

DEPT. OF THE SENATE	
No.	573
Presented	21 OCT 1954
<i>John W. O'Connell</i> Acting CLERK OF THE SENATE	

1954.

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

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THE SENATE

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NINTH REPORT  
from the  
STANDING COMMITTEE  
on  
REGULATIONS AND ORDINANCES

(Being the First Report of the 1954 Session, and the  
Ninth Report since the formation of the Committee.)

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MR. PRESIDENT -

I bring up the Ninth Report from  
the Standing Committee on Regulations  
and Ordinances, and move - That the  
Report be printed.

PERSONNEL OF COMMITTEE.

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Chairman:

Senator Ian Wood.

Members:

Senator J.J. Arnold.

Senator C.B. Byrne.

Senator the Hon. J.A. Guy.

Senator the Hon. H.S. Seward.

Senator V.S. Vincent.

Senator D.R. Willesee.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.  
NINTH REPORT.

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The Standing Committee on Regulations and Ordinances has the honor to present its Ninth Report to the Senate.

2. The Eighth Report, presented to the Senate on the 3rd June, 1952, dealt primarily with the Customs (Import Licensing) Regulations of 1939, and their use 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. This present Report relates to two matters. Firstly, reference is again made to the procedure of giving expression to important matters of Government policy, other than the administrative detail, by processes other than Parliamentary enactment. Secondly, an informative statement is presented relating to Acts which confer statutory powers of a legislative character, together with comment on the provision - or absence of provision - in the parent statutes for the tabling in Parliament, and disallowance by Parliament, of the instruments made under those powers.

THE PRINCIPLE OF ADMINISTRATIVE DETAIL ONLY IN REGULATIONS.

4. One of the guiding principles of the Committee in its scrutiny of delegated legislation has always been to ascertain that Regulations are concerned with administrative detail and that they do not amount to substantive legislation which should be a matter for Parliamentary enactment.

5. Since the presentation of its last Report, the Committee on three occasions found it necessary to address letters to the Minister for Health drawing attention to

what it considered to be breaches of this principle.

6. The first instance concerned Statutory Rule No. 72 of 1952, being Regulations made under the Hospital Benefits Act. The Committee questioned whether the Regulations went beyond administrative detail and came within the category of matters which would, more appropriately, be the subject of Parliamentary enactment. In his reply, the Minister (a) agreed that these Regulations were a matter of considerable public importance and did in fact contain matters which might more appropriately be the subject of Parliamentary enactment, and (b) advised that the substantive provisions of the Regulations would be incorporated in the National Health Act (which was finally passed in December, 1953).

7. The next instance was the subject of correspondence with the Minister in October-November, 1953. That correspondence related to Statutory Rule No. 75 of 1953 (being amendments of the Medical Benefits Regulations) and Statutory Rule No. 76 of 1953 (being amendments of the Hospital Benefits Regulations). The Committee drew the Minister's attention to the principle of law relating to onus of proof, and suggested that, if the principle were to be reversed, such an important change should be effected by Parliamentary enactment. In thanking the Committee for focussing his attention on this matter, the Minister advised that the regulatory provision would lapse upon the passing of the National Health Act, in which the relevant provisions were drafted in such a way as to avoid reversing the traditional onus of proof.

8. The third submission to the Minister for Health related to Statutory Rules Nos. 96 to 100 (inclusive) of 1953, being Regulations made under the National Health Service Act 1948-1949, the Hospital Benefits Act 1951 and the Pharmaceutical Benefits Act 1947-1952. Those Regulations took certain powers temporarily pending legislation, and the proclamation of such legislation. That is to say,

the principles of the Regulations were incorporated in the National Health Act 1953, which came into full operation in May, 1954. The Minister informed the Committee that the only reason for the making of the Regulations was to ensure that the relevant aspects of the National Health service were conducted in accordance with the provisions of the National Health Act during the period which intervened between the passing of the Act and the proclamation of commencing dates for the various operative parts. He agreed with the Committee that the subjects of these Regulations were appropriate for Parliamentary enactment, and that therefore it was his objective to have the National Health Act in full operation at the earliest possible date.

9. In each instance the Minister for Health was in general agreement with the principle put forward by the Committee, and we are satisfied that steps were taken as soon as practicable to put the offending Regulations into statutory form.

10. However, to avoid any repetition, it is recommended that the Government consider reminding all Departments that Regulations should be concerned only with administrative detail and should not amount to legislation of a kind which is more appropriately the subject of Parliamentary enactment.

PARLIAMENTARY CONTROL OF STATUTORY INSTRUMENTS OF A  
LEGISLATIVE CHARACTER.

11. At a recent meeting of the Committee, the following resolution was agreed to :-

That the Attorney-General be asked if he will kindly arrange for his officers to go through the statutes and prepare a list of all statutory powers of a legislative character contained in Commonwealth Acts and indicate whether there is provision in the statutes for the tabling in Parliament, and disallowance by Parliament, of the instruments made under those powers.

12. This resolution arose from a consideration by the Committee of Parliamentary control of subordinate legislation. It was suggested that there may be subordinate legislation which may not be required by the parent statutes

to be tabled and which, furthermore, is not required by the terms of the Senate Standing Orders to be referred to the Regulations and Ordinances Committee. (Under the Standing Orders only Regulations and Ordinances laid on the Table of the Senate stand referred to the Committee for consideration.)

13. Accordingly, the Attorney-General was asked to approve of the preparation of the statement sought in the resolution in order that the Committee might be in a position to consider whether they should recommend any amendment of the Standing Orders (and, if necessary, the statutes) to ensure that all instruments of a legislative character are referred to the Committee for scrutiny.

14. The full text of the statement prepared by the Attorney-General's Department is as follows :-

Statement relating to Acts which confer statutory powers of a legislative character.

There is no separate record kept by the Attorney-General's Department showing those Commonwealth Acts which confer statutory powers of a legislative character and to enable a complete answer to be given to the question it would be necessary to examine closely each Act. This would take some days at least and it would probably be desirable for the Attorney-General's Department to undertake the search in conjunction with the other Departments, which should be familiar with the contents of the Acts administered by them and would, no doubt, be in a position to facilitate the search for statutory powers conferred by those Acts. This statement should not, therefore, be regarded as dealing with the matter exhaustively.

2. The question of determining whether a particular statutory power is of a legislative character or of an executive character is often a matter of difficulty and, in some cases, it is not possible to express a firm opinion whether a Court would hold that the powers were of legislative character or not. It may, however, be said with certainty that the powers conferred by an Act to make regulations or ordinances are of a legislative character.

3. Regulations. The majority of Commonwealth Acts confer power to make regulations. By virtue of section 48 of the Acts Interpretation Act 1901-1950 (or, in some exceptional cases, the Act conferring the power to make regulations), regulations must be tabled in Parliament and are subject to disallowance. No instance has been found of Regulations which are not subject to tabling and disallowance. A possible exception is s. 87 of the Quarantine Act, which, so far as relevant reads as follows :-

"87.- (1.) The Governor-General may make regulations .....

- (v) for regulating inter-State traffic and prescribing measures of quarantine in relation to inter-State traffic for the prevention of the occurrence or spread of communicable diseases or diseases or pests affecting animals or plants.

(2.) Regulations made under paragraph (v) of the last preceding sub-section -

- (a) shall be published in the Gazette;  
 (b) shall come into force only in pursuance of an order made by the Minister;  
 (c) shall be in force in such State, Territory, place, area or locality within the Commonwealth as the Minister by order directs; and  
 (d) shall remain in force for such time as is specified in the order, but may from time to time, by a further order, be renewed for a further specified period for the same locality or part thereof.

(3.) Any order made by the Minister in pursuance of the last preceding sub-section shall set forth the regulations to which the order relates."

4. Ordinances. The position so far as Ordinances made under the Acts which provide for the administration of the Territories may be summarized as follows:-

- (a) Ordinances made by the Governor-General (for instance, those which have effect in the Australian Capital Territory and Norfolk Island) must be tabled and are subject to disallowance;  
 (b) Ordinances passed by Legislative Councils (those which have effect in the Northern Territory and the Territory of Papua and New Guinea) are required to be tabled. Those Ordinances may be disallowed by the Governor-General in Council, but not by either House of the Parliament.

5. Statutory Orders and By-laws. A number of Commonwealth Acts confer power to make statutory instruments other than regulations and Ordinances. References to the appropriate sections of the Acts concerned, the nature of the powers and whether the section requires the instruments to be tabled are set out hereunder. (Where an Act does not require the instruments to be tabled, there is no power of disallowance.)

- (1) Australian National Airlines Act 1945-1952. Section 69 authorises the Commission to make By-laws in relation to the operation of its air services. The By-laws must be tabled and are subject to disallowance.  
 (2) Broadcasting Act 1942-1950. Section 6L authorises the Australian Broadcasting Control Board to make orders for the purpose of exercising its powers and functions. The orders must be tabled and are subject to disallowance (sub-section (3.)).



- (3) Coal Industry Act 1946. Section 15 confers on the Joint Coal Board power to make orders and give directions necessary for, or incidental to, the effective exercise of its powers and functions, namely the securing and maintaining adequate supplies of coal. The Act does not require the orders and directions to be tabled. (Section 55.)
- (4) Coal Industry (Tasmania) Act, Section 11 confers similar powers on the Tasmanian Joint Coal Board and section 38 is in similar terms to section 55 of the Coal Industry Act 1946. This Act has not been proclaimed to commence.
- (5) Commonwealth Bank Act 1945-1953. Section 191 authorises the Commonwealth Bank to make, with the approval of the Treasurer, rules providing for a superannuation fund of the Bank. The Act does not provide for the tabling of the rules.
- (6) Commonwealth Railways Act 1917-1950. Section 88 empowers the Commissioner to make By-laws. The section requires the By-laws to be tabled but does not provide for the disallowance.
- (7) Customs Act 1901-1953. Sections 271-273B empower the Minister to make By-laws for the purposes of the Customs Tariffs. The Act does not require the By-laws to be tabled. It is not easy to say whether the By-laws are legislative in character.
- (8) Defence (Special Undertakings) Act 1952. Section 5 authorises the Minister to make orders prohibiting or regulating flights over restricted areas. The orders are required to be tabled and are subject to disallowance. (Section 6.)
- (9) Explosives Act 1952. Section 6 authorises the making of orders relating to handling, etc., of Commonwealth Explosives. The orders must be tabled and are subject to disallowance.
- (10) Navigation Act 1912-1953. Section 138 authorises the Crew Accommodation Committee to make orders in relation to the accommodation to be provided in ships. The Act does not require the orders to be tabled.
- (11) Stevedoring Industry Act 1949. Section 16 authorises the Stevedoring Industry Board to make orders regulating and controlling the stevedoring industry. The Act does not require the orders to be tabled.

6. Proclamations. Certain Acts (for instance, the Quarantine Act 1908-1950) authorise the Governor-General to make Proclamations which are possibly of a legislative character. Proclamations are not tabled and not subject to disallowance.

7. Rules of Court. The Judiciary Act authorises the High Court Judges to make Rules of Court, which are required to be tabled and are subject to disallowance. The Judges of the Commonwealth Court of Conciliation and Arbitration and the Judge of the Federal Court of

Bankruptcy do not have power to make Rules of Court. Rules for those two courts are made by the Governor-General in Statutory Rules and are subject to tabling and disallowance. The Australian Capital Territory Supreme Court Act 1933-1950 authorises the Judge of the Court to make Rules of Court. The Act does require the Rules to be tabled, but provides for disallowance by the Attorney-General.

8. There are, in addition, numerous Acts which authorise the employment of officers and employees who are not subject to the Public Service Act. The Acts confer on the employing authority power to determine the terms and conditions of employment, and do not require the determinations to be tabled. It is doubtful whether the determinations are of a legislative character.

15. In seeking this statement the Committee was concerned primarily with the scrutiny of those instruments which were of a legislative character, but from a reading of the fore-going statement it will be seen that the question of determining whether a particular statutory power is of a legislative character or of an executive character is a matter of difficulty, as, for example, By-laws under the Customs Act.

16. At this stage in its consideration of the subject, the Committee does not recommend any amendment of the statutes, or of the Standing Orders, with respect to the Parliamentary control of any of the afore-mentioned instruments. For the time being, the Committee does no more than :-

- (a) Bring the statement to the attention of the Senate, with a view to informing Senators of the various statutory instruments which are made, together with the control (if any) of the instruments by Parliament; and
- (b) Recommend to the Government that, to assist further consideration of the matter, a statement be prepared, for presentation to the Parliament, explaining the official criteria which determine whether or not it shall be provided in the parent statutes that statutory instruments must be tabled and be subject to disallowance by either House of the Parliament.

*Ian Wood*

IAN WOOD

Chairman.