

1951-52.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

EIGHTH REPORT
from the
STANDING COMMITTEE
on
REGULATIONS AND ORDINANCES.

(Being the First Report of the 1951-52 Session,
and the Eighth Report since the formation of
the Committee.)

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

EIGHTH REPORT OF THE COMMITTEE.

The Standing Committee on Regulations and Ordinances has the honour to present its Eighth Report to the Senate.

2. This Report is concerned primarily with a consideration of, and report on, the procedure of giving expression to important matters of Government policy by processes other than Parliamentary enactment; and, in particular, the use of the Customs (Import Licensing) Regulations of 1939 for the implementation, by ministerial determination made under those regulations, of the far-reaching import restrictions decided upon by the Government in March, 1952.

3. In presenting this Report, however, the opportunity is taken to set out, for the information of Senators, the purposes and method of functioning of the Regulations and Ordinances Committee. In addition, short references are made to the Defence Preparations Regulations and the Re-establishment and Employment Regulations.

Functions of the Committee.

4. The Committee was first appointed on the 17th March, 1932.

5. Pursuant to Standing Order No. 36A, all regulations and ordinances laid on the Table of the Senate stand referred to the Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, may be taken in the Senate on motion after notice.

6. Succeeding Committees from 1932 have followed the principle that the functions of the Committee are "to scrutinize regulations and ordinances to ascertain -

(a) that they are in accordance with the Statute;

- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment."

The principle has also been followed that "questions involving Government policy in regulations and ordinances fell outside the scope of the Committee."

7. It is emphasized here that, pursuant to Standing Order No. 36A, all regulations and ordinances laid on the Table of the Senate stand referred to the Committee for consideration and, if necessary, report thereon. Thus it is competent for, and more particularly the duty of, the Committee to keep under review any regulation or ordinance which the Committee considers in its use and operation may present a changed aspect insofar as the Committee's earlier consideration of it disclosed.

8. To assist the Committee in its work, a copy of every regulation and every ordinance is forwarded to the Committee accompanied by a departmental explanation setting out, first, the effect of the regulation, and, secondly, the reason for enacting it.

9. To further assist the Committee in its work, since 1945 a legal adviser has been appointed at a present fee of two hundred and fifty guineas per annum. The Legal Adviser is supplied with copies of all departmental explanatory statements, and he, in turn, submits to the Committee his own report on each regulation and ordinance. These reports are of great value to the Committee.

10. The Regulations and Ordinances Committee has no executive power. It may only submit reports to the Senate, which may adopt or reject its recommendations. A motion for the disallowance of a regulation or

ordinance must always be submitted, upon notice, by a Senator, who may, of course, be a member of the Committee.

Defence Preparations Regulations.

11. The Defence Preparations Act, assented to on the 19th July, 1951, contains provision for the making of emergency regulations for or in relation to defence preparations. The special types of defence preparations on which emergency regulations may be made are set out in the Act.

12. Such general powers are uncommon, but were sought by the Government because (to quote a passage from the Preamble to the Act) -

In the opinion of the Parliament and of the Government of the Commonwealth, there exists a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent, and with a degree of urgency, not hitherto necessary except in time of war.

13. The Committee reports that to date one set of regulations has been made under the Defence Preparations Act 1951. The regulations were published as Statutory Rules 1951, No. 84. The regulations were made under section four of the Act, and relate to capital issues.

14. These regulations, in their use and operation, will be kept under review by the Committee.

Re-establishment and Employment Regulations.

15. In its Sixth Report, presented to the Senate on the 30th April, 1947, the Committee drew attention to the unusual powers contained in section 137 (2) of the Re-establishment and Employment Act 1945, whereby regulations may be made providing for the repeal, amendment or the addition to any of the provisions of the Act. The Committee in 1947 expressed the opinion that as the emergencies of war no longer existed, consideration should be given to the repeal of the provision and the enactment of appropriate legislation.

16. The Committee records its gratification at the passing of the Re-establishment and Employment Act 1951, whereby the regulation power was put on the normal basis, the power to amend the Act by regulation being omitted.

Customs (Import Licensing) Regulations.

17. The Customs (Import Licensing) Regulations - Statutory Rules 1939, No. 163, made under the Customs Act - provide that no goods shall be imported unless a licence to import the goods is in force and the terms and conditions of the licence are complied with; or the goods are excepted from the regulations. The regulations were designed to bring imports under licensing control for the purpose of giving effect to the then Government's decision to reduce expenditure in foreign exchange, required to pay for imports from countries outside the sterling area.

18. On the 6th March, 1952, the Government decided upon import restriction controls, aimed at preserving Australia's international solvency.

19. Following such decision, there appeared in the Commonwealth Gazette of the 7th March, 1952, a Notice, signed by the Minister for Trade and Customs (Senator O'Sullivan), in which he notified that, pursuant to the powers conferred upon him under regulation 15 of the Customs (Import Licensing) Regulations, he revoked all previous ministerial determinations published in Commonwealth Gazettes relating to the exception of goods from the application of the regulations; the Notice excepted from the application of the regulations certain goods enumerated in a schedule.

20. No new regulation was necessary to implement these import restrictions. They stem from the withdrawal by the Minister of exceptions made under the 1939 regulations.

21. Although no new regulation concerning import licensing was made, the Committee decided to re-open its consideration of the Customs (Import Licensing) Regulations in relation to their operation in the light of the recent import restriction controls.

22. In a reconsideration of, and report on, the Customs (Import Licensing) Regulations, the Committee wishes to make it very clear that it makes no comment regarding the wisdom, or otherwise, of the present import restriction controls. That is a matter of Government policy - and questions involving Government policy are considered to be outside the scope of the Committee.

23. The comment which the Committee does wish to make, however, relates to the method of implementation - by ministerial determination made under a regulation - of what must be regarded as a decision of major Government policy, affecting as it does Australia's commercial relations with other countries.

24. No legal or administrative misuse by the Government (or by previous Governments) of the Import Licensing Regulations is suggested by the Committee. Rather is the Committee's comment directed towards suggesting that it would be more in the Parliamentary tradition if an important question of Government policy, such as far-reaching import restrictions, were to have been given effect to by Parliamentary enactment or (if necessity so dictated) by the making of specific regulations, rather than that such a policy should be given expression by ministerial determination made under a wartime regulation.

25. An important feature of the method adopted by the Government to give expression to its import restriction policy is that the method adopted - ministerial determination under a regulation - afforded the Parliament no opportunity to deal with the Government's import policy. Again, and this is a point which

the Committee wishes to stress, a ministerial determination is not subject to Parliamentary review in that it may not be disallowed by either House as may a proposed law or a regulation.

26. The Committee is conscious of the fact that in the introduction of a policy, such as the recent import restriction controls, the Government may have been anxious, for administrative or other reason, to put the new arrangements into force at once, and without warning. But the Committee feels that the introduction of a Bill, or the making of a specific regulation, would not have precluded the making of special provision in such legislation to counteract any particular reaction in the commercial world which the Government may have sought to avoid in connexion with its import policy.

27. In this Report on the use and operation of the Import Licensing Regulations, the attention of the Senate is drawn to a statement by Latham C.J. in Poole v. Wah Min Chan, 75 C.L.R., at p. 229, (1947), as follows -

I agree that the power to add by regulation to the list of prohibited imports has been used so as to produce a complete change in the effect of customs legislation. The Customs Act, dealing with the importation of goods, provides for the importation of goods subject to the operation of a limited list of prohibitions. Additions to that list may be made by regulations. The effect of the Import Licensing Regulations is to substitute for this system a general prohibition of imports subject to allowances of importation by licences. There are many obvious objections to a system which so clearly involves the risk of arbitrary control and discrimination in respect of which a member of the public has no effective remedy. But whether economic or other circumstances justify the establishment of such a system notwithstanding such objections is a matter for Parliament, and not for the court.

In Poole's case the High Court was evenly divided on the question as to whether the regulations were valid under the Customs Act. The present Chief Justice (Sir Owen Dixon) held the regulations to be invalid, and said -

It will be seen that the purpose of the regulation is to prohibit all importation, whatever the goods, unless a licence for the particular consignment or importation is obtained from the Minister or the goods are exempted. It places

the entire inward trade of the country under the control of his particular discretion or that of his delegate, exercised in respect of every separate parcel or consignment of goods which it is sought to import.

There is, of course, no doubt that the Parliament in the exercise of the power to make laws with respect to trade and commerce with other countries could enact a law in the form of the regulations if it thought fit to do so. But it has not yet done so, and it is self-evident that nothing but a clear and unmistakable expression of intention would justify a court in concluding that Parliament had delegated to the Governor-in-Council power to make such a law as a subordinate legislative authority.

The Committee, the function of which is (in part) to scrutinize regulations to ascertain that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions, feels bound to remind the Senate of the views expressed in the High Court.

28. The Committee's comments on the Import Licensing Regulations, and the use to which they have been put, find a parallel with the comments made by the Regulations and Ordinances Committee in 1938 in regard to the Trade Diversion Policy. That important item of policy was given effect to by regulation - see Statutory Rules 1936, No. 69. In its Fourth Report, presented to the Senate on the 23rd June, 1938, the Committee had this to say -

... the Committee held the view that an important matter of policy such as trade diversion should have been the subject of Parliamentary enactment, and it is this view which the Committee desires to emphasize in this Report.

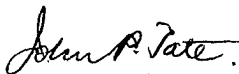
29. The present Committee records its agreement with the opinion expressed by the 1938 Committee that important matters of Government policy should be the subject of Parliamentary enactment, and recommends accordingly.

30. In making this recommendation, the Committee adds that, whereas the 1936 Trade Diversion Policy was given effect to by regulation, the import restriction policy of 1952 goes even further away from the

recommendation of the 1938 Report in as much as it was implemented by ministerial determination made under a regulation. An important difference to be noted is that a regulation is subject to Parliamentary review, and it may be disallowed by either House, but there is no such Parliamentary control over a ministerial determination. Thus, in the present case, there is added point to the view expressed by the 1938 Committee, and endorsed by the present Committee, that important matters of Government policy should be the subject of Parliamentary enactment. Particularly is this so in the case under review, where doubts have been expressed in the High Court as to the validity of the basic regulations under which the Government's import restriction policy was given expression.

General.

31. In conclusion, the Committee announces to the Senate that it proposes, progressively, to review the use and operation of all regulations which, like the Customs (Import Licensing) Regulations of 1939, appear to the Committee to permit the giving effect to of important questions of Government policy which would, more appropriately, be the subject of Parliamentary enactment.



JOHN P. TATE,

Chairman.

Senate Committee Room,
29th May, 1952.