PARLIAMENT OF WESTERN AUSTRALIA

JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION

FIFTEENTH REPORT:

THE COMMITTEE'S INVESTIGATIONS IN WASHINGTON, LONDON AND PARIS

Presented by the Hon Bruce Donaldson (Chairman)

15
July 1995

Joint Standing Committee on Delegated Legislation

Members

Hon Bruce Donaldson MLC (Chairman)
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Mr Kevin Leahy MLA
Mr Ted Cunningham MLA
Mrs June van de Klashorst MLA

Advisory/Research Officer

Stuart Kay

Committee Clerk

Ms Jan Paniperis

Terms of Reference

It is the function of the Committee to consider and report on any regulation that:

(a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;

(b) unduly trespasses on established rights, freedoms or liberties;

(c) contains matter which ought properly to be dealt with by an Act of Parliament;

(d) unduly makes rights dependent upon administrative, and not judicial, decisions.

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

Report of the Joint Standing Committee on Delegated Legislation

in relation to

The Committee's Investigations in Washington, London and Paris

1 Introduction

1.1 One of the functions of Parliament is to scrutinise subordinate legislation[1]. Subordinate legislation includes such things as regulations, rules and by-laws that are made by administrative agencies such as government departments. Due to pressures on parliamentary time and the large volume of subordinate legislation that is being made, Parliament has delegated its scrutiny function to the Joint Standing Committee on Delegated Legislation. The Committee is therefore charged with scrutinising and monitoring subordinate legislation in Western Australia.

1.2 With the escalating volume and complexity of subordinate legislation being published in Western Australia, the Committee's role is becoming increasingly important. Concerns have been expressed that the process of making subordinate legislation is not sufficiently accountable to the Parliament or to the people of Western Australia. It has been noted that some subordinate legislation which would formerly have been subject to scrutiny by the Committee is now contained in instruments which are beyond the Committee's terms of reference. The Committee presently lacks the resources adequately to examine all of the matters which are currently within its terms of reference.

1.3 Because of the increasing volume, diversity and complexity of subordinate legislation, it became desirable to investigate other methods of scrutiny to determine if improvements can be made in the Western Australian system. Subordinate legislation directly affects the rights, obligations and livelihoods of the citizens of this State. Can subordinate legislation and those who propagate it be made more accountable to Parliament and, ultimately, the people of Western Australia?

1.4 In these circumstances the Committee formed the opinion that it would be most advantageous for members to observe other systems and meet with various government officials and committees in other jurisdictions for the purpose of acquiring a better understanding of the nature of subordinate legislation. It was considered that the Committee members should be exposed to different systems and new and innovative ideas if they are to fully appreciate the process of making and reviewing subordinate legislation. The Committee put a proposal for travel for this purpose to the Parliament. The proposal was approved on 25 October 1994[2].

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[1] Subordinate legislation is also known as delegated or subsidiary legislation. The term subordinate legislation has been chosen as it is the most grammatically correct and accurate description of the material it refers to. It is noted that the *Interpretation Act 1984* uses the term subsidiary legislation.

[2] 1994 WAPD 5888-91

1.5 Between 18 February and 7 March 1995, the Committee visited Washington DC, London and Paris. In Washington, it was proposed that the Committee would investigate such systems as the Federal Register, a publicly accessible register of US federal subordinate legislation; the requirement for agencies to prepare regulatory impact statements detailing how proposed regulations will impact on the community; and the process of negotiated rule-making, whereby persons who will be particularly affected by regulations are an integral part of the process of making them. Consideration was also to be given to the interaction of federal and state subordinate legislation.

1.6 The processes of making and reviewing subordinate legislation in the United Kingdom are similar to those in Western Australia. It was therefore proposed that the Committee would investigate general processes and any recent innovations which could be imported into Western Australia. It is a requisite of membership of the European Union that the law of the Union has supremacy over national law. Despite the UK's constitutional doctrine of parliamentary sovereignty, the law of the European Union has practical supremacy over the UK's national law. This is achieved by a system whereby Union law is enacted in the UK as subordinate legislation. It was therefore proposed that the Committee would also investigate how the UK Parliament scrutinises legislation and subordinate legislation relating to the European Union. In addition to its general relevance to the making of subordinate legislation, this system is relevant to the making of subordinate legislation under uniform national legislation schemes.

1.7 The French system is very different to that in Australia. In France the government (as well as the parliament) has inherent power to make laws of the kind that would be the subject of both primary and subordinate legislation in Australia. There is a separate system of administrative law which rules administrative activity. At the apex of this system is the *Conseil d'Etat*, which has a consultative function in the making of laws and a judicial function in determining their interpretation and validity. It was therefore proposed that the Committee would investigate the French system of allocation and control of legislative power.

1.8 In order to comprehend subordinate legislative processes it is necessary to have some understanding of the environment in which they operate. In this report, therefore, a brief introduction is given to the structure of government and administration in each of the United States, the United Kingdom and France. The introductions are not intended to be comprehensive and they reflect the Committee's impressions of the practicalities of the relevant structures rather than their theoretical bases.

2 United States of America

2.1 A list of persons with whom the Committee met in the United States is attached as Appendix 1.

Structure of Government

2.2 The US is a federal republic with a written constitution. The Committee reviewed government and administration principally at a federal level, though some consideration was given to government and administration at state level.

2.3 The legislative branch of the federal government is Congress. Like most Australian parliaments, Congress is comprised of 2 houses - the Senate and the House of Representatives. Two senators are elected from each State. There are 435 members of the House of Representatives, elected from districts within States. The population size of districts must be equivalent, though each State is guaranteed at least one member of the House.

2.4 The executive branch of the federal government is represented by the President. Presidents are nominated by party congresses and elected in an indirect election that is separate from congressional elections. The method of election is by the Electoral College, the members ("electors") of which vote according to which presidential candidate received the majority of votes in the state which elected the elector. The term of a President is 4 years and a maximum of 10 years may be served. The President is assisted in the performance of his functions by a Cabinet consisting of the heads ("secretaries") of federal departments and other officials. Secretaries are appointed by the President but the appointments are subject to confirmation by the Senate. Secretaries may not be members of Congress.

2.5 The United States Supreme Court is the court at the apex of the federal judiciary. Like the High Court of Australia, but unlike the House of Lords of the United Kingdom, one of its functions is constitutional interpretation.

2.6 The US Constitution *appears* to adopt the doctrine of separation of powers in its strictest form. In theory this would prevent delegation of legislative powers by the Congress to the President or other executive or administrative agencies. In terms of separation of powers, the Constitution:

2.6.1 establishes presidential as opposed to parliamentary government (the President and the Cabinet cannot be members of Congress, although the Vice President presides over the Senate);

2.6.2 separates the executive from the legislature still further by precluding the President and Cabinet from introducing bills in, and securing their passage by, Congress (although by convention the President may communicate with Congress by "messages" and so influence the course of legislation); and

2.6.3 vests federal judicial power in the Supreme Court and places it in the position of arbiter over both the legislature and the executive by impliedly (although not expressly) authorising it to determine the constitutional validity of legislation and executive action.

2.7 However, the strict separation between the legislature and the executive is modified by a system of "checks and balances". Thus:

2.7.1 the President can veto legislation passed by Congress, although a veto may itself be overridden by a 2/3 majority of both Houses.

2.7.2 the President, although not dependent on the support of a majority in Congress to remain in office, may be impeached by Congress.

2.7.3 the President's treaty making power is subject to ratification by a 2/3 majority in the Senate.

2.7.4 appointments of federal judges and certain other office holders by the President are subject to confirmation by the Senate.

2.7.5 federal judges, although not removable by the executive, may be impeached by Congress.

2.8 As one person said to the Committee, the purpose of the separation of powers is to hinder efficient government. It stems from a deep and abiding distrust of government by the American people[3].

2.9 It was repeatedly emphasised to the Committee that the US is a union of 50 independent states, which had delegated certain limited powers to a federal government. This fact colours the whole spectrum of US federal politics and government. As one person said to the Committee, there are no Federal elections, only State elections to fill Federal positions. Although there are 2 principal political parties in the US (the Republicans and the Democrats), each party is comprised of members who embrace a broad spectrum of political views, many of which overlap. Individuals are elected to Congress and their party affiliation is a secondary concern. Individual members may (and frequently do) vote against their party on a particular matter if the party position is contrary to the interests of their constituents[4].

2.10 State government structures and systems vary from State to State, but are generally similar to the federal models.

Administrative Agencies

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[3] This distrust and dislike of government by the American people was brought to the Committee's attention on a number of occasions. It colours the whole American system of government. As one commentator has noted, this attitude at least in part reflects a misunderstanding of fundamental power structures in the United States. While government is at least to a certain extent accountable to the people, large corporations which have autocratic structures and which largely control the economy (and therefore exert significant influence over the lives of citizens), are not so accountable and their impact is less visible - consequently the focus of blame is shifted to the government: Chomsky, N & Barsamian, D, *Keeping the Rabble in Line*, Common Courage Press, Maine, 1994, pp177-8.

[4] "According to their detractors, congressional parties, unlike their parliamentary counterparts, cannot muster unified blocks of votes to enact policies espoused in the preceding election. In the absence of "responsible" parties in the Westminster mold, policy-making in Congress becomes subject to great uncertainty and instability. Majorities that coalesce to enact a piece of legislation are fleeting and ad hoc. Whatever stamp the majority party might put on legislation is further obscured by the tendency for winning coalitions to take the form of vast logrolls encompassing more than 90 percent of the members of both parties...": Kiewit, DR & McCubbins, M, *The Logic of Delegation: Congressional Parties and the Appropriations Process*, University of Chicago Press, 1991

2.11 There are differences between executive departments and agencies (such as the Department of Labor) and independent agencies (such as the Environmental Protection Agency). The distinction is based largely on the extent of Presidential control and is not significant for the purposes of the Committee's investigation. Consequently, in this report the generic term "agencies" has been adopted. Agencies in practice possess the full range of governmental powers: they may legislate by regulation, administer by inspection and supervision, and adjudicate disputes. There is no emphasis on ministerial control and emphasis is placed on fair internal procedures and judicial review.

2.12 Congress and the President are in a perpetual political struggle to control agencies. Congress has power to create and abolish agencies and also has the power of the purse. However, the President has the power to hire and fire (with the advice and consent of the Senate) the senior office-holders of agencies. In this struggle the courts act as mediators or arbitrators between the Congress and the President.

2.13 In US agencies, decisions in contested matters (which are proportionately few) are reached by an administrative law judge (ALJ), who is an officer within the agency structure[5] and who is required by the *Administrative Procedure Act, 1946*[6] (*APA*) and the requirements of "due process" under the 5th and 14th Amendments to the Constitution to give a full and fair hearing to the parties (which may include the agency itself). The ALJ's decision is final unless review is requested by a party or the agency. Where a review is requested, the agency heads will review the ALJ's decision. In many such cases the agency's final order may have to be enforced by the courts. In other cases, review may be had by a petition for judicial review (which is usually provided for in the statute establishing the agency) or by a suit for an injunction or a declaratory judgment. In the vast majority of agency matters, decisions are not contested or can be dealt with by informal hearing or by submission of documents ("informal adjudication"). Generally the whole process of decision-making and review usually takes place within the agency, but there is scope for judicial review in exceptional cases. Judicial review may also be sought in respect of agency rules by a person who is aggrieved or adversely affected by them[7].

The Process of Making Subordinate Legislation

Administrative Procedure Act

2.14 In the US, this process is known as "agency rulemaking". The basic framework of administrative law governing agency action, including rulemaking, was established by the *APA*. In terms of rulemaking, the *APA* recognised and incorporated different agency procedures that are commonly known as "formal rulemaking" and "informal rulemaking". Formal rulemaking occurs only where a parent statute requires a rule "to

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[5] Creation of an independent body of ALJs is a matter currently being discussed.

[6] 5 USC §§ 551-9, 701-6, 1305, 3105, 3344, 5372, 7521

[7] 5 USC §701-6

be made on the record after opportunity for an agency hearing"[8]. Formal procedures are infrequently used because they are cumbersome, time consuming and expensive. It was in the context of formal rulemaking that President Jimmy Carter once commented:

> It should not have taken 12 years and a hearing record of over 100,000 pages for the FDA to decide what percentage of peanuts there ought to be in peanut butter.[9]

The procedure for informal, or "notice and comment", rulemaking is set out in §553 of the *APA*. These are the minimum procedural requirements with which an agency must comply when making rules.

2.15 In brief, §553 of the *APA* provides for the following minimum procedures for rulemaking. Notice of the proposed rule must be placed in the Federal Register[10]. The notice must include: details (time, place and nature) of the public rulemaking proceedings, the legal authority under which the rule is proposed, and a description of the substance of the rule and the issues involved. Interested persons may then participate by making a written submission (or oral presentation, at the discretion of the agency). The rule is published (in the Federal Register), together with an accompanying statement of basis and purpose, at least 30 days before it becomes effective. There are a number of exceptions to the procedure, many of which may be determined by the agency proposing the rule. Interested persons may petition for the issuance, amendment or repeal of a rule.

Accountability in Rulemaking

Congressional Oversight

2.16 Congress is responsible for the primary legislation which delegates to agencies the power to make rules. In granting such a delegation, Congress may impose more extensive (or lesser) procedures than are required by the *APA*. These may include requirements for public hearings, cross-examination of witnesses and more extensive statements of justification for rules. Congress may also impose statutory deadlines for the making of rules[11].

2.17 Apart from the *APA*, Congress has enacted a number of statutes which affect rulemaking by agencies. These include: the *Regulatory Flexibility Act*[12], which requires agencies

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8 5 USC §553(c)

9 15 Weekly Comp. of Pres. Doc. 482 (15 March 1979)

10 The Federal Register is a publication similar to the WA Government Gazette. It is published daily.

11 Congress started setting deadlines for the re-issue of rules in order to get around OMB procedures. OMB ignored the deadlines and parties had to go to court to have the deadlines enforced.

12 5 USC §§ 601-12

to consider the potential impact of rules on small business and other small organisations and to consider alternatives to the proposed measures; the *Paperwork Reduction Act*[13], which requires the minimisation of the federal paperwork burden for individuals, small businesses and state and local governments; and the *National Environmental Policy Act*[14], which requires agencies to include in proposals for "major Federal actions significantly affecting the quality of the human environment" a detailed environmental impact statement.

2.18 Prior to 1983 Congress incorporated "legislative veto" provisions into many statutes. Legislative veto provisions are similar to the disallowance procedures currently in force in Western Australia. In 1983, however, the Supreme Court held that legislative veto violated the separation of powers doctrine and was therefore unconstitutional[15]. Consequently, legislative veto provisions are not currently available to Congress as they are to the Western Australian Parliament[16].

2.19 Another means by which Congress can influence rulemaking is by its "oversight" authority. Congressional committees can hold oversight hearings on rulemaking issues and file reports on them. This can have significant budgetary consequences for a relevant agency and is an incentive for the agency to work with Congressional committees. It often means that an agency will work closely with a relevant Congressional committee when it is drafting rules in which the committee may have an interest. It also means that there is a lot of informal contact between Congressional staff and agency staff.

Presidential Oversight

2.20 Since 1971, the President has also exercised oversight of regulation. This principally has been achieved through the issue of executive orders requiring agencies to comply with certain procedures. Such procedures have included: the publication of semi-annual rulemaking agendas; the establishment of procedures to identify "significant" rules; and the preparation of regulatory impact analyses (RIA) or cost-benefit analyses for review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB)[17]. One person to whom the Committee spoke said that

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13 44 USC §§ 3501-20

14 42 USC §§ 4321-47

15 *Immigration and Naturalization Service v Chadha* 462 US 919 (1983); see also *US Senate v FTC* 463 US 1216 (1983).

16 At the time the Committee was in the United States, the Republicans were planning a new proposal designed to overcome the constitutional objections to the legislative veto, which they were considering introducing into Congress in the near future. The Committee has since received information that this proposal is on track for implementation.

17 OMB suggestions are not binding on agencies. However, OMB is controlled by the President and the President has power to hire and fire the heads of agencies. OMB also has control over agencies' budgets. It is relevant to note that independent agencies did not, at the time the Committee was in Washington, have to go through OMB procedures when rulemaking. OMB review is not public and is not subject to judicial review.

many such procedures put in place by the Reagan administration principally were an attempt to reduce the overall amount of rulemaking by making the process more difficult. This was a part of the policy of the Reagan administration to reduce regulation, particularly of commerce.

2.21 Executive Order No. 12,291[18] (EON 12,291) was promulgated by President Reagan on 17 February 1981. It was intended to minimise duplication and conflict in federal regulation and to ensure that any regulations made were the least costly alternative. In respect of "major" rules, it requires executive branch agencies to send to OMB, at least 60 days prior to publication of a notice of proposed rulemaking (NPRM) in the Federal Register, a preliminary or final RIA, unless the rules fall into one of the exemptions in the order. A "major" rule is one that is likely to result in:

> "(1) an annual effect on the economy of $100 million or more;
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> (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or
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> (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets."[19]

The relevant agency makes the initial determination as to whether a proposed rule is a major rule. However, the Director of OMB has power to require a rule to be treated as a major rule. While non-major rules do not require a RIA to be submitted, they must nevertheless comply with the principles of EON 12,291 and be submitted to OMB at least 10 days prior to publication of the NPRM. EON 12,291 also requires agencies to publish bi-annually an agenda of the rules it has issued or proposes to issue.

2.22 Each RIA must contain:

> "(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
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> (2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
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> (3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;
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> (4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential

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[18] 3 CFR 127 (1981)

[19] §1(b) Executive Order No. 12,291

> benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted..."[20]

OMB has extended these requirements. It has done so by: stressing that the RIA must contain a statement explaining why the proposed rule is needed and why other alternatives are inadequate; requiring that the RIA should demonstrate that the proposed activity is within the authority of the relevant agency; and requiring the RIA to explain why the regulatory alternative proposed (which should be the one with the greatest net benefit) has been chosen. OMB also requires that costs and benefits be expressed in monetary terms to the maximum extent possible.

2.23 EON 12,291 also requires relevant agencies, before approving any final major rule, to "[m]ake a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular"[21]. Pertinent to the Committee's inquiry, this provision implicitly requires agencies to maintain a record of their rulemakings. It also requires agencies to address public submissions in their rulemakings. The requirement that agencies address public comments is taken seriously by agencies.

The Rulemaking Record

2.24 One of the tools developed by the courts in the United States to assist in their task of judicial review of rulemaking is the concept of the rulemaking record. When the *APA* was enacted, agencies were generally not thought to be required to base rules on factual material. They were expected to use their discretion to develop supporting materials where this was warranted. One reason for this was the legal presumption that rules were made by agencies on a rational basis. This concept developed and changed to the point where the courts have said:

> Whatever the law may have been in the past, there 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 implicates 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... [It is against this material that it is] the obligation of this court to test the actions of the [agency] for arbitrariness or inconsistency with delegated authority.[22]

2.25 Thus the purpose of the rulemaking record is to ensure that agencies use "reasoned judgment" and do not act arbitrarily and inconsistently. It also provides the basis for

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[20] §3(d) Executive Order No. 12,291

[21] §4(b) Executive Order No. 12,291

[22] *Home Box Office Inc v FCC* 567 F 2d 9 (DC Cir), 434 US 829 (1977)

judicial review of rules. Congress has, in some statutes, specifically provided that there must be "record" support for final rules promulgated by relevant agencies. As was noted at paragraph 2.23, EON 12,291 also requires agencies to maintain a record of their rulemaking.

2.26 There are 3 main reasons offered to support the maintenance of rulemaking records. The first is that the rulemaking record is an aid to public participation in the rulemaking process. It is considered that public comments are much more likely to be pertinent and useful if persons wishing to make submissions have access to comments or submissions made by others. More range and depth in comments benefits the agency, the public and the reviewing courts. The second is that the rulemaking record is a database of information on which an agency can make a determination as to whether a rule is warranted and, if so, what provisions it should contain. The third reason is that the rulemaking record forms the basis for judicial review of a rulemaking by an agency. It is an inherent requirement of the review function that there must be material to be reviewed. If there is no demonstrable factual basis for a rule, a court has no choice but to return the matter to the agency for further proceedings to justify the rule.

2.27 As a practical matter, rulemaking records in the United States can be interminably long and poorly organised and indexed. These conditions can severely limit the benefits to be gained from maintaining the record. They can also substantially increase the costs of judicial review of a rule or rulemaking.

Judicial Review

2.28 It is a widely held belief that the United States is a more litigious and litigation-conscious society than Australia. It is true that there are many actions or suits in the United States that would not be entertained by, or would be determined very differently in, Australian courts. Litigation by means of judicial review of administrative action, and particularly of rulemaking by agencies, is more extensive in the United States than in Australia.

2.29 It seems that this is due, at least in part, to the less restrictive standing rules in the United States. For example, the *APA* provides that any "person suffering legal wrong... or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof..."[23]. By way of contrast, in Australia a person must have a special interest in the matter over and above that of the public generally, in order to commence an action[24]. In practice, standing rules are not generally an obstacle to review in the United States, while in Australia they do prevent many actions from proceeding.

2.30 Though there is a presumption against preclusion of judicial review[25], it is possible for Congress, as it is for Australian parliaments, to preclude judicial review by express

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[23] 5 USC §702

[24] See, for example, *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27

[25] In Australia, see *Twist v Randwick Municipal Council* (1976) 136 CLR 106

words. The Committee considers that judicial review of administrative action, at least in the context of legality, procedural fairness and error of law, should not be precluded save in the most exceptional circumstances.

Overview of a Typical Rulemaking

2.31 Appendix 2 contains a simplified diagrammatic representation of a typical rulemaking process prior to the 1994 Congressional elections. As part of its "Contract with America", the Republican Party, which won a majority in the House of Representatives in 1994, has proposed certain new rulemaking procedures which will serve to make the rulemaking process for specified rules immensely more cumbersome, expensive and time consuming[26]. Based on the previous experience of the policy of the Reagan administration regarding regulation as described to the Committee, it would appear that the proposed new procedures are another attempt to curb rulemaking. Indeed, while the Committee was in Washington, the Republicans introduced the "Moratorium Bill"[27] - a bill to prohibit all rulemaking for a period of 6 months. President Clinton commented:

> A small army of special-interest lobbyists knows they could never get away with an outright repeal of consumer or environmental protection, but why bother if you can paralyze the Government by process?[28]

Negotiated Rulemaking

2.32 An alternative procedure for rulemaking is negotiated rulemaking or "reg-neg". This is governed by the *Negotiated Rulemaking Act 1990*[29], which supplements the *APA*. In this process an agency proposing a rule brings together representatives of interested groups for face-to-face negotiations with the aim of achieving consensus on the proposed text. The philosophy behind the procedure is that it is considered that if consensus is achieved the rule will be easier to implement and there will be less likelihood of litigation from affected persons. Even if consensus is not achieved, it is considered that the process will nevertheless have served to better inform the agency on the issues and concerns of affected persons. In practice, reg-neg can only be used where the majority of affected persons can be identified and represented at the negotiations. One of the drawbacks of the process is that it has high "up-front" costs to implement. It is not used frequently, but it does have a high success rate when it is used. While the Committee was in Washington, President Bill Clinton said that he would like to see more use of reg-neg procedures.

General Observations

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[26] An analysis of the proposed procedures was published in the *New York Times*, 23 February 1995, page A23

[27] *Regulatory Transition Act of 1995*. At the time of writing the Bill was still before Congress.

[28] *New York Times National*, Wednesday, 22 February 1995, page A14

[29] 5 USC §§581-90

2.33 It was suggested to the Committee that major changes in rulemaking policies in the United States have been effected by subtly changing the burden and standard of proof in rulemaking procedures. The procedures set out in EON 12,291 and promulgated by the Reagan administration are an example of this. By requiring an agency to justify its actions in a detailed RIA, it was anticipated that there would be an overall reduction in rulemaking. As was noted at paragraph 2.31, by extending RIA procedures in certain areas, the Republicans hope to achieve similar results. Extension of rulemaking records also facilitates the commencement of proceedings for judicial review of rulemaking; it makes it easier for people to identify where an agency has failed to comply with relevant procedures and challenge the validity of a rule on that basis.

2.34 It is nevertheless the case that, as matters presently stand, there is a massive amount of regulation in the United States. It is difficult to imagine that an average citizen or business person would be aware of all the written laws that may affect that person. One proprietor of a small to medium sized manufacturing business with domestic and export markets informed the Committee that it was impossible for him to keep track of all the regulations which applied to his business. Equally, despite the "notice and comment" procedures in place (under the *APA*), it was economically impossible for him to continually review the Federal Register to ascertain if his business may be affected by any proposed new regulations.

2.35 The Committee was informed that it was often difficult for agencies to enforce their rules or even to put into place rules required to give effect to the primary legislation enacted by Congress. This is partly due to competing political pressures between the President and the Congress, and partly due to economic constraints, among other things. This prompted one person with whom the Committee met to comment that America is largely "a lawless society".

2.36 Politics is pervasive within the United States' system of making subordinate legislation. This is guaranteed by the constant jockeying for power between the branches of government and the very real American distrust of government and its institutions. As a result it seems that, in terms of efficient government, while the United States has some of the most democratic procedures which have resulted in some of the best written laws observed by the Committee, it also has some of the worst procedures and laws observed by the Committee.

2.37 The Committee was particularly impressed with the opportunities of individuals to participate in the rulemaking process. It seems that this is one way of improving the accountability of agencies to the people directly, as well as to their elected representatives and the judiciary. The Committee was also impressed by requirements regarding justifications for rules, such as RIAs and maintenance of a rulemaking record. It is noted that the use of RIAs is supported in principle by the Administrative Conference of the United States[30]. However, the Committee considers that there needs to be a balance between agency justification of its actions and the costs of justifying

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[30] The Administrative Conference is an independent, non-partisan agency whose purpose is to recommend reforms to federal administrative processes. It is a "think-tank" on federal administrative procedures. Its recommendations are published in the Federal Register and sent to relevant agencies.

those actions. It was pointed out to the Committee that a full cost-benefit analysis could cost an agency in the vicinity of US$500,000. In a system the size of the United States federal system, many of the advantages of these procedures are lost in the sheer bulk of available information and the costs of implementation of the procedures. The difficulty is in finding a reasonable balance between justification procedures and cost.

2.38 Another aspect of the United States system with which the Committee was impressed was the use of Administrative Law Judges (ALJ) in agencies and, more particularly, the proposal to establish an independent body of ALJs. ALJs provide a valuable function in relieving the general judiciary of an enormous load of administrative cases. They are also able to provide a specialised administrative judicial service. A drawback of the system would appear to be practical difficulties of ALJs in maintaining independence from their agencies and a possible perceived lack of independence of ALJs by the public. This would be alleviated by establishing an independent body of ALJs or separate administrative court.

3 United Kingdom

3.1 A list of persons with whom the Committee met in the United Kingdom is attached as Appendix 3.

3.2 The Western Australian and Australian systems of government are based on the British model known as the parliamentary or Westminster system. There are therefore many similarities between the systems. There are also some significant differences, which include the facts that the United Kingdom does not have a written constitution and that the British courts cannot question the validity of an Act of Parliament.

3.3 The Committee investigated 2 matters relevant to subordinate legislation in the United Kingdom. The first was the system of review or scrutiny of subordinate legislation. The second was the system of review or scrutiny of written laws of the European Union which must be applied in the United Kingdom.

Structure of Government

3.4 The United Kingdom is a constitutional monarchy with a bi-camarel legislature.

3.5 The monarch, as head of state, and only on the advice of the Prime Minister, appoints members of the House of Lords and summons, prorogues and dissolves Parliament. By convention, the monarch's prerogative powers are only exercised on the advice of the Cabinet. The monarch must also assent to legislation passed by Parliament; the Royal Assent has not been withheld since Queen Anne refused assent to the *Scottish Militia Bill* in 1707.

3.6 The legislative branch of government is comprised of the Houses of Parliament, known as Westminster. There are 2 Houses - the House of Lords and the House of Commons. The House of Lords is comprised of hereditary peers, life peers, 26 Lords Spiritual and 11 Law Lords. In all, there are approximately 1200 mambers of the House of Lords of which approximately 800 attend the House. The average daily attendance is

approximately 400. Members of the House of Lords are not elected to the House. The House of Commons is comprised of 651 elected members (though the Commons Chamber only seats 437).

3.7 In the United Kingdom, Parliament is supreme. This means "that the freedom of speech or debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament"[31]. Consequently the courts cannot question an Act of Parliament, unlike the situation in Australia (or the United States) where superior courts can determine the constitutional validity of Acts of Parliament. Whilst Parliament is said to be supreme, there are, however, practical restrictions on legislative power. They include: international obligations, constitutional conventions, electoral mandates, enforceability of legislation, the influence of powerful, organised interest groups and the ballot box.

3.8 The executive branch of government includes the Cabinet, the ministry, central government departments and statutory authorities. The Cabinet is a corps of ministers chosen by the Prime Minister. It advises the Prime Minister on the government of the nation. It is the link between Parliament and the administration and is responsible to Parliament for its administration of the affairs of the nation. The concept of ministerial responsibility to Parliament is one of the hallmarks of the Westminster system. Ministers must be members of Parliament - unlike in the United States where they cannot be members of Congress.

3.9 The House of Lords in its judicial capacity is the court at the apex of the British judiciary. Lay peers have not participated in the judicial business of the House of Lords since the middle of the 19th century. Thus the judicial business of the Lords is carried out by the Law Lords.

Administrative Agencies

3.10 There are 2 principal types of administrative agencies in the United Kingdom. The first type is the government departments which conduct the administration of the central government. They are headed by a Secretary of State (minister) who is responsible to Parliament. The second type is statutory authorities which are, to varying degrees, autonomous and independent of ministerial or Parliamentary control. Statutory authorities include organisations which carry out important national services, regulate public services or private industry, provide social services or provide advice to government. The statutes which create the authorities provide for the relevant minister to give general policy directions and sometimes to give specific directions. Ministers will usually have power to appoint and dismiss members of authorities and will retain important financial powers.

3.11 The most important administrative decisions are made by the senior civil servants (of which there are approximately 800). Powers vested in ministers may, as a general rule, be exercised on their behalf by senior civil servants without the necessity for any formal delegation of power. Civil servants may not participate in national political activities.

48

[31] *Bill of Rights, 1689 (UK)*

The civil service is protected by security of tenure and can therefore maintain its professionalism and institutional memory. It appears not to be as susceptible to the vagaries of political change as is the Western Australian public service or the United States administration.

The Process of Making Subordinate Legislation

3.12 The process by which subordinate legislation is made by government departments in the United Kingdom is very similar to that in Western Australia. It was not reviewed in any detail by the Committee. The only observation to be made is that there appears to be a stronger (but arguably diminishing) convention in the United Kingdom than in Western Australia that identifiable groups with an interest in relevant subordinate legislation should be consulted in the process of its preparation.

Accountability in Making Subordinate Legislation

3.13 The Committee investigated the operations of the Joint Committee on Statutory Instruments and the House of Lords Delegated Powers Scrutiny Committee.

Joint Committee on Statutory Instruments

3.14 The Joint Committee on Statutory Instruments (JCSI) is the only body which scrutinises all general subordinate legislation (except that subject to approval in the House of Commons alone). It is required to review statutory instruments to determine whether the special attention of the Parliament should be drawn to them on any of the following grounds:

(i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;

(ii) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;

(iii) that it purports to have retrospective effect where the parent statute confers no express authority so to provide;

(iv) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;

(v) that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where an instrument has come into operation before it has been laid before Parliament;

(vi) that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

(vii) that for any special reason its form or purport calls for elucidation;

(viii) that its drafting appears to be defective;

or on any other ground which does not impinge on its merits or on the policy behind it...[32].

3.15 The term "statutory instrument" is defined in the *Statutory Instruments Act, 1946*. It encompasses "regulations, rules, orders and other subordinate legislation"[33]. Thus the JCSI is empowered to review a broader range of subordinate legislation than is the Committee (whose terms of reference only include a power to review "regulations"[34]). This was one of the problems identified as being experienced by the Committee - that it does not have power to review instruments which are not "regulations". Consequently, there is some subordinate legislation in Western Australia which is not subject to any independent review process.

3.16 In terms of how Parliament deals with subordinate legislation, it was explained to the Committee that, in practical terms, there are 7 categories of statutory instruments. They are:

3.16.1 instruments requiring affirmative resolution of both Houses or the Commons only;

3.16.2 draft instruments requiring affirmative resolution;

3.16.3 instruments subject to negative resolution of both Houses or the Commons only;

3.16.4 draft instruments subject to negative resolution;

3.16.5 instruments not subject to Parliamentary proceedings laid before Parliament;

3.16.6 instruments not subject to Parliamentary proceedings not laid before Parliament;

3.16.7 instruments subject to special Parliamentary procedure.

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[32] The full terms of reference of the JCSI (Commons) are set out in Appendix 4. The terms of reference of the JCSI (Lords) are substantially the same.

[33] s 1(1) *Statutory Instruments Act, 1946 (UK)*

[34] Under s 42(8) of the *Interpretation Act 1984 (WA)*, the term "regulation" includes rules and by-laws.

3.17 The choice of procedure is in nearly all cases set out in the parent statute. Occasionally the parent statute gives the relevant Secretary of State the power to determine which procedure should be used.

3.18 The important distinction for the Committee's purposes is between instruments requiring affirmative resolution and instruments subject to negative resolution. The affirmative resolution procedure requires: either that both Houses (except in the case of fiscal instruments which need only be affirmed by the Commons) affirm the instrument before it comes into effect; or that the instrument comes into effect but its continued operation is subject to an affirmative resolution. The negative resolution procedure is similar to the procedure in Western Australia - either House may disallow the instrument within a specified period after it comes into effect. The affirmative resolution procedure is used in the case of the more important or contentious statutory instruments.

3.19 It should also be noted that in some cases draft instruments must be laid before Parliament and are subject to the affirmative or negative resolutions procedures. In practice, most draft instruments are subject to the affirmative procedure. They are not required to be re-tabled in their final form.

Delegated Powers Scrutiny Committee

3.20 The Delegated Powers Scrutiny Committee (DPSC) is a select committee of the House of Lords. Its relevant term of reference is:

> to report whether the provisions of any bill inappropriately delegate legislative power; or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny.

3.21 It was established in 1992 and its terms of reference are substantially derived from those of the Australian Senate Standing Committee on the Scrutiny of Bills.

3.22 The Commitee was established for the purpose of redressing what many consider to be abuses of legislative power. These abuses include:

3.22.1 the inclusion of "Henry VIII" clauses (which permit the amendment of primary legislation by subordinate legislation with or without Parliamentary scrutiny) in legislation;

3.22.2 the enactment of "skeleton bills" (in which the delegation of power is so extreme that the real substance and operation of the relevant law is contained in the regulations); and

3.22.3 a perceived general downgrading of Parliamentary control of subordinate legislation (eg from affirmative procedure to negative procedure or from negative procedure to general instruments over which Parliament has no control).

3.23 The Committee is of the view that each of these problems also applies, in general terms and to a greater or lesser extent, to the Western Australian system. It is within the

Committee's terms of reference to comment on Henry VIII clauses and skeleton bills[35]. The Committee has repeatedly expressed its concerns with the use of Henry VIII clauses[36]. In terms of skeleton bills, this has not to date been a substantial problem, but concerns recently have been expressed about inappropriate delegations of power in some statutes. These delegations leave ministers or government departments to create policy which many people consider is more appropriately the province of Parliament. However, the Committee can only comment on such issues at the time of the making of subordinate legislation, which occurs after the primary Act (being a skeleton bill or containing a Henry VIII clause) has passed through Parliament and has come into force.

3.24 While the Committee has power to comment on such matters at a late stage in individual cases, it notes that it is incumbent on parliamentarians generally to seek to avoid the use of such devices save in the most exceptional circumstances. A failure to do so could have the effect of undermining the authority of Parliament. As has been noted in the House of Lords, the executive's aspirations to legislate were one of the causes of the Glorious Revolution of 1688.

The European Union

3.25 In 1971 the United Kingdom Parliament voted to join the European Communities. The *European Communities Act 1972* (*ECA*) was passed in 1972 and came into effect on 1 January 1973. The European Communities were established under a number of treaties, the history of which it is not necessary to go into in this report. Since the Maastricht Treaty[37] came into force on 1 November 1993, the European Community has become generally known as the European Union.

3.26 The Union is based on the consent of the Member States. The government of each Member State must be willing to accept rules of Union law which may not be in the best interests of that State alone. It is a tacit assumption that all Member States will play the game according to the same rules. It follows that Union law must have the same effect in all Member States and consequently Union law must override national law in the event of a conflict. In order to ensure consistency it is prudent that ultimate authority to decide questions of Union law should reside in a single court - the European Court of Justice. The Union Treaties are more than mere international agreements. They form the constitution of the Union and the rules derived from them form the internal law of the Union.

3.27 Accession to the Union Treaties has fundamentally altered many British institutions. The United Kingdom was faced with 3 constitutional issues when it joined the Union. The first was that it did not have a written constitution which could be amended to provide for its membership of the Union. The second was that there was no means in

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35 The Committee has power to consider and report on any regulation that "contains matter which ought properly to be dealt with by an Act of Parliament".

36 See, for example, Western Australian Joint Standing Committee on Delegated Legislation, *Review of Operations 1991 - 1992*, 11th Report, December 1992, pp 34-37

37 Treaty on European Union, *Official Journal*, C 224, 31 August 1992

British law whereby an international treaty could take effect in the national legal system. These 2 problems were essentially overcome by the *ECA*. The third issue, which rests on the British doctrine of the sovereignty of parliament, was more problematic.

3.28 The doctrine of sovereignty of parliament is the fundamental principle of the British constitution. It states that there are no legal limits to the legislative power of parliament, except that parliament cannot limit its own powers in the future. Consequently, constitutionally the British Parliament could not give supremacy to Union law if this placed a fetter on its future powers. To join the Union, however, the United Kingdom had to cede supremacy to Union law. The mechanism by which this apparent impasse was overcome, if somewhat unsatisfactorily, was to insert in the *ECA* a rule of interpretation that Parliament is presumed not to intend any future statute to override Union law[38]. Thus, in practice, priority is given to Union law.

3.29 The decision-making structure of the Union is set out in the Treaties. There are 4 principal institutions which carry out the tasks of the Union: the European Parliament, the Council of Ministers, the Commission and the Court of Justice. The process of making Union legislation involves a complicated interaction between the European Parliament, the Council of Ministers and the Commission. For the purposes of this report it is sufficient to note that the Council of Ministers, which comprises ministerial representatives of the governments of Member States, is the principal legislative body of the Union[39]. The Commission is the executive arm which, among other things, initiates Union action and implements Union policies.

3.30 Section 2(1) of the *ECA* provides for the application of Union law of "direct effect"[40] in the United Kingdom. It specifies that Union Treaties and Union legislation (current and future) are to take effect in the United Kingdom without further enactment. In effect, s 2(1) makes the Union Treaties part of British law because it incorporates them in the *ECA* by reference; and Union legislation becomes part of British law because the *ECA* has delegated power to the Union to legislate for the United Kingdom. Section 2(1) also makes clear that it is the Union (and not the United Kingdom as a Member State) which determines whether a particular provision is one which is directly effective.

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38 s 2(4) *ECA*

39 It was stated to the Committee that the powers of the European Parliament in respect of the making of legislation are gradually increasing. One commentator has noted: "One of the big public concerns in the European Community is described as nationalism, but what it really has to do with, I think, is what's called in EC parlance the "democratic deficit," meaning the gap that is developing between executive decisions, which are secret, and democratic, or at least partially democratic institutions, like parliaments, which are less and less able to influence decisions made at the Community level. All of this is a marvellous device for rendering democratic forums meaningless. It means crucial decisions with enormous impact are being raised to a level where the population can't influence them even indirectly through parliaments and furthermore doesn't know about them." (Chomsky, N & Barsamian, D, *Keeping the Rabble in Line*, Common Courage Press, Maine, 1994, p47)

40 Legal provisions of direct effect are provisions which grant rights to individuals which must be upheld by the national courts of Member States.

3.31 Section 2(2) of the *ECA* provides for the implementation of Union law (which does not have direct effect) by means of subordinate legislation. This may be done by Order in Council or by regulations made by a Minister or department who has been authorised to do so by Order in Council. The power may be used (with certain specified exceptions) for the purposes, among other things, of implementing any Union obligation of the United Kingdom and of enabling any rights of the United Kingdom under Union Treaties to be exercised.

3.32 In these circumstances there are 2 opportunities for scrutiny of Union law within the United Kingdom. The first occurs before a European bill becomes law. This is the most important time for scrutiny because once a piece of legislation is made by the Union, it will (where relevant) be binding on the United Kingdom. The second opportunity arises when subordinate legislation is made to implement a directive of the Union. At this stage, however, the import of the law will be unalterable.

3.33 The Committee observed the work of the House of Commons Select Committee on European Legislation and the House of Lords Select Committee on the European Communities. The srutiny procedures of the 2 committees are very similar. Following is an overview of the substantive procedures.

3.34 Commission proposals are submitted to the Council. The Council circulates the proposal to the governments of Member States. In the United Kingdom, copies of the proposals are given to both Houses by the Government. The appropriate Government department prepares an explanatory memorandum (usually within 2 weeks), summarizing the proposal and its implications, including its legal, financial and policy implications, the procedure to be followed in negotiations and the likely timetable for its consideration by the Council. Important proposals are identified for detailed consideration[41]. Proposals may be referred to sub-committees for consideration. The committees may submit detailed reports to their respective Houses. In the House of Commons the Government usually follows the recommendations made by the European Legislation Committee.

3.35 A recent development by the House of Lords European Communities Committee is the use of letters to ministers to express the Committee's views on a proposal. This procedure is used for fast-moving proposals or where the Committee's views can be stated succintly. The letters and the replies to them are published by the Committee.

General Observations

3.36 The Committee was impressed with the dedication of many members of the House of Lords. The members of this House are, essentially, unpaid for the work that they do. Whilst the House has extremely limited direct legislative power, the Committee's impression was that it does fulfil an important and practical review and comment role.

3.37 The Committee notes the establishment of the House of Lords Delegated Powers Scrutiny Committee and its term of reference based on one of the terms of reference of

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[41] There are too many proposals (approximately 800 - 900 each year) for the committees to be able to consider each one in detail.

the Australian Senate Standing Committee for the Scrutiny of Bills. While the Committee itself is empowered to report to Parliament on regulations which contain "matter which ought properly to be dealt with by an Act of Parliament", the Committee considers that this function might more usefully be filled by expanding the terms of reference of the Legislative Council Legislation Committee or by creating a scrutiny of bills committee similar to the Senate Committee. In this way, inappropriate delegations of power could be dealt with at the source, rather than attempting to correct the situation some time after enactment of a statute and the coming into force of regulations inappropriately made under it by the executive. This could assist Parliament to maintain control over the use of, for example, Henry VIII clauses and skeleton bills.

3.38 The Committee was impressed with the distinction made between regulations requiring ratification by Parliament by the affirmative resolution procedure and those only subject to disallowance. The Committee considers that such a distinction may be a useful device. The main difficulty with this system is that it relies on the Government or the Parliament to prescribe the affirmative procedure in bills on a case by case basis. Political circumstances may prevent the Government from adopting the procedure in cases in which it would be appropriate. It is also conceivable that Parliament may not be aware, when considering a bill, of the extent of regulation which will be required under the bill and therefore would not be in a position to incorporate the appropriate procedure in the bill.

3.39 The role of the United Kingdom European Union laws scrutiny committees was instructive in terms of the operation of national uniform laws in a federation such as Australia. It is not yet clear what role (if any) the Committee will play in the scrutiny of subordinate legislation made under national uniform legislation. The Committee notes the paramount importance of the Parliament having some input into the primary legislative process if any form of Parliamentary control over policy is desired. Similarly, there should be an opportunity to scrutinise proposed regulations in draft before they are promulgated (unlike the system of State regulations which are scrutinised by the Committee after promulgation). It would clearly be impractical to disallow a regulation made under a national uniform scheme after it has been promulgated.

4 France

4.1 A list of persons with whom the Committee met in France is attached as Appendix 5.

4.2 A glossary of French terms is attached as Appendix 6.

Structure of Government

4.3 France is a republic with a written constitution.

4.4 It has been said that France is administered rather than governed. Discretions are given to officials rather than politicians. There is a distinct administrative hierarchy. Administrative law is distinct from civil law. And there is a separate hierarchy of administrative courts, at the apex of which is the Council of State (*Conseil d'Etat*).

Administrators (including the President, the government, ministers, prefects, mayors and other public officials) have inherent *pouvoir réglementaire* - power to make regulations. Consequently, much of what in Australia would be governed by regulations which are subordinate legislation, in France is governed by regulations which have primary authority (or are equivalent to primary legislation). In some cases (for instance, regulations made by the government through the Council of Ministers), there must be consultation with the *Conseil d'Etat* in the making of the regulations.

4.5 Generally French reformers have sought for improvement in the system of administration by regulating the actual process of decision-making where it occurs, ie, in the office of the bureaucrat. Consequently, procedures may require that persons have access to information and may also require bureaucrats to have discussions or consultations with affected persons.

The Parliament

4.6 The legislative branch of the French system of government is the Parliament (*Parlement*). It is bicameral and comprises the Senate (*Sénat*) and the National Assembly (*Assemblée Nationale*). The Senate has 321 members. Senators are elected for a 9 year term by an electoral college composed of members of the National Assembly, delegates from the Councils of the Departments and delegates from the Municipal Councils. One-third of the Senate is renewable every 3 years. The National Assembly has 577 members (known as *deputés*). They are elected for a 5 year term by universal adult suffrage, under a single member constituency system of direct election, using a second ballot if the first ballot failed to produce an absolute majority.

4.7 Parliament is supreme, but is subject to express constitutional limitations. Under the Constitution, Parliament has power (*pouvoir législatif*) to enact statutes (*lois*) in specific areas (like the Australian Commonwealth parliament). Theoretically it has no power outside these areas. However, in practice it can and does legislate outside its specific areas of competence. Such legislation can be struck down by the Constitutional Council (*le Conseil Constitutionnel*) if a formal objection is made by the government. If Parliament legislates in the executive domain, the government can modify the *loi* by *décret*. *Lois* are not subject to judicial review (unlike government-made *décrets* which are subject to review by the *tribunaux administratifs* and ultimately the *Conseil d'Etat*). Although the areas of competence of Parliament are technically limited, in practice most of the legislative power lies with Parliament.

The President

4.8 The President is head of state and holds executive power. The functions of the President include: ensuring respect for the Constitution and the regular functioning of governmental authorities; and acting as guarantor of national independence, the integrity of the territory and respect for European Union agreements and for treaties. The President is elected by popular vote for a term of 7 years. He appoints the Council of Ministers (on the recommendation of the Prime Minister).

The Government

4.9 The government (*gouvernement*) is represented by the Council of Ministers which is headed by the Prime Minister. The Prime Minister is responsible to Parliament. Members of the Council of Ministers may not be members of Parliament. However, Ministers have the right to speak in both Houses.

4.10 The government has broad legislative power (*pouvoir réglementaire*) to regulate by decree (*décret*). The power extends to all matters which are not within the specific competence of Parliament. In practice there are few *décrets* which are autonomous (*décrets autonomes*) of *lois* - most *décrets* are subordinate legislation or merely implement a *loi* (*décrets d'application*). Additionally, the government may obtain the consent of Parliament to legislate (in the domain of Parliament) by *ordonnance* for a limited period (this is rarely used). *Décrets* must be submitted to the *Conseil d'Etat*, which can annul them.

The Judiciary

4.11 There are 2 branches of the judicial arm of the French system of government. The court at the apex of the administrative system is the *Conseil d'Etat*. Below the *Conseil d'Etat* are 5 *Cours Administratives d'Appel* and numerous regional *tribunaux administratifs*. The court at the apex of the civil and criminal system is the *Cour de Cassation*.

The Constitutional Council

4.12 Another important institution in the French system is the Constitutional Council (*le Conseil Constitutionnel*). The main functions of the Constitutional Council are:

4.12.1 to adjudicate upon the validity of presidential and parliamentary elections and upon the conduct of referenda;

4.12.2 to express an opinion (*avis*), prior to their promulgation, on the legality under the Constitution of all *lois organiques* approved by Parliament;

4.12.3 if an ordinary *loi* or international treaty is challenged as contrary to the Constitution, to decide upon its constitutionality, again prior to its promulgation or ratification;

4.12.4 to ensure that both Parliament and the Government keep within the domains reserved for their respective legislative activities under the Constitution.

Outside these areas the Constitutional Council has no general or inherent jurisdiction.

4.13 The Constitutional Council rules (by the process of *délégalisation*) on whether provisions of a *loi*[42] fall outside the legislative domain of Parliament and so may be amended or repealed by *décret*. This enables the Constitutional Council to clarify the line between *loi* and *règlement* and therefore, by implication, to indicate whether the *règlement* trespasses on the legislative domain of Parliament.

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[42] Only *lois* enacted after 1958 - the date of the current Constitution (of the 5th Republic).

4.14 The Constitutional Council is a court in the sense that it adjudicates constitutional disputes, but it is not an appellate court (there is no appeal from the *Cour de Cassation* or the *Conseil d'Etat*). Nor is it a true constitutional court because it can only express an opinion before a law is promulgated (though its opinion is binding on the President, the Government and the Parliament), and a reference may be made to it only by certain persons (such as the President).

The Council of State

4.15 Originally established by Napoleon in 1799, the Council of State (*Conseil d'Etat*) "has survived two monarchies, two empires, and four republics, to give France very considerable internal stability"[43]. It is composed of the cream of the French civil service and enjoys a high degree of prestige. It is both an adviser to, and judge of, the administration. It has been referred to as the memory or conscience of the State. It can remind the government of previous reforms or failures. And it advises the government on the best means of achieving political objectives.

4.16 The President of the *Conseil d'Etat* is the Prime Minister. In 1994 there were 200 members (*Conseillers d'Etat*) of the *Conseil d'Etat* in active service. The *Conseil d'Etat* is divided into 2 domains - administrative (*attributions administratives*) and judicial (*attributions contentieuses*) at the apex of which are the *Assemblée Generale Plénière* and the *Assemblée du Contentieux* respectively. These 2 domains comprise 6 sections - 5 administrative and 1 judicial.

4.17 *Attributions contentieuses* (judicial functions). The judicial section (*Section du Contentieux*) of the *Conseil d'Etat* has 3 main heads of jurisdiction:

4.17.1 Jurisdiction at first and last instance includes:

- *recours pour excès de pouvoir* (action for excess of power) to annul a Government *décret* or *ordonnance*, or an *acte réglementaire*, or other decision of a minister which has to be taken with the advice of the *Conseil d'Etat*;
- disputes concerning the individual status of those public servants who are appointed to the more important administrative or public bodies by presidential decree;
- disputes concerning decisions of collegiate bodies at a national level;
- disputes concerning election to the regional councils in France and to the European Parliament;
- proceedings to challenge administrative acts, the application of which extends geographically beyond the area of any single *tribunal administratif*.

4.17.2 Appellate jurisdiction over those appeals from the *tribunaux administratifs* which have not been diverted to the *Cours Administratives d'Appel*.

4.17.3 *Cassation* - power to review the legality of decisions of the *Cours* and of a miscellany of specialized administrative jurisdictions (it is not a review on the

[43] Brown & Bell, p24

merits - the power is generally only to quash for procedural error or illegality and to refer the case back for a new adjudication[44]).

4.18 *Attributions administratives* (administrative functions). The 5 administrative sections are: interior (*Section de l'Interieur*), finance (*Section des Finances*), public works (*Sections des Travaux publics*), social (*Section Sociale*) and report (*Section du Rapport et des Etudes*). The *Conseil d'Etat* gives opinions in the legislative and administrative domain.

4.18.1 Advice on bills: All bills (*projets de loi*) introduced into Parliament by the Government must be submitted to the *Conseil d'Etat* for its advice. The Government does not have to follow the advice and Parliament retains complete freedom to adopt whatever text it pleases. The eventual enactment recites "*Le Conseil d'Etat entendu...*". The *Conseil d'Etat*'s advice on bills is normally given by the General Assembly (*Assemblée Generale Plénière*) of the *Conseil d'Etat* after an initial examination and report from the appropriate administrative section(s). Principle responsibility for a report will lie with a *rapporteur* (advisory officer). Where the Government specifies the matter as one of urgency, the General Assembly will be replaced by a smaller standing committee (*Commission Permanente*).

4.18.2 Advice on *règlements* (*décrets automomes*): Where the Government uses its *pouvoir réglementaire* to legislate by *décret* (*décret autonome*), the text of the *décret* must be submitted to the *Conseil d'Etat*. Again the Government is not obliged to follow the *Conseil d'Etat's* advice. However, the *Conseil d'Etat*, in its judicial capacity, will annul a *décret* which conforms neither to the original text submitted, nor to the modifications suggested by the *Conseil d'Etat*.

4.18.3 Advice on *règlements* (*décrets d'application*): The *Conseil d'Etat* must also be consulted upon the text of delegated legislation falling into the category of *décrets d'application* (decrees expressly authorised by Parliament to fill out the details of their parent statute). Again, the *Conseil d'Etat* normally acts through its General Assembly after a report from the appropriate administrative section. The *rapporteur* will often be involved in the drafting process with the government department promulgating the *règlement*. Where consultation with the *Conseil d'Etat* is constitutionally required, the resulting decree is known as a *décret en Conseil d'Etat*.

4.18.4 Consultation: Where consultation is not required the Government remains free to seek the *Conseil d'Etat's* advice, if it so desires.

4.18.5 General legal advice: The *Conseil d'Etat* is the general legal adviser to the Government and to individual ministers. In some matters (eg deprivation of French nationality), the advice of the *Conseil d'Etat* must both be sought and followed.

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[44] In some cases the *Conseil d'Etat* may substitute the correct decision without remitting the case to a lower court (the procedure of *cassation sans renvoi*).

4.18.6 Annual Report: The *Conseil d'Etat* is charged with submitting an annual report to the President which reviews its year's work and may also indicate what reforms of a legislative or administrative nature it considers desirable.

Accountability and the Process of Making Subordinate Legislation

4.19 As has been noted, the term "subordinate legislation" cannot readily be applied to executive regulation in France. However, for the sake of describing relevant systems, the procedures applying to the making of *décrets* will be taken as those most like those that would apply to subordinate legislation in a system based on the English model.

4.20 The text of a proposed *décret* is drafted by the appropriate government department. The drafting is not necessarily done by a specialist draftsman. There must be consultations with persons who will be affected by the *décret*. The resources required to implement the *décret* must be identified.

4.21 When the text of a *décret* has been finalised it is submitted to the appropriate administrative section of the *Conseil d'Etat*. The president of the section nominates a *rapporteur* to report on the *décret*. The *rapporteur* gives particular consideration to:

4.21.1 whether the *décret* infringes the Constitution;

4.21.2 *opportunité*: that is, the administrative policy of the *décret* - its general merits and suitability as a means of giving legislative expression to the policy of the Government (which the *Conseil d'Etat* may not comment on); and

4.21.3 *rédaction*: the drafting of the *décret* as a matter of technique and style.

4.22 The *rapporteur* may raise any difficulties with the relevant ministry. This process is informal and a telephone call may result in solution of the problem. The *rapporteur* prepares a brief report to which is attached any revisions of the text considered necessary.

4.23 The report is then considered by the section as a whole. Officials of the relevant ministry may attend this session and participate in the debate about the report. The *décret* is considered article by article and may be amended in this process. The final text of each article of the *décret* is voted on by the *Conseillers* (senior members) of the section. The *rapporteur* may also vote.

4.24 The Government has 3 options when the text of the *décret* is finalised by the *Conseil d'Etat*. It may adopt the text of the *décret* as amended by the *Conseil d'Etat*; give effect to the *décret* as it was originally drafted; or abandon the *décret*. While the opinion of the *Conseil* is binding only in certain limited circumstances, the *décrets* promulgated by the Government may, upon a suit being brought by a citizen, be declared null and void by the *Conseil* in its judicial capacity. Consequently, there is a strong incentive for the Government to accept the advice of the *Conseil*.

General Observations

4.25 People are appointed to the *Conseil d'Etat* from 2 principal sources. The first is the *Ecole Nationale d'Administration*, an elite college for those wishing to pursue a career at senior levels in the public service. Most appointments to the *Conseil* are from this source. The second source is the ranks of talented, senior public servants. Members of the *Conseil* have guaranteed tenure until the age of retirement. Promotion within the *Conseil* is theoretically a matter for the Government on the advice of the *Bureau des Présidents,* but in practice promotion is nearly always based on seniority.

4.26 The Committee was particularly impressed by the high degree of professionalism of the *Conseil d'Etat*. This perhaps is due to the independence of the *Conseil* and the fact that appointment to the *Conseil* is on the basis of merit and there are few (if any) political appointments. It can be said that the *Conseil* is a technocratic institution which commands a great deal of respect for its expertise.

4.27 The Committee was also impressed by the separation of the administrative system from the civil and criminal system. It appears that the separation may provide a more practical means of dealing with the seemingly inevitable expansion of bureaucracy than is in place in common law systems. It recognises that administration has become almost a fourth arm of government; that in the modern democratic state which provides services to its citizens, the administration has an existence quite distinct from, though interdependent with, the legislature, the executive and the judiciary. In this context it is noted that the French system of administrative law has been adopted by a number of other European countries.

4.28 Though it did not appear that consultation in the making of subordinate legislation was as formally entrenched in the French system as it is in the system in the United States, the Committee noted that it seemed to be generally accepted that consultation with affected persons was expected.

5 The Committee's Findings and Recommendations

5.1 Generally the Committee is of the view that there is both scope and a need for significant changes in the system of making and scrutinising subordinate legislation in Western Australia. There is a need to improve accountability in the system without necessarily imposing more restrictive and inflexible Parliamentary mechanisms. Some of the scrutiny techniques that the Committee investigated in Washington, London and Paris could usefully be adapted for application in Western Australia.

5.2 The Committee is cognisant of the findings of the Standing Committee on Government Agencies that:

> ...there are many facets to what accountability is supposed to encompass and disparate opinions on where it should start and finish.
>
> For the committee, accountability has 2 aspects. First, it describes the duty of the executive to conduct its administration openly, fairly and in accordance with the Rule of Law. Second, it describes the duty of each agency to act always in conformity with its mandate, ensure that its functions are performed

carefully, reliably and with due regard to costs, and report as and when required to Parliament.[45]

5.3 The Committee is aware of instances in Western Australia in which a government agency has promulgated regulations without having undertaken any form of public or external consultation. In such circumstances the only external control exercised in respect of the relevant regulations is scrutiny of them by the Committee. Even where agencies have undertaken relevant consultations, the Committee has limited resources to inquire into the views expressed and the conclusions drawn. In most cases the Committee is not aware of what records (if any) are maintained by the relevant agency. Additionally, the Committee does not in many cases have the experience, technical expertise or resources[46] to ascertain the effect and impact of many regulations. Consequently its scrutiny of some regulations is, at best, perfunctory. It is the Committee's view that this is not satisfactory.

5.4 The Committee is of the view that the maintenance of a rulemaking record by agencies is likely to significantly improve accountability in the rulemaking process. In this respect, the Committee supports the findings of the Standing Committee on Government Agencies that there are significant advantages to be had in maintaining a rulemaking record. They include:

- agency policy is developed on a consensual basis;
- interested persons are given an opportunity to be heard and rebut contra arguments...
- each interested party has the same opportunity to present its case; accusations of agency bias can be lessened if not extinguished...[47]

The Committee would elaborate on these by adding the reasons advanced for the maintenance of rulemaking records in the United States. These include: that the record is an aid to public participation in the rulemaking process; it forms a database of information for the agency; and it is a basis for judicial review of a rule or rulemaking (see paragraph 2.26).

5.5 Proposals of contemporary relevance for significant reform of the Western Australian scheme of regulatory review date back at least to 1985 when the government considered a proposal for a *Subordinate Legislation (Revocation and Review) Bill*. In 1992 the Office of Economic Liaison and Regulatory Review published a paper on *A Statutory Framework for Review of Subordinate Legislation in Western Australia*. That report

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45 Legislative Council of Western Australia, Standing Committee on Government Agencies, *State Agencies - Their Nature and Function*, 36th Report, April 1994, p3

46 In this respect it is noted that, compared to its counterparts in Washington, London and Paris, the Committee is relatively understaffed.

47 Legislative Council of Western Australia, Standing Committee on Government Agencies, *State Agencies - Their Nature and Function*, 36th Report, April 1994, p17

was inadequate in a number of respects, some of which were considered by the Committee shortly after release of the report[48].

5.6 On 8 May 1992 the Committee organised a seminar to consider a draft *Interpretation (Subsidiary Legislation) Bill* that it had prepared for discussion purposes[49].

5.7 Since 1984, States including Victoria, New South Wales and Tasmania have recognised the need for significant reform to schemes of regulatory review and have accordingly enacted relevant laws. In 1992, after undertaking substantial consultations, the Australian Administrative Review Council (ARC) published a comprehensive report on the need for reform of the Commonwealth government's regulatory review scheme[50]. The ARC report is the most comprehensive report of its kind prepared in this country. Many of its findings and recommendations are of direct relevance in Western Australia (though equally, some of its findings and recommendations are not relevant to the situation in Western Australia). The ARC report resulted in the preparation of the Commonwealth *Legislative Instruments Bill* which, at the time of writing, is before the Commonweatlh Parliament.

5.8 In 1992 the Royal Commission into Commercial Activities of Government stated:

> The least visible law making activity undertaken in this State is that by which statutory rules are made. These have a pervasive effect upon the lives and livelihood of the community. The Joint Standing Committee on Delegated Legislation and the *Interpretation Act 1984* constitute significant checks in the processes through which rules are given legal effect. The Commonwealth Administrative Review Council in its Report No 35, "Rule Making and Commonwealth Agencies", has given extensive consideration to rule making procedures. We understand that the Joint Standing Committee had initiated consideration of this issue prior to that report and is currently pursuing this matter. Public participation in rule making is a goal which should be pursued in this State.[51]

5.9 As a result of the 1992 seminar and of the Committee's investigations in Washington, London and Paris, the Committee is now in a position to formulate recommendations for reform of the regulatory review process in Western Australia. The Committee will

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48 Western Australian Joint Standing Committee on Delegated Legislation, draft *Report on the Office of Economic Liaison and Regulatory Review Report "A Statutory Framework for Review of Subordinate Legislation in Western Australia" and on similar legislation in other States*, May 1992, unpublished

49 Western Australian Joint Standing Committee on Delegated Legislation, *Review of Operations 1991 - 1992*, 11th Report, December 1992, pp66-7

50 Australian Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, Report No 35, March 1992

51 Western Australia, *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, Part II, 1992, para 5.9.7

make its specific recommendations in a report, *The Subordinate Legislation Framework in Western Australia*, anticipated to be tabled later in 1995.

5.10 In the interim, the Committee foreshadows that its recommendations will, among other things, deal with the following issues and questions.

5.10.1 Should the general procedure for the making of subordinate legislation include:

5.10.1.1 antecedent publicity (eg public notice of intention to make subordinate legislation, public availability of draft copies);

5.10.1.2 consultation (eg formal or informal hearings or consultations with interested groups or organisations; written submissions and/or oral evidence);

5.10.1.3 drafting: by experts in drafting; or by experts in technical areas; or by agency officers;

5.10.1.4 publication or notification (eg notification or publication in a regular government publication; availability of copies to the public; operative date of subordinate legislation dependent on date of publication);

5.10.1.5 preparation of a regulatory impact statement (if so, should this be a requirement pertaining to all subordinate legislation or just the most significant subordinate legislation - how is the difference between ordinary and the most significant subordinate legislation determined?; should there be different levels of RIS for different categories of subordinate legislation?; what factors should it include - economic, social, environmental? how are matters to which it is difficult to assign an economic value factored in to economic cost-benefit analyses? what is the cost of preparation of the RIS?);

5.10.1.6 scrutiny by the legislature:

- by legislative committee (joint committee or committee of a single house), or directly by the legislature?;

- by negative resolution? - ie subordinate legislation comes into operation but is subject to annulment by resolution of either house (what time frame?; what are the consequences of annulment?);

- should the subordinate legislation specify that it will come into operation after a specified period if it is not previously annulled by the legislature?;

- by affirmative resolution? - ie subordinate legislation does not commence operation unless affirmed by one or both houses;

- is it merely laid before the legislature for the information of members?;

- should the legislature have power to amend the subordinate legislation?

5.10.2 Should relevant procedures be specified in a general interpretation statute, or should they be specified in enabling legislation on a case-by-case basis?

5.10.3 What are the consequences of non-compliance with any of the procedures, particularly publication/notification (eg invalidity, inoperativeness)?

5.10.4 Should the legislature or a relevant committee have a power, after a preliminary review, to suspend subordinate legislation pending the outcome of detailed considerations? If this power is vested in a committee, can the committee exercise it during a recess or adjournment of the legislature?

5.10.5 If a legislative committee is to review subordinate legislation, what should be the composition of the committee? In particular, should it comprise a majority of government (or minority party) members and should the chairperson of the committee be a government (or minority party) member?

5.10.6 Should there be a requirement or convention that the government give the legislature an explanatory memorandum setting out the proposed scope for delegated legislation when it introduces a bill which contains a delegation of legislative power?

5.10.7 Should there be a requirement that the agency responsible for relevant subordinate legislation maintain a register of all subordinate legislation for which it is responsible?

5.10.8 Should there be a general sunset provision (ie which deems subordinate legislation to lapse 5, 7 or 10 years after is comes into operation) which applies to subordinate legislation? How does this impact on the cost of maintaining a regulatory system? Alternatively, should subordinate legislation be subject to continuing review or periodic mandatory review?

5.10.9 Should there be a general restriction on the attempted exclusion in subordinate legislation of judicial review of administrative action?

5.10.10 Should there be a general restriction on, or means of control over, or review of subordinate legislation which purports to modify primary legislation (ie Henry VIII clauses)?

Appendix 1

Persons with whom the Committee met: United States

Tuesday February 21 1995

Mr Michael Cain, Program Officer, US Information Agency
Mr Andrew Maybrook, Associate, Delphi International
Ms Sherri Wolfinger, Associate, Delphi International
Mr William Kimberling, Deputy Director, National Clearinghouse for Election Administration, Federal Election Commission

Wednesday February 22 1995

Mr Charles Johnson, Parliamentarian of the House of Representatives
Mr Robert D Harris, Director, Information Systems & Technology, Committee on Rules and Administration, US Senate
Mr Morten Rosenberg, American Law Division, Congressional Research Service
The Honorable Anthony Kennedy, Justice, Supreme Court of the United States
Ms Barbara Perry, Judicial Fellow, Supreme Court of the United States
Mr Ray Smietanka, Chief Counsel, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, US House of Representatives

Thursday February 23 1995

The Honorable Gerald B Solomon, Chairman, Committee on Rules, US House of Representatives
Mr David Lonie, Staff Assistant, Committee on Rules, US House of Representatives

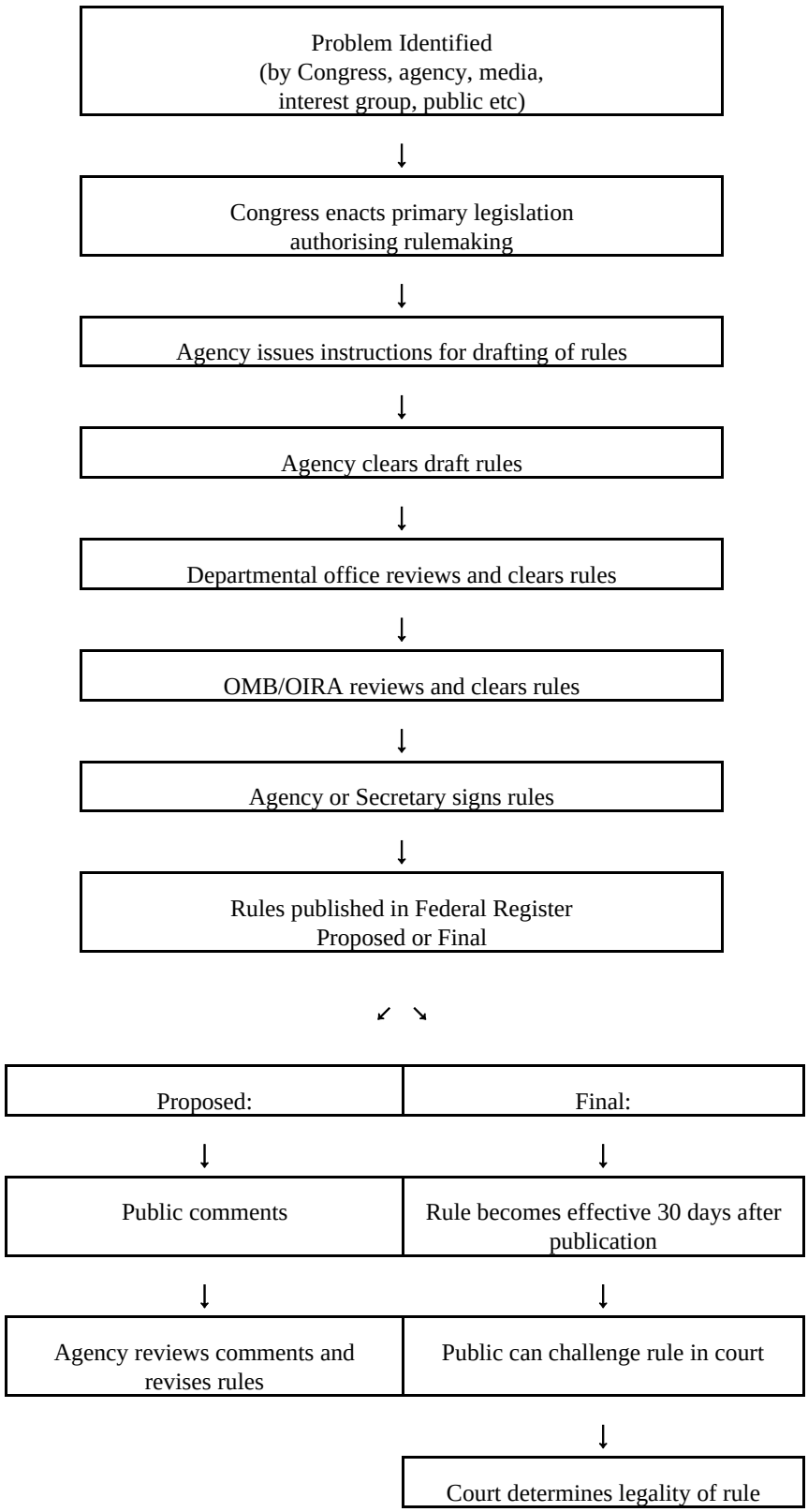
Friday February 24 1995

Mr Jefferey Lubbers, Research Director, Administrative Conference of the US
Mr Joseph Freedman, US Environmental Protection Agency
Mr David Gravallese, US Environmental Protection Agency
Mr Glenn Holm, Area Advisor, Office of Foreign Relations, Bureau of International Labor Affairs, US Department of Labor
Mr Vince Trivelli, Associate Director, Employment Standards Administration, Office of Congressional Affairs, US Department of Labor
Mr Robert J Tyson, Congressional Liaison, and other Australian Embassy Officials

In addition, the Advisory/Research Officer, Stuart Kay, met with the following:

Professor Nelson Polsby, Director, Institute of Governmental Studies, University of California, Berkeley, 15 February 1994
Professor Mathew D McCubbins, Coordinator, Law and the Behavioural Sciences Project, University of California, San Diego, 16 February 1994

Appendix 2



Diagrammatic representation of a typical rulemaking process (prior to the 1994 Congressional elections)

Appendix 3

Persons with whom the Committee met:

United Kingdom

Monday February 27 1995

Mary Bloor, Lord's Clerk to the Joint Committee on Statutory Instruments
Robert Rogers, Tim Pratt and David Lloyd & Members of the House of Commons Select Committee on European Legislation

Tuesday February 28 1995

Sir James Nursaw KCB QC, Norman Adamson CB, QC, Stephen Mason CB, Anwar Akbar and Members of the Joint Committee on Statutory Instruments
Sir Michael A J Wheeler-Booth, KCB, Clerk of the Parliaments
David Batt, Michael Pownall, and Eileen Denza & Members of the European Communities Committee, House of Lords
Tim Pratt CB, David Lloyd and Members of the European Communities Committee, House of Commons

Wednesday March 1, 1995

Sir James Nursaw, Counsel; Simon Burton, Committee Clerk and Members of the Delegated Powers Scrutiny Committee
Dr Rhodri Walters, Establishment Officer, House of Lords

Appendix 4

Joint Committee on Statutory Instruments: Terms of Reference (Commons)

(1) A select committee shall be appointed to join with a committee appointed by the Lords to consider -

(A) every instrument which is laid before each House of Parliament and upon which proceedings may be or might have been taken in either House of Parliament, in pursuance of an Act of Parliament, being -

(a) a statutory instrument, or a draft statutory instrument;

(b) a scheme, or an amendment of a scheme, or a draft thereof, requiring approval by statutory instrument;

(c) any other instrument (whether or not in draft), where the proceedings in pursuance of an Act of Parliament are proceedings by way of an affirmative resolution; or

(d) an order subject to special parliamentary procedure;

but excluding any Order in Council or draft Order in Council made or proposed to be made under paragraph 1 of Schedule 1 to the Northern Ireland Act 1974 and any draft order proposed to be made under section 1 of the Deregulation and Contracting Out Act 1994;

(B) every general statutory instrument not within the foregoing classes, and not required to be laid before or to be subject to proceedings in this House only, but not including measures under the Church of England Assembly (Powers) Act 1919 and instruments made under such measures:

with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds:

(i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;

(ii) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;

(iii) that it purports to have retrospective effect where the parent statute confers no express authority so to provide;

(iv) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;

(v) that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where an instrument has come into operation before it has been laid before Parliament;

(vi) that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

(vii) that for any special reason its form or purport calls for elucidation;

(viii) that its drafting appears to be defective;

or on any other ground which does not impinge on its merits or on the policy behind it; and to report its decision with the reasons thereof in any particular case.

(2) The quorum of the committee shall be two.

(3) The committee shall have power to appoint one or more sub-committees severally to join with any sub-committee or sub-committees appointed by the committee appointed by the Lords; and to refer to such sub-committee or sub-committees any of the matters referred to the committee.

(4) The committee and any sub-committee appointed by it shall have the assistance of the Counsel to Mr Speaker and, if their Lordships think fit, of the Counsel to the Lord Chairman of Committees.

(5) The committee shall have power to sit notwithstanding any adjournment of the House and to report from time to time, and any sub-committee appointed by it shall have power to sit notwithstanding any adjournment of the House.

(6) The committee and any sub-committee appointed by it shall have power to require any government department concerned to submit a memorandum explaining any instrument which may be under its consideration or to depute a representative to appear before it as a witness for the purpose of explaining any such instrument.

(7) The committee and any sub-committee appointed by it shall have power to take evidence, written or oral, from Her Majesty's Stationery Office, relating to the printing and publication of any instrument.

(8) The committee shall have power to report to the House from time to time any memorandum submitted to it or other evidence taken before it or any sub-committee appointed by it from any government department in explanation of any instruments.

(9) It shall be an instruction to the committee that before reporting that the special attention of the House be drawn to any instrument the committee do afford to any government

department concerned therewith an opportunity of furnishing orally or in writing to it or to any sub-committee appointed by it such explanations as the department think fit.

(10) It shall be an instruction to the committee that it shall consider any instrument which is directed by Act of Parliament to be laid before and to be subject to proceedings in this House only, being -

(a) a statutory instrument, or a draft of a statutory instrument;

(b) a scheme, or an amendment to a scheme, or a draft thereof, requiring approval by statutory instrument; or

(c) any other instrument (whether or not in draft), where the proceedings in pursuance of an Act of Parliament are proceedings by way of an affirmative resolution;

and that it have power to draw such instruments to the special attention of the House on any of the grounds on which the Joint Committee is empowered so to draw the special attention of the House; and that in considering any such instrument the committee do not join with the committee appointed by the Lords.

(11) Unless the House otherwise orders, each Member nominated to the committee shall continue to be a member of it for the remainder of Parliament.

Appendix 5

Persons with whom the Committee met:

France

Thursday March 2, 1995

Monsieur Jean-Eric Schoettl, Director, Secrétariat Général du Gouvernement
Mr Daniel Rowland, Attorney-General's Department, seconded to the Conseil d'Etat

Friday March 3, 1995

Mme Charline Le Fier de Bras, International Relations Unit, Conseil d'Etat
Mr Daniel Rowland, Attorney-General's Department, seconded to the Conseil d'Etat
Monsieur Michel Gentot, Head of International Relations Unit, Conseil d'Etat
Monsieur Jean-Michel Galabert, President de la Section due Rapport et des Etudes
Monsieur Dieudonne Mandelkern, President of the Interior Section, Conseil d'Etat
Mr Alan Brown, Australian Ambassador to France

Monday March 6, 1995

Monsieur Paul Cahoua, Head of Secretariat, Law Committee, National Assembly
Mme Nicole Hennekinne, Conseiller, Service des Affaires Internationales, National Assembly

Appendix 6

Glossary of French Terms

avis - opinion.

cassation - to quash the decision of an inferior court.

Cour de Cassation - the highest court in the judicial hierarchy.

décrets - laws made by the government on subjects that are out of the legislative domain of the parliament. They are considered to be administrative decisions, whether made directly under the constitution or under a delegation from parliament, and are therefore subject to the jurisdiction of the *tribunaux administratifs*.

> *décrets d'application* - decrees expressly authorised by *Parlement* to fill out the details of their parent statute (delegated legislation).
>
> *décrets autonomes* - (primary) decrees made under the authority of Art 37 of the Constitution.

délégalisation - the process whereby the Constitutional Council rules on whether provisions of a *loi* fall outside the legislative domain of parliament and may be amended or repealed by *décret*.

droit administratif - administrative law.

droit civil - civil law.

fonctionnaires - civil servants.

loi - a law made by parliament within its specified legislative domain.

> *lois ordinaires* - ordinary laws, which are not subject to automatic scrutiny by the Constitutional Council but which may be referred to the Constitutional Council by the President, the Prime Minister, the President of the National Assembly or the President of the Senate or by a collective submission of 60 *deputés* or 60 senators.
>
> *lois organiques* - laws of particular importance which affect the powers and interrelationship of such constitutional authorities as the President, Parliament, the Constitutional Council and the judiciary. They must be submitted to the Constitutional Council before they are promulgated for a declaration that they conform to the Constitution.

l'opportunité - administrative policy.

ordonnance - ordinance, a law made by the government (Council of Ministers), after consultation with the *Conseil d'Etat*, under a limited duration delegation from the parliament. They must be submitted to parliament for ratification within the period specified in the enabling statute.

l'ordre administratif - the administrative hierarchy.

l'ordre judiciare - the judicial hierarchy.

pouvoir réglementaire - the right of the government or lesser authorities (including ministers, prefects, mayors and other public authorities) to make legislation (eg *décrets*). Because it is an inherent power in the office, the legislation, regulations or rules so made are not subordinate legislation.

pouvoir législatif - the right of the parliament to make legislation (*loi*).

projet de loi - a bill introduced into the Parliament by the government. All *projets de loi* must be submitted to the *Conseil d'Etat* for its advice (the advice does not have to be followed).

rédaction - legislative drafting.

règlements - "Matters other than those that fall within the domain of law shall be of a regulatory character." (Art 37, Constitution). May be modified by *décret* after consultation with the *Conseil d'Etat*.

*tribunaux administratif*s - the administrative courts.

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