Committee Act 1969* to

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[113] See Western Australia, *Twenty-Third Report*, above n 77, 18-19.
[114] David Williams, 'Subordinate Legislation and Judicial Control' (1997) 8 *Public Law Review* 79.
[115] See Western Australia, *The Subordinate Legislation Framework in Western Australia*, above n 22, 38.
[116] Williams, above n 114, 82.
[117] For example see the decision and reasoning of Crawford J in *Causby v Hedditch*, [1989] Tas R 108.
[118] Palmer, 'Deficiencies in New Zealand Delegated Legislation', above n 50, 12. Some of the more important Australian cases include: *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 27 ALD 633, *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201, *Re Gold Coast City By-laws* [1994] 1 Qd R 130 and *House v Forestry Tasmania* (1995) 5 Tas R 169.

regulations being considered by the Committee. The pilot was intended to provide both a research resource to the Committee, and an opportunity for law students to gain experience of the work of the Committee and an understanding of its role.

Feedback from both the Committee and students has endorsed the general concept of the pilot project. The students worked in teams of 3-4 and their briefing papers were assessed. The difficulties encountered by the students included the tight sitting schedule of the Committee, difficulty in determining sitting days and attempting, like the Committee, to assess the legal aspects of the regulations divorced from further background and policy information. The Subordinate Legislation Committee has expressed a desire for the pilot to continue.

V CONCLUSION

Times are changing in relation to the legislative process in Australia. Initiatives such as the Intergovernmental Competition Principles Agreement force different considerations to be taken into account in developing legislation. The demands on scrutiny committees arising out of initiatives such as the Position Paper on Scrutiny of National Schemes of Legislation appear to be increasing. The passage of Acts regulating the making and passage of delegated legislation is also gaining momentum. Many of these Acts contain mandatory consultation procedures and sunsetting provisions. These reforms are important steps in improving the quality of delegated legislation in Australia. However, the role of scrutinising the new processes, however, generally falls to Scrutiny Committees. The performance of these Committees therefore largely determines the level of compliance with, and success of, the new schemes. Consideration of the Tasmanian Subordinate Legislation Committee suggests that in addition to legislative reform of the delegated legislation regime, Scrutiny Committees may need to examine their own processes and operations in light of these changes to ensure that they continue to perform effectively.

This brief review of the operation of the Tasmania Subordinate Legislation Committee is only a preliminary baseline enterprise. It has built upon the solid foundations laid by Pearce in 1977 and continued the work undertaken by administrative law students at the University of Tasmania between 1993-1999. The relative invisibility, both in the zones of administrative law and public management, of the regulatory process and the limited analysis of process reform has only been slightly altered with this study. Nevertheless as John Griffith observed, and which the case study on aerial spraying attests, we do live in a 'highly authoritarian society, [and are] fortunate only [in] that we do not live in other societies which are even more authoritarian.'[119] It is important that we evaluate the operational performance of scrutiny committees like the Tasmanian Standing Committee on Subordinate Legislation. More important, we need to understand why and how initiatives like the *Subordinate Legislation Act 1992* enter onto the statute book only to undergo a

[119] John A G Griffith, *The Politics of the Judiciary* (1977) 213.

metamorphosis into the much amended creature reflected in the *Subordinate Legislation Amendment Act 1994*.

The streams of regulatory reform charted by the Victorian Law Reform Committee report on Regulatory Efficiency Legislation highlights the rapid evolution, if not total revolution, being wrought by global implications of regulatory failure, technological (and informational) change and the demands of globalisation versus domestic considerations.[120] Serious concerns about the readiness, capacity and efficacy of the Tasmanian Subordinate Legislation Committee to respond to these changes have been raised by this paper.

[120] See Victorian Law Reform Commission, *Regulatory Efficiency Legislation*, Report No 61 (1997) [2.4].

Table 4: Comparison of Tasmanian Subordinate Legislation[121]

	Subordinate Legislation Committee Act 1969	*Subordinate Legislation Act 1992*	*Subordinate Legislation Amendment Act 1994*
Definition of regulation or subordinate legislation	'regulation' = a regulation, rule or by-law that is made under an Act and required by law to be laid before both Houses of Parliament, but does not include rules of court (s 2).	'subordinate legislation' = a regulation, rule or by-law- (a) that is made by the Governor; or (b) that is made by a person or body other than the Governor, but is required by law to be approved, confirmed or consented to by the Governor (s 3).	'subordinate legislation' = (a) a regulation, rule or by-law that is- (i) made by the Governor; or (ii) that is made by a person or body other than the Governor, but is required by law to be approved, confirmed or consented to by the Governor; or (b) any other instrument of a legislative character that is- (i) made under the authority of an Act; and (ii) declared by the Treasurer under subsection (2) to be subordinate legislation for the purposes of this Act; (2) The Treasurer, by notice published in the Gazette, may declare an instrument of a legislative character that is made under the authority of an Act to be subordinate legislation for the purposes of this Act (s 3).
Terms of reference of Subordinate Legislation Committee	s 8(1)(a) to examine the provisions of every regulation, with special reference to the question whether or not: (i) the regulation appears to be within the regulation-making power conferred by, or in accord with the general objects of, the Act pursuant to which it is made;		No amendments.

[121] The 1994 Amendment Act actually changed the 1992 Act. This Table therefore blurs the distinction between the 1992 Act (col) 3 and the 1994 Act (col 4). It is simply intended to provide an illustration of the differences.

[122] The Act contains mandatory consultation and sunsetting provisions. Agencies must prepare an RIS for legislation likely to have a significant impact on the public (s 5). Section 11 provides for a staged automatic repeal of all existing regulations over a 10 year period. Agencies are required to comply with the RIS process when remaking sunsetted regulations.

	(ii) the form or purport of the regulation calls for elucidation; (iii) the regulation unduly trespasses on personal rights and liberties; (iv) the regulation unduly makes rights dependent on administrative decisions and not on judicial decisions; or (v) the regulation contains matters that, in the opinion of the Committee, should properly be dealt with by an Act and not by regulation; and (b) to make such reports and recommendations to the Legislative Council and the House of Assembly as it thinks desirable as the result of any such examination.	(ab) to examine whether the requirements of the *Subordinate Legislation Act 1992* have been met[122];	
RISs	No reference	s 5(1) – RIS required for parts of subordinate legislation which would impose a burden, cost or disadvantage on any sector of the public.	s 5(1) as amended – RIS required for parts of subordinate legislation which would impose a significant burden, cost or disadvantage on any sector of the public. (1A) Secretary of Treasury to determine question of whether any part of proposed subordinate legislation would impose a significant impact on the public, after considering the advice of the responsible Department. (1C) Secretary's determination is conclusive.
RISs not necessary in certain cases		Section 6 – Minister need not comply with s 5 (RIS) if the Chief Parliamentary Counsel certifies in writing that the proposed subordinate legislation comprises or relates to matters set out in Schedule 3 (Matters and categories in respect	Section 6 as amended – The responsible Minister need not comply with ss 4 and 5 if the Treasury Secretary certifies in writing that the proposed subordinate legislation comprises or relates to matters set out in Schedule 3 (Matters and categories in respect of which RISs are not required) (b) the Secretary certifies that the public interest requires that the

		of which RISs are not required) (b) the Premier certifies that the public interest requires that the subordinate legislation be made without complying with s 5.	subordinate legislation be made without complying with s 5 (c) if the responsible agency is a State Authority under the *State Authorities Financial Management Act 1990* and the Secretary certifies that the proposed delegated legislation falls into a list of categories.

Table 5: Scrutiny of Subordinate Legislation at the State Level

State	No of regulations scrutinised in 1996	RISs	Separate scrutiny Committees for Bills	Peculiarities within the individual committee	Recent Changes
Victoria	183	RISs are regularly used by this Committee.	The Subordinate Legislation Sub-committee is a sub-committee of the Scrutiny of Acts and Regulations Committee.	The number of pieces of Subordinate Legislation being scrutinised by the committee is consistently decreasing.	There have been no major changes to this system in the past five years.
New South Wales	78	66% of those pieces of subordinate legislation were subjected to an RIS.	The Regulation Review Committee is concerned solely with subordinate legislation.	This system has the highest usage of RISs of all the systems across Australia, and claims a very high success rate.	The use of RISs has consistently increased during the past five years.
ACT	300 +	No usage of RISs.	The Standing Committee on Bills and Subordinate Legislation is also responsible for the scrutiny of Bills.	Unlike other jurisdictions, the number of regulations scrutinised by the committee is actually increasing.	This system has not undergone any changes in the last five years.
NT	Unknown	This system does not utilise RISs.	The Subordinate Legislation and Tabled Papers Committee is responsible for the scrutiny of both Bills and Sub Leg.	This committee does not require RISs, and does not make use of a legal adviser as the other committees do.	This system has not undergone any changes in the last five years.

Queen-sland	300+	This system does not utilise RISs.	The Scrutiny of Legisla-tion Committee is responsible for the scrutiny of both Bills and Sub. Leg.	This committee has a much wider focus than its counterparts in other jurisdic-tions.	This system has not undergone any changes within the last five years.
Tasmania	220	1.5 %	The Standing Committee on Subordinate Legisla-tion is only responsible for the scrutiny of Bills.	Treasury has been given an unusual respon-sibility to request RISs from the appropriate body with respect to the subordinate legislation.	The system changed greatly in 1992 and underwent more amendments in 1994.
South Australia	Unknown	This system does not use RISs.	The Legislation Review Committee is responsible for the scrutiny of both Subordinate Legislation and Bills.	Sunset clauses are attached to all regulations in this jurisdiction.	
Western Australia	234	This system does not use RISs.	In WA the Joint Dele-gated Legislation Com-mittee is responsible merely for the scrutiny of subordinate legislation.	This system is an extremely conservative one, greatly limiting the powers of the committee to review and make recommenda-tions.	This system has not undergone any major changes in the last five years.[123]

[123] Major reforms recommended by the Western Australian Joint Standing Committee on Delegated Legislation in *The Subordinate Legislation Framework in Western Australia* (at page 40) but were rejected by the Government in 1996—see *Twenty-Third Report*, above n 77, 19.