1969

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TWENTY-SIXTH REPORT FROM THE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

(Being the First Report of the 1969 Session, and the Twenty-sixth Report since the formation of the Committee).

PERSONNEL OF COMMITTEE

Chairman:

Senator I.A.C. Wood

Members:

Senator R. Bishop
Senator J.L. Cavanagh
Senator G.S. Davidson
Senator D.M. Devitt
Senator I.J. Greenwood
Senator A.G.E. Lawrie

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

TWENTY-SIXTH REPORT OF THE COMMITTEE

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

Guiding Principles of the Committee

2. Since its formation in 1932, the Committee in its scrutiny of delegated legislation has been guided by the principles suggested by the 1929 Select Committee on the Standing Committee System, i.e., that regulations and ordinances should be scrutinised to ensure that -

(i) they are in accordance with the Statute;

(ii) they do not trespass unduly on personal rights and liberties;

(iii) they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;

(iv) they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

3. In particular, the Committee has in recent years objected to delegated legislation which makes the rights of individuals dependent upon actions which the administration may or may not take, at its discretion; or deprives individuals of the right of appeal to a court of law against administrative actions affecting their rights; or places the onus of proof upon the defendants instead of upon the prosecution in cases at law; or makes payments with long periods of retrospectivity, thereby denying Parliament the right to approve or disapprove of the expenditure before it is made.

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4. This Committee has always believed that long-cherished safeguards against arbitrary power, provided by the rule of law, should not be diminished by regulations.

Procedure of the Committee

5. All regulations and ordinances referred to the Committee, together with the departmental explanatory memoranda, are forwarded to the Committee's legal adviser for his comments. The Committee then examines the regulations and ordinances together with the departmental explanation and the legal adviser's report.

6. Where regulations or ordinances contain provisions which appear to infringe upon the principles which the Committee upholds, the responsible Minister may be invited to send a written explanation as to the necessity for the provisions, or, in some cases, witnesses to give evidence and answer questions regarding the provisions.

7. After considering all the evidence and written explanations available to it the Committee must decide whether it wishes to pursue the matter further; if it is of the opinion that the offending provisions ought to be changed, it may decide to take the matter up with the responsible Minister; alternatively the Committee may wish to report the facts to the Senate and, if it is considered appropriate, recommend disallowance.

8. The Committee regards a report recommending the disallowance by the Senate of certain delegated legislation as a serious matter. Only where important questions of principle are involved should the case be placed before the Senate for consideration.

A report recommending the disallowance of a regulation or ordinance places the matter in the hands of the Senate for its determination.

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The Committee believes that its existence and the vigilance of its members in their examination of regulations and ordinances over the years has had a salutary effect upon the formulation of delegated legislation.

9. The Committee acknowledges the ready response which it has received from Ministers of State and their Departmental Advisers.

10. The Committee now reports to the Senate upon some aspects of the regulations and ordinances with which it has been concerned since the time of its last general report.

Norfolk Island Ordinances

11. The Committee has been concerned with several Ordinances of Norfolk Island which, in the Committee's opinion, unduly abridged the rights and liberties of individuals.

12. The Committee is mindful of the special problems of the Island, and of the fact that the Minister for External Territories promulgates the Ordinances with the advice of the elected Norfolk Island Council.

13. It is the duty of the Committee, however, to draw the Senate's attention to any provisions in subordinate legislation which, in the opinion of the Committee, trespass unduly on personal rights and liberties, and the Committee will continue to closely scrutinise these Ordinances to see that they accord with the Committee's guiding principles.

Norfolk Island Ordinance No. 7 of 1966

Bean Seeds and Bean Plants Ordinance, 1966

14. This Ordinance was before the Committee in August 1966.

15. The Committee communicated to the Minister for External Territories its objections to the Ordinance; namely, that it gave unlimited discretionary power to a single officer; that

it did not allow for any appeal against administrative decisions which in this case could involve the confiscation of a citizen's property; and that it did not provide for any legal redress in case of the misuse of the discretionary powers conferred.

16. The Committee was not concerned with the policy of the Ordinance, nor with the relative unimportance of the matters with which that policy dealt. The Committee felt that it was necessary, however, to restate the important and long-established principle that Regulations and Ordinances should not make the rights and liberties of the subject dependent upon the exercise of a discretionary power conferred upon executive officials, without the proper safeguards of an appeal to a Court of Law and criteria set out in the regulations or ordinance by which the officials' actions could be judged.

17. After the Committee received an assurance from the Minister that the Ordinance would be amended to accord with the Committee's wishes, no further action was taken. The Ordinance was amended accordingly early in 1968.

Norfolk Island Ordinance No. 5 of 1967

Immigration (Temporary Provisions) Ordinance

18. In March 1968, the Committee had before it the Immigration (Temporary Provisions) Ordinance of Norfolk Island.

19. The Committee was concerned about certain provisions of this Ordinance, which provided that an authorized officer was not bound by any criteria in deciding whether to issue permits to enter Norfolk Island; that the Administrator had a discretionary power to cancel any temporary entry permit; and that the Administrator could take into custody and deport any person whose entry permit had been so cancelled, the person in question having no right of appeal except to the Minister for External Territories.

20. The Committee considered that these provisions imposed undue restrictions on the legal rights and liberties of Australian citizens.

21. After evidence from a witness representing the Department of External Territories, and a conference between members of the Committee and the Minister, the latter gave an undertaking to the Committee that the Ordinance would be limited to a period of six months, and that he would keep the Committee's principles in mind when drafting the permanent Immigration Ordinance, which is discussed below.

22. In view of this undertaking, the Committee resolved not to take any further action with regard to the Ordinance.

Norfolk Island Ordinance No. 7 of 1968

Immigration Ordinance

23. This Ordinance was before the Committee in March 1969.

24. The Ordinance overcame many of the Committee's objections to the temporary Immigration Ordinance.

The Committee was concerned, however, about :

(a) Section 22(1)(c)(i) and (ii) whereby a person was to be a prohibited immigrant if suffering from a "prescribed" disease or had been convicted of an offence punishable by imprisonment for six months or more;

(b) Section 26(1)(a), whereby a person could be deported if his conduct was "such that he should not be allowed to remain in Norfolk Island"; and

(c) Sections 18 and 67 which did not allow for appeal to a normal court of law against administrative decisions regarding the granting of status of resident and the granting of an entry permit.

The Committee felt that these provisions gave to executive officers too great a discretionary power over the rights of Australian citizens.

25. The Committee, on several occasions, received evidence from the Minister for External Territories and officers of his Department, who explained that the absence of appeal to an ordinary court in certain parts of the Ordinance was due to the evidence which would have to be considered on such appeal being not the kind of evidence which a normal court could take into account. The apparently highly restrictive provisions relating to prohibited immigrants and deportation were explained in terms of the peculiar conditions of the island.

26. After deliberating upon this evidence the Committee resolved to insist upon only one alteration of the Ordinance: the deletion of Section 26(1)(a) whereby a person could be deported for any conduct considered to be "such that he should not be allowed to remain in Norfolk Island". This Section, apart from conferring too great a discretionary power upon the administration, was felt to be unnecessary in that specific and adequate grounds for deportation were set out elsewhere in the Ordinance.

The Minister for External Territories agreed to have Section 26(1)(a) deleted, and also agreed to a suggestion that he facilitate a debate in Parliament on the Ordinance.

27. In view of the assurances received from the Minister, the Committee, after long and careful consideration, resolved not to press for any further amendments. In September, the Minister informed the Committee that the desired amendment of Section 26 had been made.

Norfolk Island Ordinance No. 2 of 1969

Crown Lands Ordinance

28. This Ordinance was before the Committee in May 1969.

29. The Ordinance provided for a periodic re-appraisal of the value of leased Crown Lands, and for the lessees to pay rent on the basis of the re-appraised values.

30. The Committee pointed out to the Minister for External Territories that the Ordinance gave lessees no right of appeal to a court against the administration's re-appraisal of land values.

A right of appeal under similar circumstances is provided for in Australian Capital Territory legislation, and must be regarded as a fundamental safeguard of the rights of the lessee.

31. In June 1969, the Committee received from the Department of External Territories an assurance that amendments of the Ordinance were already being prepared so as to provide a right of appeal. The Committee accepted this assurance.

A.C.T. Ordinance No. 23 of 1968
Companies (Life Insurance Holding Companies) Ordinance

32. This Ordinance was before the Committee in March 1969.

33. The Committee was concerned about Sections 40 and 42 of the Ordinance, which provided that where a company was convicted of an offence against the Ordinance, the directors of that company would be automatically convicted of an offence unless they could prove that they did not know of the offence or took all reasonable steps to prevent it, and such an offence was to be punished summarily.

34. After considering evidence from a representative of the Attorney-General's Department, and examining closely the implications of Sections 40 and 42 in the context of the whole Ordinance, the Committee resolved to request that the word "all" in the phrase "all reasonable steps" in Section 40 be deleted, thereby making the onus of proof placed upon the defendant less burdensome.

35. Upon an assurance being given by the Attorney-General and the Treasurer that this amendment would be made, the Committee accepted the Ordinance.

A.C.T. Ordinance No. 30 of 1968
Sewerage Rates Ordinance

36. This Ordinance was before the Committee in April 1969.

37. The Committee was not concerned with the policy of the Ordinance, which had been the subject of a disallowance motion in the Senate.

38. The Committee was, however, concerned with certain matters raised by Senator Greenwood during the disallowance debate in the Senate on April 30, namely the discretionary powers given to the Minister under certain Sections of Part III of the Ordinance. These Sections appeared to allow the Minister, at his discretion, to exempt any person from the charges imposed by the Ordinance, or to vary the charges.

39. The Committee resolved to ask the Minister, when amending the Ordinance, to bear in mind the Committee's objection to this type of discretionary executive power.

In June the Minister informed the Committee that he had given directions for amendments to be drafted to repeal the sections to which the Committee objected.

Retrospectivity of Financial Regulations

40. The Committee reiterates the principles which it set out in its Twenty-fifth Report to the Senate on retrospectivity of financial regulations and Parliamentary control of expenditure, and once again draws the attention of Ministers responsible for issuing financial regulations to the terms of this Report.

41. Since that Report, there has been some improvement in the situation regarding retrospectivity, due to the diligent efforts of the responsible Ministers, but regulations are still coming forward purporting to authorize payments involving a degree of retrospectivity which must be regarded by the Committee as unacceptable.

42. The Committee will continue to scrutinise closely and investigate all such regulations.

Effects of Some Previous Reports

43. The following list shows what action has been taken with regard to matters reported upon by the Committee since its last general report (Nineteenth Report):

Twentieth Report: The Christmas Island Ordinance No. 1, 1965, Tuberculosis Ordinance, was amended so as to remove the Committee's objections to it (Ordinance No. 6 of 1966).

Twenty-first Report: Statutory Rules No. 6, 1966, Air Navigation (Buildings Control) Regulations, were amended so as to remove some of the Committee's objections to them (S.R.66 of 1967).

Twenty-second Report: The A.C.T. Ordinance No. 14, 1966, Advisory Council Ordinance, was amended in accordance with the Committee's principles (Ordinance No. 6 of 1967).

Twenty-third Report: The A.C.T. Ordinance No. 27, Freehold Land (Subdivision and Use) Ordinance, was disallowed by the Senate on November 2, 1967.

Twenty-fourth Report: A.C.T. Ordinance No. 13, 1967, City Area Leases Ordinance: the provisions objected to by the Committee in this Ordinance were not removed by subsequent amendments, and the remarks made in the Report stand.

Twenty-fifth Report: Retrospectivity of financial regulations: see paragraphs 40-42 above.

IAN WOOD,

Chairman

Regulations and Ordinances
Committee Room,
Thursday, 18 September 1969.

1968

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TWENTY-FIFTH REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES

(Being the First Report of the 1968 Session, and the Twenty-fifth Report since the formation of the Committee.)

PERSONNEL OF COMMITTEE

Chairman:

Senator I.A.C. Wood

Members:

Senator R. Bishop
Senator J.L. Cavanagh
Senator G.S. Davidson
Senator D.M. Devitt
Senator I.J. Greenwood
Senator A.G.E. Lawrie

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

TWENTY-FIFTH REPORT OF THE COMMITTEE

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

Retrospectivity

2. For many years the Committee has kept a close scrutiny on delays which occur in the promulgation of regulations, and the consequent retrospective operation necessitated in some cases, with a view to minimising the incidence of retrospectivity in regulations, particularly those involving the payment of moneys.

3. Delays in the promulgation of regulations providing for the payment of moneys denies to either House of the Parliament the right to approve or disapprove of the expenditure at the time of expenditure and, under these circumstances, the Committee is of the opinion that such provisions should, more properly, be embodied in substantive legislation.

4. The Committee has corresponded with various Ministers and from time to time received written assurances that their Departments are cognisant of the need to take action to expedite the processes in order to avoid undue retrospectivity. On other occasions it has been considered

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necessary to call witnesses from various Departments before the Committee in order to ascertain the reasons for undue delays and to reach an understanding of the problems concerned.

5. The Committee is pleased to report that all Departments have indicated a readiness to co-operate, and that, with the exception of those relating to the Defence Services, regulations involving undue retrospectivity are now few in number.

6. In the case of the Defence Services and, in particular, the Department of the Navy and the Department of the Army, the number of regulations being promulgated providing for the retrospective payment of certain types of pay and allowances and other financial entitlements, some dating back as far as four and five years, has now reached considerable proportions. The Committee has regularly written to the appropriate Ministers explaining the need to avoid undue retrospectivity and criticising the inordinate delays that have taken place in the promulgation of regulations.

7. In view of the large number of Defence Services regulations which have recently come forward offending in this manner, the Committee, over recent weeks, has called and examined witnesses from the Department of Air, the Department of the Army, the Department of the Navy, and the Attorney-General's Department.

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8. The delays revealed by this examination can be divided into two principal areas:

(i) The time taken to decide upon the amount and conditions of the adjustment, to obtain necessary approval and issue instructions to the Draftsman; and

(ii) the time taken by the Draftsman to finalise the regulations and arrange for their promulgation.

9. In the first area there appears to the Committee to be considerable room for improvement. In some cases examined, there were what appeared to be inordinate delays while negotiations between the Public Service Board, the Inter-Service Committee and the Treasury have taken place; at times there have been delays while submissions were prepared by the Departments for consideration by one or all of these bodies; and, delays have taken place after final Treasury approval has been granted before instructions have been sent to the Parliamentary Draftsman.

10. During its inquiry, the Committee was informed that in the case of certain regulations, some of which provided for long periods of retrospectivity, the delays were due to administrative difficulties within the Department and the Committee was assured that this type of delay should not occur again. The Committee has been corresponding with

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the Defence Services Departments since 1960 and has had repeated assurances that action had been taken to avoid delays within the Departments concerned.

11. The Committee was advised that, in relation to 12 regulations involving retrospective operation as far back as 1963, the Department concerned accepted 50% of the responsibility for the delays which occurred in promulgating these regulations.

12. In the light of this evidence, and, if no significant improvement in this situation is evident after a reasonable period of time, the Senate may wish to consider whether an inquiry should be conducted into the administration of the appropriate sections of the Departments involved.

13. The second area of delay occurs in the drafting of the necessary statutory instruments by the Parliamentary Drafting Section of the Attorney-General's Department. Whilst the Committee accepts the explanations given over the last eight years and realizes that there are difficulties in recruiting staff with sufficient training and experience for this specialized work, it must be stressed that this situation cannot be allowed to go on indefinitely.

14. The Committee was pleased to note that investigations have recently been carried out overseas, and that plans are at present being formulated, in an attempt to overcome the lengthy period of delay which occurs in the drafting section.

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15. This report has expressed the view of the Committee that delay in promulgation of regulations denies to Parliament the right to approve or disapprove of expenditure at the time of expenditure. It is for this reason that the Committee has over a long period, scrutinised regulations involving payment of moneys which have a retrospective operation. In the 19th Report of the Committee, the principle was enunciated that, based on a desire to avoid any possibility of adversely affecting the rights of servicemen serving in overseas areas, a maximum period of two years retrospectivity could be accepted for exceptional cases, but that two years should not be taken in any way as a criterion for retrospectivity. "On the contrary, the Committee believes that retrospectivity beyond a few months is objectionable, and will continue its scrutiny on this basis." The Committee now re-affirms the principles set out in the 19th Report.

16. The Committee has explored every available avenue for reducing the incidence of retrospectivity, including writing to Ministers, the examination of witnesses from offending Departments, and reporting to the Senate when the situation warranted such action.

17. The Committee has now formulated guidelines which it will observe in its examination of such regulations. These are:

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(1) All regulations, of whatever character, having a retrospective operation will prima facie attract the attention of the Committee.

(2) Where the retrospectivity involved is in relation to payment of moneys the Committee will view the retrospectivity as requiring close scrutiny.

(3) The Committee regards retrospectivity beyond a few months as objectionable. It is recognised, for obvious practical reasons of an administrative character, that some retrospectivity is inevitable. The Committee believes that such retrospectivity should be of the shortest period practicable.

(4) Regulations involving retrospectivity in payment of moneys, if extending beyond two years, will be subject of report to the Senate and, unless quite exceptional circumstances are established to the Committee's satisfaction, will be the subject of a recommendation for disallowance.

The Committee will continue to scrutinise all regulations for payment of moneys which contain retrospective provisions extending beyond a few months, and will regard the retrospective aspect of such regulations as warranting some explanation.

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18. The disallowance of such regulations by the Senate will have the effect of placing the onus upon the Minister to obtain proper Parliamentary sanction before the payments to which the retrospective provisions apply can be made.

IAN WOOD
Chairman

Regulations and Ordinances Committee Room,
Thursday, 28 November, 1968.

THE SENATE

TWENTY-THIRD REPORT

FROM THE STANDING COMMITTEE ON

REGULATIONS AND ORDINANCES

TOGETHER WITH

MINUTES OF EVIDENCE

(BEING THE FIRST REPORT OF THE 1967 SESSION, AND THE TWENTY-THIRD REPORT SINCE THE FORMATION OF THE COMMITTEE)

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

1967—Parliamentary Paper No. 147

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
1967—Parliamentary Paper No. 147

THE SENATE

TWENTY-THIRD REPORT

FROM THE STANDING COMMITTEE ON

REGULATIONS AND ORDINANCES

TOGETHER WITH

MINUTES OF EVIDENCE

(BEING THE FIRST REPORT OF THE 1967 SESSION, AND THE TWENTY-THIRD REPORT SINCE THE FORMATION OF THE COMMITTEE)

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PERSONNEL OF COMMITTEE

Chairman:

Senator I. A. C. Wood

Members:

Senator R. Bishop
Senator J. L. Cavanagh
Senator G. S. Davidson
Senator D. M. Devitt
Senator A. G. E. Lawrie
Senator R. C. Wright

Printed in Australia by the Commonwealth Government Printer, Canberra

TWENTY-THIRD REPORT OF THE COMMITTEE

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

Australian Capital Territory Ordinance No. 27 of 1967
Freehold Land (Subdivision and Use) Ordinance 1967

2. This Committee is informed that no Town plan has been prepared for zoning of the Australian Capital Territory. This is almost unbelievable in relation to a territory and a city of the significance of the Australian Capital Territory and Canberra.

3. The Ordinance No. 27 of 1967 is of an interim nature and is expressed to operate only until 30 June 1968. Its temporary duration indicates its rush nature. It is not unusual for such temporary legislation to be continued indefinitely.

4. But the Ordinance operates:

(a) to legislate for specific areas thereby discriminating between them and other areas; there is no provision for zoning after a public right of objection as is common in State Planning Legislation;

(b) to prohibit subdivision of land except in accordance with an approval of the Minister. The Minister may in his discretion grant or refuse to grant an approval. He need state no reasons, give no hearing and act on different grounds in similar cases;

(c) to prohibit a grant by the 'proper authority' of a permit for the erection of a dwelling house, hall or community centre under the Canberra Building Regulations, unless the Minister has approved its erection;

(d) to prohibit building for 'prescribed purposes' which are spelt out by the Ordinance to mean—

'(i) a hotel, picture theatre, shop, service station, factory or saw mill;

(ii) flats or home units or other residential accommodation of a kind commonly known as a flat or home unit;

(iii) a motel or guest house or a building, however described, for the provision of accommodation of a kind commonly provided by a motel or guest house;

(iv) a restaurant or café or a building, however described, for the provision of services commonly provided by a restaurant or café; or

(v) a stall for the display or sale of goods.';

(e) to prohibit the alterations of or addition to buildings unless the Minister approved;

(f) to prohibit the use of buildings erected in specific areas for certain purposes without the approval of the Minister; and

(g) to make void certain contracts for purposes contrary to those prohibitions.

5. The Ordinance is obnoxious to the principles which this Committee is constituted to support:

(a) It unduly interferes with rights of property and contract by means of Ministerial discretionary decision.

(b) the Minister is bound by no rule of law.

(c) there is no right of appeal to any tribunal or any Court of Justice from the Minister's decision.

(d) the Ordinance is discriminatory without giving the public the right to object to zoning in the manner customary in State Planning legislation.

6. It is therefore recommended that the Ordinance be disallowed.

7. Our recommendation imputes no want of good faith to any person. We are concerned with the maintenance of a system which does not make the rights of persons unduly dependant on administrative decision without protection of the Courts of Justice. Nor do we fail in appreciation of the merits of proper town planning.

IAN WOOD
Chairman

Regulations and Ordinances Committee Room,
Thursday, 5 October 1967

MINUTES OF EVIDENCE

Taken at Canberra
THURSDAY, 21 SEPTEMBER 1967

Present:

Senator WOOD (Chairman)

Senator Bishop	Senator Devitt
Senator Cavanagh	Senator Lawrie
Senator Davidson	Senator Wright

Mr James Andrew Costello, Director (Planning) Department of the Interior, and Mr Eric Wigley, Assistant Secretary (Lands) Department of the Interior, were sworn and examined.

Chairman

We would like some further information on Ordinance No. 27 of 1967. The matters about which we would like this information are related to sections 4, 5, 6 and 7. The purpose of the Ordinance is to obtain control over certain lands in an area for which no plan has yet been devised. The Ordinance vests in the Minister control over sub-divisions and building in the areas concerned. They are wide powers which are sought, and the Committee would like some argument from you as to why you feel these controls and powers should be granted?—**(Mr Costello)** I think the basic problem can be said to be that the expansion of Canberra in recent years has brought about an influence wider than was originally anticipated. This has been accentuated in recent times with the alteration of planning from the north to further development in the south which was not envisaged originally. The problem arises because certain areas of land on the outskirts of the Australian Capital Territory were being exposed to these influences far in excess of what was anticipated originally. We in the Department saw some development this way last year and investigations were started for the purpose of bringing in complete legislative control in the accepted sense. The purpose of the Ordinance is twofold. Firstly, it is to protect the essence of Canberra as a national capital by avoiding having on the immediate outskirts of the national capital undesirable fringe development, unattractive commercial development and so on, and also to prevent the type of ribbon development that occurs in the approaches to large cities. Basically, the purpose of the Ordinance is to protect the national capital, but it also seeks to preserve the community atmosphere. The first is not a concept which is embodied in Australian town planning. Therefore, we have not been able to get guide lines on it. We have been developing *ab initio*. Australian town planning, so far as it has been developed to date, has been essentially on community protection and it has developed from the point only. This is one side only of our problem. We have problems connected with the protection of the national capital and then the protection of the community. The latter side of the ultimate development, the preservation of the general amenities of the areas which will be subject to development, the demand upon the community for urban servicing which could not be supplied perhaps commensurate with the development is one of many principles applied in State urban planning. These are some of the principles which would have to be taken into account with respect to the urban amenity problem and can be identified from State planning. Then, of course, there is the possibility of future land requirements for the expanding city. In this respect we have regard to the original concept of the development of the Australian Capital Territory to provide, amongst other things, sufficient water, drainage and so on for the national capital. Some of these areas which are subject to the freehold land controls are Naas and Gudgenby to the south, and at this stage these areas could be potential much needed water supply areas but current development has not proceeded to the stage where we can be specific enough. Our attention has been directed to clarifying all this with the idea of getting a specific set of proposals in the normal way and having a legislative pattern upon which these can be based. Our difficulty has been that unfortunately development has occurred more rapidly than we anticipated. This has been accentuated by the recently announced development of the capital to the south and one of our problems here is that if this area goes completely

unharnessed in the intervening period a great deal of damage could be done and individuals could suffer. This was the basic reason why we felt it necessary to have some interim control. In the same way as the States allow for interim control when a plan is being prepared or has been prepared and is being processed, the same position applies. Unfortunately we do not have the complete legislative pattern that the States have under which they bring these interim orders into play. This has been rather difficult. The purpose of the interim legislation is not so much to control but to preserve the *status quo*. When we examined this we took it that it could be done one of two ways. It could be a complete freeze. We thought that a period of approximately 12 months would be necessary. Then we thought if we had this complete freeze and prohibited all development for 12 months that would give the answer and the development could occur under the control system. If we brought this sort of prohibition down we could create problems with individuals; for instance, a person who had a block and wanted to build on it or a person who had a large farm and wanted to have a member of the family sub-let the far portion of the allotments and use it for share farming or a farmer who wanted to build a hay shed. With these types of development we thought it would be unreasonable to completely prohibit that for 12 months. From this point of view we do not know how far these desirable elements in this go, but we did not want to prohibit them completely. This generally is the background as to why the legislation has been drawn in this pattern.

Senator Devitt

You have mentioned that the first alternative was the complete freeze. What was the other alternative?—The line that we have taken.

Chairman

Does it not seem rather strange that the whole of the area set out for Canberra belongs to the Commonwealth Parliament and why some classification of use of the land in association with a complete plan of the area has not been evalued years ago? Do you not think that the Commission has been very lax in not bringing this to some fruition? The situation is that the Department is more or less trying to freeze development in the whole Canberra area. Every town is planned right to its very boundary. Why did not Canberra have this before?—(Mr Wigley) Perhaps I could give a little background information on this. There are some eighty-six holdings of freehold land.

Senator Wright

Has anybody a plan?—Yes, there is a plan here. It is rather large.

Would you open it out, then the whole Committee could see it.—The land with which this Ordinance is concerned is the land coloured yellow.

Senator Cavanagh

The Ordinance covers the whole Territory. —It is concerned only with freehold land. All the land except the yellow land is owned by the Commonwealth. There is some freehold land in the village of Hall, some small allotments which are used mainly for residential purposes. There are some residential blocks in the area known as the Oaks Estate across the railway line from Queanbeyan and some down in the village of Tharwa. You can see that the Commonwealth had acquired or had passed to it from the State as Crown Land all the other land which is there, except the yellow. I have been unable to ascertain precisely why these areas were left; in other words, why all that was acquired and some pockets left as freehold. This goes back quite some years of course. Those yellow areas total some 90,000 acres, something less than one-fifth of the total area of the Territory. The area with which the National Capital Development Commission is concerned is mainly the area around the city. From our discussions with them it is quite clear that their future plans for the development of the city lie generally to the north side of the Murrumbidgee River, the land on the other side not lending itself readily to urban development.

Senator Wright

The Ordinance does affect the freehold land to the south of the Murrumbidgee River?—Yes, both sides.

Senator Bishop

Including Hall?—Yes. There is a slight distinction in the Ordinance. The Ordinance does make a distinction between the generally rural areas and the land in Hall. Perhaps Mr Costello might explain this. I think basically the difference is that the areas in these villages are for residential or perhaps business purposes and the sort of controls that we had in mind are really for rural areas. We would not envisage that a freehold owner in Hall, Oaks Estate or Tharwa would want to erect a shearing shed. This would not be part of a residential lease. The owner of freehold land in other areas would or could want to erect a shearing shed. In that case it was not envisaged that the Minister would prevent such a building being erected.

Senator Wright

Has he power to do so?—I think the Ordinance has excluded certain forms of buildings.

Senator Cavanagh—The definition is 'no prescribed purposes'. That is contained in section 6 (3.).

Would you tell us the interpretation of the provision?—**(Mr Costello)** The provision is under section 6. The control is exerted in respect of those small allotments which comprise Oaks Estate, Hall and Tharwa. The prescribed purposes are defined under section 2.

The section refers to freehold land in the part of the Territory 'other than'?—I am sorry, I am looking at the wrong section. The provision here is section 6. It is the rural land other than Oaks Estate, Hall and Tharwa. The provision is that in those rural areas the proper authority under the Canberra Building Regulations is not permitted to grant a permit for the erection of a building for use as a dwelling house, hall or community centre along the lines to which the section applies, unless the Minister has approved its erection. The point is that this would enable a farmer, for example, under this to build his normal outbuildings.

You are not making it very clear to me. To which section are you referring?—To section 6.

What does it say? Refer to the specific part of it and then explain its application?—Sub-section (1.) restricts its application to freehold land other than the land that is within Oaks Estate, Hall and Tharwa.

What does the section say with regard to all freehold land other than in those three places?—It purely provides that before the proper authority who controls building may issue a permit under the Building Regulations to enable the erection of a building for use as a dwelling house or hall or community centre, the applicant must have the approval of the Minister to erect those premises on that land.

What is the justification for that?—The reason for it is to prevent in an underhand fashion the erection of such things as motels and so on.

But what it says here is that the building authority is prohibited from permitting a dwelling house to be erected except with the approval of the Minister. What is the justification for that?—The justification would be that a person may apply under the Building Regulations for a permit to build. He may call the building a dwelling house, but in fact that building may be designed in such a way that it can be used as boarding house or hotel.

But the building regulation already prohibits you from using it for any purpose other than that for which the permit has been given by the building authority, does it not?—No.

I have not looked at the Regulation, but if it does not I am amazed at the deficiency of it? —It is just restricted to the control of the actual building.

We have it now firmly in our minds that you are asking for permission to prohibit the proper authority from permitting the erection of a dwelling house without the Minister's approval?—Yes.

What does (3.) say?—While this Ordinance continues in force, the proper authority shall not grant a permit under the building regulations for the erection of a building on land to which this section applies if the building is for use for a prohibited purpose.

'Prohibited purpose' is defined?—Yes. It is defined in sub-section (2.) of section 2, paragraph (d), which reads:

> A reference to the use of a building for a prescribed purpose shall be read as a reference to the use of the building as:
> (i) a hotel, picture theatre, shop, service station, factory or saw mill;
> (ii) flats or home units or other residential accommodation of a kind commonly known as a flat or home unit;
> (iii) a motel or guest house or a building, however described, for the provision of accommodation of a kind commonly provided by a motel or guest house;
> (iv) a restaurant or café or a building, however described, for the provision of services commonly provided by a restaurant or café; or
> (v) a stall for the display or sale of goods.

In effect, the substance of section 3 is to say that with regard to the whole of the area other than Oaks Estate, Hall and Tharwa, none of these buildings can be permitted absolutely?—That is right.

There is a complete embargo?—Yes.

Senator Cavanagh

What is the necessity for this? Why prohibit, say, a shop?—This is the area outside established villages.

Senator Wright

Paragraph (d) of sub-section (2.) of section 2 refers to residential accommodation of the kind commonly known as a flat or home unit, to a restaurant or café and to a stall for the display of goods. You say that you have not got anything analagous to State town planning legislation in operation in the Territory?—That is so.

The Chairman has referred to the time factor. I wanted to ask you why you could not frame the ordinary town planning legislation in the form of an ordinance with the same facility as you frame this. Why could you not adopt the principles of town planning from the State legislation and apply them by ordinance as such? I am referring now to what appear to me to be arbitrary powers that you seek?—The answer to that is that if we had to be concerned only with community interests that is all we would need to do, but we have the other problem that we are also trying to preserve the national capital.

Take the area at Rendezvous Creek, which is part of the area subject to this Regulation. What is the interest of the national capital that prevents you from having a café or stall in that area?—At this point of time we are still working this out. We know that some of this immediate planned development is working into this area within the next 15 years. We know that the immediate water supply for the city from the Cotter area will not be sufficient to cater for the city's development within another given number of years. We also know that we are going to have to rely a great deal on water supply from the eastern water shed of the Tidbinbilla range.

But, surely, in so far as you foresee water supply, the thing to do is to acquire the land that will be the source of your water supply. That is not a subject of town planning as a rule?—This is one of the problems. Until such time as our research is specific and our investigations indicate just what we do need, complete acquisition itself would be unreasonable. A couple of recent newspaper reports of one of these sub-divisions which have recently been processed indicates a degree of uncertainty, yet, in all fairness to purchasers, they must be made aware of it.

These are in the areas that we are discussing?—That is right. I have the plan of the particular sub-division here which is affected by this.

We dealt with section 6, to take a specific example, and we saw that it related to dwelling houses. Then as to buildings for prescribed purposes it includes home units, flats and cafés. You test the reasonableness by its application to the land on the other side of the Murrumbidgee River. How can it possibly be suggested that the Minister should have the power to approve of every dwelling house proposed to be erected there, big or small?—**(Mr Wigley)** The Tidbinbilla Fauna Reserve is in the area. There was some similar land which was acquired by the Commonwealth last year. It was in mind to acquire it as it was necessary to include it in the reserve. It is part of the valley. For the natural topographical features it was necessary to acquire this. While the Department was considering the need for this one of the land holders, who had some property at the then entrance to the Reserve, was proposing to erect a motel, caravan park and kiosk. Word of this got around the place and the Department was subjected to quite a deal of criticism from people who were afraid that this development was going to spoil the reserve.

The Department has had 40 years to zone the area. It should have determined for everybody just what use could be made of the land in a particular zone.

Senator Bishop

Where are the sub-divisions concerned?—These were done before the Ordinance was drawn up and the particular sub-division to which I am referring had already been lodged with the Titles Office. In fact, it has been advertised for sale.

The point with which the Committee is concerned is that the Minister or an official in the Department should say that Y can build a motel on Black Acre but X is prohibited from building one on White Acre. It is the method by which you are achieving the restriction?—I would like to go back again to mention that over the years no insuperable problem arose because of the Commonwealth's lack of control of this nature such as exists in all the States. The land is being used mainly for grazing and agricultural purposes. There was an occasional sub-division but the public generally was not concerned. Indeed, some of the local solicitors came to the Department and asked for approval for their sub-divisions. I think their basis for this line was the Real Property Ordinance where there is the requirement that the Registrar has to satisfy himself that a survey has been carried out and plans drawn to certain technical requirements. It has been the custom over the years that the Territory has been a territory that applications of this kind have been fairly rare and on infrequent occasions only have these people come to the Department with plans or that the surveyors have brought their plans to be certified that the surveys have been in order before the Registrar of Titles could be satisfied sufficiently to register any dealings on the land. As I say, these were very rare occasions.

For 40 years it has been common State legislation to say that nobody shall sub-divide and the Registrar of Titles shall not register a plan of sub-division unless it is approved in accordance with a plan by the local authority. Why has that not happened here?—**(Mr Costello)** I would like to refer back to the map again in respect of the situation in Canberra going back, let us say, 40 years. It was never envisaged that Canberra would extend beyond certain boundaries. The Commonwealth owned all the land within those boundaries. The end result from the Commonwealth's point of view was that it should not have any interference with what might be done there (witness pointed to map) or it should not have undue interference.

You are referring to Lanyon?—Yes. The situation is that in the post-war period the previously unforeseen rapid expansion of Canberra did place some strain on the area. The planning which had developed particularly in the period since 1958, when the Commission was established, was apart from this development to the south of the established Canberra area; that is the Woden area. The planning was for Belconnen, Majura and Gungahlin. I draw attention to the fact that it was within this total area which was acquired by the Commonwealth, this area north of the Murrumbidgee. It was always envisaged that the city would lie within that. The problem has been that the development of Woden and the commencement of Belconnen has meant further planning and investigation had to be done by the Commission. They found that some of the areas which had been planned were unsuitable.

Senator Davidson

Why unsuitable?—Numerous reasons; some topography, some in respect of previous land use. For example, I refer to the Majura firing range where there could be numerous unexploded shells and heavens knows what. Other reasons could have been the general pattern of the established services such as sewerage. For example, Belconnen necessitates a complete sewerage system of its own but has an outlet. Majura would have had to have its own system, but it does not have the access out. The emphasis then changed over to the other area at reasonably short notice and a need arose to ensure that no problem arose from this. Senator Wright raised the question of the need to control an area down towards the south.

What is that area?—One of the small areas down towards the south, in respect of a house as distinct from a commercial development. The essential point here is that what we are striving to achieve in this interim period of only 12 months is to ensure that the person who wanted to build his own house or farm buildings would not be hindered. He would not present any problem to anyone else in the years to come, whether to us by acquisition or neighbours.

The Minister has to give approval?—Yes.

The Minister may not approve?—He may not.

Senator Wright

He may approve for one but refuse for another for reasons that are not specified in the Regulations?—This I concede. One of our problems has been to be able to identify and spell out in full the guide lines because we are still investigating and developing the principles.

Senator Cavanagh

Is it not an offence to use the land in the 12 months period?—There is no offence in respect of use of the land itself.

Senator Bishop

Under section 6 (3.) you tie up prescribed buildings. The point is that you deny people certain things but in respect of a dwelling the Minister can refuse for no reason. No guide line or criterion is established under which a person knows whether he is entitled to build or not. That is the sort of thing that is worrying us?—**(Mr Wigley)** This is merely an interim ordinance. We have talked about 12 months. It came into effect on 27 July, I think. The Ordinance says that it will cease to operate as from 30 June next year. We hope by that time, which we hope is before that time, we will be able to introduce permanent legislation which will give guide lines and will provide the grounds for objections or appeal and that sort of thing. In the meantime we have some sub-divisions which are shown on this further

plan which might help you to appreciate our problem that we see here. It might also indicate that the Minister's approval—it was not intended that the Minister's approval would be withheld in any unreasonable way. We felt that if there happened to be a case where the Minister felt his approval should be withheld this could happen, as you will appreciate. Without any control over sub-division we could, for instance, have a block of land which may be very narrow and very long, going back from a road to a river. In the Yarrowlumla Shire outside the Territory boundary, the interim order says that the minimum size block shall be 50 acres, but these interim development orders of New South Wales go on to talk about frontage and depth. You could have 50 acres and it could be very long and narrow or a very irregular shape, which would certainly not be in the public interest.

Senator Wright

What is the relevance of that to this?—If a sub-division of that nature were put before the Minister here, thought would be given to withholding approval. Having in mind that the 30 June next year is not very far away, and remembering that we hope that permanent legislation, guide lines and so on will be available by then, perhaps the worse that could happen to the individual would be that he would be delayed a little in implementing his sub-division and he will have a chance of appealing when the permanent legislation came into force.

But the usual experience in the States is that it takes 3 or 4 years to get a town plan. Although you have set down next year, in my view that is completely unrealistic and you will be coming to us to extend it for 3 years after then, and another 7 after that?—Could I point out with respect that the legislation in the States is of a rather more complex nature than we anticipate. Also, it is only a relatively small area that is involved here. There are not a great number of land holdings involved, and the variety of uses is not very great.

Is there any specific project that you have in mind that is going to create a difficulty and that you mean to stop by this Regulation?—No, there is nothing that we know of at the moment.

There is no actual case that evidences a need for this interim restriction?—Not at this moment.

Senator Bishop

What about the sub-divisions that have been sold?—**(Mr Costello)** Those have been allowed—they exist. In fact, two of them were in process of examination but we made no attempt to prevent them because they had already been done.

Senator Devitt

The thing that passes through my mind is what is the urgency for bringing down an ordinance of this kind when apparently work is now going on in the preparation of permanent legislation which will be brought into being in June or thereabouts of next year. The answer to Senator Wright was that there was nothing at the moment which seems to require an ordinance of this kind to be brought down now. Is there some thought in the minds of the planners that things will be awry between now and the time when the permanent legislation can be brought down?—**(Mr Wigley)** A little while ago Mr Costello mentioned the negotiations which are current. The Commission is investigating a number of possible sources within the Territory of Canberra's future water supply. The Naas Valley happens to be one of these sources. The Commission feels that this area will be needed for water supply purposes, but it cannot say when or just precisely what part. One sub-division which has been receiving a certain amount of publicity in the Press here is one in which the blocks happen to be rather narrow and long and in which there are a number of entrances onto a quite important road that links Canberra directly to Adaminaby. It is a sub-division in the parish of Cuppacumbalong, in the district of Tennent.

Senator Davidson

Is it a main arterial road?—No, but the Adaminaby people like to use it as it is a much shorter road. It is only 70 miles to Adaminaby from here over that road.

Senator Wright

The sub-divisional blocks average about 20 acres each?—Yes.

Chairman

You would not call that a conglomeration?—No, but they might construct a motel there.

Senator Wright

What area do you call that?—The Naas Valley. It is in the parish of Cuppacumbalong. As a matter of fact, there have been other sub-divisions in the area. There are about eight or nine blocks which would be of an average area of 40 acres each.

Is there any legislation in the Territory which regulates the creation of sub-divisions?—**(Mr Costello)** Only the Real Property Ordinance with respect to registration.

I would like to know what is in it?—The provision is the normal one with respect to Torrens title requiring the lodgment of plans of sub-divisions with the Registrar of Titles before the issue of titles to the sub-divided property. It empowers the Registrar to require the certificate of the Surveyor-General that the survey has been properly carried out.

Does it say anything about minimum size?—It lays down no standards at all.

You mean that this area has gone on registration without regulating the sub-division of land with relation to use, size and so on?—Yes. We have no immediate sub-divisions that we know of coming up, but we do receive sub-divisions like this. As a matter of fact, we had received sub-divisions such as this one in Cuppacumbalong within the preceding 12 months which indicated that in the absence of control something was going to go. If we had to wait until we had finished our final legislation, things would have gone too far. We had to arrest the situation.

Senator Lawrie

What are these 20-acre blocks to be used for?—**(Mr Wigley)** They have been advertised as suitable for fishing lodges and so on. I do not think any one of them could be regarded as a living area unless the living that was obtained from the land was in the nature of a business such as a motel, service station and so on. It is quite conceivable that a number of these blocks could be used for the purpose of motels, service stations, hot dog stands and so on, if we had no control. That could spoil the effect of the road which is quite a scenic road.

That is why you zone an area and why you have rules for sub-divisions. One rule applies to motels, another to hotels and so on. How can the Minister be a judge as to whether a café or motel should go on any particular block there and, having permitted one on Smith's block, refuse it on Brown's block?—I take the point. The fact is that we were really aiming to hold the situation until we got our guide lines and rules straight.

Perhaps the emergence of this plan qualifies your previous answer and you are putting forward the sub-division to show what you are attempting to block by the Regulation?—No. We have advised these people that the sub-division was not caught by the Ordinance, except that in the buildings they have asked us—under the Ordinance they have sought approval for the buildings to be erected thereon as dwellings. The answer that they will be given will be that the Minister will approve the buildings as dwellings. There is no intention to withhold approval to any of these.

Chairman

Can you say that a motel is not a dwelling?—**(Mr Costello)** That is the reason why we had to have that reservation power in respect of section 6 (2.). We wanted to prohibit the development of the commercial facility there, which we have sought to do under section 6 (3.), the prescribed purposes, and to ensure that a place was not overtly constructed as a guest house. These things have to be watched carefully.

Why cannot these things be made the automatic decision of some authority other than the Minister? What would the Minister know about it? What special qualification would he have to make a decision; not just this Minister, any Minister?—**(Mr Wigley)** The method we had in mind was that when a sub-divisional proposal was put to the Department for approval we would seek the advice and comments of the National Capital Development Commission. We would be guided by their advice and comments before we advised the Minister. We would foresee in this holding period—and really what we have set out to do and tried and hoped to do was to hold the situation so that it did not deteriorate. In other words, with the knowledge that the Commission is proposing certain future water storage areas it could be that some of these land holders—and they would be entitled to at the present time—would want to capitalise on the areas that they have, sub-divide them, with water frontages, and make quite a lot of money. They would certainly pay very handsomely. Keeping in mind that the water authorities may not want people on the lake shore we would probably have to keep in mind at some stage to acquire these lands and pay the owners just compensation. It is all a little uncertain at this stage. We thought that any information we could get at the present time

to get for this admittedly belated legislation the guide lines, avenues of appeal and this sort of thing—this is really what we are striving to do.

Senator Cavanagh

Under the Canberra Building Regulations has the proper authority only the power to say the types and standards of construction?—The proper authority is actually the chief architect in the building section of the Department and is responsible for the administration of the Canberra Building Regulations.

Apparently he grants a permit?—Yes.

On what grounds can he refuse a permit?—Subject to this Ordinance he would be restrained from giving a permit if the Minister had withheld approval.

Without the Ordinance now?—He would be just constrained to deal with it under the Canberra Building Regulations.

Senator Bishop

On building standards?—Yes.

Senator Davidson

What is his connection with the Commission?—He belongs to the Department. Plans of buildings and so on are submitted to the proper authority, which refers them to the Commission which looks at them and has power of approval or to withhold approval as to external design of the building or siting of the building on a block. Most of this activity is in the city.

You said that it was proposed to consult with the Commission?—No. It is an established routine.

Even with these?—**(Mr Costello)** Yes. The Commission has no authority outside because of the terms of its Act, but we would regard them as experts.

Senator Cavanagh

Has the Commission no authority, but generally it assists?—That is so.

Senator Devitt

The regulations cover the whole of the Territory?—**(Mr Wigley)** Yes. The Department is responsible for the Territory.

Chairman

What is the width of the road in the subdivision and the width of the sub-divisions about which you are worried?—This road is 100 feet wide. The frontages are about 400 to 500 feet.

Senator Lawrie

Are not the measurements given in links?—These are in feet in the Australian Capital Territory.

Senator Davidson

What is the situation on the other side of that road?—They are rather bigger blocks.

Chairman

That road is a 1¼ chain road. You have blocks of land of about 8 chains. Even if you had motels along there you would not get a heavy flow of traffic that would worry you on a road that wide? I do not think there would be a great flow of traffic even with a few motels along there. Has Canberra still no classification of land usages right throughout the city?—It has not. The town planning control here is exercised through the lease. As you know, all the land in Canberra is leased.

People break leases and somebody winks the eye, which has been going on in relation to certain accommodation. Why is there not a complete land usage plan for the whole area? As Senator Wright mentioned, other municipalities have town plans. I cannot understand why Canberra has not.—It has been thought of. I can recall the National Capital Development Commissioner recently prepared a scheme for the Rocks area in Sydney. He was reported in the paper as saying how well the leasehold system of control of town planning matters worked in Canberra. It has worked very well. We have had such comments made from people elsewhere and overseas too, I think, when they have examined the way in which we do it here, they think it is very effective. It is very direct.

Senator Wright

Because you own the land and let it on terms on which you wish to let it?—Yes.

We are considering land that is owned by other people.—I thought the Chairman was referring to zoning in the city itself.

Chairman

Right through.—My remarks were related to the city leases, which have a purpose.

If the whole land is zoned nobody could come and buy a lease from somebody and use it for a different purpose. When they looked at the plan they would know for what purpose the land was zoned. I cannot understand why Canberra has not had such a system. I have said this time and time again. Why does not Canberra have a plan for the whole of the area? As Senator Wright says, it goes before the people, becomes statutory law and everybody knows just where they stand.—That is so.

The whole of the Australian Capital Territory area should be planned to show the urban area, city plan area, rural areas and so on so that anybody seeing it would know exactly what they could do. It does not take an over intelligent person to follow a town plan. —That is right.

Senator Bishop

Suppose the Government or the Minister told you tomorrow that you had to carry out a zoning plan in this area. How much could you effectively do, remembering your argument about water supply and so on?—I think we could do it effectively. In fact, it is a zoning plan that we have in mind so far as this is concerned because this is freehold land and we have no leasehold contracts through which we can enforce our zoning intentions.

Senator Devitt

Is it mandatory at the moment for all subdivisional plans throughout the whole area to be submitted to some authority for approval? —Only for certain technical aspects, as to the plans which are set out in the Real Property Ordinance which says that the plans shall be drawn to a certain scale.

Senator Lawrie

We have discussed at great length land other than what is contained in the three villages which you mentioned earlier. What is the reason for requiring restrictions in the three villages? There is a good bit of land outside the villages?—**(Mr Costello)** It is a matter of degree. As I said before, a farmer in a rural area could build, for example, a workshop of fairly large proportions on his property and still not impair the primary use of the land, which is agricultural or pastoral purposes. On the other hand, the same type of activity in a built up area of one of the villages could in fact change the primary purpose of a subdivided block from residential to industrial.

This applies to places already erected and the use to which they can be put?—Yes. We are seeking to ensure that if someone has a house already there and is using it as a house he cannot use it as a factory or a hotel or a guesthouse before we bring down permanent control. The basic purpose is to preserve the amenity of the three villages as they are at present.

Senator Cavanagh

Do not section 8 and section 9 (2.) (a) and (b) conflict with sub-sections (3.) of section 3? One says that the Ordinance shall not apply to buildings that were used for certain purposes and the other says that it is an offence to use them for those purposes?—Sub-section (3.) permits of the continued use of the land or building for the purpose for which it was used before the Ordinance came in.

And section 8 takes away that permission? —If it does, it was not intended to.

Section 9 (2.) (a) and (b) also takes away that permission?—I suggest that the words 'this ordinance' in section 3 were used advisedly by the draftsman to ensure that sections such as 8 and 9 did not apply. That was our instruction to him, and that is the way I interpreted the Ordinance when I received it. We wanted to ensure that they could continue to use them. **(Mr Wigley)** It was not intended to disadvantage anybody. We tried to maintain the *status quo.*

Senator Bishop

Section 10 (2.) is drafted in such a way as to be quite open. Could not a more specific form be prescribed?—**(Mr Costello)** I think you will find that in all Commonwealth drafting to date this is the practice. They do not prescribe forms any more than is required in trying to get a fluid situation of giving power to the Minister.

Senator Devitt

When the new Regulations which are now in course of preparation are completed, would it not be desirable concurrently with them, to prepare a fully zoned plan?—Yes, but in the meantime we want to prevent deterioration because it does seem rather remarkable that these sub-divisions have come along with a great rush in the 12 months or so prior to this. It is very rarely that we had sub-divisions of this type prior to that and we were a bit fearful that in the period between now and when we get effective permanent legislation there would be further deterioration that would certainly not be in the public interest and a lot of people could perhaps suffer thereby.

Senator Wright

Could you tell us the nature of your experience and duties in this respect?—I am

Director (Planning) in the Department of the Interior. That is policy planning. I have the legislation section, special projects and other groups under me. I have been in the Department of the Interior for 11 years and associated with this work during the whole of my time—that is, the work of preparation of legislation and policy. **(Mr Wigley)** Originally I worked for a private firm in Queensland of Surveyors Draftsmen and Agents in 1936. I have been in this Department for some 20 odd years. For the last 2 or 3 years I have been Assistant Secretary of the Lands Branch of the Department.

Chairman

Is there anything further that you would like to say?—**(Mr Costello)** What I would like to mention is that going back to what I indicated at the opening, we originally felt we had to choose between two alternatives. One was to prohibit completely in order to freeze. The other one was to prohibit but to allow some form of alleviation. I realise the fears of members of the Committee in respect of the arbitrary use of unfettered discretion. The Minister has indicated that if the Committee really feels that the degree to which discretionary power is incorporated in the Ordinance is really objectionable he is quite happy to make some alteration. The only problem that arises is what such alterations may be. This is the reason why it was put in this form. We do not like complete prohibition, but if we had to we would. The form of control that there might be in respect of the exercise of discretion, perhaps tabling in the House would be—perhaps there would be ways and means of overcoming the problem that way if the Committee so desired. We have considered the question of oversight by courts. The problem is that we have no special criteria because we are still working them out. The courts would not have a set of criteria by which to judge the decisions from a point of law. Hence any question of oversight by a court would be one of reasonableness only. As far as we can see it is not a satisfactory proposition from the point of view of the affected applicant. The Department's advice to the Minister was on the basis that with the watering down of the discretionary authority to what we thought was the minimum, by specifying these proscribed purposes which we thought were completely objectionable and prohibiting them absolutely, the Ordinance would have a very limited life, and stated on its surface, would perhaps lessen the problem to the point where it would have no real objectionable application. In relation to this point of view we would hope to have the guidance of the Committee in its consideration of the problems.

Senator Bishop

Rather than have a lot of proscribed conditions or standards would it not be better to apply them to certain areas? You would be less likely to make a mistake. I take it, from what you have said, that there are some areas where you are satisfied that certain types of building would not be possible, etc. Would it not be fairer in an interim period to apply conditions to certain areas rather than impose prohibitions which will only last for some months?—I think the answer to that point is that we still have a fair bit of work to do to finalise these. The two points that rather concerned us were, firstly, in the final analysis we might have to reconsider some of our earlier analyses where certain things were found impracticable and we would have to go over what we thought was really essential. If we had to go over old ground 8 or 9 months later and make certain prohibitions, that would be objectionable. Secondly, there was the problem that we thought that the specification in it in this way could well work an unfair burden at this point of time when it could not categorically be stated in full that it was desirable for these reasons because we are still establishing our criteria. We thought it could work an unfair burden on neighbouring areas.

Senator Wright

To consider some application to an expert such as a town planner, with the right of appearance and appeal, and then anybody who is subject to restriction being compensated, will be getting nearer to the ordinary ideas that the community has as to individual rights?—These are some of the principles we are working on in our permanent legislation. **(Mr Wigley)** I would add that we have been working in close co-operation with the National Capital Development Commission on a land use plan for the Territory.

Chairman—Thank you, gentlemen, for your attendance.

The witnesses withdrew

The Committee adjourned

Taken at Canberra

THURSDAY, 5 OCTOBER 1967

Present:

Senator Wood (Chairman)

Senator Bishop	Senator Devitt
Senator Cavanagh	Senator Lawrie
Senator Davidson	Senator Wright

Wing Commander Gordon Leslie Waller, 53 Dominion Circuit, Forrest, Australian Capital Territory, was sworn and examined.

Chairman

You asked for the opportunity to meet the Committee in connection with Ordinance No. 27 of 1967 and you have given us a list of eleven points on which you clearly are at variance with the necessity for the Ordinance. Probably the best way might be to give you the opportunity to express yourself freely as to why you would like to talk to the Committee about it and what you have in mind in relation to the Ordinance.—As is known, I am a serving Air Force officer. I am also a freeholder in the Australian Capital Territory. I was also responsible for the first sub-division of freehold land in the Australian Capital Territory.

Senator Wright

In what year?—It began in 1965 with full consultation with the Department of the Interior. I shall speak further on that later. My sub-division is completed and I have titles to the various blocks, so therefore it might reasonably be considered that this Ordinance does not really affect me other than in respect of the restrictions on what I may now do with my land. It certainly does not affect me from the sub-division point of view. I am concerned as a freeholder and that the use to which I can put my land is undesirably and rather arbitrarily restricted. I am also concerned about this Ordinance from the liberty of the subject point of view. I have tertiary education in the subject of constitutional law, and in particular in delegated legislation, a subject in which I am personally very interested. I cannot help but feel—I am speaking freely as you have asked me to do—that this Ordinance as a whole smacks a panic legislation. It is arbitrary in the extreme and is in fact the worst kind of delegated legislation and is an affront to me as a citizen of this country. I believe that it is quite contrary to the sort of legislation we could reasonably expect in a democracy. I have stated that I believe that it is probably repugnant to the enabling Act, the Seat of Government (Administration) Act. This I am not qualified to be dogmatic about because I have not adequately studied the enabling Act, but it is inconceivable to me that the framers of that Act should have anticipated that it could be used as the vehicle for framing an ordinance such as this. If I may go back to the subject of my sub-division in the Naas Valley—this relates to my statement that I think this ordinance is panic legislation. I have copies of correspondence with the Department on the matter of my sub-division but I do not think it is necessary to table it before the Committee. However, I might say it reflects very badly upon the administration of a government department but I think that is beside the point. Eventually I was able to get on to an amicable footing with the Department with regard to the sub-division of the land. Previously I had given them the opportunity to raise any objections they might have had to the sub-division but they interpreted that as meaning I was offering the right of veto to them, until I pointed out to them their error. However, when we got on to the amicable footing the responsible authority not only approved—perhaps that is not the right word—he agreed with the desirability of the sub-division, the form of it—

Where was it?—In the Naas Valley, about 3 miles from Tharwa. It was just over 400 acres of land which was divided into eight separate blocks of a minimum acreage of 40 acres. I chose this particular size because I believed it was the smallest area that could be regarded as viable as a farming area and secondly because there is a precedent for this minimum area in local government regulations that exist in nearby areas in New South Wales. When I got on to an amicable footing with the Department, they realised I was not doing the sub-division primarily as a business enterprise but was in fact more concerned with aesthetic values. This is beautiful country and I spent a great deal of money on having it surveyed properly and getting the very best advice from a town planner and other people. When this realisation permeated through and we could talk about it I said—I think I can quote almost verbatim; remember this was in 1965—'I suggest that as a result of this sub-division the real estate sharks will get on the bandwagon and they will endeavour to chop up every piece of freehold land in the Australian Capital Territory into the smallest possible areas, because that is how they will make the most money.' It was agreed that something should

be done and that moves should be made to produce some reasonable legislation.

Chairman

In what year was this?—1965. I firmly believed that this would happen. In fact, moves might have taken place but if this is the legislation that has taken 2 years to complete God help us. I believe that this legislation took place very quickly as a result of a subsequent sub-division that was made public only a few months ago, and which was precisely the sort of sub-division I had warned the Department would occur. I believe that when I warned the Department I was something of an expert adviser and I believe that the Department should have acted on my advice. I believe it did not and, as I said before, I believe this legislation was prompted by a bad sub-division. It was quickly drafted and is clearly bad legislation. It is imprecise legislation and I think this is usually an indication of rather hurried drafting.

Senator Cavanagh

Do you think that this is a result of the recent sub-division?—Unquestionably. I do not think there is any doubt about that at all.

Can you give us details at some time of this recent sub-division?—I can, indeed. This has nothing to do with me, of course. It was advertised in the Press by a local agent.

Senator Devitt

Do you say that it is an undesirable sub-division?—I believe so. It is an area of river flats between the road and the Naas River. The area has been chopped up like a loaf of bread into long narrow strips which range from about 12 acres to about 25 acres. Some of these areas might be viable as a market garden area but this is not what they are being sold as. They were being sold for use as small farms or places on which to build—places for gracious living. I do not think either of these things could come about with this sort of sub-division.

Senator Lawrie

Has the Department of the Interior approved this sort of sub-division?—I believe that it was a matter of hours between the time that this Ordinance came into effect and the issuing of the titles to the sub-divisions. I think the Ordinance was just a little late.

Senator Davidson

Did the owners of this latter sub-division do what you did about making a survey and consulting with a town planner?—I have no idea but from merely looking at the plan I would say definitely not.

What town planning authority did you consult with?—I used Dr Taglietti, a well known architect here, who has been responsible for town planning and for large areas of sub-division in Italy. I have great admiration for him, as do other people who know of his work. I also went to the trouble of getting aerial photographs. I did everything that was humanly possible. I again stress that this was less a commercial exercise than an exercise in aesthetics.

Senator Lawrie

What are your particular objections to the ordinance in any particular detail?—Having stated the position generally, perhaps I might go through my points. So far as I am able I have explained my first objection, I think. I say that the Ordinance represents panic legislation. My second point is that the Ordinance is an example of secretive preparation affecting a minority group which could easily have been consulted during such preparation to ensure that the group's suggestions and/or objections were considered. There are about 90,000 acres of freehold land in the Australian Capital Territory and it is held by approximately sixty-five people, of whom I am one. I believe—and in fact there is ample precedent for this—that when legislation such as this is being prepared which will affect a small group which can be easily contacted without trouble, then I think it is not only reasonable but is surely obligatory for the drafting authority, or the authority instructing the drafter, to find out just what the situation is; to find out what people are doing and what they expect to do. This is a restrictive Ordinance. Presumably it was thought of in terms of: 'What is the other man thinking', without effort being made to find out what that man intends to do with his land.

Senator Devitt

Would it be a normal practice to consult with such people?—All I can say is that I believe that where it is possible and easy to consult a minority group which is to be affected by legislation then they should, as a democratic principle, be consulted. There is certainly precedent for this in English law and I believe there is precedent in our law.

Senator Lawrie

Why should this minority group of sixty-five people have any more say about this? I know that they own the land but the wellbeing of the Government and of the rest of the Australian Capital Territory has to be considered. The expansion of the city of Canberra and the problems associated with it have to be considered. Are there not two sides to this question?—I agree entirely. My third point states that a land holder in fee simple has an absolute right to use and alienate his land as he desires, subject only to such reasonable restrictions as are necessary for the good of the whole community. I recognise this. There is no question about this. Indeed, I suggest that there are probably exceptional circumstances in the Australian Capital Territory because it is the seat of Government. Probably there might be a reason for greater restrictions but only those which are reasonable. I believe this Ordinance goes beyond that point.

Senator Wright

You are making the point that a definite number of people are involved and they could have been consulted?—Yes.

Chairman

You said in your fourth point that the Ordinance as a whole was repugnant in principle.—Either that point is accepted or not. I believe this is a principle in our system of law. In fact it virtually stems from this principle of law.

You think that the Ordinance is contrary to the spirit of the enabling Act?—As I said before, I have not had the opportunity to really study the enabling Act. I only hope that the Committee has looked at it.

Senator Wright

What provision of the Act do you have in mind?—I have no provision in mind that I can point to. The nature of the Ordinance is such that I cannot believe that the framers of the original Seat of Government (Administration) Act anticipated that such legislation as this would be enabled by the Act. I think this is a matter for careful study by your legal advisers. I can only say that I hope that this will be done.

Chairman

Would you now refer to your fifth objection?—I think Senator Wright, who has read the Ordinance, will, I am sure, agree that the Ordinance is an imprecise document. One can look practically anywhere at it and see imprecision. I believe this is a result of hurried drafting. Whatever the cause, I think the Ordinance as a whole is imprecise. Again I believe that this matter requires careful study by properly qualified persons. I cannot really say much more than that. I deal with some of the imprecise aspects in my later objections.

Senator Devitt

Had you in mind any shortcomings in, say, the provisions of any ordinance granting normal civil rights to people in other areas of the Australian Capital Territory?—I cannot relate it to any other ordinance.

Senator Bishop

You pointed out that each Minister could have a different idea about applications and so on.—I have stated this further on in my objections. I said that each successive Minister or Minister's delegate could interpret it differently. You would have the highly undesirable position of a landholder not knowing where he is from one administration to another or from one week to another if it comes to that, in regard to certain aspects of the Ordinance.

Chairman

You think that the Ordinance grants to the Minister powers that are arbitrary?—Yes. The Ordinance gives the Minister powers without it being clear either in the Ordinance or from any other source precisely why the Minister is being given those powers. Perhaps the object of these powers, as has been attributed to him in the Press, is to maintain the *status quo* so far as freehold land in the Australian Capital Territory is concerned.

Senator Cavanagh

Until they get a complete Act?—Until a further ordinance replaces this one.

Chairman

You say that the requirements of sections 4 (3) and 10 (2) of the Ordinance are harsh and of doubtful necessity. I take it you mean that it ties up the whole of this land without the preparation of any plan for guidance?—

Senator Bishop

Section 4 (3) obliges the applicant to apply to the Minister in writing and submit copies. How is this harsh?—I would like to elaborate

on this. You might also look at the other sub-section 10 (2) that I have cited, wherein there is a requirement if one is to erect a building to provide sketch plans and brief specifications to the Minister. So far as the sub-division of land is concerned, this places the freeholder in the position that if he wishes to sub-divide his land—if this Ordinance is interpreted as meaning what it says but particularly if it is interpreted narrowly—he is required to submit a surveyor's plan showing the surveyed sub-division of his land. I can only say that portion of the survey of my sub-division cost $2,000, so what this Ordinance is in fact asking the freeholder to do if he wants to sub-divide his land, or in fact just cut it down the centre for a son, is to employ a surveyor, pay for the survey, then put it to the Minister in the hope that it will be accepted. This to me is incredible. Certainly it will stop people from thinking about sub-dividing if they have to outlay a considerable sum for the surveyor's plan to submit to the Minister in the hope that he will accept it. They probably will not sub-divide, so perhaps the Ordinance will achieve its object.

Chairman

Who would you suggest should pay for the survey?—I believe this is a case for the Minister to accept in principle that sub-division is acceptable in the area. He might say: 'Sub-division into areas of less than 40, 50 or 100 acres will not accepted, but go ahead with your sub-division within the confines of this direction.'

Senator Cavanagh

You think that there should be guidelines?—Yes, precisely. The Minister's powers should be such that he can agree in principle to doing a sub-division.

Chairman

You are not objecting that where a person knows he can sub-divide he should have to pay his own survey fees?—Not at all.

You suggest that he may have to pay them and not know whether he will have the right?—Yes, he needs some certainty.

Senator Wright

That is got over in State spheres where sub-division is required by letting people put in a preliminary sketch that is a 5-guinea job instead of 400 guineas and then general approval is given and they go on with the detailed survey. You would not object to that system if it were made obligatory according to zones previously laid down indicating what kind of sub-division would be permissible in the various zones?—Precisely.

We understand that. I would not have understood it from paragraph 7 of your letter but that is why you are here to amplify it?—Yes. This, I suggest, is a good example of the impreciseness of this Ordinance.

No. It is an indication that all power is centred in the Minister without guidelines, as Senator Cavanagh stated.—Yes.

Chairman

Paragraph 8 of your letter states that the provision in section 11 of the Ordinance for the creation of a post of inspector is undesirable and unnecessary.—I mentioned section 10 (2). This relates to sketch plans of a dwelling or plans and specifications of a dwelling. I think there is no doubt that the object of this Ordinance so far as buildings on freehold land are concerned is to prevent shack development and development of business activities that are incompatible with what is wanted for the Australian Capital Territory. I am at present in the position where I have put in roads through my land, one to the top of a hill has been a most expensive process, and leads to where I propose to build a house—I hope. This house will not be a Canberra cottage. It is likely to be a highly unconventional piece of architecture which my architect calls an environmental response. I use my own situation to illustrate the problem. I am in a position where I can write a letter to the Minister requesting permission to build a house on top of this hill but I must say to him that I am not in a position to present a sketch plan. I do not think any self respecting architect would produce a sketch plan of what he is going to design, because the architect's design is usually empirical; the more challenging the site the more empirical it is. So the best one can do would be, perhaps, to go along to the NCDC Small Homes Service and get one of their set plans and say: 'Mr Minister, here is a plan. This satisfies the ordinance but the end result will probably be different.' Perhaps if one were completely honest one would say: 'It will not bear any resemblance to this cottage from the plans of the NCDC Small Homes Service', or one might say: 'I am afraid I just cannot produce a sketch plan or specifications because I propose to employ an architect and I must sign a contract with him, and therefore I do not want to do that unless I have an assurance in

principle that you are going to approve the building of a dwelling house, whatever design it might be, on top of this hill.' Much the same problem exists in the sub-division provisions of the Ordinance.

Senator Wright

It is common for State legislation to require submission of plans to a properly constituted building authority which has power in accordance with the rights laid down to approve or disapprove of the structure proposed.—This indeed is so, but this Ordinance requires that as well—

The Ordinance gives the Minister a superior autocratic power over and above the building authority?—Yes.

Senator Wright—That is all that is in it.

Senator Bishop

Do you maintain that in any circumstances of reasonable legislation where the Minister has not arbitrary powers you have a right to develop your own design of dwelling?—Yes.

And the man who wants to build a cheap shack should be proscribed?—I believe that this Ordinance should be more precise in saying that the Minister can or might approve in principle the building of a dwelling house of a reasonable standard.

Chairman

What you are getting at is that you want to know whether you have the right to build a dwelling at that spot or not?—Precisely.

Senator Cavanagh

I think there is a difference because with normal building regulations which contain stipulations as to certain sizes of timber, etc. you are still permitted to build provided you adhere to those regulations. This seems to indicate that it must be as the Minister desires. Again the guide lines are not stated.—Precisely.

Senator Bishop

Regarding point No. 11 in your objections. Would you object to an inspector having the right to go to your property in order to ensure that regulations were adhered to? Would you object to proper planned town planning principles being adopted? You have referred to section 11 of the Ordinance being a 'catch all'. It refers to the right of inspectors to go to your property. Would this not be reasonable legislation if it was properly designed?—I referred to section 14 as being a 'catch all', not section 11.

The point you made about section 11 was that it was undesirable and unnecessary. As other senators have said, have we not a situation in most modern communities where an inspector is necessary?—We do have building inspectors in the building section here in Canberra and that section would have to approve plans of any buildings constructed. To have an extra inspector to make sure that you are not disobeying the Building Regulations and erecting something without the approval of the building section would seem to me to be compounding the problem.

To you this would only be a second inspector?—Precisely.

Senator Wright—An unnecessary vertebra in Parkinson's backbone.

Senator Cavanagh

If there is a second authority there is only one inspector?—I believe that a proliferation of inspectors is undesirable and unnecessary. My view is subjective in this case.

Chairman

In objection 11 you said quite clearly that you think this Ordinance is contrary to the true purpose of democracy. I take it you say that because of this blanket legislation?—Yes.

Senator Cavanagh

You said that in 1965 you told the Department of the need for some action. The Department did not heed that advice. Now, recently, the wisdom of that advice has been impressed on the Department by an undesirable sub-division. The Department plans to introduce some legislation in 1968. What would you suggest should be the attitude of the Government between now and the time that the Department has considered plans laid out? Some quick action must be taken, must there not, to see that these undesirable sub-divisions do not continue?—I agree entirely. I suppose that this Ordinance represents the quick action. I believe that if this Ordinance is varied to make it compatible with the real requirements—if it is made precise—then that is all that is required.

Senator Lawrie

You are not objecting to one of the purchasers of your land building a motel or a drive-in theatre, are you? Would you like to see that made possible?—No.

Would you like to see a filling station or something like that built out there?—I would

be horrified if that happened. But whether or not it would be reasonable to restrict such development is not a matter that I am prepared to speak about.

Senator Cavanagh

As the need for this legislation is urgent and as it would take time to form these guide lines, is there some alternative to what you say is panic legislation? But the time the law was prepared and set out in a form that could be understood the area might be sub-divided.—That is so.

Senator Bishop

Do you think it would be possible to write into the regulations criteria to cover this quick development but yet provide a basis for proper legislation later on?—I believe this could be done.

Senator Wright—This is a common provision in all town planning legislation. Intermediate development has to be approved. Sub-divisions have to be approved. But in that case the approving officer is a town planner, not a political minister, and there is a right of appeal to other people who are experienced and impartial.

Senator Devitt

Have you been studying a recent ordinance which is roughly similar to this one?—I have not been following that matter but I am aware more or less of the provisions of similar legislation in the Yarralumla Shire. That legislation is reasonably precise and I think is acceptable.

Are you aware of the recent ordinance concerning the rights of the subject to take action at law about something in an area which appears to be wrong and not in conformity with the principle of definition of the area in its original form?—No, I am not aware of this.

Chairman—I would like to thank you for coming along to present your point of view about this matter.

The witness withdrew

The Committee adjourned

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
1967—Parliamentary Paper No. 148

THE SENATE

TWENTY-FOURTH REPORT
FROM THE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES

(BEING THE SECOND REPORT OF THE 1967 SESSION, AND THE TWENTY-FOURTH REPORT SINCE THE FORMATION OF THE COMMITTEE)

Brought up and
ordered to be printed 5 October 1967

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PERSONNEL OF COMMITTEE

Chairman:

Senator I. A. C. Wood

Members:

Senator R. Bishop
Senator J. L. Cavanagh
Senator G. S. Davidson
Senator D. M. Devitt
Senator A. G. E. Lawrie
Senator R. C. Wright

Printed in Australia by the Commonwealth Government Printer, Canberra

TWENTY-FOURTH REPORT OF THE COMMITTEE

Australian Capital Territory Ordinance No. 13 of 1967
City Area Leases Ordinance 1967

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

2. This Ordinance No. 13 should be considered in the light of its history.

3. In the *Canberra Times* on 8 May 1964, Professor Richardson, the Robert Garran Professor of Law and Dean of the Faculty of Law, Australian National University, published articles emphasising the arbitrary character of land control by means of lease covenant. On 13 July 1964, an article was published from the Australian Planning Institute Journal emphasising the inequity of certain purchases of leases where covenants in leases were varied to the great advantage of commercial entrepreneurs.

4. In August 1964, clause 9A of the City Area Leases Ordinance was enacted which made it a punishable offence to use land comprised in a lease for a purpose not authorised by the lease. Sub-clause 4 provided:

> '(4.) It is a defence if a person charged with an offence against either of the last two preceding sub-sections, being an offence that relates to a lease of land granted for residential purposes but no other purpose, proves that the use of the land—
>
> (a) does not constitute a substantial nuisance;
> (b) does not substantially disturb the occupier of any adjoining land;
> (c) does not substantially interfere with the nature or amenities of the neighbourhood; and
> (d) does not cause untidiness in the neighbourhood.

5. Ordinance No. 13 of 1967 operates to repeal sub-clause 4 and substitute the following provision:

> '(4.) An offence against either of the last two preceding sub-sections shall not be prosecuted except with the consent in writing of the Minister or of a person authorized by the Minister, by writing under his hand, to give such consents.'.

6. In response to the Committee's inquiry the Minister for the Interior, the Hon. J. D. Anthony, has written the following letter—

> 'I refer to your letter of 28 August 1967 wherein you sought an explanation of the amendment to section 9A of the City Area Leases Ordinance 1936-1966.
>
> The City Area Leases Ordinance provides the legislative authority for the general leasing system within the city of Canberra. In general terms, neither the Ordinance nor leases issued under it confer upon lessees rights or liabilities *inter se*. Rather do the terms of the Ordinance and the

lease agreements provide the basis of the relationship existing between each individual lessee and the Commonwealth of Australia as lessor.

The relationship existing between lessees is governed by the ordinary rules of common law and the City Area Leases Ordinance does not derogate from these rules in any way.

The fundamental reason for the inclusion of section 9A of the Ordinance was to provide for a penalty for breach of the purpose clause in the lease so that lessees could not break their covenants with impunity. It was not intended that it should either add to or subtract from the rights and liabilities of lessees inter se.

Before the inclusion of section 9A in the Ordinance there was no offence for a breach of the purpose clause in a lease. The only right of the Commonwealth was to sue for damages for breach of the agreements, which procedure was useless. The provision for forfeiture of leases is limited to three cases:

(i) where rent payable under the lease remains unpaid for twelve calendar months next after the date appointed for payment;

(ii) where a building in accordance with the building covenant is not commenced and completed within the periods stipulated in the covenant; and,

(iii) where, after completion of the building, the land is at any time not used for a period of two years for the main purpose for which the lease is granted.

Every lessee enjoys the benefit of his common law rights to take action against an adjoining lessee to abate a nuisance or to take such other action as might be necessary to protect his property. These rights have in no way been disturbed by the provisions of the City Area Leases Ordinance 1967.'.

7. In the leasehold area of Canberra, control over land use is operated by inserting covenants in the leases. It is an elementary idea that such lease covenants are intended to benefit the neighbourhood. It is an alarming disclosure of arbitrary outlook to suggest that 'neither the Ordinance nor leases issued under it confer upon lessees rights or liability inter se'. That is no doubt the technical legal situation. But in the Committee's opinion it is wrong that the arbitrament as between neighbours on land use of leaseholds should rest in the arbitrary decisions of the Minister.

8. The Committee records its opinion disapproving of the repeal of objective grounds stated above as affording defence. It is no proper substitute for such objective grounds of defence to make the commencement of a prosecution dependent upon the Minister's consent. The uncontrolled discretion of the Minister to consent or to withhold consent is no proper substitute for rules which give the citizen a right to defence.

IAN WOOD
Chairman

Regulations and Ordinances Committee Room
Thursday, 5 October 1967

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1957.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

ELEVENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1957 SESSION, AND THE ELEVENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

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PERSONNEL OF COMMITTEE.

Chairman:
Senator I. A. C. Wood.

Members:
Senator J. J. Arnold.
Senator C. B. Byrne.
Senator K. A. Laught.
Senator the Hon. H. S. Seward.
Senator D. R. Willesee.
Senator R. C. Wright.

FUNCTIONS OF COMMITTEE.—Since 1932, when the Committee was first established, the principle has been followed 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 rather than 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.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

ELEVENTH REPORT OF THE COMMITTEE.

1. The Committee has had before it Statutory Rules 1956, No. 93, being the Customs (Import Licensing) Regulations, made under the Customs Act 1901-1954. These Regulations were made and gazetted on 14th December, 1956, and tabled in the Senate on the first day of the present session (19th March, 1957).

2. The Committee, in its scrutiny of Regulations and Ordinances referred to it under Standing Order No. 36A, follows the principles which previous Committees have followed since 1932. Its main function is 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".

3. When the original Customs Act was passed the enactment of the customs duty on any particular import was possible only by Act of Parliament. That is still the position.

But the original Act declared a list of goods prohibited, specifying the categories. One category included goods "prohibited by proclamation". After the Parliament jealously claimed the right to review executive decisions of this nature in the critical thirties, Parliament in 1934 altered the word "proclamation" to "regulation" for the specific purpose of bringing the prohibition under review by Parliament so that improper regulations for the purpose could be disallowed by either House.

The Executive issued regulations containing a list of goods importation of which was prohibited. These regulations survived a challenge in the High Court as to their legality (in 59 C.L.R. 189) notwithstanding a strong dissenting judgment by Dixon and Evatt JJ. The regulations were reissued in the universal forms of the present regulations on 1st December, 1939 (No. 163 of 1939). Their actual legality survived another challenge to the High Court in *Poole's* case (1947) 75 C.L.R. 229 (Latham C.J., Williams and McTiernan, JJ., holding them to be valid, but Dixon, Starke and Rich, JJ., declaring them to be invalid) on the casting vote of the then Chief Justice.

This Committee in its Fourth Report presented on 23rd June, 1938, said—

"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."

On the 3rd June, 1952, the Committee presented its Eighth Report to the Senate drawing attention to the precarious legal basis for the actual validity of the regulations then being used for import licensing and said—

"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."

Parliament thereupon enacted an amendment of the Customs Act in the following form on 19th November, 1952 (No. 108 of 1952)—

"DIVISION I.—PROHIBITED IMPORTS.

"50.—(1.) The Governor-General may, by regulation, prohibit the importation of goods into Australia. Prohibition of the importation of goods.

"(2.) The power conferred by the last preceding sub-section may be exercised—

(a) by prohibiting the importation of goods absolutely;

(b) by prohibiting the importation of goods from a specified place; or

(c) by prohibiting the importation of goods unless specified conditions or restrictions are complied with.

"(3.) Without limiting the generality of paragraph (c) of the last preceding sub-section, the regulations—

(a) may provide that the importation of the goods is prohibited unless a licence or permission to import the goods has been granted as prescribed by the regulations;

(b) may provide that a licence or permission so granted may be subject to conditions or requirements to be complied with by the person to whom the licence or permission is granted, either before or after the importation of the goods in respect of which the licence or permission has been so granted; and

(c) may provide that the grant or continuance in force of a licence or permission so granted shall be subject to the condition that the applicant for, or the holder of, the licence or permission furnishes to the Customs security for compliance with this Act and for compliance with the conditions or requirements to which the licence or permission is subject.

"51. Goods, the importation of which is prohibited under the last preceding section, are prohibited imports." Prohibited imports.

That enactment put an end to the doubt as to the legal authority of the Executive, pursuant to that amendment, to make import licensing regulations.

4. On 14th December, 1956, almost exactly four years after the amending Act was passed, enabling the making of regulations, the regulations before the Committee were gazetted. The departmental explanatory note to the Committee on these Regulations was certainly not provoking. It consisted merely of a statement that—

"The Customs (Import Licensing) Regulations have been re-issued to conform with the new provisions enacted in Act 108 of 1952.

2. The only material change in their terms is contained in draft Regulation 12 in that an import licence may now be issued subject to a requirement to be fulfilled after importation of goods as authorized by Act 108.

3. Certain other changes of a drafting nature only are proposed on the advice of the Parliamentary Draftsman."

5. The Committee has carefully examined the Regulations, heard evidence from an officer of the Department of Customs and Excise and reports as follows.

6. This Committee is not concerned with Government policy sought to be achieved by the regulations and it is important to note that this immunity of the Committee from responsibility for Government policy imposes on the Committee an impartial duty to determine whether regulations conflict or comply with the above standards, whether the importance of the regulations to Government policy be great or small.

7. But the Committee is concerned to prevent parliamentary authority being undermined by the making of regulations of the character above referred to by the Executive, and so exposing individual rights and liberties to Executive decision as distinct from parliamentary enactment without proper safeguards for the individual to invoke the process of judicial review.

8. It is not expected that anyone will be found to deny that the total restriction of imports without a licence in respect of each individual consignment is an important measure restricting the individual right to trade. The ambit of the restriction is tremendously wide—

(i) As expressed in the regulation, the importation of *all* goods into Australia without a licence is prohibited.

(ii) The licence may be subject to such conditions as are specified in the licence.

(iii) The Minister may, even after the issue of a licence, vary existing conditions or, by direction in writing to the licensee, add new conditions.

(iv) The conditions may refer to requirements to be complied with by the licensee after the importation as well as before.

(v) The scope of conditions which the Minister may impose is limited only by the judgment or discretion of the Minister or licensing officer.

(vi) The conditions may be different for, and discriminate between, individuals in exactly the same position.

(vii) A licensing officer may require security, "in such sum as the *licensing officer* considers sufficient for compliance with the Customs Act and for compliance with the conditions of the import licence".

(viii) The Minister may *revoke* a licence at will.

(ix) The decision of the Minister is final and not open to review.

As Dixon C.J. said in *Poole's* case (1947) 75 C.L.R., page 235, in relation to similar regulations—

"There is nothing to indicate the grounds upon which his (the Minister's) discretion should be exercised. 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 excepted. 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."

9. Do these regulations provide for mere administrative detail for the implementation of an existing Act of Parliament, or are they the basis of a new policy appropriate to parliamentary debate and definition? In the Committee's opinion the answer to that question is clear. In war-time the Executive usually has conferred on it wide powers. Regulations are employed in war-time for many purposes. But in peace-time retail rationing would not be expected to be acceptable to a parliamentary democracy in the form of regulation. But this is import rationing. It rations the trade of every importer. The Committee is of the opinion that this policy should pass into law, if at all, only in the form of a Statute through Parliament, undergoing the process of free parliamentary debate and scrutiny; it is of such fundamental character as to be inappropriate to enactment by Cabinet or an individual Minister by regulation.

10. But further, it is transparently plain that the regulations deny every individual in the Australian import trade any right of access to the Courts to adjudicate as to complaints as to discrimination, *refusal to consider applications*, unjust treatment or delays—all of which can ruin a man's business. The regulations are couched in terms which make it practically impossible for the Minister's decision to be reviewed in any Court. No reflection is made upon the integrity of the Minister. But "amid the cross-currents and shifting sands of public life, the *Law* (not the Minister's opinion) is like a great rock upon which a man may set his feet and be safe". (Mansion House speech of Sankey L.C. 5/7/1924.) Not a majority imputes to the Department want of good faith. But "good faith is, in my view, not sufficient in itself; some of the most honest people are the most unreasonable, and some excesses may be sincerely believed in quite beyond the limits of reasonableness". (As Scrutton L.J. said, *R. v. Roberts* 1924, 2KB, 695, at 719.)

Denning L.J. has put it quite cogently. (*Freedom under the law*, p. 100): "An official who is the possessor of power often does not realize when he is abusing it. Its influence is so insidious that he may believe he is acting for the public good, when, in truth all he is doing is to assert his own brief authority. The Jack in office never realizes he is being a little tyrant."

The system expressed in these regulations deprives every trader of his *right* to import without the Minister's consent, and the *right* to complain to any Court of any unfair decision of the Minister.

11. In this Committee's opinion, the Senate ought not to permit a law of such a character to be made by the Executive. The result would be, if not a "new despotism"—yet a despotism not made any better because we have become somewhat cynical of it.

This Committee therefore is bound to report to the Senate its opinion that the regulations ought to be disallowed.

12. Two further observations ought to be made for the consideration of the Senate—

(a) By virtue of the Acts Interpretation Act and section 6 of the Customs Act 1901-1954 the term "The Minister" in these regulations means the Minister for Customs and Excise, yet in actual administration the authority conferred by the regulations is exercised by the Minister for Trade.

(b) Section 50 (2)(*c*) of the Customs Act authorizes regulations to provide for prohibition except under licence upon *specified* conditions. The most natural meaning of that expression would require the conditions to be specified in the regulations and of general application to various categories or circumstances and not left to be specified in each individual licence.

(Sgd.) I. A. C. WOOD
Chairman.

Senate Committee Room.
2nd May, 1957.

STATUTORY RULES.

1956. No. 93.

REGULATIONS UNDER THE CUSTOMS ACT 1901-1954.*

I, THE GOVERNOR-GENERAL, in and over the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulations under the *Customs Act* 1901-1954.

Dated this fourteenth day of December, 1956.

W. J. SLIM
Governor-General.

By His Excellency's Command,

DENHAM HENTY
Minister of State for Customs and Excise.

CUSTOMS (IMPORT LICENSING) REGULATIONS.

Citation.

1. These Regulations may be cited as the Customs (Import Licensing) Regulations.

Repeal

2 The Customs (Import Licensing) Regulations, being Statutory Rules 1939, No. 163, are repealed.

Licences granted, and applications and exceptions made, before commencement of these Regulations.

3.—(1.) A licence which was granted under the Regulations repealed by the last preceding regulation and was in force immediately before the commencement of these Regulations, shall be deemed to be a licence granted under these Regulations and the conditions and requirements, or the conditions or requirements, to which the licence was subject shall be deemed to be the conditions and requirements, or the conditions or requirements, as the case may be, to which the licence is subject under these Regulations.

(2.) An application for a licence under the Regulations repealed by the last preceding regulation which has not been granted or refused before the commencement of these Regulations shall be deemed to have been made under these Regulations.

(3.) Where any goods were, immediately before the commencement of these Regulations, excepted from the application of the Regulations repealed by regulation 2 of these Regulations, those goods shall, subject to sub-regulation (3.) of regulation 17 of these Regulations, be deemed to be excepted from the application of these Regulations.

Definitions.

4. In these Regulations, unless the contrary intention appears—

"licence" means a licence granted or deemed to have been granted under these Regulations which is in force;

"licensing officer" means an officer authorized by the Minister to act as a licensing officer for the purposes of these Regulations.

Application of Regulations.

5.—(1.) The provisions of these Regulations are in addition to the provisions of any other law of the Commonwealth relating to the importation of goods into Australia.

(2.) The grant of a licence under these Regulations to import goods into Australia or the exception of goods from the application of these Regulations shall not absolve a person from the obligation to comply with any other law relating to the importation of those goods.

Delegation.

6.—(1.) The Minister may, in relation to a matter or a class of matters, or to a State or part of the Commonwealth, by writing under his hand, delegate to a licensing officer any of his powers and functions under these Regulations (except this power of delegation).

(2.) A power or function so delegated may be exercised or performed by the delegate with respect to the matter or to the matters included in a class of matters, or with respect to the State or part of the Commonwealth specified in the instrument of delegation.

(3.) A delegation under this regulation is revocable at will and does not prevent the exercise of a power or the performance of a function by the Minister.

Prohibition of the importation of goods.

7 The importation of any goods (not being goods which are excepted from the application of these Regulations) is prohibited unless—

(*a*) a licence under these Regulations to import the goods is in force; and

(*b*) the conditions and restrictions (if any) to which the licence is subject are complied with.

Application for licence.

8.—(1.) An application for a licence under these Regulations shall be in accordance with such form as the Minister directs.

(2.) The application shall be delivered, in such manner as the Minister directs, to the Collector at the port at which it is proposed to import the goods.

* Notified in the *Commonwealth Gazette* on 14th December, 1956.

Licence not to be applied for unless goods ordered.

9. Except—

(*a*) where the Minister otherwise approves; or

(*b*) where goods in respect of which the licence is applied for have been exported at the date of the application for the licence,

a person shall not apply for a licence to import any goods unless he intends forthwith after the grant of the licence to give to the overseas supplier firm directions for the exportation to Australia of the goods.

Additional information.

10. An applicant for a licence shall supply to a licensing officer such information additional to that required to be supplied in the form of application as the licensing officer requires.

Grant of licence.

11. The Minister may—

(*a*) grant a licence in respect of all the goods included in an application for a licence;

(*b*) grant a licence in respect of part only of the goods so included; or

(*c*) refuse to grant a licence.

Conditions of licences.

12.—(1.) The Minister may grant a licence subject to such conditions or requirements to be complied with by the person to whom the licence is granted, either before or after the importation of the goods in respect of which the licence is granted, as are specified in the licence.

(2.) After the grant of a licence under these Regulations, the Minister may, by notice in writing—

(*a*) where the licence was granted subject to conditions and requirements or conditions or requirements—

(i) vary any or all of those conditions or requirements, or

(ii) direct that the licence be subject to conditions or requirements additional to those conditions or requirements; or

(*b*) where the licence was granted without being subject to conditions or requirements—direct that the licence be subject to specified conditions or requirements,

and the conditions or requirements as so altered or directed are the conditions or requirements to which the licence is subject.

(3.) A copy of a notice under the last preceding sub-regulation shall be served on the person to whom the licence has been granted.

Notification of directions for exportation to Australia.

13.—(1.) A person to whom a licence is granted shall, except insofar as the Minister otherwise directs—

(*a*) if the firm directions for the exportation to Australia of all of the goods to which the licence relates (other than goods so exported at the date of the grant of the licence) are not despatched to the overseas supplier within one month after that date;

(*b*) if firm directions so despatched are countermanded; or

(*c*) if all the goods are not imported within the time (if any) specified in the licence,

notify the Collector to whom the application for the licence was made in writing accordingly.

(2.) Where a person fails to comply with the last preceding sub-regulation, the licence shall, by force of this sub-regulation, be deemed to have been revoked.

Security.

14. Where a licensing officer so requires, the grant or the continuance in force of a licence shall be subject to the condition that the applicant for, or the holder of, the licence furnishes to the Customs security, in such sum as the licensing officer considers sufficient, for compliance with the Customs Act 1901-1954 and for compliance with the conditions or requirements to which the licence is subject.

Revocation of licence.

15. The Minister may revoke a licence.

Licence not transferable.

16. A licence is not transferable.

Exceptions of goods from application of Regulations.

17.—(1.) The Minister may except from the application of these Regulations any goods or any goods included in a class of goods.

(2.) Without limiting the generality of the last preceding sub-regulation, the exception of any goods from the application of these Regulations may be limited to—

(*a*) goods produced or manufactured in a country or countries specified by the Minister;

(*b*) goods to be imported in a manner, or at or within a time, specified by the Minister; or

(*c*) goods to be used for a purpose specified by the Minister.

(3.) The Minister may vary or revoke an exception made in pursuance of this regulation.

Review of decisions by the Minister.

18. A person who is dissatisfied with a decision of a licensing officer given in the exercise of a power which has been delegated to him under these Regulations by the Minister may request the Minister to review the decision, and, upon such a request being made, the Minister may affirm, vary or revoke the decision.

Decision of the Minister to be final.

19. The decision of the Minister on a matter arising under these Regulations is final.

REGULATIONS AND ORDINANCES COMMITTEE.

MINUTES OF EVIDENCE.

(Taken at Canberra.)

THURSDAY, 11TH APRIL, 1957.

Present:

Senator WOOD (Chairman).

Senator Byrne.	Senator Willesee.
Senator Seward.	Senator Wright.

William Callaghan, Chief Inspector of Licensing, Department of Customs and Excise, called and examined.

The Chairman.—This Committee has been considering Statutory Rule No. 93 of 1956, and should be glad of your assistance. I shall ask Senator Byrne to explain what is in our minds and the nature of the information we desire from you.

Senator Byrne.—The Committee has considered the powers conferred by these regulations more particularly in connexion with regulation 12, and should like some information on the approach of the Customs and Excise Department in administering regulations of this kind, which have to do with the granting of import licences and the imposition of conditions at the time of the granting of the licence, or subsequent to the issue of the licence, or at a later date, as provided in regulation 12. Although it looks as if the powers are almost arbitrary and extensive, we find that there may be practical problems associated with them, and that the drafting in another form might interfere with the administration. That is the background to our inquiry. Could you tell the Committee how you impose these particular conditions in relation to import licences?

Mr. Callaghan.—The need for the power to impose these conditions arose almost solely from the importation of motor cars, particularly American motor cars. These have given a lot of trouble in recent years. There is now a virtual prohibition under the balance of payments restrictions on cars from the United States of America. A few cars are allowed to come in; some of the larger American cars are allowed in as a kind of token importation to enable the makers to keep their names on the Australian market. Otherwise there is no importation of American cars because exchange is not made available for their purchase. There are some exceptions, however. The main exceptions relate to people who come from the United States of America to live in Australia as permanent residents. It is thought to be reasonable that they should bring their cars with them. The same attitude is adopted towards Australians returning to this country after an absence of three years or more. Others in this category include visitors to Australia. They are allowed to bring their cars with them for use temporarily while in this country. At one stage there was an extensive business in what were called gift cars. Because of the inability to import American cars a number of people made gifts of cars for all sorts of reasons. However, after dealing with a number of cases which appeared at first to be genuine cases, and in which we accepted the stories as being true, we found that in a number of instances the gift of a car was merely a means of getting around the restrictions. In some cases cars were imported against an undertaking not to sell them within a certain period. These cars were sold on what amounted to a black market, and generally they were sold at an enormous profit because of the restrictions that were in force.

Senator Byrne.—What power did you have at that stage?

Mr. Callaghan.—We had no power. I am speaking of the time up to the introduction of these regulations, and in particular of the years 1953-54-55.

Senator Byrne.—What was the nature of the arrangement you eventually made?

Mr. Callaghan.—We would agree to issue an import licence to a person wanting a car against an undertaking, in the case of a resident, not to sell the car within two years, and in the case of a visitor, an undertaking to export the car within twelve months.

Senator Byrne.—What happened in the event of default?

Mr. Callaghan.—We attached conditions which meant that it would be unprofitable to sell the car, but we discovered that our power to do that was limited to the point of clearance from customs. We had no power to attach conditions afterwards. We could apply conditions up to the point of importation, but once the vehicle was cleared from customs our powers existed no longer.

Senator Byrne.—The condition to export within twelve months or not to sell within two years was a condition imposed subsequent to the release from customs control.

Mr. Callaghan.—It was imposed before release, but it applied after release. We had no power to hold them to the conditions.

Senator Byrne.—Even though the condition was imposed before release?

Mr. Callaghan.—We had no power after we released the car from control.

Senator Byrne.—Was the power challenged?

Mr. Callaghan.—Yes, several times. Our position was so weak that either we released people from securities or did not press for securities?

Senator Byrne.—What effect did that have on your policy?

Mr. Callaghan.—Almost automatically the policy became more harsh. The department found itself in difficulty and reached the position where it was unable to believe what it was told. The result was that gift motor cars were ruled out.

Senator Byrne.—You say that this position arose almost solely in connexion with motor cars? It did not apply generally?

Mr. Callaghan.—No.

Senator Byrne.—Yet regulation 12 is wide and would apply generally. It is not restricted?

Mr. Callaghan.—We have had no particular trouble, but we do issue import licences with other conditions. For example, special allocations have been made with respect to textiles. We issue import licences on condition that importers will use the textiles in manufacture and not sell them in the open market.

Senator Byrne.—Was that done prior to this?

Mr. Callaghan.—Yes.

Senator Willesee.—Then the regulations apply to more than American cars?

Mr. Callaghan.—Yes. The position in connexion with cars from the United Kingdom and the Continent of Europe has been good. In any case, the Holden car is the equivalent of most of those cars, and there is no great demand that cannot be met. There is a plentiful supply of United Kingdom, Continental and Australian cars, but there is a big demand for luxury American cars.

Senator Byrne.—What principle did you apply in the case of textiles and other things? What kind of condition did you impose?

Mr. Callaghan.—We agreed that licences would be granted against an undertaking that the goods would be used for a particular purpose or exported within a certain time.

Senator Byrne.—What rules would you apply subject to that condition. Would it be the need of the industry, and would there be preference to one manufacturer or distributor?

Mr. Callaghan.—There would be no preference. A manufacturer would really have to show that he was unable to get sufficient supplies from his usual sources of supply. Some importers were selling goods across the counter instead of selling them to manufacturers. The result was that manufacturers were unable to obtain adequate supplies of textiles from people who held quotas. We gave special allocations to manufacturers. After the first few special allocations had been granted we found that some manufacturers were as bad as the people they complained about. They themselves sold the goods instead of manufacturing them.

Senator Byrne.—They imported materials for manufacture but did not manufacture them.

Mr. Callaghan.—That is so.

Senator Byrne.—Would it not have been logical to impose conditions on the importer of piece goods?

Mr. Callaghan.—That was not considered advisable. A quota holder can import for free sale. He was importing goods against a quota that arose from the base year imports. We endeavoured to influence importers to take care of specific manufacturers. It was not considered advisable to force them to do so. The solution seems to be to give some assistance to manufacturers rather than give the benefit of a relaxation to the importers of textiles.

Senator Byrne.—You have mentioned motor cars and textiles. Would these conditions be confined to those fields?

Mr. Callaghan.—There may be some other fields, such as machinery for copying purposes, demonstration purposes and so on. That applied particularly to importations from the dollar area.

Senator Byrne.—They would be subject to prohibition against re-sale?

Mr. Callaghan.—They would be subject to the requirement to re-export the goods.

Senator Byrne.—There were two types of conditions imposed—re-sale or re-export and the question of defaulting in particular cases?

Mr. Callaghan.—Yes, the re-exportation within a certain period or importation for a particular purpose.

Senator Wright.—As to these conditions, would it be possible for you to tell the Committee the full list of conditions that you have imposed? You said that they applied mainly to re-sale and re-export of goods.

Mr. Callaghan.—The full list is the list that I have given to Senator Byrne. We have so far imposed conditions against re-sale within a certain period, and a condition to export before the expiration of a given period, and conditions to use goods for specific purposes. In the past the obtaining of securities has applied mainly to motor cars. We propose in future to ask the importer of motor cars, in cases where we are doubtful of his bona fides and suspect that a car may be put on the market without authority, thus giving him a big profit, to enter into a security to pay to the Collector of Customs a sum to be determined at the time. The sum decided on would be an amount about equal to the profit he would be likely to make.

Senator Wright.—You take power in the regulation to vary the conditions after the original issue of a licence, or to add to the licence conditions which are entirely new. Could you give us an example of the application of that power to vary conditions or to impose additional conditions?

Mr. Callaghan.—An example would be a case where a licence had been granted to import a car for a certain period, or against re-sale within a period, without conditions, and the department suspected an intention to break the undertaking. An unconditioned licence would be granted in the first place, but if we suspected an intention to sell the car we could impose a condition under which the importer would have to give a security.

Senator Wright.—Do these conditions apply only to cars of American origin?

Mr. Callaghan.—They apply almost solely to cars of American origin.

Senator Wright.—Do you get any trouble in respect of cars of European origin in excess of the quota?

Mr. Callaghan.—Not until recently. There is at the moment a slightly greater demand for some expensive English cars than can be supplied. However, the recent relaxations that have been decided on should meet the position and we do not expect present conditions to last for long. The position then will probably be that the difficulties will apply almost solely to American cars.

Senator Wright.—How was the allocation of dollars under currency control originally fixed?

Mr. Callaghan.—That question brings us into the field of policy which is not within the functions of the Customs and Excise Department. There is an interdepartmental policy committee which considers the amount of dollars to be allocated.

Senator Wright.—Who decides what categories of goods are entitled to absorb that dollar allocation?

Mr. Callaghan.—That is a policy question which I am afraid I cannot answer.

The Chairman.—If matters of policy are involved, perhaps we should not question Mr. Callaghan further along those lines.

Senator Wright.—I am interested to know who specifies the quantity of American cars to be allowed into this country in a given period under currency control.

Mr. Callaghan.—No officer of my department has any final right of control. Officers make recommendations to the Minister. The department prepares a dollar budget which is passed by the Minister. Any action that is taken is taken with the Minister's approval.

Senator Willesee.—You are dealing with visitors to Australia and Australian residents returning to this country? Do you say that the numbers are few?

Mr. Callaghan.—There are some importations in addition to those. I mentioned earlier an arrangement had been made to enable manufacturers of cars to keep their names on the Australian market. The evils that arose came from the general restriction on American cars as a whole.

Senator Wright.—Chevrolet, Ford and Studebaker cars come from America?

Mr. Callaghan.—Yes.

Senator Byrne.—Not all Ford cars come from America?

Mr. Callaghan.—They—those you see here—nearly all come from outside America.

Senator Wright.—The restrictions apply to Chevrolet, Cadillac and Buick cars. Was an importer trading in that line of business given any quota on a base year, or was it brought down to nothing?

Mr. Callaghan.—It was not established on a base year. It was an allocation made against the overall amount of dollars available.

Senator Wright.—Cars from American sources came in for particular scrutiny in comparison with other American goods that the nation had need of?

Mr. Callaghan.—Yes.

Senator Wright.—Has that policy operated uniformly throughout the years of import control or has it varied, say, up 5 per cent. in one year and down 5 per cent. in the following year?

Mr. Callaghan.—It has varied as the dollar ceiling went up or down.

Senator Wright.—The final fixation of the volume rests with the Minister?

Mr. Callaghan.—Yes.

Senator Wright.—With regard to the particular conditions that you thought were proper to impose on cars, has the department power to impose different conditions in respect of any individual?

Mr. Callaghan.—Yes.

Senator Wright.—It has an unfettered right to discriminate between individual importers?

Mr. Callaghan.—Yes, that would be so.

Senator Wright.—You have directed your mind to these regulations that we are considering which empower you to impose conditions after importation?

Mr. Callaghan.—Yes.

Senator Wright.—Would the department's purpose have been capable of fulfilment if the old regulations were simply altered in respect of cars of American origin to provide that the Minister may impose conditions for periods after importation?

Mr. Callaghan.—Our purpose would be met solely in relation to cars of American origin.

Senator Wright.—Have you experienced a need for power to impose importation conditions in respect of anything but cars of American origin?

Mr. Callaghan.—We have had need for power in relation to machinery for exhibition, and goods for copying, samples for manufacture and so on.

Senator Wright.—What conditions do you impose in relation to machinery?

Mr. Callaghan.—Certain goods would not normally be licensed for permanent importation, but if goods are required for copying, or as samples, or for exhibition purposes, we are willing to issue an import licence on the condition that the goods will be re-exported within a given time. Unless we have that power and are able to impose such a condition, once the goods are cleared from customs it would amount practically to their permanent importation.

Senator Wright.—Are you referring to machinery of American origin?

Mr. Callaghan.—Yes, in the main, but it could apply to machinery of other origin. The imposition of these conditions gives the department a better opportunity to meet demands for import licences which we were not fully capable of meeting in the past.

Senator Wright.—I understand that you imposed conditions as to payment and then felt that your legal position was too weak to enforce them. Why did not the department immediately prepare a regulation and submit it to the appropriate authority asking for the necessary legal power? Why avoid the justification, by law if necessary, of anything that is imposed on a trader?

Mr. Callaghan.—I do not think we reached the situation where we actually refused a licence because we were doubtful of our power. We avoided the issue of licences where we could but we took a chance in some cases. We then proceeded to have the regulation varied as quickly as possible. It is not a quick process.

Senator Seward.—Why should it take a long time?

Mr. Callaghan.—In order to obtain the power to impose conditions after importation an amendment of the Customs Act was necessary. We had no power to do so under the Act, and so it had to be amended. After that, the regulations had to be framed.

Senator Wright.—This weakness developed before the Act was amended in December, 1952.

Mr. Callaghan.—The weakness was apparent then.

Senator Wright.—Do you seriously justify a delay of four years after the Act was amended before getting this power?

Mr. Callaghan.—The delay arose because the Act was amended in relation to all prohibitions. It covered prohibitions on the importation of narcotic drugs and other things.

Senator Wright.—When the Act was passed in December, 1952, the difficulty was overcome. Where is the justification for this post-importation condition? That weakness was permitted to continue from November, 1952, to December, 1956, before any regulation thought to be appropriate to overcome the weakness was gazetted?

Mr. Callaghan.—Yes.

Senator Wright.—Do you, as the Chief Executive Officer of the Licensing Branch, seriously say that, having permitted a period of four years to elapse, that weakness was really an urgent impediment militating against the efficacy of import control?

Mr. Callaghan.—Not against import control as a whole, but it was difficult in dealing with applications from individuals for exceptional treatment.

Senator Wright.—I should like that to be understood—a weakness in dealing with individual cases calling for exceptional treatment.

The Chairman.—Mr. Callaghan has been abroad for a number of years and returned to Australia only about two months ago.

Senator Wright.—I hope that the organization responsible for implementing this legislation that is said to be important does not depend on the presence in Australia of any particular individual. The situation is that under these regulations all goods are prohibited from entry into this country except with the consent of the Minister?

Mr. Callaghan.—Yes, other than cases which are excepted.

Senator Wright.—What is the range of goods that have been excepted up to date?

Mr. Callaghan.—There is a small range. An Exception Notice was published in the "Gazette" of the 14th March last. The range covers, mainly, goods which would not, in any case, incur the expenditure of exchange overseas, such as gifts and the like and re-imported goods. Here is an extract from "Gazette", No. 17, of the 14th March, 1957—

CUSTOMS (IMPORT LICENSING) REGULATIONS.
EXCEPTION NOTICE A1.

I NORMAN HENRY DENHAM HENTY, the Minister of State for Customs and Excise, in pursuance of the powers conferred upon me under regulation 17 of the Customs (Import Licensing) Regulations do hereby except from the application of those Regulations the goods specified in the schedule to this notice.

This notice shall be read and construed so that only the goods or classes of goods specified in that schedule shall be deemed to be excepted from the application of those regulations.

For the purposes of this notice—

"Tariff Item" means an item in the schedule to the Customs Tariff 1933-56 as amended from time to time or as proposed to be amended from time to time by a Customs Tariff alteration proposed in the Parliament;

"the dollar area" includes the following countries, Canada, United States of America, Alaska, Hawaiian Islands, Puerto Rico, the Virgin Islands of the United States of America, Guam, American Samoa, Bolivia, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Republic of Honduras, Liberia, Mexico, Nicaragua, Panama, Philippine Islands, Salvador, Venezuela.

THE SCHEDULE.

Item No.	Description of Goods.
1	Goods to which Tariff Items 51 (A), 229A, 338 (B), 338 (D), 338 (G), 396, 400, 401, 404, 409 (B), 410 (B) (1), 410 (B) (2), 410 (C), 412, 417 (B), 417 (D), 423, 424 (C), 427 (A), 427 (E) and 434 apply
2	Goods to which Tariff Item 195 applies when those goods have been imported empty for repair or refilling
3	Goods to which Tariff Item 339 applies and which have been published in and imported from any country not in the dollar area when imported by Universities, Public Libraries, Colleges and Schools for their own purposes
4	Goods of a value not exceeding £5 to which Tariff Item 339 applies and which have been published in and imported from any country not in the dollar area
5	Goods to which Tariff Items 250 (A), 376 (D), 376 (E), 376 (F) and 408 apply when imported containing solely goods which are excepted from the application of those Regulations
6	Goods, other than motor cars, motor vans and motor trucks, to which Tariff Item 409 (A) applies
7	Motor cars, motor vans and motor trucks to which Tariff Item 409 (A) applies and which the Collector is satisfied will not be sold or disposed of in Australia within two years from the date of importation
8	Motor vehicles which are permitted importation under Carnets de Passage en Douanes or Triptyques and which the Collector is satisfied will not be sold or disposed of in Australia
9	Goods which in the opinion of the Collector are not related to any commercial transaction
10	Goods which in the opinion of the Collector have no commercial value
11	Goods the produce or manufacture of and shipped direct from a Territory of the Commonwealth
12	Samples and advertising films permitted importation temporarily in conformity with the provisions of the International Convention to Facilitate the Importation of Commercial Samples and Advertising Matter signed at Geneva on 7th November, 1952

Dated this twenty-seventh day of February, 1957.

DENHAM HENTY
Minister of State for Customs and Excise.

Senator Wright.—Could you describe the goods referred to in item No. 1?

Mr. Callaghan.—Tariff item 51 (A) relates to fresh fish. Item 229 (A) covers fuel imported in aircraft tanks and not unloaded in Australia. Item 338 (B) covers printed matter and photographs the property of any public institution and intended for deposit or exhibition therein. Item 338 (D) refers to trade catalogues, non-advertising price lists, &c., in single copies. Item 338 (G) covers catalogues and price lists from the United Kingdom. The point is that they do not involve the expenditure of exchange overseas. These catalogues are usually sent here by people overseas. We are trying to facilitate their entry. Item 396 refers to antiquities for public institutions. Item 400 covers goods re-introduced after repair and goods imported for repair and export. Item 401 covers re-imported goods and item 404 refers to samples of negligible value. Item 410 (B) (1) covers paintings by Australian residents abroad, and item 410 (B) (2) covers paintings not for sale bequeathed to a person or institution in Australia. Item 410 (C) refers to paintings imported by, or presented to, public institutions, cathedrals or churches. Item 412 covers illustrations, casts and models imported by universities, schools, colleges and public institutions. The other items refer to goods in similar categories.

Senator Wright.—That gives the Committee an indication of the variety of goods referred to. Have you a written list that could be attached? Would you give the Committee some information regarding item No. 7 which deals with motor cars, motor vans and motor trucks, to which tariff item 409 (A) applies, and which the Collector is satisfied will not be sold or disposed of in Australia within two years from the date of importation?

Mr. Callaghan.—The item refers to motor cars, vans and trucks, which are admissible as passengers' personal effects—their property on arrival in this country. They must have been in the passenger's possession and in use overseas for eighteen months.

Senator Wright.—Does it cover cars from the dollar area?

Mr. Callaghan.—The goods could be cars from the dollar area.

Senator Wright. — They are excepted from the regulations.

Mr. Callaghan.—Only if the Collector is satisfied that they will not be sold within two years.

Senator Wright.—The regulation as to the post-importation condition would not be applicable to them?

Mr. Callaghan.—That is so.

Senator Wright.—The regulations apply to all goods other than those excepted. Has it been the practice to gazette lists of excepted goods at all times since import restrictions have applied?

Mr. Callaghan.—Yes. This notice replaces a notice issued in 1939 under the previous regulations.

Senator Wright.—That notice was issued about 1939?

Mr. Callaghan.—The first exception notice was issued at the time of the imposition of import restrictions.

Senator Wright.—Intermediate notices have been gazetted between then and the present time.

Mr. Callaghan.—Yes. There have been amendments.

Senator Wright.—We heard something about percentages and importer's base year. How was that applied in relation to import licences?

Mr. Callaghan.—If you look at the whole arrangements for import licensing—I am speaking of non-dollar licences—where goods are to be licensed on a quota basis and not dealt with on the merits of each application, the quota is set at a percentage of the base year imports made in a particular year. In the case of goods in the (B) category the base year is 1954-1955. The quota for (B) category goods to-day works out at about one and two-thirds of thirty-three and one-third per cent. The last period of quota was thirty-three and one-third per cent. of the imports in 1954-55. Within this licensing period there has been a two-thirds increase on the previous period. That is about 45 per cent. or 46 per cent. on the base year.

Senator Wright.—Who fixes the categories?

Mr. Callaghan.—The Department of Trade.

Senator Wright.—Are they gazetted?

Mr. Callaghan.—No. They are published as licensing instructions.

Senator Wright.—What categories exist to-day?

Mr. Callaghan.—There are four categories. The first is Administration, under which each application is dealt with on its merits. Then there is category (A), which deals with goods of more essential types, and category (B), which covers the less essential goods. The fourth category is Administration World Licence group, under which licences are issued for particular goods and the goods may be purchased in any part of the world. It covers mainly raw materials.

Senator Wright.—Who fixes the percentages?

Mr. Callaghan.—The Department of Trade. Our advice is obtained from the Department of Trade.

Senator Wright.—Is that gazetted?

Mr. Callaghan.—No.

Senator Wright.—As to the Administration category, the quantity to be imported by each individual importer is solely in the discretion of the department or the Minister?

Mr. Callaghan.—Yes. The decision in respect of each application is made by the department and the Minister.

Senator Wright.—I saw something in the press about the removal of paper from category (B) and its transfer to category (A)?

Mr. Callaghan.—That is so.

Senator Wright.—Was that done by ministerial direction?

Mr. Callaghan.—That would be so. This matter is now outside the functions of the Department of Customs and Excise. We merely issue licences on advice given to us by the Department of Trade.

Senator Wright.—The person who really decides the matter is the Minister for Trade.

Mr. Callaghan.—That is so.

Senator Wright.—The staff that actually scrutinizes applications in the Administration category is a staff directly under the Minister for Trade?

Mr. Callaghan.—That is so.

Senator Wright.—Until the last announcement those officers were located in Sydney.

Mr. Callaghan.—Yes.

Senator Wright.—All applications throughout Australia for goods in that category have to be submitted to Sydney?

Mr. Callaghan.—Yes, with minor exceptions in order to facilitate the issue of Administration licences for goods of small value. In respect of such goods the Collector of Customs can issue licences up to £100 in each application.

Senator Wright.—Is that since the last announcement?

Mr. Callaghan.—That situation has existed throughout the whole of the licensing period. It has been varied. The discretion has been restricted or relaxed from time to time. Since the last announcement the discretion has been considerably relaxed. The Collector can issue an Administration licence for goods up to £100 if he is satisfied of the merits of the application.

The Chairman.—Was it not for a smaller amount at one time?

Mr. Callaghan.—It has always been £100 for non-dollar licences.

Senator Wright.—This direction from the Minister for Trade and his officers comes from the Department of Trade to the Department of Customs and Excise?

Mr. Callaghan.—Yes.

Senator Wright.—Is there any gazetted document for persons to see in law pursuant to which their entitlement may be varied?

Mr. Callaghan.—No. A public notice is issued by the department, and copies are made available to interested importers.

Senator Wright.—They are departmental directives?

Mr. Callaghan.—Yes.

Senator Wright.—I take it that there was a policy reason for lifting paper out of category (B) and placing it in a different category?

Mr. Callaghan.—Yes.

Senator Wright.—Is (A) category an Administrative category?

Mr. Callaghan.—No, it is a quota category with a greater percentage than category (B).

Senator Wright.—What was the alteration with regard to paper?

Mr. Callaghan.—Under category (A) the quotas were increased by 10 per cent. Had paper remained in category (B) it would have been increased by 66⅔ per cent.

Senator Wright.—That alteration was made simply by ministerial direction?

Mr. Callaghan.—The Department of Trade advised the Department of Customs and Excise to issue licences on that basis.

Senator Wright.—From the point of view of departmental arrangements, how was the staff for import licensing set up under the authority of the Department of Trade?

Mr. Callaghan.—The staff had been attached to the Department of Trade and Customs until January, 1956. Then arrangements were made whereby the function on the policy side was transferred to the Department of Trade and the staff also was placed under the control of that department.

Senator Wright.—There is an arrangement under which all matters covered by the Customs Act are assigned to the Minister for Customs. The only matter coming under the jurisdiction of the Minister for Trade is the Customs tariff and New Zealand preference. I am speaking from memory. Has there been any variation?

Mr. Callaghan.—No. The administration of import licensing, that is, the issue of licences and the setting up of quotas, &c., is still a part of the function of the Department of Customs and Excise. We are guided in carrying out that function by advice received from the Department of Trade.

Senator Wright.—Did you not say that applications in connexion with the Administration category go to Sydney, where they are dealt with by members of the staff of the Department of Trade?

Mr. Callaghan.—They are dealt with to the extent that they are considered. If licences are to be issued they are passed on to the Department of Customs and Excise, which issues the licences. Consideration of Administration licences is carried out by the Department of Trade.

Senator Wright.—That department, in fact, makes the decision?

Mr. Callaghan.—Yes.

Senator Wright.—Over the signature of officers of your department licences are issued?

Mr. Callaghan.—We carry out the issue of licences.

Senator Byrne.—As to the delay in the promulgation of these regulations. You suggested that the regulations before they were amended were actually operating harshly against individuals because of your deficiency of power. You said that that caused the department to adopt a harsh policy. These regulations enable you to impose conditions which extended more liberality?

Mr. Callaghan.—That is so. These conditions will not hurt any importer who is prepared to abide by them and is telling the truth.

Senator Byrne.—The effect of the delay has been to assist the import policy?

Mr. Callaghan.—Yes.

Senator Byrne.—The liberalisation of conditions has favoured the individual?

Mr. Callaghan.—Yes.

Senator Byrne.—Any delay has told solely against individuals rather than against the policy?

Mr. Callaghan.—Yes. When the act was amended in 1952 the section concerned, Division 1 of Part IV., was to be introduced on a date to be proclaimed. The reason

was that all prohibited import regulations under the act had to be remade. Certain prohibitions were contained in the act and others were dealt with by customs regulations. It was thought advisable to include them all under the prohibited import regulations. We were faced with reviewing the film censorship regulations as well as the Customs (Import Licensing) Regulations and regulations dealing with literature. Our departmental assessment at that time was that they would all be tabled by mid-1953 at the latest. However, on the advice of the Attorney-General's Department we commenced a complete overhaul of the regulations, and in particular the Customs (Prohibited Import) Regulations which had not been overhauled for a number of years. That overhaul took some time. In some instances it involved consultation with international organizations, as, for instance, those dealing with narcotic drugs, the work involved going back to the source of over more than 100 items. Moreover, it had to be done in addition to the normal work of the department. While the job was proceeding the old regulations stood and were administered. That is my explanation of the delay.

Senator Wright.—Can you say whether categories of goods as now existing in the general level of entitlement are available to the public in book form?

Mr. Callaghan.—We issue notices, or schedules of categories, giving the information, but so far as the general public is concerned they are difficult to follow. A person must have a knowledge of the customs tariff to follow them. This is a schedule of categories which sets out against each category item the licensing treatment.

Senator Wright.—It refers to items in the tariff?

Mr. Callaghan.—Yes.

Senator Wright.—The duties appropriate to each individual item in the tariff are always subject to an act of Parliament?

Mr. Callaghan.—Yes.

Senator Wright.—You would not vary a duty by regulation?

Mr. Callaghan.—No, we cannot do that.

Senator Wright.—Parliament retains that authority to itself?

Mr. Callaghan.—Yes.

Senator Wright.—The question whether a Chevrolet motor car shall be subject to a certain percentage of duty is fixed by Parliament, but whether it comes in or not is decided by the department?

Mr. Callaghan.—Government policy determines that.

Senator Wright.—An officer of the department determines it in accordance with the policy laid down by the Parliament.

Mr. Callaghan.—Yes.

(The witness withdrew.)

(The Committee adjourned.)

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

TWELFTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE SECOND REPORT OF THE 1957 SESSION, AND THE TWELFTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

Brought up and ordered to be printed, 20th May, 1957.

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No. S.2 [GROUP H].—F.6423/57.—PRICE 3D.

PERSONNEL OF COMMITTEE.

Chairman:
Senator I. A. C. Wood.

Members:
Senator J. J. Arnold.
Senator C. B. Byrne.
Senator K. A. Laught.
Senator the Hon. H. S. Seward.
Senator D. R. Willesee.
Senator R. C. Wright.

FUNCTIONS OF COMMITTEE.—Since 1932, when the Committee was first established, the principle has been followed 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 rather than 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.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

TWELFTH REPORT OF THE COMMITTEE.

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

2. The Committee wishes, in this report, to refer briefly to three matters with which it has concerned itself in its scrutiny of Regulations and Ordinances laid on the Table of the Senate. These matters are amendments of the Australian Capital Territory Companies Regulations, amendments of the Estate Duty Regulations and amendments of the Public Service Regulations. The amending legislation is contained in Australian Capital Territory Regulations 1955, No. 16, Statutory Rules 1956, No. 51 and Statutory Rules 1956, No. 48.

AUSTRALIAN CAPITAL TERRITORY COMPANIES REGULATIONS (No. 16 of 1955).

3. The Committee has taken these Regulations into consideration and has heard evidence on them from departmental officers. It noted that the regulations are retrospective in their operation, as they were gazetted on 22nd December, 1955, and were expressed to have effect from the first day of October, 1954. They authorize a refund of registration fees paid by companies for registration in the Australian Capital Territory. The amount refunded was £6,950 2s. 6d.

4. The Committee invites attention to regulations which retrospectively authorize refunds of public revenue. The justification explained to the Committee was that in prescribing the original scale of registration fees the New South Wales scale was adopted. That scale, we were told, inadvertently imposed fees calculated in accordance with the company's capital without a maximum limit. This required payment by companies registering in the Australian Capital Territory of large amounts, in some cases as much as £659 and £815, and, in one case, £1,534. The view upon which the regulation was based was that it was considered that the maximum limit should be £50 and any excess refunded.

5. From the evidence taken by the Committee, it appeared that companies registering in the Territory enjoy immunity from stamp duty on registration, and that transferors of shares which are registered in the Australian Capital Territory share register also are free from stamp duty.

6. While the policy giving rise to the regulations is no concern of the Committee, it considers that the inter-relation of these matters with effects of the regulations retrospectively refunding revenue may be an appropriate matter for consideration by the Parliament. The Committee calls attention to the matter only insofar as executive action subtracting money from the Treasury affects parliamentary control of public revenue.

ESTATE DUTY REGULATIONS (STATUTORY RULES 1956, No. 51).

7. The Committee has noted that these Regulations, gazetted on 21st June, 1956, give effect, *inter alia*, to certain of the provisions of the *Estate Duty Assessment Act* 1953. This Act raised the statutory exemption exempting estates from federal estate duty from £2,000 to £5,000, where the whole of the estate passed to the widow, widower, children or grandchildren of the deceased, and from £1,000 to £2,500 where no part of the estate so passed. It provided for decreased exemption in certain other cases. The Act was assented to on *28th October, 1953*.

8. The Committee believes that following the 1953 Act a relatively large number of estates of comparatively small value would have become entirely exempt from estate duty and a further group would become partially exempt from estate duty.

9. The Committee notes with surprise that no regulations giving effect to the amendment of the Act were made until over two and a half years after the passing of the Act.

10. The Regulations of *1956* include a provision that the relative sub-regulation giving effect to the amendment of the Act should apply in relation to estates of deceased persons dying *on or after the twenty-eighth day of October, 1953*.

11. The effect of the delay in bringing out regulations to give effect to the parliamentary enactment has been that administrators of estates of deceased persons falling within the limits set out in paragraph 7 have, by virtue of unamended regulations, been required to submit returns from which exemption was virtually granted by Parliament in October, 1953. This could have involved persons in unnecessary costs, for solicitors' fees, valuers' fees and the like.

12. The Committee invites attention to these regulations as illustrating a situation arising from long delay between a parliamentary enactment and the promulgation of consequential subordinate legislation. Relief has thus been denied to the subject through this delay. While not attempting to extend its activities beyond a proper sphere, the Committee suggests that it is important for Ministers when introducing Bills to Parliament, and particularly Bills providing for a measure of relief to the subject, to ensure that should Parliament enact the legislation, immediate promulgation of subordinate legislation could follow with reasonable promptness. To enable this to be done it is suggested that the subordinate legislation should be at least in fair copy draft form by the time Parliament has approved of the legislation.

PUBLIC SERVICE REGULATIONS (STATUTORY RULES 1956, No. 48).

13. The Committee considered these regulations, and heard evidence relating to them. In the course of its inquiries, it learned that the regulations, by increasing the salaries of public service officers, make provision for increasing the expenditure from Commonwealth revenue by an amount of £9,500,000 per annum. The total amount involved in payments under the regulations is in the vicinity of £120,000,000 per annum.

14. While the regulations do not provide the authority for payment of these amounts, which is provided in the annual Appropriation Act, their enactment in advance of parliamentary appropriation does place an obligation upon the Parliament to increase the relevant appropriations.

15. In the circumstances, as explained to the Committee, this appears unavoidable, but the Committee expresses the view that control over taxation and appropriation is a strict parliamentary function, and that the development of any tendency to lessen that control should be closely watched.

16. In conclusion, the Committee expresses its appreciation of the assistance which it continues to receive from departmental officers in the course of its inquiries.

IAN WOOD, Chairman.

Senate Committee Room.
20th May, 1957.

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

THIRTEENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES.

(BEING THE THIRD REPORT OF THE 1957 SESSION, AND THE THIRTEENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

Brought up and ordered to be printed, 31*st October*, 1957.

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No. S.3 [GROUP H].—F.6456/57.—PRICE 3D.

PERSONNEL OF COMMITTEE.

Chairman:
Senator I. A. C. Wood.

Members:
Senator J. J. Arnold.
Senator C. B. Byrne.
Senator K. A. Laught.
Senator the Hon. H. S. Seward.
Senator D. R. Willesee.
Senator R. C. Wright.

FUNCTIONS OF COMMITTEE.—Since 1932, when the Committee was first established, the principle has been followed 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 rather than 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.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

THIRTEENTH REPORT OF THE COMMITTEE.

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

2. The Committee's attention was drawn to A.C.T. Ordinance No. 6 of 1953, to amend the Meat Ordinance 1931-1950, and to Clause 20A of Regulation No. 5 of A.C.T. Regulations, 1953, made thereunder, by Senator Gorton on 4th September, 1957.

3. The Committee has considered the Ordinance and the Regulations on the 3rd, 10th, 25th and 30th October, and has taken evidence from Mr. R. N. Wardle, the Director of Veterinary Hygiene.

4. The original Ordinance of 1931, by section 7, prohibited the bringing of meat into the Territory for the purposes of sale or business "except in accordance with such conditions as are prescribed", i.e., conditions stated in regulations. The amending Ordinance in 1953 altered this provision to a prohibition against bringing meat into the Territory for the purposes of sale or business "except as authorized under the Regulations". It will be apparent that the original Ordinance required the conditions of entry to be prescribed and set forth in the regulations. The amended Ordinance enables the regulations to authorize the entry.

5. Under the amended Ordinance the following regulation 20A was made:—

"20A.—(1.) The Director-General may grant to a person a permit in writing authorizing him to bring meat into the Territory, or to cause meat to be brought or sent into the Territory, for the purposes of sale or of a business carried on by him or by another person, and, subject to this regulation, meat may be brought or sent into the Territory in accordance with the permit.

"(2.) A permit under this regulation (other than a permit referred to in the next succeeding sub-regulation) does not authorize a person to bring meat into the Territory, or to cause meat to be brought or sent into the Territory, unless—

(a) the meat has been obtained from beasts slaughtered at an abattoir approved by the Director-General;
(b) the meat has been branded by a meat inspector employed at that abattoir with a brand indicating that it has been passed by him as fit for human consumption;
(c) the meat is accompanied by a certificate of that inspector, bearing a replica of the brand referred to in the last preceding paragraph, stating the date of slaughter and certifying that the meat is of first quality or second quality as prescribed by the Commerce (Meat Export) Regulations in force under the *Customs Act* 1901-1952 and the *Commerce (Trade Descriptions) Act* 1905-1950;
(d) the meat is transported from the abattoir to its destination in the Territory in a vehicle approved by the Director-General; and
(e) the holder of the permit has given to the Director-General, not less than twenty-four hours before the entry of the meat into the Territory, notice of the time at which the meat will arrive at its destination in the Territory and of that destination.

"(3.) A permit under this regulation may be expressed to apply only to packaged deep-frozen cuts of meat.

"(4.) A permit referred to in the last preceding sub-regulation does not authorize a person to bring meat into the Territory, or to cause meat to be brought or sent into the Territory, unless—

(a) the meat is in the form of packaged cuts and is frozen to, and maintained during transport at, a temperature not higher than 0 degrees Fahrenheit;
(b) the meat is accompanied by a declaration to the satisfaction of the Director-General that no meat other than meat obtained from beasts slaughtered at an abattoir approved by the Director-General is used at the establishment at which the meat has been deep-frozen; and
(c) the meat is accompanied by a certificate of a meat inspector employed at that establishment certifying that the meat has been passed by him as fit for human consumption and that the meat is of first quality or second quality as prescribed by the Commerce (Meat Export) Regulations in force under the *Customs Act* 1901-1952 and the *Commerce (Trade Descriptions) Act* 1905-1950.".

6. It was explained to us by Mr. Wardle that sub-paragraph 2 of the regulation specified all the conditions which were necessary to ensure compliance with proper standards of hygiene. Mr. Wardle said that until 1953 there was not a great demand for the introduction of meat at all. He quite frankly said that the discretionary right of the Director-General under sub-paragraph 1, to permit or prohibit entry of meat was taken in the regulations to protect the abattoir investment on economic grounds.

7. The Committee is of the opinion that the regulation—

(a) provides a discretionary power for the Director-General to give or refuse a permit to a person authorizing him to bring meat into the Territory;

(b) enables the Director, by administrative decision, to discriminate between persons;

(c) enables the Director to refuse a permit without stating any grounds of refusal; and

(d) denies the applicant any remedy in the Courts unless he can prove that the Director has acted capriciously or wholly unreasonably or for corrupt and improper motives.

8. In the opinion of the Committee the regulation makes the right of the person seeking to bring meat into the Territory unduly dependent upon administrative decision, with insufficient means of protection by the Court process.

9. It should be noted that section 92 of the Constitution has been held to protect the freedom of trade only " between the States ", and does not protect free trade between a State and a Territory. But an administrative discretion to refuse a licence or a permit is an authority to deny freedom of trade. In Collier Garland Ltd. v. Hotchkiss, 1957 A.L.R. at 679, the High Court has ruled that a right to trade only with the permission of an official is not freedom to trade.

10 It may be proper to suggest that if protection of the Government investment in the abattoir is the aim, that could be secured by fiscal provisions which tax but do not prohibit the right to trade.

IAN WOOD, Chairman.

Senate Committee Room,
31st October, 1957.

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE

FOURTEENTH REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES.

(being the First Report of the 1959 Session, and the Fourteenth Report since the formation of the Committee.)

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

FOURTEENTH REPORT OF THE SESSION 1959.

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

2. The Committee has considered regulation-making powers contained in the Civil Aviation (Carriers' Liability) Bill 1959, which, at the date of this report, is before the Senate for consideration. The Clauses of the Bill to which the Committee has given its serious consideration are Clauses 40 and 41.

3. Having in mind the proper limits of delegated legislation, the Committee has reached the following conclusions -

(a) Clause 40: In the opinion of the Committee, Clause 40 purports to enable, by regulation, the modification of Clause 31, a key clause of Part IV of the Bill, and that this is not a matter of administrative detail but substantive legislation, appropriate only to Parliamentary enactment. In the opinion of the Committee, Clause 31 is a most important clause of Part IV , and it should not be permissible to use regulations to modify Parliament's will in that respect.

(b) Clause 41: In the opinion of the Committee, Clause 41 does not concern itself with power to make regulations dealing with administrative detail, but gives power to enact regulations which amount to substantive legislation, appropriate to Parliament.

Ian Wood,

Chairman.

Senate Committee Room,

18th March, 1959.

1959.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

FIFTEENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE SECOND REPORT OF THE 1959 SESSION, AND THE FIFTEENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

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No S.1 [GROUP H].—F.8411/59.—PRICE 6D.

PERSONNEL OF COMMITTEE.

Chairman:
Senator Ian Wood.

Members:
Senator J. J. Arnold.
Senator J. A. Cooke.
Senator K. A. Laught.
Senator G. C. McKellar.
Senator D. R. Willesee.
Senator R. C. Wright.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

FIFTEENTH REPORT OF THE COMMITTEE.

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

FUNCTIONS OF THE COMMITTEE.

2. On 18th March, 1959, the Committee tabled its Fourteenth Report, drawing the attention of the Senate to regulation-making powers contained in the Civil Aviation (Carriers' Liability) Bill, which was before the Senate at that time. A point of order was taken objecting to a motion for the printing of that report on the grounds, as stated by the Minister for Civil Aviation, that the functions of the Committee did not include the consideration of any bill and the tabling of any report thereon. The point of order was upheld and the motion lapsed.

3. Briefly, the history of the appointment of the Standing Committee on Regulations and Ordinances was as follows:—

In 1929, the Senate, upon the motion of Senator Elliott, appointed a Select Committee " to report and make recommendations upon the advisability or otherwise of establishing Standing Committees of the Senate upon—

(*a*) Statutory Rules and Ordinances,
(*b*) International Relations,
(*c*) Finance,
(*d*) Private Members' Bills,

and/or such other subjects as may be deemed advisable ". It is of interest to note that the motion for the appointment of the Select Committee commenced by stating the reason for its appointment to be " with a view to improving the legislative work of this Chamber and increasing the participation of individual Senators in such work ".

4. That Committee, after hearing evidence from no less than fifteen distinguished persons interested and experienced in Parliamentary practice and procedures, came to its considered conclusions in March, 1930. First among its recommendations was the following:—

" 1. (*a*) That a Standing Committee of the Senate, to be called the Standing Committee on Regulations and Ordinances, be established.

(*b*) That all Regulations and Ordinances laid on the Table of the Senate be referred to such committee for consideration and report.

(*c*) That such Standing Committee shall be appointed at the commencement of each session on the recommendation of a Selection Committee, consisting of the President, the Leader of the Senate, and the Leader of the Opposition, shall consist of seven members, and shall have power to send for persons, papers, and records; and that four members shall form a quorum.

(*d*) That such Standing Committee shall be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a legislative power of a character which ought to be exercised by Parliament itself; and that it shall also scrutinize regulations to ascertain—

(i) that they are in accordance with the Statute,

(ii) that they do not trespass unduly on personal rights and liberties,

(iii) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions,

(iv) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment."

5. That recommendation was followed by a recommendation for the appointment of a Standing Committee on External Affairs and a recommendation relating to procedures consequent upon the establishment of such Standing Committees.

6. Following debate, the report was recommitted to the Select Committee with a view to considering the suggestion that the method of appointment of the Standing Committee on Regulations and Ordinances be altered. It is of interest to note that no controversy existed in relation to paragraph (*d*) of the recommendation relating to that Committee. The Committee stresses at this point that no objection was raised to that paragraph and that the sole reason for the recommittal of the report was because of objections taken to the proposed method of appointment of members of the Committee.

7. Upon further consideration, following the Senate's motion for recommittal, the Select Committee then submitted a very brief report containing a new recommendation 1 as follows:—

"1. (*a*) That a Standing Committee of the Senate, to be called the Standing Committee on Regulations and Ordinances, be established.

(*b*) That all Regulations and Ordinances laid on the Table of the Senate be referred to such Committee for consideration and report.

(*c*) That such Standing Committee shall consist of seven Senators and shall be appointed at the commencement of each session in the following manner:—

(1) The Leader of the Government in the Senate shall, within four days from the commencement of the session, appoint, in writing, four Senators to be members of the Committee; and

(2) The Leader of the Opposition in the Senate shall, within four days from the commencement of the session, appoint, in writing, three Senators to be members of the Committee.

(*d*) That such Committee shall have power to send for persons, papers and records, and that four members shall form a quorum."

8. As a result of this second report, which was adopted by the Senate on 14th May, 1931, in lieu of the first report, the Standing Orders were amended by the inclusion of Standing Order 36A, as follows:—

"36A.—(1.) A Standing Committee, to be called the Standing Committee on Regulations and Ordinances, shall be appointed at the commencement of each Session.

(2.) The Committee shall consist of seven Senators chosen in the following manner:—

(*a*) The Leader of the Government in the Senate shall, within four sitting days after the commencement of the Session, nominate, in writing, addressed to the President, four Senators to be members of the Committee.

(*b*) The Leader of the Opposition in the Senate shall, within four sitting days after the commencement of the Session, nominate, in writing, addressed to the President, three Senators to be members of the Committee.

(*c*) Any vacancy arising in the Committee shall be filled after the Leader of the Government or the Leader of the Opposition, as the case may be, has nominated, in writing addressed to the President, some Senator to fill the vacancy.

(3.) The Committee shall have power to send for persons, papers and records, and to sit during Recess; and the quorum of such Committee shall be four unless otherwise ordered by the Senate.

(4.) All Regulations and Ordinances laid on the Table of the Senate shall stand referred to such Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Senate on motion after notice."

9. The Standing Order was clear in so far as it went but, as in the case of similar Standing Orders relating to other Committees, laid down no principles for the Committee to follow in its work. In its fourth Report to the Senate in 1938, the Regulations and Ordinances Committee referred back to the recommendations of the 1929 Select Committee, as fully set out in its first report, and stated that the Regulations and Ordinances Committee had adopted for its scrutiny of all Regulations and Ordinances the principles set out in paragraph 1 (*d*) of those recommendations. Reference should be made also to paragraph 23 of the 1929 Select Committee's report, as follows:—

"23. In the opinion of the Committee the work of the proposed Standing Committee on Regulations and Ordinances would be *both preventive and corrective*. It would be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a legislative power which ought to be exercised by Parliament itself. It would be required to scrutinize regulations to ascertain:—

(*a*) that they are in accord 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."

Successive Committees since that date have continued to follow those last-named principles, although they were never set out in the Standing Orders or, indeed, in the second report of the 1929 Select Committee.

10. When preparing its Fourteenth Report earlier this Session, the Committee, in pursuance of its task of assisting the Senate as a House of Review, followed, in the same way as the Committee in 1938, a principle contained in paragraph 1 (*d*) of the First Report of the 1929 Select Committee. In this case the principle followed was to see "that the Clause of each Bill conferring regulation-making power does not confer a legislative power of a character which ought to be exercised by Parliament itself."

11. The Committee regards as a proper demonstration of its function and its effectiveness the drawing of the Senate's attention to an example of what appeared to the members to be a particularly wide regulation-making power in the Civil Aviation (Carriers' Liability) Bill 1959.

12. It is of interest to note that this function on the part of a Parliamentary Committee dealing with delegated legislation has been recognized in the Parliament of India where the Committee on Subordinate Legislation, appointed in 1953—

"to scrutinize and report to the House whether the powers to make regulations, rules, sub-rules, by-laws, &c., conferred by the Constitution, or delegated by Parliament, are being properly exercised within such delegation"

follows this practice. In his "Parliamentary Control of Delegated Legislation", (Public Law, Autumn, 1956) which includes reference to the Australian Senate Committee, Sir Cecil Carr, Q.C., refers without comment to the fact that the Indian Committee does extend its activity to the scrutiny of Bills as well as subordinate orders.

13. This Committee regards itself as charged with the duty of supervision of the powers of delegated legislation in this Parliament for the purpose of assisting the Senate in this aspect of its work as a House of Review. Witnesses before the 1929 Select Committee stressed that the Senate was the appropriate House for the careful supervision of delegated legislation, and the Committee, in exercising that supervision, draws strength from the wording, already quoted, of the motion appointing the 1929 Committee to the effect that the appointment of a Committee to investigate the Standing Committee system was with a view to improving the legislative work of the Senate.

CUSTOMS (PROHIBITED EXPORTS) REGULATIONS (STATUTORY RULES 1958, No. 5).

14. The Committee has considered these Regulations closely and has heard evidence as to their practical application in the administrative field. The basis of the Regulations is that the export from Australia of specified goods is prohibited, in some cases absolutely, and in others subject to conditions. In the case of goods referred to in Regulations 5 to 12, the condition is stated to be "unless an approval in writing to the exportation of the goods issued by the Department of . . . . . is produced to the Collector" (in Regulation 11 the issuing authority is the Australian Atomic Energy Commission).

15. The policy of the regulations is a matter entirely outside the Committee's consideration.

16. But the form of this regulation illustrates the exclusive and ultimate claim of bureaucracy. The individual right of the citizen to export is prohibited. But in respect of the exercise of the prohibition he is totally denied recourse to the Law Courts. His right is determined and finally decided by the administrators. But even the responsibility which devolves on an administrator is evaded—because the regulations rest the power not in an officer but in the bureau itself—the Department—with the result that the official who actually refuses or grants approval is not by law identified. Consequently, the citizen is wholly excluded from legal redress in the Law Courts and the administrator can hide behind the general cloak of "the Department" if the citizen having a grievance wishes to complain.

17. In other words, this is the form of regulation which expresses bureaucracy in the ultimate. For a misuse of the authority given, the ordinary citizen who feels himself aggrieved has neither legal nor political redress.

ORDINANCES OF THE TERRITORIES.

18. In 1947, provision was made, by the *Northern Territory (Administration) Act* 1947, for the establishment of a Legislative Council for the Northern Territory, including a number of elected members. In 1949, during the post-war period when the Territories of Papua and New Guinea were functioning under a provisional administration, somewhat similar provision was made, by the *Papua and New Guinea Act* 1949, for the election of a number of members to the new Legislative Council for the Territory of Papua and New Guinea.

19. Since these provisions came into effect, the relationship of the ordinances of those Territories to the Committee's functions have from time to time been considered. The terms of the Senate Standing Orders constituting this Committee are probably wide enough to bring the territorial ordinances within the scope of the Committee's consideration. But the general purpose of this Committee is not felt to be to supervise the legislation of a territorial Legislative Council. Such a Council consists of elected representatives and nominated members. Its ordinances are resolved upon after public debate. There is an incongruity about the idea of this Committee examining legislation so made for the purposes specified in paragraph 4 above, namely—

(i) . . . . .

(ii) that they do not trespass unduly on personal rights and liberties,

(iii) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions,

(iv) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment."

20. The view which the Committee has taken is that it has no responsibility to scrutinize the ordinances of the Legislative Councils for such purposes.

21. That view leaves a position which might be thought to be a constitutional anomaly. The Minister by reason of his power to appoint a majority of the Council members, in effect directs and procures the enactment of ordinances. If the Minister himself enacted the legislation in the form of regulations this Committee would be bound to take the regulations into consideration. But as the Legislative Council ordinances, at any rate in form, are the product of a legislative assembly they are exempt from this scrutiny, although in truth they may be the ordinances of the Minister approved of by the Council.

22. Neither House has power to disallow the ordinances of a Legislative Council.

IAN WOOD,
Chairman.

Regulations and Ordinances Committee Room,
22nd September, 1959.

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1960.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

SIXTEENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1960 SESSION, AND THE SIXTEENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

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No. S.1 [GROUP H].—F.3781/60.—PRICE 3D.

PERSONNEL OF COMMITTEE.

Chairman:
Senator Ian Wood.

Members:
Senator J. J. Arnold.
Senator J. A. Cooke.
Senator K. A. Laught.
Senator G. C. McKellar.
Senator D. R. Willesee.
Senator R. C. Wright.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

SIXTEENTH REPORT OF THE COMMITTEE.

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

PUBLIC SERVICE REGULATIONS.

2. The Committee has considered the amendments of the Public Service Regulations contained in Statutory Rules 1960, No. 12. Statutory Rule No. 12 of 1960 was made by the Public Service Board and approved by the Governor-General. The regulations increase salaries of officers of the Public Service by amounts which represent a budget load of £10,000,000 in a full year.

3. The explanatory memorandum accompanying the regulations is probably unique for the fact that it quotes a Cabinet decision. The memorandum says:—

"The adjustments have been made in accordance with Cabinet decision No. 578 of the 15th December, 1959, which reads—

It was decided that the Public Service Board should be informed that Cabinet—

(1.) Agreed that Fourth Division salaries up to and including the level of tradesman should be adjusted on the basis of a 28 per cent. increase in margins:

(2.) Considered that salaries at the top of Second Division should be increased by an amount of the order of £750, and that the Board should proceed to make an appropriate adjustment of all intervening classifications down to those of tradesman in the Fourth Division."

4. This Committee is authorized to consider the regulations from the points of view—

(*a*) as to whether in making them the Statute has been complied with;

(*b*) as to whether the regulations are concerned with administrative detail only or amount to substantive legislation which should be a matter for Parliamentary enactment.

5. The authority for the Public Service Board to alter public service salaries by regulation derives from the Statute of 1922.

Section 30 of the *Public Service Act* 1922–1958 is as follows:—

"30.—(1.) Officers of the First Division shall be paid such salaries as the Parliament provides.

(2.) Officers of the Second, Third and Fourth Divisions shall be paid salaries at such rates, or in accordance with such scales of rates, as are prescribed.

(3.) The regulations may, notwithstanding the classification of officers, provide for the variation of rates of salary according to variations in the cost of living."

6. The Board has power, with the approval of the Governor-General, to make regulations under the Act, including the prescription of rates of salaries.

7. Section 18 of the Act provides—

(1.) The Board shall furnish reports or recommendations on all matters required to be dealt with by the Governor-General under this Act or referred to the Board by the Governor-General; and no such matters shall be submitted for the consideration of the Governor-General unless accompanied by a report or recommendation of the Board.

(2.) If the Governor-General does not approve of any recommendation, he may require the Board to furnish a *fresh recommendation*, which shall be considered and dealt with by the Governor-General.

(3.) If the Governor-General does not approve of the fresh recommendation, *a statement of the reasons* for not approving shall be laid before *both Houses* of Parliament . . .

8. In evidence, Mr. F. C. Nordeck, Acting Commissioner of the Public Service Board, told the Committee that the Board put before the Government quite a comprehensive submission reviewing all the facts.

9. It was in the light of such submission apparently that the Cabinet minute referred to in paragraph 3 above was decided on. This procedure appears to be a substantial but not a strict compliance with Section 18.

10. Within the previous period of twelve months, following the basic wage decision, the Board issued regulations increasing Public Service salaries by an amount of the order of £5,500,000. The total budget load of increases in the Public Service salaries authorized by such regulations in the present year was of the order of £15,500,000.

11. In the opinion of this Committee, the regulation making authority which enables increases of expenditure of this magnitude warrants review. It may be appropriate to provide that when increases decided upon exceed some specified figure, say £2,000,000 per year, such increases should be authorized only by Parliament.

CANBERRA BUILDING REGULATIONS.

12. The Committee has also considered the amendments of the Canberra Building Regulations contained in A.C.T. Regulations 1959, No. 13.

Regulation 7 provides—

(5.) The proper authority may, *in his discretion*, issue to an applicant under this regulation a Builder's Licence or a Builder's Special Licence, as the case requires.

. . . . . .

(9.) The proper authority may, by notice in writing to the holder, cancel or suspend a Builder's Licence or a Builder's Special Licence.

13. Regulation 4 of the Canberra Building Regulations defines "the proper authority" as "the person or persons for the time being appointed as such by the Minister".

14. The Committee does not question the policy of regulations relating to the issue of licences to builders in the A.C.T., but considers that where a power of issue or cancellation or suspension is given to an administrative authority, with the possible effect of completely taking away a person's means of livelihood, provision should be made for a right to be heard, and, in the event of an adverse decision, a right of appeal.

15. As the Committee scrutinizes regulations to ascertain that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions, the Committee reports that, in its opinion, action should be taken to provide for a right to be heard and a proper right of appeal where a licence has been refused, cancelled or suspended.

IAN WOOD,
Chairman.

Regulations and Ordinances Committee Room.
11th May, 1960.

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

SEVENTEENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1961 SESSION, AND THE SEVENTEENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

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No. S.1 [GROUP H].—F.9777/61.—PRICE 3d.

PERSONNEL OF COMMITTEE.

Chairman:
Senator Ian Wood.

Members:
Senator J. J. Arnold.
Senator J. A. Cooke.
Senator K. A. Laught.
Senator G. C. McKellar.
Senator D. R. Willesee.
Senator R. C. Wright.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

SEVENTEENTH REPORT OF THE COMMITTEE.

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

PUBLIC SERVICE REGULATIONS.

2. Public Service Regulations, contained in Statutory Rules 1961, No. 83, were gazetted on 6th July, 1961, and tabled in the Senate on 15th August, 1961.

3. Regulations 1 to 5 of these Regulations deal with the granting of leave, and the payment of salary while on leave, to officers and employees of the Commonwealth Public Service engaged in activities as members of the Citizen Naval Forces, the Citizen Military Forces or the Citizen Air Force. Regulation 1 provides that Regulations 2 to 5 shall have retrospective operation to 29th March, 1960—a period of fifteen months prior to gazettal.

4. The Government announced policy in this matter on 29th March, 1960. The amount expended pursuant to this policy before it was enacted into law by regulation was approximately £58,000.

5. To delay regulations is to deny the right to either House of Parliament to approve or disapprove of the expenditure at the appropriate time—before expenditure.

6. The Committee regards the delay as inexcusable and records its opinion that future regulations giving retrospective operation of this degree should be disallowed.

IAN WOOD,
Chairman.

Regulations and Ordinances Committee Room.
5th October, 1961.

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1962.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

EIGHTEENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1962 SESSION, AND THE EIGHTEENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

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PERSONNEL OF COMMITTEE.

Chairman:
Senator Ian Wood.

Members:
Senator J. J. Arnold.
Senator J. A. Cooke.
Senator M. C. Cormack.
Senator E. W. Prowse.
Senator D. R. Willesee.
Senator R. C. Wright.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

EIGHTEENTH REPORT OF THE COMMITTEE.

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

CUSTOMS (PROHIBITED IMPORTS) REGULATIONS.

2. The Committee has considered the amendments of the Customs (Prohibited Imports) Regulations contained in Statutory Rules 1962, No. 82.

3. The Customs (Prohibited Imports) Regulations, Statutory Rules 1956, No. 90 provide—

"(3) The importation into Australia of the goods specified in the first Schedule to these Regulations is prohibited absolutely."

The First Schedule includes the following items:—

"(2) Advertising matter relating to any goods covered by this Schedule.
(7) Blasphemous, indecent or obscene works or articles."

4. The Amendments of the Customs (Prohibited Imports) Regulations contained in Statutory Rules 1962, No. 82, provide—

"1. The First Schedule to the Customs (Prohibited Imports) Regulations is amended by omitting item 7.
2. The Second Schedule to the Customs (Prohibited Imports) Regulations is amended by inserting after item 5 the following item—

'5A Blasphemous, indecent or obscene works or articles and advertising matter relating to blasphemous, indecent or obscene works or articles.'

....."

5. The effect of the Regulations in Statutory Rule No. 82 of 1962 is, therefore, to transfer works or articles which are blasphemous, indecent or obscene from the list of goods the importation of which is *absolutely prohibited by law* to the list of goods the importation of which is prohibited "unless *the permission in writing of the Minister* has been granted."

6. In evidence before the committee, Mr. H. A. Forbes, an Assistant Comptroller-General of the Department of Customs and Excise, indicated that this was done primarily at the request of the Chairman of the Literature Censorship Board and was intended to permit the Minister to sanction importation of an occasional work for a particular person or body and for a particular purpose. The only example quoted was for use by a university for research.

7. The Minister's discretion is—

(*a*) Unrestricted in quantity;
(*b*) Not limited to any particular purpose;
(*c*) Not controlled by any conditions laid down in the regulations, such as a recommendation of the Literature Censorship Board; and
(*d*) Unappealable.

8. In the opinion of the Committee, if the prohibition of importation of blasphemous, indecent or obscene literature is to cease to be absolute, the law should prescribe proper safeguards limiting the Minister's discretion. It is the written law, and not an uncontrolled Ministerial discretion which should regulate the importation of such works.

9. The Committee draws attention to the existence of other items in the second Schedule to the principal regulations which are objectionable.

10. The Committee makes reference generally to its Eleventh Report and to paragraphs fourteen to seventeen of its Fifteenth Report.

IAN WOOD,
Chairman.

Regulations and Ordinances Committee Room,
14th November, 1962.

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

NINETEENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1964 SESSION, AND THE NINETEENTH REPORT SINCE THE FORMATION OF THE COMMITTEE)

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PERSONNEL OF COMMITTEE

Chairman:
Senator Ian Wood

Members:
Senator J. J. Arnold
Senator J. A. Cooke
Senator M. C. Cormack
Senator E. W. Prowse
Senator D. R. Willesee
Senator R. C. Wright

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

NINETEENTH REPORT OF THE COMMITTEE

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

2. At its first meeting this year the Committee agreed that it should submit to the Senate a general report on its activities since its last report in November, 1962. This decision was to some extent prompted by the fact that in some quarters the Committee has become more associated with motions for disallowance of regulations than with the less controversial but equally important and effective work carried on by the Committee in its general supervision of delegated legislation. This work regularly involves the hearing of evidence from departmental witnesses, and the exchange of correspondence with Ministers, in relation to regulations and ordinances tabled in the Senate.

3. In accordance with its decision the Committee has selected certain matters with which it has dealt since its last report and reports to the Senate upon them as follows:

CUSTOMS (PROHIBITED IMPORTS) REGULATIONS

4. Following the Committee's eighteenth report, the Chairman gave notice on 15th November, 1962, of a motion to disallow Regulations 1 and 2 of the regulations referred to in that report (Statutory Rules 1962 No. 82), the effect of which was to transfer works or articles which are blasphemous, indecent or obscene from the list of goods the importation of which is absolutely prohibited by law to the list of goods the importation of which is prohibited unless the permission in writing of the Minister has been granted.

5. In the opinion of the Committee, if the prohibition of importation of such material were to cease to be absolute the law should provide proper safeguards limiting the Minister's discretion.

6. After debate, extending over three days, the Minister for Customs and Excise, Senator the Hon. N. H. D. Henty, gave an undertaking to the Senate that he would have the regulations amended to meet the requirements of the Committee. In view of this undertaking the Chairman withdrew his motion, by leave of the Senate, on 4th December, 1962. The regulations were subsequently amended (Statutory Rules 1963, No. 26) as follows:

1. After regulation 4 of the Customs (Prohibited Imports) Regulations the following regulation is inserted:—

"4A.—(1.) This regulation applies to blasphemous, indecent or obscene works or articles and advertising matter relating to blasphemous, indecent or obscene works or articles.

(2.) The importation of goods to which this regulation applies is prohibited unless a permission, in writing, to import the goods has, after the Minister has obtained a report from the Chairman of the Literature Censorship Board constituted under the Customs (Literature Censorship) Regulations or from the Director-General of Health, been granted by the Minister.

(3.) A permission under this Regulation shall be subject to such conditions imposing requirements or prohibitions on the person to whom the permission is granted with respect to the custody, use, reproduction, disposal or destruction of the goods, or with respect to accounting for the goods, as the Minister thinks necessary to ensure that the goods are not used otherwise than for the purpose for which he grants the permission."

BROADCASTING AND TELEVISION REGULATIONS

7. In May, 1963, the Committee considered an amendment of the Broadcasting and Television Regulations (Statutory Rules 1963, No. 11) relating to the functions of the Australian Broadcasting Control Board in connexion with conditions of licences.

8. The amending regulation provides:

"4A.—(1.) The functions of the Australian Broadcasting Control Board include the performance of the duty of duly considering and deciding applications to the Board in relation to matters which, under any condition of a licence under the Act in respect of a broadcasting station or television station, may be the subject of application to the Board.

(2.) In performing its function under this regulation, the Board shall, subject to the Act and the terms and conditions of the licence concerned, proceed in such manner, and after notice to such persons, as it thinks proper, and may inform itself in such manner as it thinks fit."

and it appeared to the Committee that a matter of such importance should be dealt with by substantive legislation rather than regulation. Upon examination of the *Broadcasting and Television Act* 1942–1962, however, it was found that section 16 (1.) provides:

"16.—(1.) The functions of the Board are—

(*a*) to ensure the provision of services by broadcasting stations and television stations in accordance with plans from time to time prepared by the Board and approved by the Minister;

(*b*) to ensure that the technical equipment and operation of such stations are in accordance with such standards and practices as the Board considers to be appropriate;

(*c*) to ensure that adequate and comprehensive programmes are provided by commercial broadcasting stations and commercial television stations to serve the best interests of the general public; and

(*d*) to detect sources of interference, and to furnish advice and assistance in connexion with the prevention of interference, with the transmission or reception of the programmes of broadcasting stations and television stations,

and shall include such other functions in relation to broadcasting stations and television stations as are prescribed."

9. *The amending regulation expands the functions of the Board considerably, and also gives it* authority to act in any manner it thinks fit in relation to its inquiries under the regulation (a power which is not given to it by Division 3 of the Principal Act in relation to other inquiries). The only justification for such a regulation lies in the very wide language of section 16 (inserted in the Act in 1948, and amended by the Parliament in 1956), and the Committee draws to the attention of the Senate this recent example of what can be prescribed by regulation, even in such a currently controversial field as the granting of television licences, when the Parliament passes legislation containing as wide a regulation making power as section 16 of the Broadcasting and Television Act.

MARRIAGE REGULATIONS

10. In August, 1963, the Committee considered the first Marriage Regulations made under the Marriage Act 1961 (Statutory Rules 1963, No. 31). It appeared to the Committee that Regulation 60 dealing with the furnishing of information relating to the re-registration of the births of legitimated children gave to the registering authority an unlimited authority to seek information, and that this might be an infringement of personal rights and liberties.

11. The Committee discussed the matter with the then Attorney-General, who agreed that no such intention lay behind the regulation. As a result of the discussions with the Minister a letter was received from the Secretary, Attorney-General's Department, in the following terms:

"I am instructed by the Attorney-General, following his discussion with the members of your Committee this morning, to inform your Committee that, in the view of the Attorney-General, the information which could be specified *in a notice under regulation 60 (1.) of the Marriage Regulations* would be limited to information of the kind set out in Form 21 scheduled to the regulations, and that, by the general law, a refusal of information on the ground that to furnish it would incriminate the person required to give it would not be a breach of the regulation.

2. However, the Attorney-General appreciates the concern of the Committee and desires to assure it—

Firstly, that the regulation will be administered so as to confine the information sought under it to the information provided for in Form 21 (other than the paternity of the child) and that he will so instruct the registering authorities, and

Secondly, that on the first occasion the Marriage Regulations are amended, regulation 60 will be amended to make express the limitation as to information and the exception of incriminating answers to which the Attorney has referred.

For the words now appearing in sub-regulation (1) ' information relating to the legitimation of the child ' would be substituted words such as ' the information relating to the legitimation of the child as set forth in Form 21 '. After the words now appearing in sub-regulation (5.) ' shall not ' would be inserted the words ' without lawful excuse '."

and the Committee agreed to take no further action in the matter.

AUSTRALIAN CAPITAL TERRITORY DENTAL REGULATIONS AND MEDICAL PRACTITIONERS REGISTRATION REGULATIONS

12. In September, 1963, the Committee considered these regulations, dealing, *inter alia*, with permitted advertising by members of the dental and medical professions. The regulations contained the widest and most detailed restrictions possible, and appeared to the Committee to be unnecessarily extensive and restrictive of the rights and liberties of citizens, in this case the members of the two professions.

13. The Committee heard evidence from the Director-General of Health, and subsequently the Chairman gave notice in the Senate, on 8th October, of a motion to disallow the relevant portions of the Regulations. Following this action, members of the Committee had further opportunity to discuss the matter with the Director-General and, as a result, the following letter was received from the Minister for Health, Senator the Hon. H. W. Wade:

"My Director-General has acquainted me with the tenor of his discussion with you on the ' advertising ' regulations, the subject of your Notice of Motion currently on the Senate Notice Paper.

Upon consideration of the matter I think it best to repeal the regulations and replace them with others which, in general terms, would permit advertising by medical practitioners and dentists to the limits sanctioned by the accepted customs and usages of the medical and dental professions. Under these regulations it would be the function of the Medical and Dental Boards to see that the bounds fixed by custom were not exceeded.

The Director-General has arranged for draft legislation along these lines to be prepared by the Parliamentary Draftsman as a matter of urgency.

In these circumstances I feel that you might wish to withdraw the Notice of Motion as the reason for debate in the Chamber would by this action largely disappear.".

14. The Chairman withdrew his motion by leave of the Senate on 15th October, and subsequently new regulations were introduced (Nos. 6 and 7 of 1963) repealing those objected to by the Committee and providing generally that permitted advertising by the members of the two professions should be of a kind which conforms to the accepted customs and usages of their respective professions. These provisions adequately overcame the objections originally raised by the Committee.

LAKE BURLEY GRIFFIN (TEMPORARY CONTROL) ORDINANCE

15. On 19th March, 1964, the Committee considered the Lake Burley Griffin (Temporary Control) Ordinance 1963 (A.C.T. Ordinance No. 20 of 1963), section 6 of which gives to the Minister for the Interior the absolute and unrestricted power of prohibition on use of Lake Burley Griffin in Canberra.

16. The Committee resolved to write to the Minister for the Interior asking for an explanation of the circumstances which, in his view, justified the granting of such a power, and pointing out also that, although the title of the Ordinance refers to the temporary nature of the Ordinance there is no provision in the body of the legislation to limit its operation.

17. The Minister replied to the Committee explaining that the ordinance had been made to protect *the public from injury by concealed hazards during the construction period of the Lake*, and that weather conditions had already caused the ordinance to be in operation longer than had been anticipated. As soon as the Lake filled and the danger from concealed hazards no longer existed, the ordinance would be repealed.

18. The Committee noted that since the receipt of the Minister's letter the Lake had in fact filled and the prohibition on its use had been lifted. In the circumstances, the Committee decided to proceed no further on the question of the arbitrary power granted under the Ordinance

19. To complete this report, the Committee refers to two subjects which have been of concern to it for a considerable time, namely, the Committee's responsibility with regard to Ordinances and Regulations of the Territory of Papua and New Guinea and the Northern Territory and the question *of the retrospective operation of regulations. The Committee has referred to these matters in previous* reports and does so again in the belief that they are matters of continuing importance.

ORDINANCES AND REGULATIONS OF THE TERRITORIES

20. In its Fifteenth Report, tabled in the Senate on 22nd September, 1959, and subsequently debated on 7th and 8th October of that year, the Committee stated that, as legislative developments in the Territory of Papua and New Guinea and the Northern Territory had resulted in the creation of representative legislatures, it was inappropriate for the Committee to assume the function of supervision over measures enacted by those legislatures. The then Minister for Territories, in a statement read in the *Senate by the Minister representing him (Senator the Hon. Sir Walter Cooper)*, agreed with the Committee's contention.

21. Subsequent developments in both Territories, resulting in even greater independence from Commonwealth control, and, in the case of Papua and New Guinea the recent election of a new Legislative House of Assembly, have reinforced the Committee's view that it should be discharged from any responsibility in relation to their legislative enactments and that formal action should be taken to have them removed from its scrutiny.

22. Following the Committee's earlier report, action was taken to refer to the Senate Standing Orders Committee the question of the advisability of amending Standing Order 36A to exclude all Ordinances and Regulations of the two Territories from reference to, and scrutiny by, this Committee. *At the present time it is understood that the matter has been considered by a sub-committee of the* Standing Orders Committee.

23. It may be that the most appropriate method of achieving the Committee's wish in this matter would be to repeal the statutory requirements relating, as far as Ordinances and Regulations of these two Territories are concerned, to tabling in, and disallowance by either House of the Parliament, but this would be a matter of Government policy. An amendment by the Senate of Standing Order 36A in the manner suggested by the Committee would, however, also achieve the Committee's purpose.

RETROSPECTIVITY OF REGULATIONS

24. The Committee has continued its close interest in the delay which occurs in the promulgation of regulations, and the retrospective operation necessitated thereby in many cases. In an attempt to alleviate the position the Committee received evidence from the Parliamentary Draftsman and representatives of various departments, particularly the Service Departments and the Public Service Board. It is clear to the Committee, as a result of this evidence that some delay is unavoidable. The Committee, over the years, has pursued its interest in this matter, and has from time to time drawn attention to cases of what it regards as exceptional retrospectivity. Written assurances have been received from certain Ministers that their Departments have been instructed to avoid delay and consequent retrospectivity. The Committee is pleased to report that it has noted a distinct improvement in this matter.

F.6875/64.—2

25. A recent example of the Committee's activity in this field of retrospectivity is as follows:

In October, 1963, the Committee had before it for consideration Statutory Rules Nos. 88, 89, 90 and 91, relating to determinations, directions or approvals made or given by the Naval Board, the Military Board or the Air Board in connexion with payment of certain types of pay, allowances and other financial entitlements under the relevant regulations. In each case a new regulation was inserted in the Regulations including the following sub-regulation:

"(2.) A determination, direction or approval takes effect from the date on which it is made or given or, if it is expressed to take effect from another date specified in it, from that other date."

26. This provision was obviously capable of giving rise to excessive retrospectivity and the Committee sought information on the matter from representatives of the three Departments concerned. Following evidence from these representatives, during which the difficulties experienced by the Administration were explained, the Chairman wrote to the respective Ministers stating, *inter alia*,

"The Committee believes that the power to give retrospective effect to determinations, directions and approvals of the respective Ministers or Boards is capable of too extensive an operation, and that it should contain a greater limitation than at present applies. A maximum limitation of two years retrospectivity would appear to be appropriate, in the circumstances explained by the departmental officers; not as a guide for the ordinary case but to be used only in exceptional cases. The Committee suggests that there be included in the regulations, by way of amendment, the words 'not exceeding however in any case a total period of two years',".

27. As a result of this suggestion further amendments were made in the regulations (Statutory Rules 1964, Nos. 5, 6, 9 and 14) providing that a determination, direction or approval shall not be expressed to take effect from a date that is more than two years before the date on which it is made or given.

28. The Committee repeats what the Chairman stated in his letter to the Ministers that the Committee's recommendation in this instance was based on a desire to avoid any possibility of adversely affecting the rights of servicemen serving in overseas areas, and that the two years period is not to be taken in any way as a future criterion for retrospectivity. On the contrary, the Committee believes that retrospectivity beyond a few months is objectionable, and will continue its scrutiny on this basis.

IAN WOOD,
Chairman.

Regulations and Ordinances Committee Room,
20th May, 1964.

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1964–65

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TWENTIETH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE SECOND REPORT OF THE 1964–65 SESSION, AND THE TWENTIETH REPORT SINCE THE FORMATION OF THE COMMITTEE)

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No. 223 [GROUP H]—F.12050/65.—PRICE 9d (8c)

PERSONNEL OF COMMITTEE.

Chairman:
Senator I. A. C. Wood

Members:
Senator R. Bishop.
Senator S. H. Cohen, Q.C.
Senator G. S. Davidson.
Senator A. G. E. Lawrie.
Senator D. R. Willesee.
Senator R. C. Wright.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

TWENTIETH REPORT OF THE COMMITTEE

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

TERRITORY OF CHRISTMAS ISLAND
ORDINANCE NO. 1 OF 1965
BEING THE TUBERCULOSIS ORDINANCE 1965

2. (*a*) This ordinance empowers the Official Representative—

(i) by notice to require persons to submit themselves to radiological examination;

(ii) by notice to require persons to submit themselves to a tuberculin skin test and, in certain cases, to subsequent vaccination or other prophylactic treatment as the Official Representative determines.

(*b*) It is further provided that where the Official Representative has reason to believe that a patient is suffering from tuberculosis in an infectious condition and that—

"(*a*) it is in the patient's interest that he should be properly attended and treated;

(*b*) the patient's circumstances are such that proper precautions to prevent the spread of the infection cannot be taken, or that such precautions are not being taken; and

(*c*) substantial risk of infection is or will be thereby caused to others,

the Official Representative may

(*d*) .....

(*e*) order the patient to be apprehended and removed to an institution or other place in the Territory and there detained for a specified period not exceeding 12 months for the purposes of isolation and treatment;

(*f*) ....."

Clause (4) provides "A person who is detained under an order under this section shall be deemed to be in lawful custody."

(*c*) The patient detained is given the right, during the currency of any order, to apply to the Magistrate's Court for a review of the order.

(*d*) Section 12 of the Ordinance reads—

"No action lies against the Official Representative, a medical practitioner or other person in respect of anything done or omitted to be done during the course of an examination, test or treatment conducted in pursuance of this Ordinance or in respect of the detention of a person in pursuance of this Ordinance but, if the Governor-General is satisfied that the thing was done or omitted to be done without reasonable cause, or that the detention was without reasonable cause, he may award reasonable compensation in respect of it."

3. The Committee is not concerned with the policy of the Ordinance.

4. The Committee is concerned to scrutinise the Ordinance to ascertain—

(*a*) that it does not trespass unduly on personal rights and liberties; and

(*b*) that it does not unduly make the rights and liberties of citizens depend upon administrative rather than upon judicial decisions.

For the reasons set out in paragraph 5, the Ordinance, in the opinion of the Committee, offends against these principles.

5. The Committee is of the opinion that, in respect of the liberty of the subject—

(*a*) no single officer should be empowered, on his own decision, to apprehend and detain persons for up to 12 months. Such a power should be conditional upon getting authority from a Justice of the Peace, Special Magistrate or Medical Board;

(*b*) that the patient's right of redress by legal action, in any case where the integrity of the person is wrongly invaded, in pursuance of procedures under this Ordinance, should not be abrogated by such provision as Section 12 of the Ordinance.

And it is not a proper provision to substitute, for such legal right of action, a discretionary administrative award of compensation determined by the Governor-General.

Such provisions re-echo the idea that the divine decisions of Kings (or their representatives) are proper alternatives to judicial decisions of independent Courts.

IAN WOOD,
Chairman,

Regulations and Ordinances Committee Room,
16th September, 1965.

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1964–65–66

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TWENTY-FIRST REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE THIRD REPORT OF THE 1964–65–66 SESSION, AND THE TWENTY-FIRST REPORT SINCE THE FORMATION OF THE COMMITTEE)

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No. 293 [GROUP H]—F.5658/66.—PRICE 15c (1s. 6d.)

PERSONNEL OF COMMITTEE.

Chairman:
Senator I. A. C. Wood

Members:
Senator R. Bishop
Senator S. H. Cohen, Q.C.
Senator G. S. Davidson
Senator A. G. E. Lawrie
Senator D. R. Willesee
Senator R. C. Wright

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

TWENTY-FIRST REPORT OF THE COMMITTEE

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

STATUTORY RULES 1966 No. 6

AIR NAVIGATION (BUILDINGS CONTROL) REGULATIONS

2. The *Air Navigation Act* 1920–1963 provides—

> "26.—(2.) Without limiting the generality of the preceding provisions of this section, the regulations that may be under the powers conferred by those provisions include regulations for or in relation to—
>
> (*g*) the prohibition of the construction of buildings or other structures, the restriction of the dimensions of buildings or other structures, and the removal in whole or in part or the marking of buildings, other structures, trees or other natural obstacles, that constitute or may constitute obstructions, hazards or potential hazards to aircraft flying in the vicinity of an aerodrome, and such other measures as are necessary to ensure the safety of aircraft using an aerodrome or flying in the vicinity of an aerodrome;".

3. Regulation 3 (1.) of the Air Navigation (Buildings Control) Regulations provides—

> "A person shall not, except in accordance with an approval given under these Regulations, construct within an area to which this regulation applies a building or other structure.
>
> Penalty: Five hundred pounds or imprisonment for six months."

Regulation 4 (1.) provides—

> "A person shall not, except in accordance with an approval given under these Regulations, construct within an area to which this regulation applies a building or other structure having a greater height above the ground than twenty-five feet.
>
> Penalty: Five hundred pounds or imprisonment for six months."

Regulation 5 (1.) provides—

> "A person shall not, except in accordance with an approval given under these Regulations, construct within an area to which this Regulation applies a building or other structure having a greater height above the ground than one hundred and fifty feet.
>
> Penalty: Five hundred pounds or imprisonment for six months."

Regulation 7 deals with the grant or refusal of an application to construct a building or other structure, the construction of which is prohibited under regulation 3, 4 or 5, and provides in sub-regulation (4.)—

> "The Minister shall not—
>
> (*a*) refuse an application for approval;
> (*b*) grant an application for approval subject to conditions; or
> (*c*) impose conditions with respect to the construction of a building or other structure or with respect to the marking of a building or other structure,
>
> unless he is satisfied that the building or other structure, if erected, or the building or other structure if erected otherwise than in accordance with the conditions, as the case may be, will or may constitute an obstruction, hazard or potential hazard to aircraft flying in the vicinity of the aerodrome situated within the area in which it is proposed to construct the building or other structure."

Regulation 11 provides that—

> "Where, under these Regulations, a building, other structure or object has been removed from any land or has been marked, any person who suffers loss or damage, or incurs expense, in or as a direct result of the removal or marking, is entitled to compensation from the Commonwealth."

4. The Committee, in its examination of these Regulations, is concerned—

(*a*) that they are in accordance with the Statute;
(*b*) that they do not trespass unduly on personal rights and liberties; and
(*c*) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions.

For the reasons set out below, the Committee is of the opinion that these Regulations and in particular regulations 3, 7 and 11 do offend against these principles.

5. Whereas the Minister in the exercise of his powers under regulations 4 and 5 cannot, by virtue of the provisions of those regulations themselves and of regulation 7, prohibit absolutely the construction of a building or other structure, the Minister's powers under regulation 3 are limited only by the general provisions of regulation 7.

However, the limitation on the Minister's powers provided by regulation 7 is one that itself ultimately depends upon the Minister's own discretion. Therefore the Committee considers that regulation 7 provides insufficient safeguards to persons to whom regulation 3 applies, that is to say, persons who are not permitted to construct a building at all except with approval.

6. (*a*) The prohibition in the area referred to in regulation 3 affects buildings irrespective of height.
(*b*) The prohibition in the area referred to in regulation 3 is not related to obstructions, hazards or potential hazards as stipulated by the Act.
(*c*) The official approval is an administrative decision on each individual application and not governed by a rule of law.
(*d*) No compensation is provided for the owner who is prevented from building or altering his building. Compensation is provided only for the owner whose building is ordered to be removed or marked.

7. The Committee recommends that the Regulations be re-framed in accordance with the above principles.

IAN WOOD,
Chairman,

Regulations and Ordinances Committee Room,
3rd May, 1966.

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1964-65-66

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TWENTY-SECOND REPORT

FROM THE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

(BEING THE FOURTH REPORT OF THE 1964-65-66 SESSION, AND THE TWENTY-SECOND REPORT SINCE THE FORMATION OF THE COMMITTEE)

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No. 329 [GROUP H]—F.13039/66—PRICE 8c

PERSONNEL OF COMMITTEE

Chairman
Senator I. A. C. Wood

Members
Senator R. Bishop
Senator J. L. Cavanagh
Senator S. H. Cohen, Q.C.
Senator G. S. Davidson
Senator A. G. E. Lawrie
Senator R. C. Wright

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

TWENTY-SECOND REPORT OF THE COMMITTEE

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

Australian Capital Territory Ordinance No. 14 *of* 1966
Advisory Council Ordinance 1966

2. Section nine of the *Advisory Council Ordinance* 1936–1965 provides:

> '9.—(1.) The Chairman of the Council, if an elected member of the Council, shall be paid an allowance at the rate of Two hundred pounds per annum.
>
> (2.) Each elected member of the Council, not being the Chairman of the Council, shall be paid an allowance at the rate of One hundred pounds per annum.'

3. *Australian Capital Territory Ordinance* No. 14 of 1966 repeals this section and substitutes a new section nine as follows:

> '9. The Chairman, if an elected member, and the other elected members of the Council shall be paid such allowances as the Minister determines.'

4. The Australian Capital Territory Advisory Council is a body consisting of eight elected and three nominated members, whose function is to advise the Minister in relation to any matter affecting the Territory including the making of new ordinances or the repeal or amendment of existing ordinances.

5. The Ordinance No. 14 of 1966, proposes to substitute for ordinance a ministerial determination as the means of fixing members' allowances. A ministerial determination is not specifically subject to disallowance by Parliament. It is not required to be published.

6. One of the elementary safeguards of the independence of members of advisory bodies is the requirement that their allowances be fixed either by a statute itself, or by subordinate legislation in the form of an ordinance or regulation made pursuant to statute. The fixation of allowances by the Executive by unpublicised determination—in this instance not necessarily in writing, and not specifically under the control of Parliament—is objectionable by these tests.

7. The Committee is of the opinion that the proposed Ordinance makes the independence of members unduly dependent on the discretion of the Minister; and recommends its disallowance.

IAN WOOD,
Chairman.

Regulations and Ordinances Committee Room,
Thursday, 29th September 1966.

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2

TABLING OF FIRST TO TWENTY-SIXTH REPORTS
AND INDEX OF THE COMMITTEE

AT TABLING OF PAPERS -

MR. DEPUTY PRESIDENT -

I BRING UP THE FIRST TO TWENTY-SIXTH REPORTS OF THE STANDING COMMITTEE ON REGULATIONS TOGETHER WITH INDEX AND APPENDICES AND MOVE -

THAT THE ~~REPORTS~~ PAPER BE PRINTED.

1969

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FIRST TO TWENTY-SIXTH REPORTS, INCLUSIVE

1932-1969

C O N T E N T S

AUSTRALIAN SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

INDEX

FIRST TO TWENTY-SIXTH REPORTS, INCLUSIVE

Note: 1. Regulations, Acts and Bills are entered under the headings "Regulations", "Acts", "Bills", respectively.

2. Ordinances and Regulations of territories are entered under the name of the territory.

3. References are thus : report no./paragraph no.

/3. ...

/4. ...

TRADE AND INDUSTRY DEPARTMENT 11/12.

TRADE DIVERSION POLICY 1936, 4/11-13, 8/28.

TREASURY 25/9, 26/35.

APPENDIX I.

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERSHIP OF COMMITTEE 1932-1969

The following Senators have served as Chairmen of the Committee:

Colebatch, Sir Hal. P.	4. 5.32 to 20. 3.33
Brennan, T.C.	1. 6.33 to 7. 8.34
Payne, H.J.M.	29.11.34 to 23. 9.35
Duncan-Hughes, J.G.	2.10.35 to 8.12.37
McLeay, G.	8.12.37 to 17.11.38
Collett, H.B.	17.11.38 to 17. 5.39
Wilson, K.C.	17. 5.39 to 30. 5.40
McLachlan, A.J.	21. 6.40 to 10.12.40
Spicer, J.A.	10.12.40 to 7. 7.43
Large, W.J.	14.10.43 to 26. 3.47
Nash, R.H.	26. 3.47 to 11. 5.50
Tate, J.P.	11. 5.50 to 30. 6.53
Wood, I.A.C.	23. 9.53 to -

The following Senators have served on the Committee :

Abbott, M.	26. 9.35 to 29. 6.37
Armstrong, J.I.	27. 9.38 to 27. 8.40
Arnold, J.J.	7.11.46 to 30. 6.65
Ashley, W.	2.12.37 to 27. 9.38
Aylett, W.E.	29. 9.43 to 16. 8.46
Barnes, J.	17. 3.32 to 25.11.32
Bishop, R.	26. 8.65 to -
Brennan, T.C.	17. 3.32 to 7. 8.34
Brown, G.	26. 9.35 to 21. 9.37
Byrne, C.B.	20. 6.51 to 5. 9.57
Cameron, D.	27. 9.38 to 20.11.41
Cavanagh, J.L.	31. 8.66 to -
Clothier, R.E.	27. 9.38 to 7. 7.43
Cohen, S.H.	26. 8.65 to 31.10.66
Colebatch, Sir Hal. P.	17. 3.32 to 20. 3.33
Collett, H.B.	31.10.34 to 30. 5.39
Collings, J.S.	26. 9.35 to 1.10.35
Cooke, J.A.	22.10.47 to 31.10.49
	19. 2.59 to 2.11.61
	11. 4.62 to 30. 6.65
Cooper, W.J.	1.10.35 to 31.10.49
Cormack, M.C.	15. 8.62 to 26. 8.65
Courtice, B.	2.12.37 to 27. 9.38
Cunningham, J.	2.12.37 to 27. 9.38
Davidson, G.S.	26. 8.65 to -
Devitt, D.M.	23. 2.67 to -
Dooley, J.B.	17. 3.32 to 30. 6.35
Drake-Brockman, T.C.	17. 9.58 to 14.10.58
Duncan-Hughes, J.G.	17. 3.32 to 30. 6.38
Elliott, R.C.D.	17. 3.32 to 30. 6.35
Greenwood, I.J.	20. 3.68 to -
Guy, J.A.	23. 2.50 to 4.11.55
Hays, Herbert	17.11.38 to 30. 6.47
Katz, F.	22.10.47 to 19. 3.51

Large, W.J.	20.11.41 to 22.10.47
Laught, K.A.	23. 2.56 to 15. 8.62
Lawrie, A.G.E.	26. 8.65 to -
MacDonald, Allan	31. 5.39 to 30. 6.47
McDonald, J.V.	26. 9.35 to 17. 8.37
McKellar, G.C.	19. 2.59 to 15. 8.62
McLachlan, A.J.	30. 5.40 to 30. 6.44
McLeay, G.	26. 9.35 to 17.11.38
Maher, E.B.	23. 2.50 to 16. 9.53
Marwick, T.W.	29. 6.37 to 21. 9.37
Nash, R. H.	29. 9.43 to 12.12.51
O'Halloran, M.R.	25.11.32 to 30. 6.35
O'Sullivan, N.	22.10.47 to 31.10.49
Payne, H. J. M.	26. 5.33 to 23. 9.35
Prowse, E.W.	15. 8.62 to 26. 8.65
Rae, A.	17. 3.32 to 30. 6.35
Rankin, A. J. M.	22.10.47 to 31.10.49
Sandford, C.W.	15. 3.62 to 11. 4.62
Seward, H.S.	16. 9.53 to 23. 7.58
Spicer, J.A.	28.11.40 to 7. 7.43
Tangney, D.M.	29. 9.43 to 22.10.47
Tate, J.P.	23. 2.50 to 30. 6.53
Toohey, J.P.	5. 7.57 to 14.10.58
Vincent, V.S.	10. 9.53 to 4.11.55
Willesee, D.R.	29. 5.52 to 31. 8.66
Wilson, K.C.	27. 9.38 to 30. 5.40
Wood, I.A.C.	23. 2.50 to -
Wright, R.C	23. 2.56 to 20. 3.68

APPENDIX II

SENATE STANDING COMMITTEE

ON REGULATIONS AND ORDINANCES

REPORTS OF COMMITTEE

Number	Dated	Chairman Senator	Parliamentary Paper Number
First	18th May 1932	Sir Hal.Colebatch	S.1 1932-34
Second	7th December 1933	T. C. Brennan	S.2 1932-34
Third	30th October 1935	J.G.Duncan-Hughes	S.1 1934-35
Fourth	22nd June 1938	George McLeay	S.1 1937-38
Fifth	17 September 1942	J.A. Spicer	S.1 1940-42
Sixth	29th April 1947	R.H. Nash	S.1 1946-47
Seventh	19th October 1949	J.A.Cooke (Acting)	S.1 1948-49
Eighth	29th May 1952	J.P. Tate	S.1 1951-53
Ninth	21st October 1954	I.A.C. Wood	S.1 1954-55
Tenth	22nd May 1956	" "	S.1 1956
Eleventh	2nd May 1957	" "	S.1 1957
Twelfth	20th May 1957	" "	S.2 1957
Thirteenth	31st October 1957	" "	S.3 1957
Fourteenth	18th March 1959	" "	Not printed
Fifteenth	22nd September 1959	" "	S.1 1959-60
Sixteenth	11th May 1960	" "	S.1 1960-61
Seventeenth	5th October 1961	" "	S.1 1961
Eighteenth	14th November 1962	" "	S.1 1962-63
Nineteenth	20th May 1964	" "	52 of 1964
Twentieth	16th September 1965	" "	223 of 1964-65-66
Twenty-first	3rd May 1966	" "	293 of 1964-65-66
Twenty-second	29th September 1966	" "	329 of 1964-65-66
Twenty-third	5th October 1967	" "	147 of 1967
Twenty-fourth	5th October 1967	" "	148 of 1967
Twenty-fifth	28th November 1968	" "	243 of 1968
Twenty-sixth		" "	

Appendix III

List of Committee's General Recommendations

NOTE: This list does not include recommendations relating to specific regulations and ordinances, or to specific provisions or types of provisions in regulations and ordinances. References are thus: report no./paragraph no.

Regulations should be consolidated periodically 2/4.

Dates and numbers of all original regulations and amendments should be printed on subsequent amendments 2/5.

Whole clauses of regulations should be repealed and re-enacted when they are amended by the addition or omission of words 2/6, 7/5-9.

Regulations containing invalid retrospective provisions should be withdrawn and cancelled or disallowed 3/6-7, 17/6.

Attorney-General should certify that regulations do not exceed the powers given by the Statute 4/9.

Important matters of government policy should be the subject of Statute, not regulations 4/13, 8/29-31.

Bound volumes of ordinances should be issued more frequently 4/14.

Regulations under ordinances should be numbered in annual series 5/3.

Inconsistencies relating to tabling and disallowance of ordinances should be removed 5/4, 7/24.

Committee should be provided with independent legal assistance 5/5.

A special Committee should be appointed to consider National Security Regulations 5/5, 6/2.

Manual of National Security Legislation should be issued more frequently 5/6.

Committee should be empowered to deal with all delegated legislation upon its gazettal 5/7.

Power to amend Statute by regulation should be used only in emergencies 6/8, 8/15-16.

Solicitor-General should be responsible for tabling regulations 7/4.

../2

Statement should be tabled setting out official criteria which determine whether a parent Statute will provide for tabling and disallowance of regulations 9/16.

Regulations should be promulgated as soon as possible after passing of Statute 12/12.

Ordinances and regulations of territories with legislatures should be explicitly excluded from Committee's scrutiny 19/22-3.

1932.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

FIRST REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES.

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No. S.1.—F.1567.—PRICE 3D.

1932.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

FIRST REPORT.

The Standing Committee on Regulations and Ordinances has the honour to report to the Senate as follows:

1. Your Committee has considered certain Regulations and Ordinances laid on the Table of the Senate since the adoption of Standing Order No. 36A (11th March, 1932).

2. Your Committee desires to report that amongst such Regulations are Regulations under the Customs Act relating to the censorship of cinematograph films (Statutory Rules 1932, No. 24).

3. Your Committee is of opinion that the matter of film censorship is of the highest public importance, and that it involves to a very large extent the rights and privileges of many individuals.

4. The main alteration made by the new regulations is the abolition of the Appeal Board, and the vesting of its powers in a single person. Your Committee expresses no opinion as to the wisdom or otherwise of this departure, but feels that the determination of public policy on a matter of such moment should not be accomplished by departmental regulation.

5. Your Committee would direct attention to the unanimous recommendation of the Royal Commission on the Constitution that the words "Cinematograph films" should be inserted as a new paragraph in Section 51 of the Constitution, in order to give to the Commonwealth Parliament power to pass laws in regard to films made in Australia, as well as those imported.

6. Your Committee would also recall the fact that at a conference of Commonwealth and State Ministers held in May, 1929, the suggestion was made that the States should refer the subject of legislation on cinematograph films to the Parliament of the Commonwealth under paragraph xxxvii. of Section 51 of the Constitution.

7. Pending the taking of action to amend the Constitution, or the reference of the subject to the Commonwealth Parliament by the State Parliaments, your Committee would submit the following resolution for the consideration of the Senate:—

> "That in the opinion of this Senate the time has arrived when public policy in regard to the censorship of imported cinematograph films should be set out in substantive legislation."

8. Apart from the important principle involved in this recommendation, your Committee is of opinion that the passing of satisfactory legislation governing the censorship of imported cinematograph films would afford the strongest possible inducement to the State Parliaments to refer the subject of film censorship generally to the Commonwealth Parliament, thereby making it possible to achieve a highly desirable end without the delay that would be occasioned by an amendment of the Constitution.

HAL COLEBATCH,
Chairman.

Senate Committee Room,
18th May, 1932.

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1932-33.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

SECOND REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES.

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No. S.2.—F.2563.—PRICE 3D.

1932-33.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

SECOND REPORT.

The Standing Committee on Regulations and Ordinances has the honor to report to the Senate as follows:—

1. Your Committee has met regularly during the times that the Senate has been in session, with the object of considering regulations and ordinances made by the Governor-General in Council. The task has been exacting, because the output of regulations has continued in but slightly diminished volume. Over 130 regulations covering a wide variety of subjects have already been gazetted during 1933.

2. Though this is a decrease as compared with such years as 1926, 1927, and 1928, it still means a very great addition to the laws of the Commonwealth.

3. The frequent amendment of regulations makes it extremely difficult for those concerned to lay their fingers upon all the regulations that bind them. Your Committee suggests three means by which this evil might be mitigated.

4. The first is that where the regulations on a particular subject are numerous and extend over a number of years, a periodic consolidation of the regulations could be made.

5. The second is that when an amending regulation is promulgated, the dates or numbers of the original and all amending regulations be printed upon it.

6. The third is that when short paragraphs of previous regulations are amended by the omission or addition of certain words the whole original clause be repealed and the clause as it would read with the omissions or additions be re-enacted.

7. *Air Force Regulations.*- Your Committee has noted that in Statutory Rules 1933, No. 46 (Regulations under the Air Force Act) an amendment was made to Regulation 180 in order to bring the Air Force Regulations into line with section 79 of the Defence Act, relating to unlawful disposal of arms, &c. Your Committee considers it extremely undesirable that the Air Force should continue to be governed by regulation while the Naval and Military branches of the Defence forces are governed by statute.

8. *Waterside Employment. Regulations.*—Your Committee has considered Statutory Rules 1933, No. 12 (Amendment of the Waterside Employment Regulations, under the Transport Workers Act), and directs the attention of the Senate to the fact that this regulation involves the question of the power of the Executive to declare, by regulation, that a State law shall have no force or effect, as to which power there is considerable legal doubt. In any case your Committee considers it desirable for action of this kind to be taken by statute rather than by regulation. (Senator Payne dissents from this last sentence.)

9. Your Committee acknowledges the great assistance it has received from the practice, instituted last year, of the department concerned in the issue of a new or an amending regulation supplying an explanation of the effect of, or the changes worked by, such regulation.

THOS. C. BRENNAN,
Chairman.

Senate Committee Room,
7th December, 1933.

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1934-35.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

THIRD REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1934-35 SESSION, AND THE THIRD REPORT SINCE THE FORMATION OF THE COMMITTEE).

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STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

THIRD REPORT OF THE COMMITTEE.

The Standing Committee on Regulations and Ordinances has the honour to report to the Senate as follows:—

1. The motion for disallowance of Statutory Rules 1935, No. 29 (Amendments of the Dried Fruits Export Control Regulations), moved by Senator J. G. Duncan Hughes in his personal capacity in the Senate on 22nd October, 1935, and carried, was moved by him with the unanimous prior endorsement and approval of the members of the Committee.

2. The principle in the disallowed regulations is an important one, as in the Committee's opinion they were in direct contravention of the law as laid down in the *Acts Interpretation Act* 1901-1931, and as decided by the High Court in the case of the Broadcasting Company of Australia Limited *v.* the Commonwealth (52 C.L.R. 52), to the effect that regulations containing a provision that they should be deemed to have commenced on a certain date, which was prior to the date of notification in the *Gazette*, were void. The Senate by its vote endorsed the Committee's view.

3. Among the 1935 regulations considered by the Committee recently are the following, each of which appears to infringe the provisions of the Acts Interpretation Act by a retrospective clause of a similar type:—

Statutory Rules 1935, No. 6 (Amendment of Naval Financial Regulations) notified in the *Gazette* on 31st January, 1935, containing a provision deemed to have come into operation on 1st March, 1934, and another on 1st November, 1934.

Statutory Rules 1935, No. 7 (Amendment of Australian Soldiers' Repatriation Regulations) notified in the *Gazette* on 7th February, 1935, deemed to have come into operation on dates going back to 9th August, 1934.

Statutory Rules 1935, No. 9 (Amendment of Waterside Workers Regulations) notified in the *Gazette* on 14th February, 1935, containing a provision for payment of certain fees for attendance at meetings held after 12th April, 1934.

Statutory Rules 1935, No. 27 (Amendment of Naval Financial Regulations) notified in the *Gazette* on 21st March, 1935, containing a provision dating back to 1st November, 1934.

Statutory Rules 1935, No. 42 (Amendment of Naval Establishments Regulations) notified in the *Gazette* on 2nd May, 1935, deemed to have come into operation on various dates going back to 6th June, 1934.

Statutory Rules 1935, No. 43 (Amendment of Financial and Allowance Regulations for the Australian Military Forces and Senior Cadets) notified in the *Gazette* on 9th May, 1935, made to operate "as if it were notified in the *Gazette* on the 21st day of April, 1935".

Statutory Rules 1935, No. 51 (Amendments of the Sales Tax Regulations) notified in the *Gazette* on 30th May, 1935, containing a provision operating with regard to actions "at any time prior to the 15th day of March, 1934".

Statutory Rules 1935, No. 54 (Amendments of Commonwealth Public Service (Parliamentary Officers) Regulations) notified in the *Gazette* on 6th June, 1935, containing a provision dating from 1st July, 1931.

Statutory Rules 1935, No. 72 (Amendments of Commonwealth Public Service Regulations) notified in the *Gazette* on 1st August, 1935, containing a provision that certain of the amendments shall be deemed to have come into operation on 1st July, 1935.

Statutory Rules 1935, No. 86 (Amendment of Naval Financial Regulations) notified in the *Gazette* on 12th September, 1935, deemed to have come into operation on dates going back to 25th January, 1935.

Statutory Rules 1935, No. 87 (Amendment of Naval Reserve Regulations) notified in the *Gazette* on 12th September, 1935, containing a provision that certain of the amendments shall be deemed to have come into operation on 1st April, 1935.

In addition to the cases above set out, attention is drawn to another case of a slightly different nature, as follows:—

Statutory Rules 1935, No. 58 (Amendment of the War Service Homes Regulations) notified in the *Gazette* on 20th June, 1935, containing a provision applying to proceedings instituted either before or after the commencement of the regulation.

4. Among the foregoing regulations perhaps the most conspicuously retrospective provisions are contained in Statutory Rules Nos. 54 and 58, the first of which goes back four years, while the second contains an undesirable provision, authorizing a new form of evidence in any proceedings instituted by or on behalf of the War Service Homes Commissioner whether *before* or after the commencement of this regulation. Other regulations are only retrospective for periods varying from months down to a few days, but the Committee feels that it is not within its province to draw distinctions on that account, when the strict legal position is the same.

5 The Committee considers that these regulations are void or voidable, in whole or in part, and would be held so to be if contested in the courts, in view of the decision of the High Court mentioned above. In some of the Statutory Rules enumerated above the retrospective regulations appear to be separable from other regulations to which they have no reference.

6 In such circumstances, and especially considering the large number of the regulations affected, the question of procedure becomes important. The Committee is of opinion that it should not be the duty of its members or of other private members of the Senate to move for the disallowance of these regulations one by one, thereby throwing the responsibility on them and also involving much unnecessary waste of the Senate's time. The duty of seeing that the law is complied with obviously falls on the Government, one of whose members admitted in the Senate that in his opinion the retrospective provision in Statutory Rules No. 29 was invalid.

7 The Committee submits therefore that the Government should withdraw and cancel such of the regulations set out in paragraph 3 above as are invalid, or alternately should move in the Senate for their disallowance within the prescribed time.

8. The Committee, further, draws attention to the provisions contained in Statutory Rules 1935, No. 93 (Amendment of the Telephone Regulations), by paragraph 2 whereof a new regulation (16A) is inserted. Under these provisions the onus of proof is not only shifted from the Department on to the person doing certain acts or suffering them to be done, that he acted without the authority of the Department. but further, in any prosecution for an offence under this regulation, the averment of the prosecutor that the proprietor of the land or building upon or within which an offence is committed *by any other person* permitted or suffered that person to commit the offence, *shall be deemed to be proved in the absence of proof to the contrary*. There appears to be no authority in the Act enabling the Department to so alter the burden of proof. In the opinion of the Committee such a provision trespasses unduly on personal rights and liberties, and should only be brought into force (if at all) by Parliamentary enactment.

9. The Committee draws attention to the fact that cases have occurred in the past and are still occurring where regulations have not been laid before Parliament within the prescribed time. A notable instance of this is the case of the Motor Omnibus Regulations of the Territory for the Seat of Government. Under section 5 of the *Interpretation Ordinance* 1914 1930 of the Territory for the Seat of Government, regulations made under an Ordinance must be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations. The regulations in question were made on 6th June, 1934, and were not laid on the Table of the Senate until 2nd October, 1935 (38 sitting days afterwards). Other instances could be cited.

10. The Committee refers again to two matters mentioned in its earlier reports, viz. :—

1. The lack of an adequate Act covering the Air Defence Forces (mentioned in the Committee's second report presented to the Senate on 8th December, 1933). The present Act (No. 33 of 1923) consists only of three sections applying portion of the Defence Act and Regulations: otherwise all provisions governing the Air Defence Forces are prescribed by regulation. The Committee maintains that such provisions are not confined to administrative detail, but that they amount to substantive legislation which should be a matter of Parliamentary enactment; and re affirms, particularly in view of the growing importance of the Air Forces, that there appears to be no valid reason why a distinction should be made in this respect between them and the Naval and Military Forces.

2. The lack of an Act relating to the censorship of cinematograph films (mentioned in the Committee's first report presented to the Senate on 18th May, 1932). This matter, also, it is claimed, should be dealt with by legislation and not controlled solely by administrative regulations under the Customs Act. No attempt has been made to obtain authority for such legislation by Referendum.

The Committee acknowledges that most of the recommendations contained in its second report have been given effect to, but repeats its previous recommendations with regard to these two matters.

11. The Committee again expresses its appreciation of the assistance which Departments generally have given it by the provision of explanatory statements accompanying regulations and ordinances.

J. C. DUNCAN-HUGHES,
Chairman.

Senate Committee Room,
30th October, 1935.

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1937-38.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

FOURTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1937-38 SESSION, AND THE FOURTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

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STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

FOURTH REPORT OF THE COMMITTEE.

The Standing Committee on Regulations and Ordinances has the honour to report to the Senate as follows :—

1. The Committee, with varying membership, has now been in existence for more than six years, having been first appointed on 17th March, 1932. As the term of service of a considerable number of Senators is about to expire, and new Senators will take their places, the Committee considers it appropriate that a report should be submitted to the Senate reviewing generally the past work of the Committee and setting out its views with regard to certain features of the system which has been termed " Government by Regulation ".

2. The Report of the Select Committee of the Senate on the Standing Committee System, appointed during the session of 1929 30 31, contained the following recommendations (amongst others)—

(*a*) That a Standing Committee of the Senate, to be called the Standing Committee on Regulations and Ordinances, be established.

(*b*) That all Regulations and Ordinances laid on the Table of the Senate be referred to such committee for consideration and report.

(*c*) That such Standing Committee shall be appointed at the commencement of each session on the recommendation of a selection committee consisting of the President, the Leader of the Senate, and the Leader of the Opposition, shall consist of seven members, and shall have power to send for persons, papers, and records ; and that four members shall form a quorum.

(*d*) That such Standing Committee shall be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a legislative power of a character which ought to be exercised by Parliament itself ; and that it shall also scrutinize regulations to ascertain—

(1) that they are in accordance with the Statute,

(2) that they do not trespass unduly on personal rights and liberties,

(3) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions,

(4) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

3. The motion for the adoption of the Select Committee's Report (including the foregoing recommendations) was not agreed to by the Senate, principally because of the method of selection proposed in paragraph (*c*). The Report was recommitted, and the Select Committee afterwards presented a Second Report, stating that the previous recommendations had been the subject of further consideration, and submitting other recommendations, providing for a different method of appointment, in their place. The Second Report was adopted by the Senate, the Standing Orders were amended to give effect to the recommendations contained in it, and the Standing Committee on Regulations and Ordinances came into being.

4. The Committee therefore has never had the Senate's formal endorsement of the four principles set out in paragraph (*d*), and intended by the Select Committee for its guidance. Indeed, these four principles were strongly attacked in the Senate by the Leader of the Opposition, the Opposition at that time comprising a majority of Members of the Senate. (See *Hansard*, Vol. 124, pages 1550–1555.) Nevertheless, the Committee has observed these four principles in its consideration of regulations, and to a less extent of ordinances.

5. The Standing Order (No. 36A) under which the Committee is appointed and under which it functions, while it gives the Committee power to send for persons, papers, and records, merely states that " All Regulations and Ordinances laid on the Table of the Senate shall stand referred to such Committee for consideration and, if necessary, report thereon." In the absence of direction as to procedure in considering the regulations and ordinances, the Committee has

formulated its own procedure, which consists of obtaining from the public department responsible for the issue of a regulation or ordinance a full explanation of it, with the reasons for the making thereof. These explanations are considered by the Committee in conjunction with the regulation or ordinance under examination, and have been found helpful. It was inevitable that many regulations would come before the Committee which, while quite correct in form, gave effect to some item of Government policy of a controversial nature. After careful consideration of this aspect, the Committee agreed that questions involving Government policy in regulations and ordinances fell outside the scope of the Committee. This decision necessarily limited the Committee's activities very considerably.

6. Within this limited range, however, the Committee has already presented three reports. The first report, presented to the Senate on 18th May, 1932, dealt with the subject of the censorship of cinematograph films. The Committee submitted for the consideration of the Senate the following resolution : " That in the opinion of this Senate the time has arrived when public policy in regard to the censorship of imported cinematograph films should be set out in substantive legislation ". The Report of the Committee was adopted by the Senate on 28th September, 1932. Up to the present, however, no action appears to have been taken to give effect to the above-quoted resolution.

7. The Committee's second report was presented to the Senate on 8th December, 1933, and was adopted by the Senate on 2nd August, 1934. Some minor recommendations contained therein were given effect to.

8. The Committee's third report was presented to the Senate on 31st October, 1935, and a motion for its adoption was moved on 28th November, 1935. This motion was debated at considerable length, and in the end was not agreed to, an amendment being carried to the effect that the report be " received and commended to the consideration of the Government ". As a result, apparently, of the Government's consideration of the report, an amending Acts Interpretation Bill was brought in, designed amongst other things to legalize certain actions authorized by regulations in the past which the Committee considered, in view of the decision of the High Court in a particular case, would be held to be *ultra vires*. The Bill also tended to extend the powers of the Executive in the making of regulations. Although not strictly within its order of reference, the Committee felt justified in spending portion of its time in discussing this Bill, in order that its members might be better informed regarding it during its consideration by the Senate. When in the Senate a majority of Senators supported the members of the Committee in rejecting an amendment made by the House of Representatives, the Government dropped the Bill ; but it was introduced again in the next session, and passed into law, its passage reducing to some extent the Committee's field of criticism.

9. The provision which members of the Committee desired to be inserted in the Bill, and which the House of Representatives rejected, was designed to ensure that no regulation shall be made unless the Attorney-General or the Solicitor-General, or some officer of the Attorney-General's Department, certifies that the regulation would not be in excess of the power conferred by the Act under which it purports to be made. An amendment to re-insert this provision, moved in the Senate on 25th August, 1937, resulted in an even vote, there being 14 Ayes and 14 Noes. Under the Constitution when the votes in the Senate are equal the question passes in the negative, and the amendment was therefore rejected. The Committee notes, however, the assurance given in the Senate by the Minister representing the Attorney-General, as follows :

" I give honorable Senators an assurance that directions will be issued to all the departments to submit all draft regulations for the consideration of the Attorney-General's Department. In other words, the object of the proposed new section will be attained by administrative action, which will, in practice, be equally as effective as the proposed certificate . . . . . It is anticipated that staff arrangements will permit of all regulations being promptly examined by legal officers . . . . . When this scheme is in operation, all draft regulations will be examined minutely and according to definite legal principles, both as to the matter and form of the regulations. This is all that honorable Senators desire, and I ask them to accept the assurance I have mentioned." (*Hansard*, Vol. 153, page 2815.)

The Committee draws special attention to this promise, and accepts the assurance given by the Minister.

10. The foregoing summary of past happenings is designed largely for the information of new Senators. The Committee desires now to refer to a number of other matters.

11. *Trade Diversion Policy.*—On 22nd May, 1936, just before the adjournment of both Houses for the winter recess, the Government announced a policy for controlling the importation of certain goods, which has come to be known as the " Trade Diversion Policy ". The Committee is very much concerned at the method which was followed on this occasion.

12. By way of explanation, honorable Senators are reminded that prior to 1934 the Government had power to prohibit the importation of goods by proclamation. Such proclamation was laid before Parliament for its information, but there existed no power for disallowing it. The House of Representatives could of course exercise a certain amount of control over the

Government's use of this power, but the Senate could not, except indirectly. In October, 1931, the Senator who subsequently became the first Chairman of the Committee, introduced a Bill providing for the substitution of the word "regulation" for the former word "proclamation" in section 52 (*g*) of the Customs Act. The Bill lapsed at the end of the session, but in the following session it was introduced as a Government measure and passed into law. It was under this power that the Government acted in its trade diversion policy.

13. Normally, the regulation giving effect to such an important item of policy would have been laid on the Table of both Houses immediately, and would have been subject to disallowance. But on this occasion, owing to the adjournment of the Parliament, the regulation (Statutory Rules 1936, No. 69) was not tabled until the Houses re assembled on the following 10th September nearly four months afterwards. Even if the Regulations Committee had met during the recess (as it has power to do), it could not have dealt with this important regulation because it had not at that time been tabled in the Senate. However, the regulation was laid before the Committee on 16th September, 1936, and was fully considered. In view of the previous decision of the Committee in 1933 that questions involving Government policy in regulations or ordinances fell outside its scope, no proposal was made to recommend the disallowance of the regulation because of the policy contained therein. Under the provisions of the Acts Interpretation Act it is open to any individual member of the Senate or House of Representatives to move in this direction, but it was agreed that action by the committee, as a committee, was not called for. At the same time 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. The regulations in question were subsequently challenged in the High Court and upheld in a majority judgment, two judges dissenting.

14. *Bound Volumes.*—The Committee appreciates the speed and efficiency with which bound volumes of Statutory Rules are produced each year by the Department responsible, but regrets that the same cannot be said with regard to some of the Ordinances. While bound volumes containing the Ordinances of the outside Territories are issued at regular intervals, there has not been a bound volume of Seat of Government Ordinances since 1924 since which time very many important Ordinances, and Regulations thereunder, have been promulgated. It must be a matter of extreme difficulty for the persons concerned to keep themselves in touch with the legal position in the case of matters in the Federal Capital Territory controlled by Ordinance. The Committee has had recourse to the expedient of having the Seat of Government Ordinances, and the Regulations thereunder, specially bound and indexed for its own use, and the Parliamentary Library has been forced to take similar action. The Committee understands that steps are now being taken to produce a bound and indexed set of Seat of Government Ordinances, and recommends that this work be expedited, and that in future such Ordinances be issued in bound volumes at regular intervals, in the same way as Statutory Rules are now issued.

15. The Committee has reason to believe, from evidence available, that its efforts in the past to keep a watch on the regulation-making power and on its undue exercise have been widely appreciated by the public especially as no such scrutinizing body exists in the House of Representatives. The Committee has endeavoured at all times to be reasonable in its recommendations. It is well aware that it has no judicial powers, yet it has been attacked on the score of endeavouring to exercise such powers. Wisely made and rightly regarded, its reports ought to be of assistance in the making of effective legislation, yet some of its few critical recommendations have apparently been regarded by the Executive as hostile. Its activities have not resulted in any appreciable reduction in the number of regulations issued.

16. In conclusion, therefore, the Committee expresses the opinion that its appointment, which was in the nature of an experiment, has been justified, and that there still exists a field of activity (although now more limited than formerly) within which it may continue to function with advantage to the people of the Commonwealth.

GEORGE McLEAY,
Chairman.

Senate Committee Room,
22nd June, 1938.

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

FIFTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1940-41-42 SESSION, AND THE FIFTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

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STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

FIFTH REPORT OF THE COMMITTEE.

The Standing Committee on Regulations and Ordinances has the honour to report to the Senate as follows :—

1. Since its last report, which was presented to the Senate on 23rd June, 1938, the Committee has met from time to time while the Senate has been in Session, for the purpose of considering regulations and ordinances which have been laid on the Table of the Senate and which were referred to it under Standing Order 36A. While the Committee since its last report has not recommended the disallowance of regulations or ordinances, it has on numerous occasions communicated with the departments responsible or with the Attorney-General's Department in order to satisfy itself as to the legality of regulations or as to other matters upon which it desired further information. Inquiries, for instance, have been made as to whether the industries affected by certain regulations were consulted when they were being framed, and stress has been laid upon the necessity of consulting interested bodies wherever practicable.

2. *Advances to Settlers Regulations.*—Correspondence extending over a period of approximately seven months took place in 1938 and 1939 between the Committee and the Minister for Commerce on the subject of tabling in Parliament particulars of cases in which the Minister for Commerce exercised the power granted to him under the Advances to Settlers Regulations to vary the provisions for payment of purchase money or instalments payable by settlers in respect of advances for the purchase of wire netting. Notwithstanding previous ministerial approval for the tabling of this information, the decision was reversed by the Assistant Minister for Commerce who stated that he considered it was not desirable for such particulars to be laid before Parliament, but that he was willing to furnish, for the information of the Committee, a quarterly statement of variations made by him. As a result of further representations by the Committee, the matter was reviewed and the previous decision to table such particulars was allowed to stand.

3. *Numbering of Regulations made under Ordinances.*—On 7th September, 1939, the Committee resolved that, in its opinion, all regulations made under ordinances should be numbered consecutively from the beginning of each year in respect of each Territory. The Committee considered that this was most desirable in view of the difficulty experienced in making adequate reference to these regulations, and that greater facility and certainty of reference by all concerned would result if the regulations were numbered in the manner suggested. The Committee's resolution was conveyed to the Attorney-General who concurred in the suggestion and gave instructions that steps should be taken to implement the Committee's proposal. As a result, the system of numbering such regulations was brought into operation as from the commencement of 1940.

4. *Norfolk Island Ordinances.*—The attention of the Senate is directed to those provisions of the Norfolk Island Act which fix the period within which ordinances of the Territory of Norfolk Island may be disallowed. Under section 8 of the Norfolk Island Act these ordinances are subject to disallowance within 30 days after being laid on the Table, whereas ordinances of the Australian Capital Territory and the Northern Territory are subject to disallowance within fifteen *sitting* days after being laid on the Table. On the other hand, regulations made under ordinances of the Territory of Norfolk Island are subject to disallowance within the latter period, viz.—fifteen sitting days after being laid on the Table. The Committee suggests that the existing provision for the disallowance of ordinances "within 30 days" be amended to read "within fifteen sitting days", as the former period might lapse while Parliament is in recess and the opportunity to move for disallowance might be lost particularly when ordinances are tabled towards the end of a Session and Parliament rises before there is adequate time to consider them. Such an alteration would also have the advantage of bringing the provisions as to the disallowance of ordinances and regulations into line.

5. *Legislation made under the National Security Act.*—Since the outbreak of war the Committee has been confronted with the heavy task of examining an ever increasing volume of regulations and orders made under the National Security Act. Section 5 of the National Security Act empowers the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, and the regulations may empower such persons, or classes of persons, as are prescribed, to make orders, rules or by-laws for any of the purposes for which regulations are authorized by the National Security Act to be made. Such of these orders, rules and by-laws as are of a legislative and not an executive character are required by the above section to be laid on the Table of both Houses and may be disallowed by either House. Since the outbreak of war the subordinate legislation under the National Security Act which has been laid on the Table of the Senate comprises—

654 Statutory Rules.
7,050 Orders.
59 Rules.
13 By-laws.
148 Miscellaneous items.

From 1st January, 1942, to 16th September, 1942, the particulars are—

288 Statutory Rules.
5,152 Orders.
37 Rules.
1 By-law.
45 Miscellaneous items.

In addition, since the outbreak of war, statutory rules, ordinances and regulations made under other Acts, which have been laid on the Table of the Senate, comprise

467 Statutory Rules.
266 Ordinances.
70 Regulations under Ordinances.

In August, 1940, the Committee, faced with the difficulty of dealing satisfactorily with such a vast volume of regulations, authorized the Chairman (Senator the Hon. A. J. McLachlan) to direct the attention of the Senate to the position that had arisen and to state that it was impossible without further skilled assistance to give adequate consideration to the regulations. In order to assist the Committee, the Government offered to make available the services of a legal officer of the Attorney-General's Department. The Committee, however, while appreciating this offer decided that this was not a satisfactory solution of the problem, as it was of the opinion that legal assistance from outside the Commonwealth Public Service was preferable. The Government, however, was not prepared to agree to any alternative proposal and further consideration of the matter was postponed.

In view of the increasing volume of regulations and other subordinate legislation which is now being made, the Committee has given further consideration to the question as to how it should deal with regulations, &c., made under the National Security Act, and whether, having regard to the principles which the Committee has heretofore applied when examining regulations, any practical advantage is derived from its examination of regulations under the National Security Act. The principles referred to are set out in paragraph 2 (*d*) of the Committee's Fourth Report and are repeated hereunder :—

(*a*) Regulations must be in accordance with the Statute under which they are made ;
(*b*) They should not trespass unduly on personal rights and liberties ;
(*c*) They should not unduly make the rights and liberties of citizens dependent upon administrative rather than upon judicial decisions ;
(*d*) They should be concerned with administrative detail and should not amount to substantive legislation which is more properly a matter for Parliamentary enactment.

These principles, though they have not been formally endorsed by the Senate, provide a sound guide in peace time to the problems with which this Committee is concerned and it is upon this basis that the Committee has always carried on in its examination of regulations. With regard to subordinate legislation made under the National Security Act, this angle of approach has little, if any, practical value. The powers of the executive under that Act are so wide that the legality of regulations can seldom be questioned and war renders necessary an interference with personal rights and liberties which would not be tolerated in times of peace. Furthermore, Parliament itself has conferred powers on the executive to make substantive legislation in this way, so that no question of confining regulations to administrative details arises. The practical question which arises in relation to such regulations is one of policy, but the Committee decided

as early as June, 1933, that questions of policy were matters for the Government and did not properly fall within the terms of reference of the Committee. The Committee still adheres to this view. In these circumstances it is felt that no useful or practical purpose will be served by the Committee continuing to review regulations and other subordinate legislation made under the National Security Act.

Although the functions of this Committee do not in our opinion extend to a consideration of matters of policy, we think in existing circumstances it would be useful if a Committee, possibly of both Houses, were constituted for the express purpose of regularly considering the practical application of regulations made under the National Security Act, and reporting to Parliament thereon. Such a Committee would have to be authorized to sit during Recess and to undertake at frequent intervals a review of regulations which are made from time to time, with a view to directing attention to such as may be thought to be unwise or to require amendment Objections have been raised on a number of occasions to the detailed provisions of regulations rather than to the main purpose and in cases of this kind it would be convenient to refer motions for disallowance to the Committee to report and if thought necessary recommend amendments thereto.

6. *Manual of National Security Legislation—Issue at more frequent intervals.*—The attention of the Senate is drawn to the difficulty experienced by the public in keeping up to date with the war legislation owing to the volume and frequency of issue of the statutory rules, orders, rules and by-laws made under the National Security Act. In April, 1941, a Manual of National Security Legislation was issued containing statutory rules and certain orders, &c., as amended to the 1st April, 1941. Another such Manual has just been issued. This publication provides access to regulations and certain orders and rules in a convenient and accessible form, but its usefulness depends upon the frequency with which it is published. The Committee strongly urges that the volume should be issued at more frequent intervals.

There is now being published supplementary annotations to the manual, which provide references to amendments to the regulations, &c. We understand it is proposed to issue this supplement every three months. It will provide a useful addition to the manual, but we think, in view of the frequency with which regulations are amended, that its publication monthly would be justified.

7. *Consideration by Committee of Regulations and Ordinances after notification in Gazette.* - As the Committee is empowered under Standing Order 36A to consider regulations and ordinances only after they have been laid on the Table of the Senate, and as such legislation may be laid on the Table at any time within fifteen *sitting* days after the making thereof, it is possible that a considerable period might elapse between the date of notification in the *Gazette* and the date regulations and ordinances are laid on the Table, during which period they may have been subject to much discussion both in Parliament and the Press, while the Committee charged with the duty of examining them is, owing to the operation of the Standing Order referred to, not authorized to consider them. It is suggested, therefore, that the Committee be empowered, by an appropriate amendment of the Standing Orders, to deal with all regulations and ordinances as soon as they have been notified in the *Gazette.*

J. A. SPICER. Chairman.

Senate Committee Room,
17th September. 1942.

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STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTH REPORT OF THE COMMITTEE.

The Standing Committee on Regulations and Ordinances has the honour to report to the Senate as follows:-

1. Following the presentation of its last report on 17th September, 1942, a motion for its adoption was moved on 25th February, 1943, but was not proceeded with and finally lapsed with the dissolution of the Sixteenth Parliament on 7th July, 1943.

2. In that report the Committee drew attention to the difficulties experienced in its examination of legislation made under the National Security Act and expressed the opinion that no useful or practical purpose would be served by the Committee continuing to review regulations and other subordinate legislation made under that Act. It further expressed the view that a Committee, possibly of both Houses, be constituted for the express purpose of regularly considering the practical application of regulations made under the National Security Act, and reporting to Parliament thereon. Speaking to the motion for the adoption of this report the then Leader of the Government in the Senate stated that after the report had been adopted he proposed to move for the appointment of such a Committee. As the motion for the adoption of the report was not proceeded with, no action was taken along the lines indicated. However, in June, 1944, a Committee, consisting of Mr. A. D. Fraser, M.P. (Chairman), Mr. David Maughan, K.C., Mr. J.V. Barry, K.C. (now Mr. Justice Barry) and Dr. Frank Louat, Barrister-at-law, was appointed by the Attorney-General to -

(a) consider the question of review, repeal or modification, in the light of changing circumstances of the war, of existing regulations and other subordinate legislation under the National Security Act;

(b) tender advice to the Government on such proposed National Security regulations and orders as might be referred to the Committee by the Attorney-General.

This Committee, known as the Regulations Advisory Committee, actively functioned until the end of the war.

3. With the re-appointment of the Regulations and Ordinances Committee at the commencement of the Seventeenth Parliament, consideration was again given to the question of obtaining outside legal advice, particularly in view of the fact that, unlike previous Committees, no lawyer was available to undertake the duties of Chairman. The appointment of such an adviser had been advocated on various occasions. After consultation with the President of the Senate, representations were made to the Leader of the Government in the Senate and an amount of £250 was provided in the Estimates for 1944-45 to cover the payment of a retaining fee to an outside legal man to be selected who could examine and report on all regulations and ordinances submitted to the Committee. The Committee then recommended that ex-Senator J. A. Spicer, a former Chairman of the Committee, should be appointed as Legal Adviser for a period of six months as from 1st January, 1945, at a fee of 200 guineas per annum, and this was approved by the President of the Senate. Mr. Spicer's term of appointment was extended for an indefinite period as from 1st July, 1945, and he continued to act as Legal Adviser until his resignation which took effect as from 30th April, 1946.

4. The new Committee appointed at the commencement of the Eighteenth Parliament, for reasons similar to that expressed by the previous Committee, decided that the re-appointment of a Legal Adviser was desirable in the interests of the efficient working of the Committee, and the President of the Senate has again approved of Mr. Spicer's re-appointment for an indefinite period, subject to termination by either party at any time.

5. Since the presentation of the Committee's last report, it has dealt with all regulations (with the exception of a small number issued in 1943 under the National Security Act) and ordinances, also regulations under ordinances, as follows:-

Year	Statutory Rules	Ordinances of Australian Capital Territory, Northern Territory, Papua-New Guinea, Norfolk Island, Nauru.	Regulations under Ordinances.
1943	317	19	13
1944	192	11	6
1945	205	24	7
1946	198	35	11

6. Following the appointment of the Legal Adviser as from 1st January, 1945, the Committee has not only had before it for consideration the actual regulations and ordinances with an accompanying departmental explanatory memorandum setting out the reasons for the promulgation of the particular regulation or ordinance, but also a separate report on each prepared by the Legal Adviser. These reports have been of great value to the Committee, and it is of the opinion that the present arrangement should continue.

7. It has not been found necessary to submit special reports to the Senate on any particular regulation or ordinance. However, on several occasions consideration has been deferred pending receipt of additional information from the Department concerned. On two occasions it was found that regulations had not been laid on the Table of both Houses of the Parliament within the prescribed fifteen sitting days, in accordance with section 48 of the Acts Interpretation Act, thus rendering them void and of no effect. The two regulations in question were subsequently re-made, laid on the Table of both Houses andl in due course, passed by the Committee.

8. In its consideration of Statutory Rules 1945, No. 181, the Committee drew the Attorney-General's attention to the 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 and expressed the opinion that as the emergencies of war do not now exist, consideration might be given to the repeal of the regulation and the enactment of appropriate legislation in its stead. While agreeing that a power to make regulations amending or repealing the provisions of any Statute is unusual and should not be given except under special circumstances, the Attorney-General stated that in this case it was thought that the methods for re-establishment and employment laid down in the Act, being to some extent of an experimental nature, might need urgent revision from time to time in the light of experience, and, for that reason, the regulation-making power which is usual to most Acts had been extended. He also pointed out that any regulations made under this special power would automatically cease to operate on the termination of the wars in which His Majesty was engaged. This would necessitate the overhaul of the Act at the termination of the war and would enable full considdration to be given by Parliament to those amendments which have been made and which, as above stated, are only of a temporary operation.

While appreciating the view expressed by the Attorney-General, the Committee suggests that the special regulation power conferred under the Re-establishment and Employment Act be availed of only in emergency cases and that wherever practicable any amendments of the Act be made through the medium of legislative action.

9. With regard to Statutory Rules 1945, No. 47, made under the National Security Act, the Committee noted that the method which was adopted to give effect to the amendments was somewhat unsatisfactory in that many regulations were affected and particulars of the amendments could only be found in the Schedules to this Statutory Rule. It appears to the Committee that it would have been more satisfactory if the particular regulations which were amended were so amended by the issue of separate Statutory Rules.

10. The attention of the Senate is again drawn to the following paragraph which appeared in the Committee's Fifth Report:-

> 4. Norfolk Island Ordinances.- The attention of the Senate is directed to those provisions of the Norfolk Island Act which fix the period within which ordinances of the Territory of Norfolk Island may be disallowed. Under section 8 of the Norfolk Island Act these ordinances are subject to disallowance within 30 days after being laid on the Table, whereas ordinances of the Australian Capital Territory and the Northern Territory are subject to disallowance within fifteen sitting days after being laid on the Table." On the other hand, regulations made under ordinances of the Territory of Norfolk Island are subject to disallowance within the latter period, viz. - fifteen sitting days after being laid on the Table. The Committee suggests that the existing provision for the disallowance of ordinances "within 30 days" be amended to read "within fifteen sitting days", as the former period might lapse while Parliament is in recess and the opportunity to move for disallowance might be lost particularly when ordinances are tabled towards the end of a Session and Parliament rises before there is adequate time to consider them. Such an alteration would also have the advantage of bringing the provisions as to the disallowance of ordinances and regulations into line.

Speaking to the motion for the adoption of that Report the then Leader of the Government in the Senate stated that the Government was prepared to introduce a bill for that purpose. To date this matter has not been finalized.

R. H. NASH,

Chairman.

Senate Committee Room,

29th April, 1947.

1948-49.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

SEVENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1948 49 SESSION, AND THE SEVENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

(Brought up and ordered to be printed, 26th October, 1949.)

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STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

SEVENTH REPORT OF THE COMMITTEE.

The Standing Committee on Regulations and Ordinances has the honour to report to the Senate as follows:—

1. Since the presentation of the Committee's last report, dated 20th April, 1947, and which was adopted by the Senate on 29th May, 1947, it has dealt with all regulations and ordinances, also regulations under ordinances, as follows:—

Year.	Statutory Rules.	Ordinances of Australian Capital Territory, Northern Territory, Papua and New Guinea, and Norfolk Island.	Regulations under Ordinances.
1947	142	41	9
1948	166	33	11
1949 (to date)	71	27	13

LEGAL ADVISER TO COMMITTEE.

2. As mentioned in its previous report the Committee has had the assistance of a legal adviser, Mr. J. A. Spicer, K.C., and his reports on regulations and ordinances referred to the Committee have materially assisted in the carrying out of the duties entrusted to it. Unfortunately, Mr. Spicer's services will not be available to the Committee after the close of the present Session of Parliament, he having been nominated as a candidate at the forthcoming Senate Elections. Any recommendation as to the filling of this important position will be left to the incoming Committee to determine.

TABLING OF STATUTORY RULES IN PARLIAMENT.

3. On several occasions during the period covered by this Report the Committee noted that certain regulations had not been laid on the Table of both Houses of the Parliament within the time prescribed by section 48 of the Acts Interpretation Act, thus rendering them void and of no effect. The Departments concerned were requested to re-make the regulations and table them in accordance with the Statute.

4. The Committee became concerned at the laxity of some Departments in not ensuring that regulations were tabled within the prescribed period, and the matter was taken up with the Solicitor-General with a view to changing the system whereby each Department was responsible for the tabling of regulations administered by it. The Solicitor-General agreed that his Department should take over this responsibility as from 31st May, 1947. Since that date all regulations have been tabled within the prescribed period.

DRAFTING OF AMENDING REGULATIONS.

5. The Committee gave careful consideration to a suggestion put forward by Senator O'Flaherty when speaking to the motion for the adoption of its Sixth Report on 29th May, 1947, to the effect that when making amendments to a regulation, such regulation should be repealed and re-enacted in its amended form rather than by the substitution, addition or omission of certain words.

6. This question was previously considered by the Committee, and in its Second Report, presented to the Senate on 8th December, 1933, the following observations were made:—

> 3. The frequent amendment of regulations makes it extremely difficult for those concerned to lay their fingers upon all the regulations that bind them. Your Committee suggests three means by which this evil might be mitigated.
>
> 4. The first is that where the regulations on a particular subject are numerous and extend over a number of years, a periodic consolidation of the regulations could be made.
>
> 5. The second is that when an amending regulation is promulgated, the dates or numbers of the original and all amending regulations be printed upon it.
>
> 6. The third is that when short paragraphs of previous regulations are amended by the omission or addition of certain words the whole original clause be repealed and the clause as it would read with the omissions or additions be re-enacted.

7. *Following the adoption of the Second Report by the Senate on 2nd August, 1934,* the Attorney-General's Department issued a series of instructions to all Departments for the guidance of officers engaged in the preparation of draft Statutory Rules, and these included the three recommendations quoted above.

8. The present Committee on re-examining the position has ascertained from the Attorney-General's Department that these instructions are still being carried out as far as it is practicable to do so. With regard to the drafting of amending regulations, the Parliamentary Draftsman has stated that while the Committee's recommendation was being carried out in all possible cases, it was not possible to lay down any hard and fast rule as to the form in which amendments should take. Each case must be considered in the light of its own circumstances. For instance, if it were desired to make a small amendment in a long regulation the complete repeal and re-making of the regulation would probably not be justified. If, however, the regulation had previously been amended on a number of occasions the repeal and re-making of the regulation might, despite its length, be justified. Moreover, if a regulation is repealed, it is often necessary to provide for the saving of matters contained in the regulation. Such saving provisions not only add to the length of the amending Statutory Rule, but also add to the time necessary in its preparation. Further, an additional burden is placed upon the Government Printer, who is already experiencing great difficulty in meeting all demands made upon him. However, it was pointed out to the Committee that the difficulty was to a large extent being overcome by the more frequent consolidation of the more important regulations. An officer of the staff of the Attorney-General's Department was now devoting a considerable portion of his time to the consolidation of regulations and the number now being issued was much greater than previously.

9. From its examination of the present position the Committee is satisfied that the *recommendations previously made concerning the drafting of Statutory Rules* are being given effect to as far as it is practicable to do so. It believes, however, that notwithstanding an improvement in the issue of regulations in consolidated form, the Attorney-General's Department should be asked to increase its efforts in that direction.

TABLING IN PARLIAMENT OF ORDINANCES AND REGULATIONS UNDER ORDINANCES OF THE TERRITORIES OF THE COMMONWEALTH.

10. Appended to this Report is a statement setting out the existing provisions relating to the tabling and disallowance of ordinances and regulations thereunder of the various Territories of the Commonwealth. They reveal a rather glaring lack of uniformity as between one Territory and another, and in some instances for no apparent reason.

11. Prior to the passing of Act No. 10 of 1937 the Acts Interpretation Act merely stipulated what action must be taken concerning the tabling of regulations after the making thereof, but made no mention as to whether such regulations still had the force of law if the conditions were not complied with. Act No. 10 of 1937 repealed the provisions of the *Acts Interpretation Act* 1904–1934 and somewhat similar provisions to the old Act concerning the tabling of regulations were inserted, but with the following additional provisions :—

(*a*) if the conditions concerning tabling are not complied with, the regulations are void and of no effect; and

(*b*) if notice of motion is given in Parliament to disallow a regulation and such motion has not been withdrawn or otherwise disposed of within fifteen sitting days, the regulation shall be deemed to have been disallowed.

12. Section 48 of the Acts Interpretation Act now reads as follows :—

48. (1.) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—

(*a*) shall be notified in the *Gazette*;

(*b*) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; and

(*c*) shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.

(2.) Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect—

(*a*) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person; and

(*b*) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification,

and where, in any regulations, any provision is made in contravention of this sub-section, that provision shall be void and of no effect.

(3.) If any regulations are not laid before each House of the Parliament in accordance with the provisions of sub-section (1.) of this section, they shall be void and of no effect.

(4.) If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after any regulations have been laid before that House) disallowing any of these regulations, the regulation so disallowed shall thereupon cease to have effect.

(5.) If, at the expiration of fifteen sitting days after notice of a resolution to disallow any regulation has been given in either House of the Parliament in accordance with the last preceding sub-section, the resolution has not been withdrawn or otherwise disposed of, the regulation specified in the resolution shall thereupon be deemed to have been disallowed.

(6.) Where a regulation is disallowed, or is deemed to have been disallowed, under this section, the disallowance of the regulation shall have the same effect as a repeal of the regulation

13. It is the opinion of the Committee that the various Territories of the Commonwealth should have followed, as far as practicable, the provisions of the *Acts Interpretation Act*, but this appears to have been done only in the case of ordinances made under the Papua and New Guinea Act. Briefly, the provisions relating to tabling of ordinances and regulations of the various Territories are as follows :—

14. *Australian Capital Territory.*—Ordinances must be laid on the Table of both Houses within 30 days of the making thereof, or, if Parliament is not then sitting, within 30 days after the next meeting of the Parliament. On the other hand, regulations made thereunder must be tabled in each House within fifteen sitting days of that House after the making of the regulations. In both cases if either House passes a resolution, of which notice has been given at any time within fifteen sitting days after the ordinances or regulations have been laid before such House, disallowing any ordinance or regulation, that ordinance or regulation shall cease to have effect.

15. It is pointed out that in some cases it would be most difficult, if not impossible, for the Department to comply with the provisions of the Act relating to the tabling of ordinances. For example, if an ordinance was made on the last day of a Parliamentary Session, and Parliament did not re-assemble for, say, two months, the 30 days allowed under the Act would have long expired before tabling could be effected.

16. *Papua and New Guinea.*—The *Papua and New Guinea Act* 1949 provides for the establishment of a Legislative Council for Papua and New Guinea, but the Minister for the Army, when moving the second reading of the Bill on 15th February, 1949, stated that the Council would not be constituted for at least one year after the proposed Act came into operation. Interim legislative powers were therefore included in this Act and, *inter alia*, provide that ordinances must be laid before each House within fifteen sitting days after making, and any such ordinances not so laid before each House shall be void and of no effect.

17. Under the Ordinances Interpretation Ordinance there is no provision for the tabling of regulations made under Papua and New Guinea ordinances, and the only power of disallowance of such regulations rests with the Governor-General.

18. It will be noted that the interim provisions in the Papua and New Guinea Act relating to the tabling and disallowance of ordinances are similar to those laid down in the Acts Interpretation Act for the tabling and disallowance of Statutory Rules. It is the only Territory which has included the provision that ordinances not tabled within the prescribed time shall be void and of no effect. On the other hand, it is the only Territory which has no provision for the tabling of regulations made under ordinances.

19. *Norfolk Island.*—The *Norfolk Island Act* 1913–1935 provides that all ordinances must be tabled within 30 days after the making thereof if Parliament is then sitting, and if not, then within 30 days after the next sitting of the Parliament. Disallowance of such ordinances may be made by either House within 30 days after tabling. Regulations under ordinances must be tabled within fifteen sitting days and may be disallowed if notice is given within fifteen sitting days after tabling.

20. In its Fifth Report to the Senate, dated 17th September, 1942, it was suggested that the existing provision for the disallowance of ordinances "within thirty days" be amended to read "within fifteen sitting days" as the former period might lapse while Parliament is in recess and the opportunity to move for disallowance might be lost. Although the Government stated that it was prepared to adopt the Committee's suggestion no action was taken, and in its Sixth Report, dated 29th April, 1947, the attention of the Government was again drawn to the matter. Speaking to the motion for the adoption of the Sixth Report the Leader of the Government in the Senate (Senator Ashley) stated—

With respect to the Committee's observations on the Norfolk Island ordinances, the Norfolk Island Act has been noted for amendment when opportunity offers. No occasion to amend the Act has occurred since 1943, and a special amendment would be necessary for the purpose The Act is being examined in order to see whether any other amendments are necessary or desirable.

Although a further period of over two years has elapsed no action appears to have been taken by the Department of External Territories to effect the necessary amendment. In fact it is over seven years since this matter was first brought under notice by the Committee. The Committee is strongly of the opinion that the necessary amendment should be effected without further delay.

21. *Northern Territory.*—The *Northern Territory (Administration) Act* 1947 provides for the tabling of ordinances in Parliament as soon as may be after the assent of the Administrator or the Governor-General. There is no provision for the disallowance of ordinances by Parliament. That power is given to the Governor-General, who may do so within six months of the Administrator's assent.

22. But with regard to regulations, these may be made by either the Administrator or the Minister. Where made by the Administrator they must be tabled in the Legislative Council of the Northern Territory on the first sitting day after making. The Minister may disallow any regulation within 30 days after making and the Legislative Council has similar power if notice is given within fifteen sitting days after tabling. Except those disallowed by either the Minister or the Legislative Council, all regulations made by the Administrator must be laid before Parliament within 30 sitting days after making and may be disallowed by Parliament if notice to that effect is given within fifteen sitting days after tabling.

23. In connexion with regulations made by the Minister, these must be tabled in Parliament within fifteen sitting days after making and may be disallowed by Parliament if notice is given within fifteen sitting days. It seems illogical that, while Parliament has the power of disallowance in connexion with Northern Territory regulations, it has no power of disallowance in respect of the ordinances under which such regulations are made.

24. In view of the inconsistencies which appear in the various Acts and Interpretation Ordinances of the Territories, the Committee submits the following suggestions for the consideration of the Government :—

(*a*) That the *Seat of Government (Administration) Act* 1910–1940 be amended to provide for the tabling of ordinances within fifteen sitting days.

(*b*) That the Norfolk Island Act be amended to provide for the tabling of ordinances within fifteen sitting days and for their disallowance by Parliament if notice thereof is given within fifteen sitting days after tabling.

(*c*) That, in the case of Territories with Legislative Councils and where the power to disallow ordinances has been taken away from Parliament, the same provisions should apply in relation to the tabling and disallowance of regulations as apply in relation to ordinances.

(*d*) That, in the case of all Territories where the power to disallow ordinances remains with Parliament, provisions similar to sub-sections (3.), (5.) and (6.) of section 48 of the Acts Interpretation Act should apply with regard to both ordinances and regulations made thereunder.

AMENDMENTS BY REGULATION.

25. The Committee desires to draw the attention of the Senate to the following regulations which have been referred to it for consideration :—

Statutory Rules 1949, No. 42, made under the *Social Services Consolidation Act* 1947–1948 ;

Statutory Rules 1949, No. 60, made under the *Defence Forces Retirement Benefits Act* 1948–1949 ;

Statutory Rules 1949, No. 72, made under the *Re-establishment and Employment Act* 1945 ; and

Statutory Rules 1949, No. 59, made under the *Supply and Development Act* 1939–1948.

26. In the case of Statutory Rules 1949, Nos. 42, 60 and 72, the Committee has noted that, although empowered by the respective Acts to do so, they contain provisions which in its opinion should have been made the subject of legislative action. The Committee feels that in cases where regulation-making power is conferred by an Act to amend or override that Act, such power should not be availed of except in cases of extreme urgency.

27. With regard to Statutory Rules 1949, No. 59, the Committee points out that the very wide powers conferred upon the Minister for Supply and Development, particularly during times of peace, might have been submitted to Parliament for approval by way of an amendment to the Supply and Development Act.

JOSEPH A. COOKE,
for Chairman.

Canberra, 19th October, 1949.

APPENDIX.

NORTHERN TERRITORY (ADMINISTRATION) ACT.

Ordinances.

Sections 4v, 4w, 4x and 4z of the *Northern Territory (Administration) Act* 1910-1947 read—

"4v.—(1.) An Ordinance made by the Council shall not have any force or effect until it has been assented to as provided in this Act.

(2.) Every Ordinance passed by the Council shall be presented to the Administrator for assent

(3.) The Administrator shall thereupon declare, according to his discretion, but subject to this Act, that he assents thereto, or that he withholds assent, or that he reserves the Ordinance for the Governor-General's pleasure."

"4w.—Within six months from the Administrator's assent to any Ordinance the Governor-General may disallow the Ordinance, and, on notice of the disallowance being published by the Administrator in the *Government Gazette* of the Territory, the Ordinance shall be disallowed from the date of publication."

"4x.—An Ordinance reserved for the Governor-General's pleasure shall not have any force or effect unless and until within six months from the day on which it was presented to the Administrator for the Governor-General's assent, the Administrator publishes in the *Government Gazette* of the Territory a notification that it has received the Governor-General's assent."

"4z.—Every Ordinance assented to by the Administrator or by the Governor-General shall, as soon as may be after being assented to, be laid before each House of the Parliament."

Regulations under Ordinances.

The *Interpretation Ordinance* 1931-1948 provides—

"15.—(1.) Where an Ordinance confers power on the Administrator to make Regulations, or where an Ordinance of North Australia confers upon the Government Resident power to make Regulations, and that power is, by virtue of section eight of this Ordinance, exercisable in the Northern Territory by the Administrator, all Regulations made accordingly shall, unless the contrary intention appears

(*a*) be notified in the *Gazette* of the Northern Territory;
(*b*) take effect from the date of notification, or from a later date specified in the Regulations;
(*c*) be forwarded to the Minister forthwith; and
(*d*) shall be laid before the Legislative Council on the first sitting day of that Council after the making of the Regulations.

(2.) The Minister may, within thirty days after the making of any regulations, by notice in the *Commonwealth of Australia Gazette*, disallow any regulation, and the regulation so disallowed shall cease to have effect from the date of the publication in the *Commonwealth of Australia Gazette* of a notification of its disallowance.

(2A.) If the Legislative Council passes a resolution of which notice has been given at any time within fifteen sitting days after the regulations have been laid before the Council disallowing any regulation, that regulation shall thereupon cease to have effect.

(3.) All regulations, except those disallowed by the Minister or by the Legislative Council, shall be laid before each House of the Parliament within thirty sitting days of that House after the making of the regulations

(4.) If either House of the Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after the regulations have been laid before the House disallowing any regulation, that regulation shall thereupon cease to have effect."

"16.—(1.) Where an Ordinance confers power on the Minister to make regulations, all regulations made accordingly shall, unless the contrary intention appears—

(*a*) be notified in the *Commonwealth of Australia Gazette*;
(*b*) take effect from the date of notification, or from a later date specified in the regulations; and
(*c*) be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.

(2.) If either House of the Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after the regulations have been laid before the House disallowing any regulation, that regulation shall thereupon cease to have effect."

PAPUA AND NEW GUINEA ACT.

Ordinances.

Sections 49, 50 and 53 of the *Papua and New Guinea Act* 1949 provide—

"49.—(1.) An Ordinance passed by the Legislative Council shall not have any force until it has been assented to as provided in this Division.

(2.) Every Ordinance passed by the Legislative Council shall be presented to the Administrator for assent.

(3.) The Administrator shall thereupon declare, according to his discretion, to be exercised subject to this Act, that he assents thereto, or that he withholds assent, or that he reserves the Ordinance for the Governor-General's pleasure."

"50.—(1.) Within six months after the Administrator's assent to an Ordinance, the Governor-General may disallow the Ordinance or any part thereof.

(2.) The disallowance shall, upon publication of notice thereof in the *Government Gazette*, have the same effect as a repeal of the Ordinance, or of the part thereof, as the case may be, except that, if any provision of the Ordinance or of the part thereof, as the case may be, amended or repealed a law in force immediately before the coming into operation of that provision, the disallowance shall revive the previous law from the date of the publication of the notice of the disallowance as if the disallowed provision had not been made."

"53. Every Ordinance assented to by the Administrator or by the Governor-General shall, as soon as practicable after that assent, be laid before both Houses of the Parliament."

NOTE.—The above legislation will not apply until the proclamation constituting the Legislative Council has been issued. In the meantime the following interim legislative powers are given to the Governor-General:—

"51.—(1.) Until the date fixed by Proclamation under section thirty-five of this Act, the Governor-General may, subject to this Act, make Ordinances for the peace, order and good government of the Territory.

(2.) Notice of the making of every Ordinance made under this section shall be published in the *Commonwealth of Australia Gazette*, and every such Ordinance shall, unless the contrary intention appears in the Ordinance, take effect from the date of publication of the notice."

"55.—(1.) Every Ordinance made under this Division shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the Ordinance, and any such Ordinance which is not so laid before each House of the Parliament shall be void and of no effect.

(2.) If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after an Ordinance has been laid before that House) disallowing that Ordinance or any part thereof, the Ordinance or part so disallowed shall thereupon cease to have effect.

(3.) If, at the expiration of fifteen sitting days after notice of a resolution to disallow any such Ordinance or part of any such Ordinance has been given in either House of the Parliament in accordance with the last preceding sub-section, the resolution has not been withdrawn or otherwise disposed of, the Ordinance or part, as the case requires, shall thereupon be deemed to have been disallowed.

(4.) . . . . . .

(5.) . . . . . ."

REGULATIONS UNDER ORDINANCES.

The *Ordinances Interpretation Ordinance* 1919 provides

"37.—(1.) Regulations or orders made or given under an Ordinance, unless the contrary intention appears in the Ordinance—

(*a*) shall be published in the *Gazette*; and

(*b*) shall, subject to this section, take effect from the date of publication, or where another date is specified in the regulations, from the date specified.

(2.) . . . . . .

(3.) Regulations shall be subject at any time to disallowance in whole or in part by the Governor-General, and a regulation so disallowed shall cease to have effect from the date of publication in the *Gazette* of notice of the disallowance.

(4.) . . . . . ."

AUSTRALIAN CAPITAL TERRITORY.

ORDINANCES.

Section 12 of the *Seat of Government (Administration) Act* 1910–1940 reads—

"12.—(1.) The Governor-General may make Ordinances having the force of law in the Territory.

(2.) Every such Ordinance shall—

(*a*) be notified in the *Gazette*;

(*b*) take effect—

(i) from the date of notification;

(ii) where another date (whether before or after the date of notification) is specified in the Ordinance, from the date specified; or

(iii) where the Ordinance so provides, from such date as is fixed by the Minister by notice in the *Gazette*; and

(*c*) be laid before both Houses of the Parliament within thirty days of the making thereof, or, if the Parliament is not then sitting, within thirty days after the next meeting of the Parliament.

(2A.) A notice in the *Gazette* of any such Ordinance having been made, and of the place where copies of the Ordinance can be purchased, shall be sufficient compliance with the requirement of paragraph (*a*) of the last preceding sub-section.

(3.) If either House of the Parliament passes a resolution, of which notice has been given at any time within fifteen sitting days after any such Ordinance has been laid before the House, disallowing the Ordinance, the Ordinance shall thereupon cease to have effect."

REGULATIONS UNDER ORDINANCES.

The *Interpretation Ordinance* (No. 29 of 1937) provides—

"16.—(1.) Where an Ordinance confers power to make regulations, all regulations made accordingly shall unless the contrary intention appears—

(*a*) be notified in the *Gazette*;

(*b*) take effect from the date of notification, or from a later date specified in the regulations; and

(*c*) be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.

(2.) If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after the regulations have been laid before such House) disallowing any regulation, that regulation shall thereupon cease to have effect.

(3.) Where a regulation is disallowed under this section, the disallowance of the regulation shall have the same effect as a repeal of the regulation.

(4.) . . . . . .

(5.) . . . . . ."

NORFOLK ISLAND.

ORDINANCES.

Section 8 of the *Norfolk Island Act* 1913–1935 reads—

"8.—(1.) Subject to this Act the Governor-General may make Ordinances for the peace, order, and good Government of Norfolk Island.

(2.) to (10.) . . . . . .

(11.) Ordinances made by the Governor-General shall be published in Norfolk Island in the manner directed by the Governor-General, and shall come into force at a time to be fixed by the Governor-General, not being before the date of their publication in Norfolk Island.

(12.) Every Ordinance made by the Governor-General shall be laid before both Houses of the Parliament within thirty days after the making thereof if the Parliament is then sitting, and if not, then within thirty days after the next sitting of the Parliament.

(13.) If within thirty days after any Ordinance has been laid before it, either House of the Parliament passes a resolution disagreeing with the Ordinance or any part of it, the Ordinance or part, as the case requires, shall cease to have effect."

REGULATIONS UNDER ORDINANCES.

The *Interpretation Ordinance* 1915–1940 provides—

"8.—(1.) Where an Ordinance confers power to make regulations, all Regulations made accordingly shall, unless the contrary intention appears—

(*a*) be notified in the *Gazette*;

(*b*) take effect from the date on which a copy of the Regulations is affixed on or near to the Court House, Norfolk Island; and

(*c*) be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.

(2.) If either House of the Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after the regulations have been laid before the House disallowing any regulation, that regulation shall thereupon cease to have effect."

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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).

[*Brought up and ordered to be Printed, 3rd June*, 1952.]

Printed and Published for the GOVERNMENT of the COMMONWEALTH OF AUSTRALIA by L. F. JOHNSTON, Commonwealth Government Printer, Canberra.
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No. S.1. [GROUP H.]—F.2552.—PRICE 6D.

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 war-time 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. 220, (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 excepted. 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.

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1954.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE

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.)

PERSONNEL OF COMMITTEE.

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.

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 posts 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

Chairman.

1956.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

THE SENATE.

TENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1956 SESSION, AND THE TENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

[*Brought up, 22nd May, 1956; ordered to be Printed, 4th September, 1956.*]

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PERSONNEL OF COMMITTEE.

Chairman:
Senator I. A. C. Wood.

Members:
Senator J. J. Arnold.
Senator C. B. Byrne.
Senator K. A. Laught.
Senator the Hon. H. S. Seward.
Senator D. R. Willesee.
Senator R. C. Wright.

FUNCTIONS OF THE COMMITTEE.—Since 1932, when the Committee was first established, the principle has been followed 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 rather than upon judicial decisions; and

(*d*) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

TENTH REPORT OF THE COMMITTEE.

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

2. The purpose of this Report is to acquaint the Senate of the Committee's inquiries in regard to its scrutiny of Statutory Rule No. 92 of 1955. On Thursday, 10th May, 1956, Senator I. A. C. Wood, the Chairman of the Committee, gave notice of motion for the disallowance of the Regulation. The motion is listed on the Notice Paper for consideration this day.

3. The explanatory statement circulated by the Department of Air in relation to the regulations reads as follows:—

The purpose of this amendment to Air Force Regulations is to provide adequate authority for the Air Board to make deductions from the pay of members of the R.A.A.F. for losses of public money or property or for damage to property occasioned by their neglect or misconduct. The amendment makes provision for delegation of the Air Board's authority.

4. Having considered the Regulation, the Committee is of the opinion—

(1) That the Regulation is not authorized by the Act;

(2) That the Regulation includes provisions of substantial alterations of the law appropriate only to enactment (if at all) by Parliament;

(3) That the Regulation authorizes deductions from a member's pay—

(*a*) not only for deficiency of stores and materials but also for third party claims,

(*b*) of unlimited amounts,

(*c*) without appeal,

(*d*) without providing the member with any procedure (such as Court Martial or Civil Court action) to be heard, and

(*e*) without protecting any proportion of the member's periodical pay—

notwithstanding that the *Air Force Act* 1923-1952, section 3 (3), specifically enacts that, subject to the last mentioned Act, section 58 of the Defence Act shall continue to apply in relation to the Air Force.

5. Section 58 of the Defence Act is as follows:—

58. The commanding officer of every corps, ship's company or air-force unit or station shall be responsible for the safe keeping and good order of all articles, the property of the Commonwealth, supplied to his corps, ship's company or air-force unit or station, and the value of any of those articles may, if lost or damaged while in possession of the corps, ship's company or air-force unit or station otherwise than through fair wear and tear or unavoidable accident, be recovered by the commanding officer by action in any Federal or State Court of competent jurisdiction from the officer or man by whom the loss or damage was occasioned. Responsibility of commanding officer.

6. For the further information of the Senate, the following documents are attached:—

(1) Copy of Statutory Rule No. 92 of 1955;

(2) Copy of the correspondence entered into with the Department of Air and the Attorney-General's Department; and

(3) Copy of the evidence taken from the Parliamentary Draftsman and officers of the Department of Air and the Department of the Treasury.

IAN WOOD,
Chairman.

Senate Committee Room,
22nd May, 1956.

STATUTORY RULES.

1955. No. 92.

REGULATION UNDER THE AIR FORCE ACT 1923-1952.*

I, THE GOVERNOR-GENERAL in and over the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulation under the *Air Force Act* 1923-1952.

Dated this twenty-third day of December 1955.

W. J. SLIM
Governor-General.

By His Excellency's Command,

ATHOL TOWNLEY
Minister of State for Air.

AMENDMENT OF THE AIR FORCE REGULATIONS.†

After regulation 514 of the Air Force Regulations the following regulation is inserted:—

Liability of members for loss, damage or expense caused to the Commonwealth by their neglect or misconduct.

"515.—(1.) Where—

(*a*) the Commonwealth has suffered or incurred loss, damage or expense; or

(*b*) there is a deficiency in the stores or materials of the Commonwealth which is not accounted for to the satisfaction of the Air Board,

and the Air Board considers that the loss, damage, expense or deficiency has been caused or contributed to by—

(*c*) the neglect or misconduct of a member; or

(*d*) the failure of a member to comply with, or a contravention by a member of, the Defence Act or the Act, a regulation made under either of those Acts or a lawful order or instruction,

the member shall be liable to pay to the Commonwealth such amount, not exceeding an amount which the Air Board considers sufficient to reimburse the Commonwealth for the loss, damage, expense or deficiency and any expenditure incurred by the Commonwealth as a result of the loss, damage, expense or deficiency as the Air Board directs to be paid by the member.

"(2.) In determining the amount payable by a member under this regulation, the Air Board shall take into consideration—

(*a*) the gravity of the member's neglect, misconduct, failure or contravention;

(*b*) the extent to which that neglect, misconduct, failure or contravention caused or contributed to the loss, damage, expense or deficiency;

(*c*) the rate of pay of the member; and

(*d*) any other relevant matters.

"(3.) An amount which the Air Board directs under this regulation to be paid by a member shall be deemed to be a debt due and owing by the member to the Commonwealth and, without prejudice to the right of the Commonwealth to recover the amount by other means, may be deducted in such instalments, and in such manner, as the Air Board directs from the pay, allowances and other moneys which are, or which may become, payable to the member by the Commonwealth under the Defence Act or the Act.

"(4.) The powers and functions conferred on the Air Board by the preceding provisions of this regulation may be exercised and performed by an officer authorized by the Air Board for that purpose, but, in the exercise and performance of those powers and functions an officer so authorized shall not, in respect of a particular loss, damage, expense or deficiency, direct the payment to the Commonwealth by a member of an amount which exceeds an amount equal to the pay and allowances of the member for a period of twenty-eight days.

"(5.) Where an officer so authorized by the Air Board has directed that an amount be paid to the Commonwealth by a member—

(*a*) the commanding officer, if any, of the officer;

(*b*) the air or other officer, if any, commanding the command in which the officer is serving;

(*c*) if the officer is outside Australia or on war service in Australia, the officer, if any, in chief command of the force to which the officer belongs; or

(*d*) the Air Board,

shall, at the request of the member, review the direction and may, in his or its discretion—

(*e*) confirm the direction;

(*f*) cancel the direction; or

(*g*) direct that a lesser amount be paid to the Commonwealth by the member.

"(6.) A direction by an officer made by virtue of sub-regulation (4.) of this regulation or the last preceding sub-regulation shall, for the purposes of this regulation, have the same force and effect as a direction by the Air Board.".

* Notified in the *Commonwealth Gazette* on 12th January, 1956.

† Statutory Rules 1927, as amended to date. For previous amendments of the Air Force Regulations, see footnote † to Statutory Rules 1955, No. 30, and *see also* Statutory Rules 1955, No. 41.

[*Copy.*]

Department of the Senate,
Canberra, A.C.T.
29th March, 1956.

The Secretary,
Department of Air,
MELBOURNE, VIC.

STATUTORY RULES 1955, No. 92.

The abovementioned Statutory Rules and the Explanatory Memorandum furnished by your Department were recently considered by the Senate Standing Committee on Regulations and Ordinances.

The Committee has queried whether Regulation 515 is consistent with that portion of Section 3 (3) of the Air Force Act which provides that Section 58 of the Defence Act shall apply.

By constituting the Air Board a court to determine damage without a trial or hearing, Regulation 515 would appear to cut across Section 58 of the Defence Act which provides for claims for damage or loss to be brought before a Court of Law.

Your departmental comment in regard to the query would be appreciated.

(Sgd.) R. E. BULLOCK, Secretary.
Regulations and Ordinances Committee.

Minuted to—
The Secretary,
Attorney-General's Department,
CANBERRA, A.C.T.

Forwarded for favour of comment please.
(Sgd.) R. E. Bullock.

[*Copy.*]

ATTORNEY-GENERAL'S DEPARTMENT.

PARLIAMENTARY DRAFTSMAN,
CANBERRA, A.C.T.
No. 54/2013.
18th April, 1956.

Memorandum for—
The Secretary,
Senate Standing Committee on
Regulations and Ordinances,
Parliament House,
CANBERRA, A.C.T.

STATUTORY RULES 1955, No. 92.

I refer to your minute to the Secretary, Attorney-General's Department, with which you forwarded a copy of your memorandum dated 20 March, 1956, addressed to the Secretary, Department of Air.

2. In your memorandum, you state that the Senate Standing Committee on Regulations and Ordinances has queried whether regulation 515, which was inserted in the Air Force Regulations by the abovementioned Statutory Rule, is consistent with that portion of section 3 (3.) of the Air Force Act, which provides that section 58 of the Defence Act shall apply to the Air Force. The Committee states that "by constituting the Air Board a court to determine damage without a trial or hearing, regulation 515 would appear to cut across section 58 of the Defence Act which provides for claims for damage or loss to be brought before a court of law".

3. For the reasons stated in the following paragraphs, I do not think that regulation 515 of the Air Force Regulations is inconsistent with section 3 (3.) of the Air Force Act. That section, so far as is relevant, reads as follows:—

> "(3.) Part 1., sections thirty, forty-three, forty-six, forty-seven, fifty-one, fifty-three and fifty-eight and Parts IV. to XIV. (both inclusive) of the Defence Act shall, subject to this Act, continue to apply to the Air Force:
>
> Provided that . . .".

4. Section fifty-eight, it will be seen, is not applied unconditionally to the Air Force. It is, by the express terms of section 3 (3.) applied "subject to this Act". The expression "this Act" is defined by section 2 as including all regulations made under the Act. Applying the defined meaning of the expression to section 3 (3.), the section means that section fifty-eight of the Defence Act applies to the Air Force "subject to this Act and the regulations made under this Act".

5. Section 9 authorizes the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for securing the discipline and good government of the Air Force and the members thereof whether within or beyond the limits of the Commonwealth, or for carrying out or giving effect to the Act. I do not think there is any doubt that the regulation is a regulation which is convenient to be prescribed for securing the discipline and good government of the Air Force. Consequently, those portions of the Defence Act which, by section 3 (3.) of the Air Force Act, apply in relation to the Air Force apply subject to regulation 515.

6. The view expressed above has been held and applied consistently by this Department since section 3 (3.) was enacted in its present form.

7. Moreover, it is by no means beyond doubt that regulation 515 would be inconsistent with section 58 if the section were not subject to the regulation. Further, I do not think that the Committee's statement that the Air Board has been constituted a Court to determine damage without a trial or hearing correctly represents the effect of the regulation.

(Sgd.) J. Q. EWENS,
Parliamentary Draftsman.

DEPARTMENT OF AIR,
MELBOURNE, S.C.1.
24th April, 1956.

Ref.: 83/1/943.

Secretary,
Regulations and Ordinances Committee,
The Senate,
CANBERRA, A.C.T.

STATUTORY RULES 1955, No. 92.
(*Your letter 20th March, 1956.*)

Since the receipt of your letter of the 20th March, concerning the legality of Air Force Regulation 515, I have received a copy of a memorandum dated April, 1956 (reference 54/2013) setting out the views of the Parliamentary Draftsman, Attorney-General's Department, on the subject matter. The views expressed are concurred in by this Department.

(Sgd.) E. W. HICKS, Secretary.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

MINUTES OF EVIDENCE.

(Taken at Canberra.)

WEDNESDAY, 16TH MAY, 1956.

Present:

Senator ARNOLD (Acting Chairman).

Senator Byrne.	Senator Willesee.
Senator Laught.	Senator Wright.
Senator Seward.	

Observers:

Mr. J. Q. Ewens, Parliamentary Draftsman.
Mr. C. L. S. Hewitt, Department of the Treasury.
Mr. F. H. Cox, Department of the Treasury.

Francis Joseph Mulrooney, Assistant Secretary, Department of Air, Melbourne, sworn and examined.

The Chairman.—Gentlemen, before we commence taking the evidence of Mr. Mulrooney perhaps, in order to make the matter clear, I should outline the purpose for which we are gathered this morning. This Committee has been constituted according to the Standing Orders and all regulations and ordinances laid on the table of the Senate stand referred to this Committee for consideration and, if necessary, report. Since 1932 the functions of the Committee have been to scrutinize regulations and ordinances and to ascertain first, if they are in accordance with the Statute, secondly, that they do not trespass unduly on personal rights and privileges, thirdly, that they do not unduly make the rights and liberties of citizens dependent on administrative rather than judicial decisions, and fourthly, that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment. Mr. Mulrooney's presence here to-day is a result of a request made to the Minister for Air for an officer of his department to be made available to the Committee to explain the reason and purpose of Statutory Rules 1955, No. 92. When we examined this regulation previously it left grave doubts in the minds of the Committee that it may transgress some of the four principles that I have read this morning. I understand that Mr. Mulrooney is aware of the correspondence that has passed between the Committee and his department, and that the Parliamentary Draftsman is also clear about the whole matter. Perhaps now Mr. Mulrooney might set out to the Committee the reasons why his department has made the regulation and the views it has about it. After he has made the statement, the members of the Committee may question him on any point that they feel should be cleared up.

Would you make a statement to the Committee, Mr. Mulrooney, about the views of the Department of Air?—Yes, I appreciate the reasons behind this investigation by the Senate Committee on Regulations and Ordinances, and therefore I think that I should start at the beginning of this matter. The principle in the regulation is not a novel one being injected into the Air Force Regulations. In fact, in 1928 by Statutory Rules 109 of 1928, regulation 163A was inserted into the regulations. That regulation provided that where any loss or improper expense has in the opinion of the Air Board been caused or incurred by any member, there shall be chargeable against the pay and allowances including deferred pay of that member such amount as, in the opinion of the Air Board, is necessary to reimburse the Commonwealth in respect of the loss or expense or any expenditure, and that amount may be stopped by the Air Board out of the pay and allowances of the member. That regulation continued in force until 1940 when it was repealed. The reason for the repeal was that in 1939 the *Air Force Act* 1923 was amended to provide for the application to the Royal Australian Air Force of certain parts of the Imperial Air Force Act. That decision was taken to bring the Royal Australian Air Force into line with the other Australian defence services which had had applied to them imperial legislation. That meant that we had to omit from the Air Force regulations all those regulations which related to discipline and which might be in conflict with or might duplicate some provision in the Imperial Air Force Act. The provision which enables substantially that principle to be continued in the Air Force legislation is contained in section 137 of the Imperial Air Force Act, which provides for what is called penal deductions. That section reads, in part, as follows:—

> The following penal deductions may be made from the active pay due to an officer of the Permanent Air Force or the Citizen Air Force when called up for war service . . .

The particular paragraph of the section—4—states—

> The sum required to make good any loss, damage, or destruction of public or service property or property belonging to the Navy, Army and Air Force Institutes which, after due investigation, appears to the Air Board to have been occasioned by the wrongful act or negligence on the part of the officer.

In reading that regulation, I have modified and adapted it in accordance with the schedule to the Air Force Regulations. It does not read in that way, of course, in the original Imperial Air Force Act. That section applied, therefore, and continued the same principle substantially which had been included in Air Force regulation 163A which I quoted to the Committee earlier. There was one difference, however, and that was that while regulation 163A applied to officers and airmen, section 137 of the Imperial Air Force Act applied only to officers. In relation to airmen section 138 of the Imperial Air Force Act, the relevant section, as modified and adapted in accordance with the Air Force regulations, provided that—

> The following penal deductions may be made from the ordinary pay due to an airman of the permanent Air Force or of the citizen Air Force when called out for war service:—
>
> . . . . . .
>
> (3) The sum required to make good such compensation for any expenses, loss, damage, or destruction occasioned by the commission of any offence as may be awarded by the court martial by whom he is convicted of such offence, or by the authority dealing summarily with the charge under section forty-seven of this Act, or if he is on board one of His Majesty's ships, by the commanding officer of that ship, or where he has confessed the offence and his trial is dispensed with by order under Section 73 of this Act as may be awarded by that order or by any other order of a competent air-force authority under that section.

The Committee will see, therefore, that the penal deduction could only be made where the airman was being dealt with for an offence.

Senator Byrne.—Did I understand you to read "where he is called out for war service"?—That is, a member of the Permanent Air Force or of the Citizen Air Force called out for war service. That means to say, when he is on full-time duty. War service means service during time of war or at a time in respect of which a proclamation has been issued declaring that a state of war exists.

Senator Byrne.—It has a limited application?—Yes.

Mr. Ewens.—But only as regards the Citizen Air Force?—Yes. I thought that Senator Byrne meant that by his question. To explain the matter, section 138 states—

> The following penal deductions may be made from the ordinary pay due to an airman of the Permanent Air Force or of the Citizen Air Force when called out for war service.

Complaints had been made by the Auditor-General that courts-martial and commanding officers, when dealing with offences, were not adverting to the requirements of that section. When airmen were convicted of charges, either by a court-martial or a commanding officer, they certainly received punishment, but that punishment did not provide also for penal deductions from their pay. That was one of the complaints.

Senator Willesee.—Although the power was there, was it not?—Yes, although it was there. That position, of course, obtained until this present regulation was gazetted in December, 1955. In 1946, the Treasurer gave a direction as to how the people who were guilty of misconduct or negligence in regard to their handling of public moneys and stores, &c., should be dealt with, and on the 9th October, 1946, the Treasury issued a memorandum stating—

> I have to advise (in relation to previous correspondence) that the Treasurer has now approved that action on the following lines be taken:—
>
> (*a*) That authority be provided in the regulations of the Navy, Army and Air conferring power on the Services Boards to require the recovery of a loss or deficiency by deduction from pay of the member responsible (such a provision already exists in Naval Financial Regulation 143A);
>
> (*b*) That a decision in regard to recovery may be taken by a Service Board without necessarily requiring as a preliminary a judicial investigation by a board of inquiry or a court-martial.

The memorandum then goes on to give quite a number of detailed conditions and procedure in regard to the adjustment of these losses and deficiencies. It is some two pages in length, and I shall not read it unless the committee wishes me to do so.

Senator Byrne.—Is there any part of it that you think is significant?—No. I think the principles are laid down in that paragraph I have just read.

Senator Wright.—The witness might read the first two paragraphs as a sample for the benefit of the Committee. Could that be done?—The first paragraph reads as follows:—

> In regard to detailed procedure to be followed on the adjustment of losses or deficiency, it is suggested a routine as broadly outlined hereunder would be satisfactory when the abovementioned amendments to the regulations have been effected:
>
> (*a*) a member to be responsible to make good the amount of any loss or deficiency in public moneys entrusted to him;
>
> (*b*) unless special circumstances or good reasons exist, a member shall make good the amount of any such loss or deficiency without delay, deduction being made from pay if necessary.

That is the sort of provision contained in the statement. The member may submit reasons why the deduction should not be made, &c. The regulations, or the conditions, were the subject of protracted negotiations between the departments. The three Service departments considered them in relation to their own requirements. The Service Boards had their own views on the matter. These were reconciled at conferences with the Treasury in Melbourne and, eventually, regulation 515 came into being. I do not think that I need go into the details of the departmental controversy. That does not affect matters so far as this Committee is concerned.

Senator Wright.—Did it operate over the whole of the nine years?—I would not say that it did. Quite a number of circumstances held it up in different places.

The Chairman.—Members of the Committee have heard Mr. Mulrooney and they will now have an opportunity to ask him questions.

Senator Seward.—You have said that an airman has a right to appeal against decisions. To whom would the appeal be made?—Under the law as it was before regulation 515 was enacted, he would be dealt with by a court-martial or by his commanding officer. Under the law, he had the right of appeal ultimately to the Air Board, and he had the right to petition for a review of that sentence or punishment to the Governor-General; that is, if convicted by a court-martial. If he were convicted by his commanding officer, he had the right to have the conviction reviewed up to the Air Board stage. In fact, the Air Board or an officer reviews summary punishments to ensure that they are consistent and not excessive.

Senator Byrne.—As "of course" they review them?—Yes.

Senator Seward.—What is the difference between a hearing by a court-martial and by a commanding officer? Does it apply to a limitation of severity of the case?—It all depends on the severity of the case and whether the airman elects to be tried by court-martial.

Senator Byrne.—I examined this regulation and the correspondence that has been presented between the Treasury, the Auditor-General and the Service departments. The problem as I see it was the departments' and, possibly, within their responsibility they are trying to improve the administrative efficiency which is under their control. Apparently, losses have been experienced and not recovered. The Auditor-General pressed the Treasury, and the Treasury pressed the departments. On one side, there was desire to have administrative efficiency, but on the other side, we have the responsibility to ensure that, in that drive, individual rights and liberties are not unduly impaired. My approach was that this regulation has tended to disturb reasonable balance between the two, and it appears that this Committee might assist to have the balance restored. That was my approach which was confirmed when I saw the impetus behind this matter which was at the administrative level for certain purposes. It appeared to me that these are not primarily penal contingencies. It is a provision aimed at indemnifying the Government, recouping losses and protecting the Commonwealth. I was interested in the British statute which spoke of penal recovery as though the matter had both categories. I think that in the part of the regulations into which this was being written, and the part of the regulations into which similar provisions had been written, the imposition of these recoveries were not penal in character but purely of an indemnity nature to protect Commonwealth property. I was not aware of the history of this matter as Mr. Mulrooney has given it and as it emanates from the Imperial Air Force Act. The Commonwealth Defence Act, section 8, had been carried into regulation 435. Section 58 is something which is receiving the statutory attention and recognition of the Commonwealth, and with that recognition it sets out where protection is required to property in one of the Services. If any loss occurs in the circumstances set down, judicial procedure is insisted upon. Now we find the regulation being introduced which has not

received that statutory recognition of the Parliament as section 58 would have, and which imports a duty *towards determination of the quantum and the reference* of guilt to an administrative tribunal.

Senator Byrne (continuing).—*It* appeared to me, therefore, that this was something which was being introduced without parliamentary consideration or statutory establishment. I do not wish to occupy the whole of the time of the Committee, but I will run through the points I had in mind briefly. Section 58, which received the attention of the Commonwealth Parliament, established the principles of recovery by judicial procedure through the courts and that it must be unit property. *Does not* regulation 515 go beyond section 58? Section 58 purports to deal only with Commonwealth property and more particularly property entrusted to a unit. Regulation 515 (1) (*a*) goes right beyond that sphere in its effect, does it not?—I do not consider it does. In my view, the provisions in regulation 515 and in section 58 are mutually exclusive and I *suggest that the* Air Board would not be offending against section 58 by proceeding under regulation 515.

Senator Byrne.—I agree they are mutually exclusive. That is my point; they deal with different things, do they not?—Yes.

Senator Byrne.—One deals with Commonwealth property and its protection as unit property and the other deals with any loss, damage or expense, whatever *the terms are, occurring to the* Commonwealth by neglect or misconduct. Is that right?—Yes.

Senator Byrne.—*My point was that the first* principle only had received express statutory recognition in the Commonwealth, that is, it had to be Commonwealth property and a judicial procedure was prescribed. Now you go right beyond that. This could be the property of a stranger. I instanced in a review that was made for the Committee a case which extra*ordinarily found a parallel yesterday.* I *instanced* the case of an airman disobeying Air Force instructions, flying below a prescribed ceiling, damaging the property of a citizen who claimed successfully against the Commonwealth and the Commonwealth establishes a debt against the airman, which could be recovered. There is no Commonwealth property involved though *it is expense incurred to the Commonwealth.* Yesterday we had the case in Sydney of an aircraft flying over a ship, which is almost a complete case in point. Does not regulation 515 in that part go completely beyond what is contemplated in section 58 where a judicial procedure is prescribed in a limited area? Here no judicial procedure is prescribed in a vastly *widened area?*—*Yes. Regulation 515 does not purport* to be made under the Defence Act, of course; it purports to be made under the *Air Force Act* 1923-1952. In that Act, of course, certain parts and sections of the Defence Act are applied to the Air Force, subject to the Act, and the Act includes the Regulations. I think this Committee has already had an opinion from *the Parliamentary Draftsman on that matter.*

Senator Byrne.—That is right. We acknowledge *that, but it might be queried. The point is that there* is a section 58 of the Defence Act which still applies to the Air Force?—Yes.

Senator Byrne.—It establishes certain principles by legislation?—Yes.

Senator Byrne.—Within the authority you have just sketched a regulation is made which departs from that principle and extends it by regulation. There you have the two things; you have Parliament adverting *to one principle and insisting on it, and you have a* regulation which has not received the scrutiny of Parliament establishing a different and wider principle, perhaps within the competence of the statute?—As I said a moment ago, the Legislature also said in the Air Force Act that the Defence Act would apply subject to the Air Force Act, which included Regulations which might be made under that Act.

Senator Byrne.—We agree with that. There is an *overall statutory authority to do something like this,* perhaps, but it is done by regulation ultimately *although there is a standing statutory provision* which still applies in very parallel circumstances which insists on a different principle?—Yes.

Senator Byrne.—In other words, there has been by subordinate legislation a by-passing of a statutory established principle still applying to the Air Force. That is it in effect, is it not?—That is so.

Senator Byrne.—Section 58 refers to the protection of articles, the property of the Commonwealth. When *you come to regulation 515, you find the same sort of* provision is made in regulation 515 (*b*). If you look at section 58, there is a procedure there which is mandatory. In other words, civil proceedings must be taken. If the Minister or the appropriate person elects to recover, he must proceed.

Mr. Ewens.—I am afraid I do not quite follow what Senator Byrne says when he says the procedure in section 58 is mandatory.

Senator Byrne.—If he elects to recover, he must do so in the way laid down.

Mr. Ewens.—Offhand, I would not agree with that. It says that the loss may be recovered by the command*ing officer. It gives him the power to sue but it does* not say he must sue. It is facultative, not mandatory.

Senator Wright.—It says, "Recover by the Commanding Officer by action in any Federal or State Court".

Mr. Ewens.—I understood Senator Byrne to say that he must recover.

Senator Byrne.—No, if he recovers, he must recover in that way.

Senator Wright.—Mr. Chairman, I should like to have the witness questioned. The Standing Orders require us to conduct deliberations in the absence of strangers and I should like the witness to be questioned by *each member in turn so that we could conclude* in time.

Senator Arnold.—*You would rather not have any* explanations from the Draftsman at the moment?

Senator Wright.—The Draftsman will *give us his* views later in proper sequence.

Senator Byrne.—That was my interpretation. If it were a requirement that the Commanding Officer recover in that way, if he elects to recover, regarding Commonwealth articles, there would then be a conflict between that and regulation 515 in the place I have *referred to?—No. 515b gives an optional procedure.* If that is the correct reading of section 58 there would be a conflict between that and 515b?—Yes, if your view of the section is correct.

Senator Byrne.—Looking at the Treasury minutes submitted to us, that is the minute from the Treasury to the Treasurer, we find that paragraph 5 reads—"The substantial matter at the conference was that a member should be required to make good" and so on. *You have attempted to carry that principle precisely* into this regulation?—Yes.

Senator Byrne.—*There has been an intent in this* regulation to avoid the barriers of formal proceedings where an offence is involved?—We would regard any decision of the Air Board under this regulation as a purely administrative decision, and I believe that it is a procedure which is quite common in the administration of a service such as the Royal Australian Air Force. There are *many administrative decisions made* by the Air Board which are penal in their nature. For example, an airman might want to take out his

discharge because he may have an opportunity to obtain a position outside which might be worth twice the salary he is getting in the Air Force. In such a case the Air Board has the right to refuse the discharge *until the airman has completed the term of his engage*ment. The airman pleads that he should get the *discharge, and not getting it might result in him losing* a considerable amount of money.

Senator Byrne.—*Is that not a matter of contract?*—No, under the Defence Act and the regulations of the Air Force there is no contract.

Senator Byrne.—It is contractual by nature?—Yes.

Senator Byrne.—*In a case where section 515 is com*plied with by an airman and he disobeys an instruction or contravenes a regulation and loss or damage is incurred or property destroyed, the Air Board makes this determination?—Yes.

Senator Byrne.—In doing that, does it not also determine who is guilty in that offence?—The Air *Board would not regard the member as having com*mitted an offence.

Senator Byrne.—Does not the Air Board, in the process of establishing the member's liability to pay, also establish that he has contravened the Defence Act or Regulations or has disobeyed a lawful order or instruction?—I would not regard the Air Board's decision as a decision that the member has been guilty of an offence.

Senator Byrne.—Not of a violation of the provisions of it?—Obviously, yes.

Senator Byrne.—If there were a loss of property through a man disobeying a lawful order, he would be charged under a very formal procedure under which he would be heard?—Yes.

Senator Byrne.—But you are casting all that procedure aside in this regulation and determining a *breach as ancillary to certain action without follow*ing out those procedures in a substantive charge?—I do not think that is a fact. There are cases in which we should have to charge a man with losing by neglect, but I have brought with me a register of penal deductions made since August, 1954, under the old section 137, and I shall read some of the entries—"Error of *judgment by experienced pilot causing damage to* Vampire aircraft to the extent of £2—£5 deduction from pay and allowances". I think that £2 mentioned there is an error, but that is the type of entry in the book. Another one is—"Negligence in performance of duties, loss of public money—£3 deduction from pay under section 137". Another is—"Negli*gence in respect of performance of duty, loss of public* moneys £51—£3 deduction from pay". Another one—"Negligence which resulted in the loss of an eight-day clock, a barometer and a thermometer—£10 deduction from pay".

Senator Byrne.—Do you not in fact establish a breach against a man without charging him or following the normal procedures?—If a man were negligent and lost an eight-day clock we would not necessarily *charge him with an offence. We would adjust his pay* to obtain a reimbursement.

Senator Byrne.—*If he disobeyed a lawful order or* instruction in a serious manner, what would happen to him?—He would be dealt with by court-martial.

Senator Byrne.—You think that would be owing to him?—Yes.

Senator Byrne.—If loss or damage occurs to the property of the Commonwealth, the Air Board only has to establish to its own satisfaction that there has been a breach and that losses have occurred?—Yes.

Senator Byrne.—But have you not established that breach against him without using the procedures of the Air Force?—It depends on the nature of the act. For example, certain persons had revolvers issued to them. *They were supposed to keep them in a drawer under* lock and key. Some of them probably forgot to lock the drawer and lost their revolvers. That sort of thing was quite common. Perhaps they were occupying a tent and the security was not too good and the revolver disappeared. The airmen in that case were deducted to the value of the goods lost. You would not regard *those people as having committed an offence. It was* almost a quasi civil action and there is a distinction between a quasi civil action and a quasi criminal charge that you suggest is made against him.

Senator Laught.—Senator Willesee suggested that there was a certain power held by the Air authorities to recover money for the Commonwealth in the case of loss or damage, and the witness said that that power was there but was not used. I now ask whether the *witness knows the reason why that power was not used* first, by commanding officers, and secondly, by courts-martial?—No, I am afraid I cannot give that information. I think it may have been due to the fact that section 137 was a little removed from the other parts of the manual of Air Force law and members of courts may not have known all the law, or may not have been *properly advised by the Judge Advocate assisting the* court. That is why they may have failed to do it. On the other hand, if the court were inflicting a punishment it may have felt that it should not inflict any further punishment in the nature of a penal deduction. They are the possibilities.

Senator Laught.—To your knowledge, before putting out this new regulation, that question was not fully investigated, was it?—I will say that from time to time *letters were sent to the Commands and to commanding* officers pointing out to officers generally that they should advert to sections 137 and 138 when they were trying a man.

Senator Laught.—Do you know what the general answer was to those letters or recommendations?—Yes, I think there was some slight improvement. I point out, however, that the discussions which take place when a court-martial proceeds to consider sentence *are not recorded in the same way as the evidence* is recorded.

Senator Laught.—Do you have conferences at any time with the legal officers of the Air Force to discuss legal problems that arise at courts-martial? Do you ever gather them in and have a chat to them on these matters?—From time to time courses are held for officers. They might do staff courses or training courses, and an element of legal instruction is given at those courses by the Director of Legal Services.

Senator Laught.—But you consider that the only way to overcome your difficulties is by means of the amendment that has been put forward?—Well, to have *it in addition.*

Senator Laught.—To add 515?—Yes, to have it in addition.

Senator Laught.—Could you give me any rough figures to indicate how many cases of restoration are made each year through the action of commanding *officers or of courts-martial?*—No. When I received the summons to attend this committee, I tried to have taken out details of the penal deductions which may have been made by commanding officers. I have some records here of the sentences inflicted by courts-martial which in some cases do and in other cases do not include this penal deduction. I do not know whether the Committee would like me to refer to them.

Senator Laught.—I think we can short-cut my interest in this matter by asking whether it would be a matter of 100, a dozen, or only three or four a year?—*There* were twenty *during the period* 1954-55.

Senator Laught.—That is, twenty cases in which courts-martial did not award stoppage of pay to compensate for loss to the Commonwealth or other persons?—Yes, in two years. I have here also details of cases in which stoppages were awarded to compensate the Commonwealth after sentences by courts-martial. Between June, 1954, and March, 1956, a period of about two years, there were eleven cases.

Senator Laught.—Could you let me know how many instances of loss there were in that period that were, *because of faulty regulations, not dealt with*?—No, I am afraid I have not got those details. I know that from August, 1954, to October, 1955, 25 cases of all sorts, dealing with penal deductions, were dealt with by the board. The amounts included sums of £3, £10, and again £10. There is reference to a case of negligence in performance of duties which resulted in the disappearance of £500 from moneys for pay. The officer concerned was a flight lieutenant, and the amount of the award by the Air Board was £100.

Senator Laught.—So that no full compensation is ever awarded, *apparently, in the cases you have cited.* A token amount is awarded?—Yes, that is so. Here is another one. I think it concerns the loss of the £500 to which I have referred. The officer concerned had an award of £10 made against him. Two officers were concerned in the matter, and the Air Board said, "Well, the degrees were different". Those were the deductions that were made. There is reference to another one here: "Theft of public moneys, £40".

Senator Wright.—Would you tell us whether or not you regard the jurisdiction of a court-martial as disciplinary?—*Certainly, yes.*

Senator Wright.—And that is its only purpose?—Yes.

Senator Wright.—Do you regard the purpose of *this regulation as disciplinary or compensatory*?—I would call it compensatory.

Senator Wright.—*Would you agree, then, that the* purpose of the court-martial procedure and the purpose of this regulation 515 are entirely different?—Yes.

Senator Wright.—Is it the intention of your department, when framing this regulation, to provide for compensation being recovered from an officer by decision of the Air Board only?—Oh, no. If the officer is dealt with by disciplinary court-martial and that court properly exercises its function it will then make a penal deduction in accordance with the law.

Senator Wright.—What law?—Section 137.

Senator Wright.—How would the jurisdiction of regulation 515 be exercised?—It would be exercised in this way: The deficiency, loss or other incident mentioned would be reported by the commanding officer.

Senator Wright.—That is, in a case where it *required disciplinary action before a court-martial*?—No, not necessarily; if it occurred in the unit it would have to be reported. If there is any loss, the Audit Act requires some report to be made.

Senator Wright.—Yes, but my question was: How is this authority under regulation 515, which you agree is of compensatory nature and different altogether from the disciplinary power of court-martial, authorized other than by decision of the Air Board? It is quite obvious, is it not, that it is a decision of the Air Board and nothing else? If there has been *a court-martial, of course the evidence before it will* be taken into account by the Air Board?—Yes.

Senator Wright.—*Does not the regulation say that* if the Air Board considers that the loss is due to certain things the officer shall be liable to pay to the Commonwealth such amount as the Air Board directs shall be paid?—On a strict reading of the regulation I would say that there is no need for the Air Board to have regard to any court of inquiry or investigation by the commanding officer.

Senator Wright.—Exactly. There is nothing in the regulation to require any procedures to take place before the Air Board makes it decision?—No.

Senator Wright.—Does your department intend the scope of this regulation to cover not only loss of service moneys and *service property* but also to cover third party claims?—It could cover those.

Senator Wright.—*I am asking does your department*, as evidenced by that correspondence over a number of years, since apparently the Treasury direction of 1940, intend this regulation to embrace within its scope not only compensation for departmental moneys and stores but also third party claims?—*I think that* the department or the Air Board would consider each case *that came before it on its merits.*

Senator Wright.—But that is a question of the exercise of the regulation. In *framing this regulation as* a law, giving the limits of your authority, does your department intend to take authority for recovery from a service member, compensation for third party claims which, by neglect or misconduct or breach of order, he incurs?—*I could not say that they intend to do it*, but they have not actually adverted to that when the *regulation was being made.*

Senator Wright.—Would you not agree that an extension of *your jurisdiction to that degree would be* a very substantial amendment to the law as defined by sections 137 and 138 of the Imperial Air Force Act or section 58 of our Defence Act?—I would not say it was a considerable extension of section 137.

Senator Wright.—Do you regard section 137 of the Imperial Air Force Act as establishing authority to *recover compensation for third party claims* incurred by the member?—Yes, I would say it would.

Senator Wright.—*Would you read it again?*—"The following penal deductions may be made from the active pay . . ."

Senator Wright.—Pausing there, does it not refer to penal deductions only, indicating that the deductions are of a disciplinary character and not of a compensatory character?—Yes, it does. "Penal" is rather a severe word.

Senator Wright.—You would never suggest that if a man ran into a civilian aeroplane and destroyed it, so that there was a £13,000 claim, under that regulation *the Air Board would have the right to make* deductions from his pay to the extent of £13,000?—No, I doubt that that would ever be done.

Senator Wright.—Well, would you not readily agree that an attempt to bring within the authority of the Air Board authority to recover from its Service personnel compensation—not a disciplinary payment, but compensation—for a third party claim is a substantial amendment of the present law?—I have never regarded *it as such.*

Senator Wright.—You have agreed that at present *you have only disciplinary powers and not compensatory* powers?—No, I have said that we have compensatory powers under section 137.

Senator Wright.—Does it not apply to penal deductions?—Yes.

Senator Wright.—Do you suggest that it applies to the extent that it imposes a penalty for indiscipline?—I think it is a very unhappy word, and the English drafting is not like ours. There are a lot of other things in section 137 which are called penal deductions, but could not be regarded as penal deductions. If I might amplify that, I wish to state that the Imperial

Air Force Act was the subject of an investigation by a Select Committee of the House of Commons. *Arising out of that report* a new Act was passed named the *Air Force Act* 1955 which took note of this very problem. The Select Committee was *assisted by* a departmental committee which referred to this matter and the report stated—

> The existing sections 137 and 138 set out so-called penal deductions which may be made from the pay of officers and soldiers respectively. *They include, however*, deductions in respect of maintenance of families, and deductions which may be awarded as punishments by courts martial or summarily. *These are dealt with elsewhere.* The remaining deductions under sections 137 and 138 are all of a penal nature in that though they may not be awarded as punish*ments, they are all to some extent*, penalties for wrong doing, for negligence or failure to fulfil obligations. It is to this last category of deductions that your Committee has confined *clauses 143-148; they have*, at the same time, removed the present anomalies between sections 137 and 138 by applying all future deductions to both officers and other ranks.

Senator Wright.—What point are you making?—I was making the point that the word "penal" is not a very happy one, and would not be used in our own legislation.

Senator Wright.—You would not have referred to this matter in your evidence-in-chief unless you thought it was a substantial matter. If you think we should have it, go ahead. Is there anything to suggest *that, before regulation 515*, the Air Board had the right to recover compensation as distinct from imposing a penalty for indiscipline? *Is there any law to* which you could refer to show where, before regulation 515, the Air Board had the power to order payment of moneys as compensation as distinct from imposing a penalty for indiscipline?—I would say that the Air Board has always relied upon section 137 (4) which I have quoted.

Senator Wright.—In the actual operation of that section, the instances you have cited are such as that of the 29th September, 1955, where a pilot officer was brought up under section 39 (a) (1) (b) in respect of damage of £13,000. He *got a severe reprimand* and forfeiture of eighteen months seniority?—That was by court-martial sentence.

Senator Wright.—In other cases, where the loss has been £90, pay was forfeited for fourteen or *ten days* or for a period to cover some more or less nominal fraction of the loss?—You are looking at papers relating to courts-martial proceedings and not to the proceedings—if you could call them such—taken by the Air Board under section 137 (4).

Senator Wright.—If a man is arraigned for committing damage totalling £13,000 and the court-martial is considering disciplinary measures, obviously it would be *completely destructive* of discipline to forfeit his pay in the future until £13,000 was recovered. Therefore, in exercising disciplinary measures, the prime purpose is not to reimburse the Commonwealth but to inflict such a penalty as will bring the man up to a standard of discipline in future?—Yes, it may go further because if he is reduced in rank, he loses a lot of money.

Senator Wright.—If the Air Board, under section 515, has, as its chief purpose, compensation and it is a case where a man has done £13,000 worth of damage, can you suggest where, under the regulation, we could find anything that expresses the considerations by which the Board will determine whether the full amount, or part of the amount only, should be directed to be recovered from the service member?—Yes. Sub-regulation (2) of regulation 515 states—

> In determining the amount payable by a member under *this regulation*, the Air Board shall take into consideration—
> (a) the gravity of the member's neglect, misconduct, failure or contravention;
> (b) the extent to which that neglect, misconduct, failure or contravention caused or contributed to the loss, *damage*, expense or deficiency;
> (c) the rate of pay of the member; and
> (d) any other relevant matters.

Senator Wright.—The power is unlimited so far as the regulation is concerned?—Yes.

Senator Wright.—You are aware that Parliament passed a Court-martial Appeals Act last year?—Yes.

Senator Wright.—That provides for an appeal to a tribunal only from a conviction recorded by a court-martial?—Yes.

Senator Wright.—Is there any similar right of appeal to any tribunal, judicial or otherwise, from a direction of the Air Board made under this regula*tion?—Not at present but perhaps I might supplement* that answer by saying that since the passing of that regulation, this matter has been the subject of consideration at both the ministerial and the departmental level. As a result, I submitted to the Parliamentary Draftsman a further sub-regulation to be inserted in that regulation in the following terms:—

> Where a member is dissatisfied with any direction made under this regulation he may, within three months after the making of the direction, appeal to the Governor-General who, after such investigation as he considers equitable, may order:
> (a) that the direction stand;
> (b) that the direction be cancelled; or
> (c) that the direction be varied to the extent that a lesser amount be paid to the Commonwealth by the member.

Senator Wright.—Has the Parliamentary Draftsman rejected *that submission*?—*No. It is being* considered at present.

Senator Wright.—*It is not in your submission*?—No. The letter was written on the 23rd March, 1956.

Senator Willesee.—What do you anticipate will be the effect of suddenly including this section 515? Is it desired to *recoup more money which was not being* done under section 137?—I should say that the Air Board will not vary the procedure and policy which has been adopted under section 137 of the Imperial Air Force Act. That is the power that it had previously. *It could do so*, but, from my long knowledge of the working of the Air Board, I suggest that it would not.

Senator Willesee.—Why alter the law if the policy is *not to be changed? I am hazy about* the transfer from regulation 137 to regulation 515. The fact that they were not doing it might be because of the way in which the manual was constructed?—It was not altogether that. The Auditor-General felt—and apparently the Treasury felt also in 1940—that proper attention was not being given to this matter by those *who should give it attention*—the court-martial or the commanding officer, in respect of airmen. I am only speaking in respect of airmen as distinct from officers because, in our view, officers had always been covered by the administration determination principle under section 137. Airmen were covered only insofar as they could be dealt with for an offence and an offence was disclosed.

Senator Willesee.—I remember in the case of the *Public Service*, the Bailey appeal when the question of seniority in the Public Service was examined. All that the Bailey appeal did was to underline the Act as it stood, but throughout the Commonwealth Public Service it shattered the whole policy of promoting officers. Therefore, I have taken the view that, even if you are only underlining regulation 137, it cannot fail to alter policy completely. After all, the personnel of courts-martial will change, and they will suddenly say that at a point the Regulations were swept aside and new powers provided, as Senator Wright pointed out, with no limit. What are your thoughts on the question of

a limit of money?—I would be quite prepared to recommend that a limit be placed on it. There is a limit in the regulation now, of course, in respect of lower authorities than the Air Board.

Senator Byrne.—Paragraph 2 of the Treasury minute to which I referred says that as regards the Army the outstanding weakness has been that no deduction from a member's pay in respect of any such loss is ordered unless he has been convicted by judicial tribunal and restitution in whole or part is included in the sentence. That is the difficulty, is it not, as the Treasury saw it?—Yes. You can see from the register that is maintained in our office here that we do exercise some powers under that, or we did exercise powers under Section 137.

Senator Byrne.—Is it not evident that with the Treasury's impetus the whole intent of this regulation has been to avoid the obstacle presented by a prior conviction, to attain the same end without the intervention of what has been regarded as a procedure that cluttered up ultimately the ability to recover and deduct?. That is the Treasury's submission, is it not? —Yes, what you have read there.

Senator Byrne.—And this regulation in fact carries that out?—Yes.

Senator Byrne.—It is to by-pass the charging of a man formally to the point of conviction?—Yes. But of course there may be no offence disclosed as such. The negligence might well be the negligence of the civil law, not of the criminal law.

Senator Byrne.—I thought it would be a breach of what we might call Air Force Law, not necessarily criminal or civil law. At least, that is the type of law that you have made the condition precedent in this regulation, a breach of the Defence Act, the regulations or a lawful order. That is what might be called service law?—Yes.

Senator Arnold.—At the moment there is no appeal against this regulation other than the appeal which has been submitted to the draftsman and has not yet been approved and in fact that appeal may never see the light of day?—We have asked the Parliamentary Draftsman to prepare this. The Minister has approved that appeal being given effect to and I see no reason why it will not come into being at an early date, as soon as we get the amendment from the Parliamentary Draftsman.

Senator Arnold.—Would the department have any feeling about withdrawing this regulation until the appeal regulation is embodied in it?—Withdrawing the regulation?

Senator Arnold.—Until it was covered by this new regulation embodying the appeal?—I suppose we could say we would withdraw it. But would it not be better to put it this way, that we will give an undertaking that the right of appeal will be injected into the regulation.

Senator Arnold.—The Air Board, in deciding the extent of negligence or guilt, has regard to the ordinary legal considerations that apply to the ordinary courts, does it not?—We have had no experience with this regulation yet, because, as you know, it has only recently come in. All those other deductions which have been made are referred to, considered by and recommended upon by the Director of Legal Services as a matter of departmental administration. The Director of Legal Services is an officer of the Air Force who is responsible for all legal questions affecting discipline. The matter is as of course referred to him for his advice. Whether that advice and his recommendation is accepted is another matter.

Senator Arnold.—Does it leave with the airman the feeling that he does not receive the same protection of law through the court-martial that he would receive in a normal court of justice?—You raise a very interesting point. In this review of the Imperial Air Force Act by the Select Committee of the House of Commons, one of the points made was that the old act made a distinction between officers and airmen in that the Air Council could make a deduction from the pay of an officer but could not make a deduction from the pay of an airman. That had to be done, as I said earlier, by a court-martial or a commanding officer when dealing with an offence. It was said, and with a lot of truth, that the airman would prefer on many occasions to have a deduction made rather than have all the worry of being tried by court-martial and having a conviction recorded against him. Furthermore, from the point of view of the discipline of the service, the airman as such, that is the average man in the ranks, does not come into contact very much with this regulation, but the warrant officer and the non-commissioned officer might well come into contact with it. If by, shall we call it, civil negligence, he is responsible for some loss and has to be tried by court-martial the disciplinary control of the service is becoming affected. Quite often the warrant officer or non-commissioned officer is quite prepared to pay the amount that he knows probably the Air Board would award against him rather than go through all the worry and trouble that would result from a court-martial conviction.

Senator Wright.—Has Mr. Mulrooney any preference as to whether we peruse the correspondence that took place over the period of nine years to see the objections and counter objections that may have been voiced at different times to this procedure recommended by the Treasury? I do not ask for the file. If he offers it voluntarily I should be quite interested to see it. I do not ask for it to be submitted.—The file could be made available if the Committee so requires it, but quite often a lot of the comments might be made by people at particular levels which could only be regarded as obiter and which would not have any real bearing on the ultimate decision that was taken at the higher level by the Air Board, the department, or the Treasury. While I have no objection to the file being made available for perusal, I am just a bit doubtful as to whether the Committee without some assistance would be in a position to interpret the importance of the opinion which might have been recorded at some stage on the file.

Senator Wright.—You do not give us credit for much perspicacity then?—Well, sir, no. If I have not chosen my words well——

Senator Wright.—No, you just say that perhaps we would not evaluate the importance of the person giving the opinion.—It is sometimes not evident from the face of the document.

Senator Wright.—I leave that as a suggestion only.

Senator Arnold.—Mr. Mulrooney, I am sure the Committee would want me to say that we appreciate very much your presence with us this morning and the way in which you have frankly expressed your views to the Committee and tried to inform us on the matter to which we are trying to find a solution. We are grateful to you for being here and we hope that we will be able to come to some determination satisfactory to everybody.

Mr. Mulrooney.—Thank you very much. If I might just in reply say that I have appreciated the many courtesies and restraint that the members of the Committee have exercised in my favour. It is a bit of an ordeal to come before such a panel as this and I have appreciated the kindness extended to me.

Senator Arnold.—I think we will adjourn now to another date.

Mr. Hewitt.—I dislike raising personal difficulties, but I have a problem. I received the request to attend this meeting at 3.30 last night and I prepared myself. After an interval of several years, I have been trying to take my children away for a holiday and I had planned to take them to-morrow. But I shall return on Friday if I am required.

Senator Arnold.—Very well, we shall continue for the time being.

Cyrus Lenox Simson Hewitt, First Assistant Secretary to the Treasury, sworn and examined.

THE CHAIRMAN.—Have you prepared a statement for the Committee?—I have not prepared a statement. I could address the Committee and then answer questions, if that course is satisfactory. Perhaps I could preface my remarks by going further back than Senator Wright and saying that this matter commenced, at least for the Treasury, in 1943. That is in my branch of the Treasury. There is another branch located in Melbourne which is called the Treasury Defence Division and which is also intimately associated with this matter. I was unable in the remaining time last night to obtain an officer from that branch, but I can give the Canberra end of the story. If it is necessary an officer can come from Melbourne and give his evidence to the Committee and then perhaps I could elaborate on what I am about to say. Our actions in this matter started about thirteen years ago, long before my own association with the Treasury commenced. In view of Senator Wright's comments and also the comments of Senator Byrne, I should say that the action in this matter was not initiated by the Treasury. When Mr. Abercrombie was the Auditor-General, he signed the Auditor-General's report on 21st March, 1944, for the financial year 1942-43, which included this matter. Therefore the matter goes back to that time, and indeed to before that time. In paragraph 109 of his report the Auditor-General of the day stated—

> Losses of cash and stores by default and other causes consequent upon inadequate safeguards and inefficiency have been numerous in the Department of the Army during the year. The apparent leniency of the courts of inquiry in dealing with such matters was a rather disturbing feature in a number of instances. It is felt that Commonwealth interests are not sufficiently protected by the existing military regulations as related to procedure. By the application and interpretation of the regulations Army personnel not infrequently obtained freedom from action for blame where, in relatively similar circumstances in the Civil Service the existence of inefficiency would have established negligence.

A little before that was published but arising from the contemporary departmental action in the Department of the Army, the Secretary of the Department of the Army wrote to the Treasury on 8th November, 1943, and quoted the terms of a minute placed on a file by the then Minister for the Army expressing concern as to the position developing regarding the responsibility of officers of the Australian Military Forces for public funds entrusted to their care.

The Minister thought that the position should be investigated to ascertain whether control could not be introduced to place definite and final responsibility under regulations on officers charged with care of public moneys held by them and for the failure to account for the moneys to be a military offence. He asked that the terms of the minute be brought to the notice of the Treasurer.

Senator SEWARD.—The word "officers" is used in the strict military sense?—No, in reference to all personnel of the Army. The date of the Minister's minute is 26th October, 1943. There followed a series of discussions and reports to the Treasury of particular cases, and a considerable amount of time was taken up in examining the defects in the court-martial procedure and, in particular, defects in the appropriate military regulation 294A. It was represented by the Department of the Army that there were two particular difficulties. The first was that sub-section 1 of the regulations did not enable the Military Board to impose a monetary penalty representing part of the loss, but required it to impose a penalty representing the amount of the loss or damage. So they would have had to impose the £13,000 that Senator Wright referred to, and that was considered to be defective. There was a second sub-section which provided that the regulations should not be applied by the Military Board to any loss, damage or expenditure which could have been the subject of an order by a court-martial. There was a description by the Department of the Army of the difficulties of sub-section (2.) including, so far as I can recollect, the difficulties in inserting into the charge to be placed before a court-martial the precise sum representing the loss or damage caused in a particular case. The Department of the Army at that time was proposing that sub-section 2 of this existing Army regulation should be repealed.

There is then on our file a series of continuing audit letters, the obtaining of legal advice and consideration of the precise application to members of the services of three sections of the Audit Act of a similar character, the Army regulation, the existing Navy regulation, and the 1955 version of Air and Navy regulations. Then, in November, 1945, there was a departmental conference in Melbourne at which my colleagues from the Melbourne section of the Treasury were present together with senior representatives of the Navy, Army and Air Force, at which the problem, which started with the Auditor-General and the Minister for the Army, was discussed and examined at great length. From that came a concensus of opinion that weaknesses in regulation 294A of the Army should be eliminated by the removal of sub-section (2.) and alteration of the mandatory amount in sub-section (1.). Air said that it would give consideration to the reintroduction of regulation 163A which dated, as Mr. Mulrooney said, from 1928, and the Department of the Navy said that the Department needed to take no action because their standing and existing regulation 143A did all that was necessary to enable the Navy Board to make deductions from pay and allowances.

It was the report of that conference and that concensus of opinion which was the genesis of the Treasury memorandum of 24th September, 1946, that the Secretary gave to the Committee. I wish to stress that far from this matter having been conceived by the Treasury, it followed from action by two people outside the Treasury, and came after a complete inter-departmental discussion from which emerged a concensus of opinion.

I want to make quite clear the part of the Treasury in the matter. The Treasurer's decision of 1946 was conveyed to the Service Departments, and thereafter, until 1953, discussions proceeded about the form that the various amendments should take. At the time, I think there were various thoughts and suggestions that the regulations ought to be uniform since they were dealing with a problem common to all three services. The Draftsman provided a draft of the regulation in 1952, following, I presume, instructions given to him by the Departments. The Treasury submitted a draft of this uniform regulation to the Auditor-General. He raised certain queries about it which were considered in the Treasury. The drafts were considered in the Departments, as I recollect it, and they also had suggestions to make. My own association with this matter commenced in December, 1953,

in considering what had been put forward in the draft from the Parliamentary Draftsman. I then said, so far as the Treasury was concerned, that the goal of uniformity might be put on one side and that a particular form of the Army regulation, the Navy regulation, and the Air Force regulation met problems as they had been put to the Treasury and met the Treasury's point of view. We so advised the Draftsman and the departments.

I do not think I can helpfully volunteer any more information, but I shall do my best to answer any questions on this problem. My final comment concerns the annual return to this subject by the Auditor-General and his continuing dissatisfaction with the state of affairs, which concerns not only power under the regulations but also civil rights. For our part, we were anxious to remove the weaknesses and the need for the regular annual complaint—a reasonable complaint—of the Auditor-General. The Navy regulation was put through, I think, just at the close of the 1954-55 financial year, and the Army has still not reached a final decision.

Senator Byrne.—I acknowledge your assurance, Mr. Hewitt, that that is how the matter originated. It appears to me that the concensus of opinion at that conference was that it was necessary to deal with moneys and property entrusted to service personnel. Would that be correct?—I do not think so. There was a reference in a Minister's minute on the file to moneys, but I think that by 1945 it had widened in terms of the authority given to the Navy by their standing regulations.

Senator Byrne.—I take it that paragraph 5 of this minute of the 24th September, 1946, epitomizes the conference and the conclusions which had been arrived at? It reads—

> The substantial matter of agreement at the conference was that a member would be responsible to make good any loss or deficiency of public monies entrusted to him.

That seems to be the guiding principle—"entrusted to him". If paragraph 5 epitomizes the general conclusions of the conference, do you not think that regulation 515A goes far beyond that?—It goes beyond paragraph 5, and picks up the separate definition of stores and public moneys in the Audit Act. The Treasury specifically reverted to the wording when the regulations were first drafted. Quickly, looking at the summary of the meeting in November, 1945, I should have thought that moneys were loosely considered as including Government property, and that that included stores also. But I may be wrong.

Senator Byrne.—It is not only money. The regulation says "the Commonwealth has suffered or incurred loss, damage or expense", which again is a different thing from moneys?—That is, I think, a change of former policy which occurred as various drafts were being considered, but the words are included in the Navy regulation and the words of the Audit Act are of long standing, and it was thought to be consistent with the originating complaint of the Auditor-General, who spoke specifically of loss of cash and stores by theft and other causes.

Senator Byrne.—That goes back to something that we might call physical. Regulation 515 (*a*) contemplates the process of indemnity when anything of a physical character owned by the Commonwealth is concerned?—This is included in one section of the Audit Act. Whether it has been administered in that way, one may go back to the regulation and the practice of the Navy which has not been changed.

Senator Wright.—Do the files disclose since 1943 any recommendation that this matter be submitted to Parliament for legislation?—Not in my recollection.

Senator Wright.—Can you conveniently prepare an annual list mentioning the faulty accounting of which the Auditor-General complains in his report since that date?—I could not do that. I think the Auditor-General would have to be asked that question. In each year running from 1942-43 he has referred in his reports to that. I assume that he did not do that if everything had been to his satisfaction. The Auditor-General must have had some reason or he would not have referred to them.

Senator Wright.—Nobody took any notice?—The departments do.

Senator Wright.—Does the Treasury?—The Treasury has been endeavouring, with the departments, to bring this matter to a close.

Senator Wright.—The basis of that would seem to be to get a list of moneys which have been deficiently accounted for. Has not that been done by the Treasury?—My colleague in Melbourne would know that.

Senator Wright.—With or without convenience, can you indicate how difficult it would be to supply this Committee with the annual list of moneys, the deficient accounting of which has been complained of under this head by the Auditor-General since a conference of Service personnel was of the opinion that some tightening up was required? I mean not later than 1946.—The complaints would be addressed by the Auditor-General first to the departments. We will ask them to provide a list.

Senator Wright.—When the Treasury took an interest in this matter, did it intend that this regulation should be operated so as to obtain recovery from the Commonwealth of third party claims?—The matter, in those terms, is not referred to in the files, and no discussion is shown in the files at all; not in these files.

Senator Wright.—From your reading in the files using your judgment and experience, did you infer that that was the intention?—My inference would not be that that was the positive intention. It could be that there was never any positive intention to exclude.

Senator Wright.—There are too many negatives in that statement. I put it again. From your re-perusal of the files, exercising your experience and judgment, did you infer that it was, or that it was not, the intention of the regulation to embrace the recovery of third party compensation payable by the Commonwealth?—I did not infer that it was the positive intention specifically to include it, or that it was the positive intention that it should ever be excluded, rather that the provision was always measured against the existing statutory powers under the Audit Act and the authority in the long-standing Navy regulation 143A which included it.

Senator Wright.—You draw the inference that the files did not disclose such an intention. There is no express reference particularly to third party claims, is there?—Not that I recall.

Senator Wright.—At the moment, without reperusing in detail the files, you say that if the matter of third party claims is, on proper consideration, included in section 515, it is there without specific consideration?—Without specific consideration, but in the knowledge that Navy regulation 143A contained it and I think, on a proper consideration, section 42 of the Audit Act contains it.

Senator Wright.—I ask you to read again regulation 143A of the Navy Regulations, if you would?—I have been reading from a quotation of it here and not from the exact form. I am speaking of a regulation that was in existence in 1926. The full text of regulation 143A is—

> 143A.—(1.) Where any loss (including loss of stores or material) or improper expense has, in the opinion of the Naval Board, been caused or incurred by the neglect or misconduct of any officer or rating, there shall be chargeable against the pay and allowances (including deferred pay) of that officer or rating such amount as, in the opinion of the Naval Board, is necessary to reimburse the Commonwealth in respect of the loss or expense or any expenditure occasioned thereby, and that amount may be stopped by the Naval Board out of the pay and allowances of the officer or rating.
>
> (2.) In determining the amount to be stopped from pay in accordance with sub-regulation (1.) of this regulation, the Naval Board may take into consideration the gravity of the neglect or carelessness of the offender and may vary the charge accordingly at their discretion.

Senator Wright.—Can you tell the Committee where, in the administration of that regulation, it has been applied to a case of recovery of third party claims?—I have no knowledge at all of the administration of the regulation. It would be in the Department of the Navy.

The Chairman.—So far as the Treasury is concerned, all you want done is to cover what the Auditor-General has reported to you as being wrong; you want that done in the future to comply with the Auditor-General's report?—And the original view of the Minister of the Army when the Treasury had satisfied itself that there was a need to correct the existing situation.

The Chairman.—You feel that this regulation does that so far as the Treasury is concerned?—Yes.

The Chairman.—Would the Treasury have any interest as to whether this was done by regulation or by Act of Parliament?—No.

The Committee adjourned.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

MINUTES OF EVIDENCE—(*continued.*)

(*Taken at Canberra.*)

THURSDAY, 17TH MAY, 1956.

Present:

Senator ARNOLD (Acting Chairman).

Senator Byrne.	Senator Willesee.
Senator Laught.	Senator Wright.
Senator Seward	

Observers:

Mr. F. H. Cox, Department of Treasury.
Mr. F. J. Mulrooney, Department of Air.

John Qualtrough Ewens, Parliamentary Draftsman, sworn and examined.

The Chairman. I understand you have not had time to prepare a statement, but you could give the Committee some thoughts that you have generated overnight; is that so? Mr. Chairman, there is very little I want to say unless the Committee wishes to ask me some questions. In the first place, I would like to refer to something which appears on page 26 of yesterday's transcript (*page 13 of this report*). Mr. Mulrooney said in his evidence, which appears towards the top of the page, "As a result, I submitted to the Parliamentary Draftsman a further sub-regulation to be inserted in that regulation" and then indicated its terms. About the middle of the page, Senator Wright asked the witness, "Has the Parliamentary Draftsman rejected that submission" and Mr. Mulrooney answered, "No, it is being considered at present". I think I should clear up any misconception which there might be in the minds of members of the Committee about the functions of the Parliamentary Draftsman. It would not be the function of the Parliamentary Draft-man to reject a proposed regulation. He is not concerned with questions of policy and it would be an intolerable position if the only regulations that were made were those that the Parliamentary Draftsman approved of. My function is simply to take instructions that are given to me and to deal with them simply from a drafting point of view. On the question of the validity of the regulations, I submitted to the Committee's secretary a memorandum on the 18th April last and I do not wish to say any more about that. I have expressed my view as to the validity of the regulation in that memorandum, and, apart from that, I do not wish to volunteer any matters to the Committee.

Senator Byrne.—Mr. Chairman, I think Senator Wright may have had in mind to discuss with the Parliamentary Draftsman the competence of the regulation and the statutes, in which case, he might briefly mention that now, if he wishes.

Examined by Senator Wright.

Senator Wright. No. I only thought that Mr. Ewens might care to take the opportunity of amplifying the basis of his view that the regulation is not in conflict with S.58. I understand his opinion to be that, in as much as section 3 (3.) of the Air Force Act states that section 58 of the Defence Act shall apply "subject to this Act", the term "this Act" (referring, of course, to the Air Force Act) by virtue of the Acts Interpretation Act, should be read as "the Air Force Act and the regulations made thereunder". Not by virtue of the Acts Interpretation Act.

Senator Wright.—By virtue then of what? By virtue of the Air Force Act itself.

Senator Wright.—But, in the Commonwealth sphere, when you refer to "this Act", what is the authority for saying that the term "this Act" means not only the text of the Statute but the regulations made under it? —There is no such general principle, but section 3 of the Air Force Act defines the expression "this Act" as including the regulations made under the Act.

Senator Wright.—In most States, that same meaning is attributed to the expression "this Act" by virtue of an Acts Interpretation Act, is it not?—I could not say. I have not studied the Acts Interpretation Acts of the States.

Senator Wright.—It is by definition under section 2 of the Air Force Act that the Act includes all regulations made thereunder?—Yes.

Senator Wright.—When the Act says that section 58 of the Act shall, subject to this Act, continue to apply in relation to the Air Force, it is then your view, that, by virtue of that expression, it would be competent for the Executive to make regulations under the Air Force Act which would have the effect of completely negativing section 58?—Yes. I think that is perfectly clear from the Act. Section 3 (3.) says that certain provisions of the Defence Act shall, subject to this Act, continue to apply to the Air Force; and the expression "this Act" which occurs in sub-section (3.) of section 3 by definition includes the regulations, so that section 3 (3.) has to be read as meaning that certain provisions of the Defence Act shall, subject to this Act and the regulations under this Act, continue to apply to the Air Force. Perhaps I should say this: That the Air Force Act is a skeleton Act; it is not a detailed Act. The whole object of the Act is to enable the regulation of the Air Force by means of regulations. It is not an Act like the Defence Act or the Naval Defence Act which goes into the matter in detail. As I said, it is a skeleton Act and I think it is perfectly clear that the regulations made under the Air Force Act can override or modify or amplify the Defence Act in its relation to the Air Force. That is the whole purpose of the Act.

Senator Wright.—And you would regard it as competent for a regulation to be made to this effect: "Section fifty-eight of the Defence Act shall not apply"?—I think there are plenty of Air Force regulations which say that.

Senator Wright. I am not concerned with that. You would regard it as competent for a regulation to say that section 58 of the Defence Act would not apply? —Yes, clearly.

Senator Wright.—I did not propose to cross-examine until the challenge was laid down, but I will. Can you cite any authority for a paramount interpretation of the expression "subject to this Act"?—I am afraid I do not follow that question.

Senator Wright. Can you find any decision of an court expounding such an interpretation of the expression "subject to this Act"?—I would have to look. I cannot quote any authority offhand.

Senator Wright.—You cannot at the moment?—No, certainly not.

Senator Wright.—You have not resorted to any for the purpose of your opinion?—I do not know of any. I would not expect to find any.

Senator Wright.—Neither would I. Now, would you turn your attention to section 9——?—Perhaps, before Senator Wright passes on, I should add that I would not like to be misunderstood on that. When I say I would not expect to find any, I mean not merely that I would not expect to find any decision on the point giving a particular result, but any decision on the point at all.

Senator Wright.—But what I said was "expounding an interpretation paramount to the same meaning as you attribute to the expression". I would not expect to find any decision precisely upon an interpretation of section 3 (3.) of the Air Force Act, but the expression "subject to this Act" is a most common expression, is it not, in all States?—Yes.

Senator Wright.—Can you cite to the Committee any judicial decision interpreting that expression in the sense that you have interpreted it for the purpose of advising the Committee?—I cannot cite any decisions.

Senator Wright.—Would you turn your attention to section 9 of the Air Force Act itself? You will notice that it says, "the Governor-General may make regulations not inconsistent with this Act". Do you read the expression "this Act" there as including the text of the statute plus the regulations?—No—only the text of the statute. It obviously cannot be read there as including the regulations because it would make nonsense of the section.

Senator Wright.—Yes, and it is the tenets of common sense that reject that construction there, is it not?—Well, I think one of the general principles of statutory construction is that you must read an Act so as to make sense of it and not nonsense.

Senator Wright.—And the expression "this Act" at the end of section 9: Do you interpret that to include the text of the statute and the regulations?—No, I should not think you would read it there, either.

Senator Wright.—The only other thing I wish to ask refers to your remarks leading up to your evidence. You referred to my question on page 26 of the transcript (*page 13 of this report*), "Has the Parliamentary Draftsman rejected that submission?" Why do you consider that that question is attributing to you a basis of policy for rejection? Would it not be regarded as your function to reject a departmental suggestion if, in your legal opinion, you considered it as suggesting a regulation not warranted by the Statute? —It is not my function or within my power to reject it.

Senator Wright.—When you advise that it is not lawful to make a regulation, you are not offended by the suggestion that that is rejecting it from the point of view of the Parliamentary Draftsman, are you?—I do not understand the word "reject" in that sense. So far as I can see, there would be nothing unlawful about the sub-regulation that we have been asked to add and, so far as I know, that question has not been raised. I thought the question had in it the implication that the Parliamentary Draftsman had the power to reject a proposal by a department to make a regulation; and that, of course, is not so.

Senator Wright.—But you were aware when you considered that transcript that members of this Committee entertained the view that legally regulation 515 was not warranted by the authority of the statute, were you not?—No.

Senator Wright.—Had you not read Senator Byrne's memorandum on the regulation?—No, I have not seen it.

Senator Wright.—You would agree that, in the question referred to on page 26 of the transcript there is nothing inconsistent with the suggestion that the Parliamentary Draftsman was simply advising that it was not lawful, would you not?—I would not use the word "reject" to describe that state of affairs. I do not think it is the appropriate word to describe that situation at all. If I thought a regulation were invalid and I said to the department that the regulation was invalid, I would not regard myself as rejecting the regulation or rejecting the submission. In fact, even in that extreme case, it is not within my power to reject it. I can advise a department that a regulation would be invalid but, if the Minister insists on submitting it to the Governor-General, it is not within my power to stop him.

Senator Wright.—In the *Boilermakers'* case, is not that the very expression the court used when they rejected one of the fundamental contentions as a matter of law?—I do not remember that expression being used.

Senator Wright.—Do you deny it is a completely proper expression to use when you disagree with the legal opinion that you reject a legal contention?—I was not dealing with the propriety or impropriety of it. I simply said that I myself would not use the word "reject" to describe the operation of telling a department that a regulation was unwise or might be invalid.

Senator Wright.—Do you not agree on reflection that there is nothing in the transcript that attributes to you any province of policy at all?—It attributes to me, as I read the transcript, the ability to reject a regulation——

Senator Wright.—On any other than legal grounds? —There is no mention of any grounds.

Senator Wright.—Why should you assume, then, that it would be an irrelevant ground of policy instead of the relevant and proper ground of legal opinion?—I think I probably thought of that because I do not see how one could possibly reject the proposed new sub-regulation on any legal ground at all. I have not studied it at all but, onhand, it seems to me to be a perfectly valid provision to add to the regulation provision for an appeal from the Air Board to the Governor-General and the only possible ground on which one could reject it would be that one somehow did not agree with the proposal, not as a matter of law, but as a matter of wisdom or policy.

Senator Wright.—You say you cannot conceive of any legal ground upon which an opinion could be held that the proposed regulation would be unlawful?—Proposed new sub-regulation. The evidence to which I referred is only dealing with the sub-regulation proposed to be added, not with the existing regulation.

Senator Wright.—When you are considering a limb you consider the tree on which it is growing, do you not, and if you are adding an appeal to a substantive regulation you could not consider the appeal except considering the validity of the primary basis, could you? —One would assume the validity of the existing regulation—the Minister has chosen to make it whether it is valid or not—and one cannot say that the addition of the sub-regulation would make it invalid.

Senator Wright.—Do you say to the Committee that you cannot conceive of any basis on which the proposed regulation would be considered illegal?—Are you referring to the whole regulation or the proposed sub-regulation?

Senator Wright.—Do you suggest that a lawyer would not have to consider the whole regulation in its entirety to consider the validity of the sub-regulation? —I do not know that you can answer that question "yes" or "no", but it must be remembered that we had already considered the validity of the regulation and were satisfied that it was good.

Senator Wright.—That is all I wish to ask.

Examined by Senator Byrne.

Senator Byrne.—Mr. Ewens was present yesterday and heard some questions on section 58 as to whether it applies as it stands or whether it applies in view of the rather contrary interpretations held by Mr. Ewens and Senator Wright "subject to the Air Force Act and the regulations". I put to Mr. Mulrooney yesterday the question of an apparent conflict between section 58 and the regulation. (*To witness*): Mr. Ewens, may I put this to you. If Senator Wright's submission were correct, perhaps hypothetical in view of your stand, would there be any conflict between section 58 and regulation 515 or regulation 435 of the Air Force Regulations (which embodies section 58 in the Air Force Regulations) and regulation 515?—I am reluctant to express opinion on that offhand. I think it would be unwise.

Senator Byrne.—I indicated to you yesterday what my interpretation of section 58 was—that the procedure there was mandatory; that if the commanding officer or the minister or an appropriate person decided to recover property, he was required to follow the procedure of section 58. Have you contrary views?—Again, it is a matter of words. I would not use the word "mandatory" to describe the situation you have in mind. If I might say so, I think what you had in mind was that the section covers the field. It is not mandatory. "Mandatory" means it imposes a duty or an obligation, and there is nothing in the section which imposes any duty or obligation.

Senator Byrne.—I will put it this way, Mr. Ewens. A procedure is made available under section 58. Is that the only procedure made available under 58 on your reading of this section?—I am not sure that I understand that question. The section, of course, makes no procedure other than what it provides itself. The question you are really asking is, does section 58 cover the field.

Senator Byrne.—I am trying to ask this question. Is a commanding officer who wishes to recover property limited to that mode of recovery mentioned in section 58?—I know of no other provision.

Senator Byrne.—If that is so, then would not there be an obvious conflict between that provision and regulation 515, which provides an alternative procedure?—No, I do not think there is. You can only say that there is conflict if you first say that the particular section covered the field.

Senator Byrne.—Well, it comes back to Senator Wright's view, that is, providing the regulation is competent. But if section 58 is still the operative section, would there then not be a conflict?—I do not think in any circumstances that there is a conflict. There may be two alternative ways of suing for the money owed; then, as in a common law matter, you might sue for the price of goods sold or you might sue on an account stated, or if the debtor is given a bill of exchange which has been dishonoured, on the bill of exchange. These are complementary and alternative ways of recovering money. I would say that you could not recover the same money twice having recovered it once.

Senator Byrne. The procedure that has received statutory attention is the one expressly mentioned in 58. This other alternative procedure or complementary procedure has not come before the Parliament except indirectly, and has received little by way of parliamentary scrutiny—There is no suggestion that the regulation is made completely without any statutory authority.

Senator Byrne.—Would you be prepared to give the Committee your views on a point I raised in Committee discussions; namely that while under the Air Force Regulations and probably the court-martial procedures, an Air Force member who commits an offence has available to him the procedures set down, the application of this regulation could, in effect, achieve the conviction of a member for an offence without charge or hearing. Paragraph 1 (*c*) and paragraph 1 (*d*) contemplate conduct implicit in which could be acts or omissions which are in their own right substantive offences probably under the Defence Act and the Air Force Act, and regulations made under either. For example, failure to comply with a lawful order or instruction, or failure to comply with a regulation, if charged as a substantive offence, would, no doubt, entitle the member to all the procedure available—probably to court-martial in certain circumstances, or civil trial. That would be so would it not?—I am not sure that it would. Regulation 515, as I understand it, provides a civil means of recovering loss or damage. I find some——

Senator Wright.—For loss of money and stores as well as third party claims?—You are asking me now about the interpretation of 515. I would regard that as covering third party claims. As I understand it, regulation 515 gives a civil method of recovering loss or damage. I find it very difficult to say that a judgment, if you like to call it that, against a person for the recovery civilly of loss or damage in effect amounts to a conviction of a person for an offence without charge or hearing.

Senator Byrne.—In order to let 515 operate to enable the Air Board to proceed and make a determination, certain prerequisites have to be fulfilled, one of which is that it has to be established, does it not, to the satisfaction of the Air Board, that loss or damage, &c. has occurred by the neglect or misconduct of a member, by the failure of a member to apply, &c. In view of that, is it not obvious that, if the Air Board makes such a determination, it has determined one or other of those conditions?—It must have determined one or other of those conditions, but I am not at all clear that the determination of one or other of those conditions is the same thing as saying that he has been convicted of an offence.

Senator Wright.—If it is a breach of an order or section of the Statute? Regulation 515 refers to those two matters, does it not?—As I understand Senator Byrne, what he means is that a successful action under 515 would have the same effect as a conviction.

Senator Byrne.—Not perhaps, with the consequences as regards imposition of discipline.—That is just the point. It just does not have all the consequences of a conviction.

Senator Byrne.—But a finding would be made by the Air Board, would it not, that this man had fulfilled one of the conditions prerequisite?—But only those mentioned in 515. The Air Board might act under 515.

Senator Byrne.—Are you often aware of cases where a crime or misdemeanour is alleged in civil proceedings?—Yes.

Senator Byrne.—The type of thing I have in mind is where an allegation of murder is made in a testamentary action. In that case, the civil court would find as a fact that the beneficiary had murdered the testator.—That is so. But that would not have the same effect as a conviction of murder.

Senator Byrne.—Nevertheless, they do, in fact, establish that?—Yes.

Senator Byrne.—But, under regulations and court-martial procedure, if that were alleged as a substantive fact, certain procedures would be available to the commanding officer and for the protection of the member—charge, response, hearing. Would that not be so?—If he is charged with an offence, the provisions relating to offences would apply.

Senator Byrne.—There is no such provision in the operation of 515?—No.

Senator Byrne.—The only consequences that might flow either from a charge of a substantive offence or the procedure in this case could be the same—imposition of a pecuniary penalty; as Mr. Mulrooney instanced yesterday in evidence, that was the outcome of most of them.—Only broadly. I do not regard 515 as involving any criminal penalty. It is only civil.

Senator Byrne.—The detriment to the member in most cases would be a pecuniary imposition?—Yes, it could be.

Senator Byrne.—A deprivation?—Yes.

Senator Byrne.—If he were charged then with this breach as an offence, he would have procedures available to him and the outcome could be the avoidance or the submission to a pecuniary imposition?—Yes.

Senator Byrne.—In this regulation, the procedures are not available to him. The outcome would probably be the same, but he is deprived of virtually every opportunity of defending himself. Would that not be right?—I cannot say he is deprived of every opportunity of defending himself. I would say that the Air Board or other person authorized to act under this regulation would give him an opportunity of stating his case and of being heard before any action were taken.

Senator Byrne.—Leaving that other point and coming to what you are now saying, in view of that, do you not think that the regulation might have set down procedures in some form to be available?—I do not know that I can answer that question. I suppose it might have. If you asked me whether I think it should have, I would reply, "Is my opinion very important?"

Senator Byrne.—Well, it is, I suppose. I will take it that your function as Parliamentary Draftsman would not only be, in strict law, to advise the department, but to sort of be a friend to them, to warn them against unwise regulations?—We would tell them if we thought a regulation were unwise or impolitic.

Senator Byrne.—Or in its operation unfair?—Yes.

Senator Byrne.—Would you not think this regulation, in view of the fact that its consequences are serious and in alternate circumstances procedures are available, could and should have set down procedures to be available?—They could have. I would not like to say they should have, because that raises questions of policy.

Senator Byrne.—I had the same thought on looking at sub-regulation (2.) of the regulation. In determining the quantum of guilt as translated into money, certain canons have been set down. That is right, is it not?—In sub-regulation (2.) that is so.

Senator Byrne.—I suppose of the two—the question of quantum and the question of guilt—quantum would possibly be less important?—I am not sure that I follow that question. Before the Air Board would take into consideration the amount to be paid by the member, they would have to come to a determination that they could claim——

Senator Byrne.—That is what I say. At least, if it is not more important, it is certainly prior in time.—I thought you put it the other way.

Senator Byrne.—No. Certainly more important in time.

Senator Byrne.—Now, canons have been set down for determining quantum, canons which certainly shall bind the Air Board, in sub-regulation (2.). To come back to my point, would it not have been at least logical to have set down canons which would guide the Air Board in determining the offence?—I do not think so. The question of whether there has been a contravention is a question of fact. The question of the amount of damages is a matter for discretion and certain provisions are laid down as to the exercise of that discretion. I am not certain whether your question amounts to this: Whether we might not have included a sort of code of evidence—in considering whether the man is liable, certain evidence is admissible or is not admissible. That seems to me to be the parallel.

Senator Byrne.—I had no firm view on it, but I do feel that the Air Board is left in a position of making big decisions without guidance. Where proceedings are taken under the Courts-martial Act or Regulations for dereliction of duty, procedures are prescribed. Is there anything like that here—canons which shall guide the tribunal?—No. It is analagous to ordinary law and the rules of evidence which apply, of course.

Senator Byrne.—That would not be prescribed by statute. The tribunal would just be expected to follow that. Would that be right?—I could not answer that offhand.

Senator Byrne.—Earlier, you said that this was in the nature of a civil action.—That is right.

Senator Byrne.—What about all those defences which are available in a civil action on the question of contributory negligence and things of that nature?—I would expect the Air Board to take that into account.

Senator Byrne.—Could the Air Board be expected to operate along those judicial lines?—Could it be expected by whom?

Senator Byrne.—Expected by you or me or anybody.—Well, it certainly would be expected by me. I would be astonished if they did not act along those lines.

Examined by Senator Laught.

Senator Laught.—In other branches of Commonwealth law, are boards entitled to make assessments of damages without recourse to ordinary courts of law, in your experience.—I think you probably could find others.

Senator Laught.—I was just wondering if you could call any to mind and let us know.—I think, in relation to the Public Service Board. All these people are servants of the Crown. It is pretty clear I think that the determination of the relations of the servant as against the Crown do not involve the use of any judicial power. Under the Public Service Act and indeed, in accordance with the courts-martial this, as the High Court has held, does not involve the exercise of any judicial power. They are simply master and servant relations. It is not a breach of that provision of the Constitution which vests judicial power in courts only to give the Commonwealth the power to impose fines as under the Public Service Act or to recover money civilly, without recourse to a court.

Senator Laught.—Which decisions are they?—There were two or three decisions during the war. *Elias and Gordon's* case is one I think. The objection was taken to a decision of a court-martial on the ground that the court-martial had exercised part of the judicial power of the Commonwealth, which, under the Constitution, could only be vested in Federal courts and States courts. The High Court rejected that contention.

Senator Laught.—If the Public Service Board desired to recover money would it act in a way similar to the way contemplated in regulation 515?—I would think it would. I am not to be taken as advising without qualification that the Public Service Board has that power. But I would expect it to act in that way.

Senator Laught.—You have had no experience in your Crown legal capacity on that point that you can recall to the Committee?—No. I have had experience of quasi criminal proceedings by departments and by the Public Service Board, but I do not recall any civil proceedings similar to what is provided in 515.

Senator Laught.—Can you recall whether you got any help in drafting 515 from other regulations and if so, what was the source of that help?—I had no personal hand in drafting 515. I knew nothing of it personally. The history of it extends over twelve or thirteen years and it was the subject of considerable discussion and consideration among two or three departments. This was the upshot of it and that decision was taken as a matter of policy that that regulation was to go in.

Senator Laught.—It is not a copy of some Imperial regulation or some civil service regulation?—No, it is not a copy of a civil service regulation. I do not know whether it is similar to something which exists elsewhere or not, except in the Naval Financial Regulations.

Senator Wright.—I misunderstood you earlier. You were not saying that the Commonwealth did not have an Acts Interpretation Act, but that the expression "this Act" was not defined?—There is nothing in our Acts Interpretation Act which says that in an Act the expression "This Act" includes the regulations. If we wish to bring about that result we bring it about as we have done in the Air Force Act by specifically saying in the Act that this Act includes the regulations.

Senator Wright.—What is the practice as to Minister's submitting regulations. I direct your attention to the Fourth Report of this Committee submitted in 1938 as to a Bill to amend the Acts Interpretation Act so as to require a certificate from the Attorney-General's Department that they were in accordance with law. That Bill, I understand, failed to be passed, but the Attorney-General of the day gave an undertaking that submissions to the Attorney-General's Department had always been made. Is that the practice?—That is the practice. They are submitted to the Parliamentary Draftsman's Office. All departments are required to submit all proposed regulations to the Parliamentary Draftsman to settle them. Since that undertaking was given in 1938, there have been two or three cases when a department has overlooked that and they were promptly reminded of it. Those cases were in the early days shortly after that undertaking was given and before it had become generally known.

Examined by Senator Willesee.

Senator Willesee.—You realize that, if this had come before Parliament by way of an amendment to the Act, this Committee would not have been interested.—That is so.

Senator Willesee.—The thing that impresses me is this: You just said that the departments, now that the undertaking has been given, submit all regulations to your department.—To the Parliamentary Draftsman, yes.

Senator Willesee.—At what point does the responsibility rest to say whether a thing should be by way of regulation or by amendment?—That rests with the Minister administering the department concerned.

Senator Willesee.—Do you not think there appears to have grown up a weakness in responsibility there, because I would say that, arising out of the report of this Committee in 1938, there would be an implied responsibility placed on your department? No. I do not think so. I think you are speaking of a different thing in the first place from the 1938 Report. That was on the question of inconsistency. You are speaking of the question whether a particular provision should be made by regulation or by Act, which is a different thing.

Senator Willesee.—Well, omitting the reference to the 1938 Report, you say that the minister is responsible—in other words, the department.—The Government.

Senator Willesee.—I know it flows from ministerial responsibility. This, to me, is most interesting. One of the things I have noticed in the last two days has been a complete defence by the departments not only on the necessity for 515, but for it to be in the exact form in which it has been submitted. The only breaking down of that was Mr. Mulrooney's evidence that there is something afoot to apply for an appeal. My own thought on that, incidentally, was that, if it is thought necessary now, the appeal should have gone in then. That is one of the things brought to the attention of this Committee. You say that completely rests on the Minister?—It could not possibly rest on the Parliamentary Draftsman.

Senator Willesee.—I am not suggesting that, but I just want to know.—Perhaps I should amplify this a little bit. Let us trace the imaginary course of a particular matter.

A proposal for a regulation is submitted to the Parliamentary Draftsman and he thinks either that it is unwise or inconsistent with the Act under which it is proposed to be made. He writes to the department and tells them.

Senator Willesee.—You would consider it his function to say if he thought it unwise?—Yes, definitely. If I can just interrupt the course of this example, he can tell them it is unwise, but he cannot compel them to accept the advice.

Senator Willesee.—But, of course, a Minister or the Government need not accept it?—That is why I say it cannot rest on the Parliamentary Draftsman.

Let me continue with the example. He advises the department that a particular regulation would either be unwise or inconsistent with the Act, or there may be some other ground of objection to it. The department concerned receives that and they submit the remarks of the Parliamentary Draftsman to their Minister and the Minister says, "I have taken that into account and I nevertheless propose to submit this regulation to the Executive Council".

The Department writes to the Parliamentary Draftsman and says the Minister has considered it and proposes to submit it to the Governor-General. My next step would be to bring the matter to the notice of my own Minister the Attorney-General, and I imagine the Attorney-General would then discuss the proposed regulation with his colleague, the Minister administering the department concerned. If the Attorney-General agreed with my view that it was unwise and the other Minister persisted, the matter would be resolved by going to Cabinet. But the Parliamentary Draftsman cannot resolve it.

Senator Willesee.—That is when it is an extreme case?—I took an extreme case as an example. I do not want to convey the impression that that is what always happens. There are dozens of instances when the Parliamentary Draftsman says to a department that a proposed regulation would be unwise or would be inconsistent and the department says, "In view of that advice, the Minister has decided not to proceed with the regulation".

Senator Willesee.—Would you think there would be many cases where you would advise the department and say, "this is outside the statutory powers of regulations and it should be an amendment to a Bill"? You would feel that was one of your implied duties at least would you not?—There is no doubt about it being our duty, but you asked me would there be many cases.

Senator Willesee.—Would there be many or few?—It would be very difficult to give an exact figure. Perhaps, on the average, once a week. Not more than one a week. Not more than perhaps fifty times in a year would be the average. Something between once a week and once a month.

Senator Willesee.—Following these inquiries over the last couple of days, in answer to Senator Wright, you said that in your view third party claims would be recoverable under regulation 515.—Yes.

Senator Willesee.—It was my impression yesterday when Senator Wright was cross-examining that this question of third party has never been clearly dealt with by any of the departments.—I am not sure what you mean when you say that it has never been clearly dealt with by any of the departments. I think it was almost certainly under consideration at some stage in the discussion concerning this regulation beginning in 1943.

Senator Willesee.—That never came out in evidence yesterday, did it?—I do not know that that precise question was asked.

Senator Willesee.—My word it was. I remember asking the Treasury gentleman, Mr. Hewitt, that precise question and he took some time to answer. I thought we had gone into a yogi session for a while. Finally, Senator Wright asked the question again. It left no doubt in my mind and I think Mr. Hewitt's words were that there was no specific discussion on it.—I cannot say.

Senator Willesee.—You cannot say, but I am worrying about the future of the Committee as well now when I see so much of this.—I think there is not a shadow of doubt, as a question of law, that it is covered.

Senator Wright.—If the regulation is valid, yes.

Senator Willesee.—I agree with your answer to Senator Wright that that was one of the reasons why this inquiry has taken place—because of this question.

To move on to one other matter, you were dealing a few moments ago with the question of the Public Service and the recovery of moneys.—I qualified that in some way. I said I was not certain about that.

Senator Willesee.—Even in the Public Service I recollect recent cases where actions have been taken by different departments in civil courts. A postman might steal some registered letters or a postal clerk takes money.—Do you mean a prosecution in a civil court?

Senator Willesee.—In what cases does the Public Service recover goods and property, and is it unlimited?—I do not think there is any very extensive power in the Public Service or in the Crown. It would not be the Public Service Board that would be the plaintiff. When the Crown recovers money civilly, the procedure is to sue in a normal court. That, of course, is different from a prosecution.

Senator Willesee.—For punishment, yes. On the recovery of money, generally, an agreement is entered into and it is taken from whatever moneys are due to the officer. That is generally the way the Public Service recovers money. Then the amount is limited to the amount of superannuation that is due to him.—No, that is not so. What often happens is that a Public Servant commits an offence which is also a breach of the civil law. He steals £50 for instance. He would be charged under the Public Service Act with an offence and we will take it he is dismissed from the Service. The Commonwealth would then have a common law claim against him for £50 and it would deduct that £50, or it would be open to the Commonwealth to deduct that from any moneys due to that man whether by way of refund of superannuation, salary, refund of income tax or any other debt due by the Crown to him. His debt to the Crown would be set off.

Senator Willesee.—But then it is limited to moneys at that point.—That is true. They are moneys owing by the Crown to him in some particular way, but it is not limited to moneys owing in any particular way.

Senator Willesee.—But the amount is limited.—In practice, it may be; but in law, it is not. The debtor and creditor set off their respective debts of unlimited amounts.

Senator Willesee.—Carry on with this case. He has stolen £5,000.—I said he has stolen £50 and that would be set off against any money, whether superannuation, salary, refund of income tax or any other type of money owing by the Crown to him. He would then be paid the difference between the amount of £50 and the amount owing to him by the Crown.

Senator Willesee.—Now take the case where it is a larger amount than the moneys due to him.—If the amount that the Commonwealth owed him were less than the amount he owed the Commonwealth, it would be open to the Commonwealth to take proceedings to recover the balance.

Senator Willesee.—I realize that is the legal position. The amount of moneys open to the Commonwealth at that stage is limited. I know they can then go to a civil court, but how often do they do it when it is only an amount of £50 or £60 and a man is out of work?—They do it quite regularly.

Senator Willesee.—But there are a lot of cases in which they do not.—I do not know.

Senator Willesee.—Well, I think I do. It is probably not important.—I can say this: that an officer in the Deputy Crown Solicitor's office in Melbourne recently embezzled or got away with a very considerable sum of money running into four figures and he was charged with an offence before a jury in Victoria and he was acquitted, although there was no doubt that he had taken the money. It is now open to the department to take action. I am not sure whether we have actually issued a writ, but we are contemplating civil proceedings to recover the amount he unlawfully took from the Commonwealth.

Further Examined by Senator Wright.

Senator Wright.—Would you be so good as to refer to section 3 (3.) of the Air Force Act, which says that section 58, amongst others, of the Defence Act shall, subject to this Act, continue to apply to the Air Force. Now, turn to section 5 and you see that the Air Force Act, in force at the date on which the *Air Force Act* 1939 came into operation, shall, subject to this Act, and to such modifications, adaptations and exceptions, if any, as are prescribed, apply in relation to the Air Force. The expression "as prescribed" is defined by the Acts Interpretation Act to mean "prescribed by the Act or by regulations", is it not?—Or by regulations under the Act.

Senator Wright.—Did you consider if the expression "subject to this Act" in section 5 has the effect of including regulations, the parallelism between it and the expression "subject to this Act" in section 3 (3.) in giving your opinion?—Yes. I do not think what is enacted in section 5 would cause me to change my opinion.

Senator Wright.—Did you consider it?—Yes, we considered the whole of the Act.

Senator Wright.—It is not referred to in your opinion.—No. I do not regard it as having any bearing on the question really.

Senator Wright.—You do not?—No.

Senator Wright.—So that, where you have in section 3 an enactment that section 58 of the Defence Act shall, subject to this Act, apply, and you have an exactly similar provision with regard to the Air Force Act that it, subject to this Act, shall apply, and where in section 5 the Draftsman considered it necessary when he intended to make sub-section (5.)'s effect subject also

to modifications and adaptations to be effected by regulations, he expressly said so, you nevertheless do not think it is relevant to consider that for the purpose of an opinion as to the meaning of "subject to this Act" in section 3.—I did not say it was not relevant to consider it. I said I did not think it had any bearing on it.

Senator Wright.—You draw a distinction between the two—that "it is not relevant to consider it and that it does not have any bearing on it?—I *did not say* it was not relevant to consider it. I *said that*, having considered it, *it was not thought to have any bearing on it*. Your point if I might say so, attributes a consistency in drafting which is very seldom obtained in practice.

Senator Wright. But is not one of the primary principles of interpretation of statutes that you will attribute [illegible] to the one statute the same meaning throughout the statute unless the context to require a different meaning?—Yes, that is so, in general.

I do not think that rule is, by any means, a governing rule in a context of this sort. I agree that, if you had the expression "The Governor-General" or "The Attorney-General" in a statute, it would, prima facie, have the same meaning throughout the statute; that is, would identify the same person in each case by the words used. But I think the context here is different from that kind of thing.

Senator Wright.—Through you, Mr. Chairman, if there are any judicial decisions to support that view, I, as one member of the Committee, would be most obliged to have reference to them.

Examined by the Chairman.

The Chairman.—There are one or two points that I could like you to amplify. You say that part of your duties is to scrutinize regulations, to scrutinize what is given to you by Ministers to put into regulations and see, in effect, that the four heads of power under which we operate are not infringed.—Yes. We are not limited to the four heads of power under which the Committee operates.

The Chairman.—You are not limited to them, but at least you do consider those four and you do, in effect, act as a watch-dog, as it were.—Yes, very definitely. We regard this duty most seriously and we endeavour to exercise it, not exactly in a watch-dog fashion, but, while we have no compulsory powers over the Department, we do try to our utmost to see that [illegible] we give them in a sense that it [illegible] them if they do not. If [illegible] or completely oblivious [illegible] suggestion would be quite wrong. We go to great pains over this. For instance, we get all the reports of the corresponding committee of the House of Commons and they are studied and circulated to senior officers. I think their terms of reference are wider than those of this Committee, speaking from memory. There are a good many points that are not taken by this Committee which would be taken by the House of Commons Committee. Those reports are circulated among the senior officers of the Parliamentary Draftsman Division; that is, those officers who have the responsibility for finally settling regulations. We discuss them among ourselves and take them into account in deciding what advice we shall give to departments as to the unwisdom or vires or validity or any other ground of objection to a proposed regulation. And, of course, many of them are discussed with the Attorney-General as well.

The Chairman.—It would suggest to me that, to a large extent, the work of this Committee might be rendered less than it is at present if those regulations to which you have drawn the attention of the Attorney-General but which the Minister in charge of that particular department insists on pressing and which Cabinet agrees shall go through in any case.—I would not say that the Committee was redundant, for two reasons. It is perfectly open to the Committee to take a different view from the view I might take as to the wisdom or otherwise of a particular regulation. The members of the Committee would be actuated by different motives in some cases. The second reason is that I might advise the department strongly that a particular regulation is unwise and, notwithstanding that advice, the department might go ahead and make it. I would then be the function of this Committee to pick up any objection to the regulation and draw public attention to it.

The Chairman.—What value do you see in this Committee retaining a legal adviser to scrutinize the regulations after they have gone through your department, which should be much more skilled in seeing that they conform to these four heads of power that are laid down?

Senator Wright.—On behalf of private counsel, of course, I reserve leave to question some of your remarks, Mr. Chairman.

Mr. Ewens.—I think a lot would depend on the gentleman you gave it to. Picking up these points requires a lot of experience and certainly a man who had never encountered this sort of work before would be in a good deal of difficulty. I would say that for every point he found we would find ten and probably do find ten.

The Chairman.—So that what has escaped you, it would be rather odd if he were to find?

Senator Willesee.—With the exception of where your advice was rejected.

Mr. Ewens.—Yes. The case of regulation 515 is the kind of thing I have in mind. I do not know whether the Committee picked up the points it has been making of its own responsibility or whether they were pointed out. This had a long history. It had years of history and it was agreed by everybody concerned that this regulation ought to be made and, by that time, what the draftsman thought had become irrelevant. It was a matter of policy to make it.

The Chairman.—The point I was coming to was this: I would ask you, did your Department advise that an appeal should be added to this regulation?—I cannot say that offhand. As I say, I personally had no hand in this and I could not say what we advised.

The Chairman.—It does appear to me that your Department has not picked up the point that the Committee, in considering the regulation, laid great stress upon, namely, the fact that there is no appeal and that this does not conform to the normal procedure—I think I could safely say that, if this regulation had had no history behind it and had simply come to us from the department to make a regulation in these terms, we would certainly have drawn attention to some of its features; but, coming to us as it did, as an agreed proposal of policy evolved out of years of discussion, I think it was natural to look at it in a different light.

The Chairman.—Why has the appeal not yet been framed in a regulation? What is the cause of the delay?—I would not say there is any delay. At the present time, it is approximately two months from the time any draft reaches us before we are in a position to take it in hand. This one is within two months. I would expect it to be taken in hand next week. A few years ago, we were two years behind with our work, but now we are only two months behind. It is not a matter of delay. Of course, it depends on how you define "delay".

The position is that we are not able to proceed with a draft immediately we receive the instructions. Under

instructions from the Attorney-General, except in the case of something especially important or urgent, all jobs are attended to in the order in which the instructions are received, and this one will be taking its place with those others, I expect. At the present time, that takes about two months. We have not got anything like our authorized staff. It is almost impossible to get a suitable man to do this sort of work. They take years of training, and we have not been able to get them for that reason.

The Chairman.—It would appear that the appeal came from the department and not from your own department?—I think the instructions came from the Department of Air. As far as I know, our department had no part in it.

The Chairman.—Your department was prepared to allow regulation 515 to go through as it stood and was satisfied that it was in order without any appeal?—I do not know that you could say that we were satisfied that it was in order. It did go through in that form, but I think it was because of the history behind it, and I would think it would be a point which would have been taken if the thing had come to us fresh without any proposal for consideration and without any history.

Senator Seward.—You said that if this had come to you as a fresh question, without any history behind it, you would have treated it differently from the way you did treat it, coming to you as it did.—What I meant is that all the considerations involved in the making of this regulation had already been considered by the policy-making people. It would have been open to us at that stage to raise the matters.

Senator Seward.—I would imagine that would have been one of your prime duties—to draw attention to it and see that these things had not been overlooked.—I would agree that it might have been desirable for me to say to them, "although this is the agreed result of consideration by two or three parties, you realize what you are doing. You realize you are making a regulation in these terms"; but, in fact, that was not done. This, of course, only emphasizes what I raised a few minutes ago—that it is very difficult to get suitable people to do these jobs. They just do not exist.

Although the officers at the top try to train them as well as we can, it is inevitable that officers, particularly the more junior officers who might not have the confidence that a senior officer has, will allow a thing to go through whereas a senior officer might have felt it ought to have some attention drawn to it.

Senator Byrne.—Can you suggest any reason why, when section 58 of the Defence Act was being imported into the Air Force Regulations in regulation 435, action at the instance of the Minister was substituted for action at the instance of the commanding officer.—No, I am afraid not.

Senator Byrne.—Regulation 435 of Air Force Regulations reads as follows:—

> 435. The commanding officer of any unit shall be responsibility responsible for the safe keeping and good order of of commanding officer for all articles, the property of the Commonwealth, unit property. supplied to his unit, and the value of any of these articles may if lost or damaged while in possession of the unit otherwise than through fair wear and tear and other unavoidable accident, be recovered by the Minister in any court of competent jurisdiction from the member by whom the loss or damage was occasioned.

When they carried section 58 into the Air Force Regulations in almost precise terms, it was written in with action to be taken by the Minister.—I do not know why that was so.

Senator Byrne.—Would it be any matter of legal facility, or do you think it might have been to bring it to the top level?—I think, myself, that a Minister is more appropriate. I do not think the provision in the Defence Act as to the commanding officer is the more appropriate of the two. Really, it should be the Commonwealth which takes the proceedings; it should not be Lowney v Brown or Smith v Brown, if that happens to be the name of the commanding officer. All through, the Constitution refers to actions by and against the Commonwealth.

Senator Byrne.—I asked the question because, if there was any real significance in that to bring the matter to top level, apart from any legal facility, we again depart from that here by giving authority to a commanding officer to proceed under regulation 515. And what would be the effect of regulation 515 (3.)—"shall be deemed to be due and owing by the member"? What would be the normal procedure from that point if the Air Board determined £1,000 to be owing?—If there were no money owing to the airman by the Commonwealth?

Senator Byrne.—Or they elected not to pursue that.

We would then have to issue a writ claiming that amount and the cause of action would be that it was determined as owing under this regulation.

Senator Laught.—You would not have to prove your case?—No, you merely have to prove that the Air Board had considered the matter and had determined that the amount was owing. Of course, the defendant in those proceedings would not be completely without defence in appropriate cases. He could raise any defences that were open to him—not the merits, but he could say that the Air Board had acted outside the scope given by the regulation or ——

Senator Laught.—The merits would be lost to him?—Not altogether.

Senator Wright.—It would be an arbitrary decision of the Air Board?—It could be challenged in much the same way as the decision of a jury or the decision of a magistrate could be challenged on the ground that there was no evidence. Senator Wright is shaking his head. It would not be a re-hearing. I take the view that it would be open to the court to find that there was no possible basis in law on which the Air Board could have come to the conclusion.

Senator Wright.—You suggest it would have been open to the Air Board to invalidate the decision if it was against the weight of the evidence?—No. If, for example, the Air Board had applied any wrong principle or there had been a mistake as to the identity of the person concerned.

Senator Wright.—A very much narrower category of invalidity than a new trial?—Certainly.

Senator Byrne.—Perhaps Mr. Mulrooney might like to indicate the reason for the transfer of the power of proceedings from the commanding officer to the Minister.

Mr. Mulrooney.—That goes back a long way. It goes back to 1927 when these regulations were first gazetted and, at that time, the Air Force Act 1923 provided that the Defence Act, subject to such modifications and amplifications as are made by regulations—and I think the section goes on to say, "which regulations the Governor-General is hereby empowered to make, shall apply in relation to the Air Force". Under that Act, we then proceeded to incorporate into the Air Force Regulations all the sections of the Air Force Act which we considered should apply to the Air Force, plus or with any modifications and adaptations that we considered necessary for the particular occasion. I just cannot remember that regulation.

I remember the circumstances of the regulations because I drafted them myself in 1927, but I cannot remember the transposition of that regulation. I may have the original documents in my office.

Senator Byrne.—It might not be material, but I thought you might know.

Senator Wright.—Have you, since yesterday, from your perusal of the files, come across any specific references to the inclusion in this method of recovery of a third party claim?

Mr. Mulrooney.—No, I have not perused the files since yesterday.

Senator Wright.—Yesterday, in referring to section 137 of the Imperial Air Force Act, I understood you to say that it applied to officers and entitled recovery without court-martial proceedings.

Mr. Mulrooney.—That is so.

Senator Wright.—I draw your attention to section 137 (2.) under which penal deductions may be made from the pay due to an officer "to make good such compensation for any expenses, loss, damage, or destruction occasioned by the commission of any offence".

Mr. Mulrooney.—That is so. That is the provision which covers him if he is tried by court-martial, but paragraph 4 of that section provides that the penal deductions may be the sum required to make good any loss, damage or destruction of public or Service property, or property, belonging to the Navy, Army and Air Force Institute which, after due investigation, appears to the Air Board to have been occasioned by any wrongful act or negligence on the part of that officer. That is the provision under which we make these penal deductions.

Senator Wright.—But sub-section (4.) is only concerned with the question of amount. The definition of quality and nature of the sum for which recovery can be made is in sub-section (2.).

Mr. Mulrooney.—No, they are quite distinct provisions, sir.

Senator Wright.—I am obliged to you for that view, but it will have to be considered. The Secretary has been good enough to bring me the *Air Force Act* 1923. The provision to which you refer is section 3 (3.) and it says, "the Defence Act, except Part XV. thereof . . . (reads) . . . and the members thereof who are outside the limits of the Commonwealth".

Mr. Mulrooney.—That is the section. Under that section, we made some 478 regulations.

Senator Wright.—I wish to add, so that the information will be complete, there is no such provision as Mr. Ewens relies upon in this Act of 1923, saying that the expression "this Act" includes all regulations made thereunder.

Mr. Mulrooney.—No, it is not in the Act.

The Chairman.—The Committee want me to express our appreciation to you for coming along, Mr. Ewens, and being of so much assistance to us.

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