Chapter 3 of the Report, which is concerned with the impact on agency resources of the FOI Act, is assessed from reports the agencies make on the costs of administration of the legislation. The Report notes that experience has shown that agencies rarely keep exact records on hours spent by officers on FOI matters and other non-labour costs involved.

The total reported cost attributable to the FOI Act during 1996/97 was $15,972,950 which is an increase of $1,408,388 (9.67%) on the previous year. For 30,788 requests, this means an average cost per request of $519.

The average staff days spent per request was 1.7 with large client service departments handling high volumes of requests very quickly because of the routine nature of the requests in contrast to the smaller policy oriented agencies which deal with fewer, but more complex, requests. The cost of requests ranged from $20 for the Employment Services Regulatory Authority to $50,787 for AUSTEL. The average cost for 10 agencies was higher than $10,000 per request.

Legislative Instruments Bill – Update

The Government introduced the Legislative Instruments Bill 1996 into the House of Representatives on 24 June 1996 and it was passed by that House on 11 September 1996. The Bill was introduced into the Senate on 8 October 1996 and finally debated in that Chamber on 24/25 September 1997 when a large number of Government and other amendments were passed.

A number of amendments were successfully moved by the Opposition/minority parties/ independents in the Senate, including

(a) that a conclusive certificate by the Attorney-General that an instrument is or is not legislative should be disallowable by either House of Parliament;

(b) to expand the provisions on consultation before the making of legislative instruments from business interests to a requirement to consult where the instrument is likely to have a direct, or substantial indirect, effect on any sector of the community or on the natural, Aboriginal, cultural or built environment or on human rights;

(c) to provide certain exemptions from consultation similar to those in the 1994 Bill, for example, where legislative instruments are urgently needed or where notice would give an unfair advantage to individuals or where the Attorney-General certifies that the instrument should be exempt in the public interest (which was explained as being included to avoid the need for specific national security and airworthiness exemptions);

(d) to delete the exemption for instruments that determine terms and conditions of public sector employment;

(e) to delete the exemption for national schemes of legislation; and

(f) to remove the automatic sunsetting provisions and to include a provision for annual reporting by each Minister on legislation within the Minister's portfolio which is no longer necessary and the action

being taken to remove this legislation from the Register of Legislative Instruments.

A Government amendment to exempt from disallowance migration control instruments other than regulations was defeated (these instruments are currently not subject to disallowance). A number of Government amendments were agreed to including clarification that any regulations that are made to effect any modification or adaptation of the provisions of the Bill in respect of Rules of Court do not permit any modification to parliamentary scrutiny and disallowance provisions. Under the Bill, while clause 7 provides that Rules of Court are not legislative instruments, Schedule 4 provides that the Bill, with some exceptions, can apply to those Rules as if they were legislative instruments. Schedule 4 also provides that the provisions of the Bill which are to apply to Rules of Court may be modified or adapted by regulations made under the Acts regulating those Courts.

The Bill was returned to the House of Representatives for consideration of the Senate amendments. The full text of the Senate amendments can be found in House of Representatives Hansard 10484-10486). In the House (on 17 November) the Government moved acceptance of less than a third of these amendments.

The Government also moved a number of new amendments which were the replicas of the amendments it had moved in the Senate but which had been rejected. The House agreed to these amendments. The remaining Senate amendments were not accepted. House of Representatives Hansard (at pages 10490-10493) explains why these amendments were not accepted. Among the amendments not accepted were the following:

(a)that a conclusive certificate by the Attorney-General that an instrument is or is not legislative should be disallowable – not accepted on the ground that the determination by the Attorney-General is a legal opinion and the proper method for review of such a decision is the normal judicial review mechanism in the Federal Court;

(b) to expand the provisions on consultation before the making of legislative instruments from business interests to a requirement to consult where the instrument is likely to have a direct, or substantial indirect, effect on any sector of the community or on the natural, Aboriginal, cultural or built environment or on human rights – not accepted mainly on the ground that the Bill already imposes quite onerous compliance requirements on rule makers and it is considered that some experience with those requirements should be gained before consideration is given to extending the ambit of consultation;

(c)to provide certain exemptions from consultation similar to those in the 1994 Bill, for example, where legislative instruments are urgently needed or where notice would give an unfair advantage to individuals or where the Attorney-General certifies that the instrument should be exempt in the public interest (which was explained as being included to avoid the need for specific national security and airworthiness exemptions) – not accepted on the grounds that this amendment reduced the number of

exemptions and that many instruments needed urgently will not be able to be made in time because of the consultation regime, that the exemption for instruments having a maximum life of 12 months was removed and this would impose an unwarranted burden, and that the amendment also changed the consultation regime based on the Commonwealth/State agreement on a range of national schemes meaning different consultation regimes would apply in the States and Territories;

(d) to delete the exemption for instruments that determine terms and conditions of public sector employment – not accepted on the ground that the actions of the Government in relation to its employees should mirror the policies and practices that legislation requires of other employers and that it would be inconsistent to apply scrutiny other than to the extent that such terms and conditions are presently subject to tabling and disallowance;

(e) to delete the exemption for national schemes of legislation – not accepted on the grounds that this would impair the operation of a scheme (noting that the legislation such a scheme requires in each jurisdiction is, of necessity, a compromise of the interests of all participants in the scheme); it was also noted that the Senate Committee on Regulations and Ordinance and the Chairs of the Review Committees of such schemes were considering a proposal that one jurisdiction would undertake the scrutiny function on behalf of all jurisdictions but that proposal was not yet sufficiently developed so the exemption was needed to avoid confusion; and

(f) to remove the automatic sunsetting provisions and to include a provision for annual reporting by each Minister on legislation within the Minister's portfolio which is no longer necessary and what action is being taken to remove this legislation from the Register of Legislative Instruments – not accepted on the ground that the automatic sunsetting provisions (Part 6 of the Bill) implement recommendation 23 of the House of Representatives Standing Committee of Legal and Constitutional Affairs in relation to the 1994 Bill (that a sunsetting regime be introduced in relation to all existing and future legislative instruments as soon as possible) and a similar recommendation that the Committee had made in its report on Clearer Commonwealth Law. Any difficulties with the operation of the Part would be identified in the statutory review (clause 72) and in the additional review (clause 73) required after the sunsetting regime has been in operation for 2 years.

The Bill was returned to the Senate where it was debated again on 3 December and a small number of amendments made in the House were agreed to. The Senate maintained the amendments previously made by the Senate with which the House had disagreed. The Bill was returned to the House of Representatives which again disagreed with the amendments insisted on by the Senate. The House then voted to have the Bill laid aside.

The Legislative Instruments Bill 1996 [No. 2]

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

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

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

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

The document read as follows:

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