



AUSTRALIAN SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FORTY-SEVENTH REPORT

GENERAL REPORT

DEPARTMENT OF THE SENATE	
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MEMBERS OF THE COMMITTEE

Senator D.M. Devitt (Chairman)
Senator W.W.C. Brown
Senator P.D. Durack
Senator J.R. McClelland
Senator J.M. Wheeldon
Senator I.A.C. Wood
Senator the Hon. 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 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

FORTY-SEVENTH REPORT

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

2. The purpose of this Report is to acquaint the Senate with the work of the Committee since its last general report (Forty-third Report), which was presented in October 1972. This Report deals briefly with questions arising in relation to some regulations and ordinances considered by the Committee over that period.

Statutory Rules 1972 No. 136

Honey Industry (Election of Board) Regulations

3. These regulations provided, in regulations 7 and 9, that apiarists were entitled to enrol to participate in elections to the Honey Industry Board if a returning officer was satisfied that they were entitled to enrolment, and could be removed from the roll if a returning officer was satisfied that they were not eligible for enrolment.
4. The Committee considered that eligibility for enrolment should depend upon the criteria for enrolment set down in the Honey Industry Act, and not upon the discretion of returning officers. The Minister for Primary Industry undertook to amend the regulations in accordance with that principle, and the amendments were made by Statutory Rules 1973, No. 202.

Statutory Rules 1972 No. 201

Amendments of the Naval Reserve Cadets Regulations

5. These regulations provided that instructors and officers of the Naval Reserve Cadets, before being discharged on certain grounds which implied some fault, were to be given opportunity to show cause why they should not be discharged.

6. The Committee considered that it was unjust that this right was not extended to cadets as well as instructors and officers. The Minister for the Navy undertook to consider this point, and appropriate amendments of the regulations were made by Statutory Rules 1973, No. 212.

Statutory Rules 1973 No. 8
Amendments of the Matrimonial Causes Rules

7. In view of the disallowance by the Senate of these regulations, the Committee abstained from considering them.

Statutory Rules 1973 No. 69
Amendments of the Navigation (Courts of Marine
Inquiry) Regulations

8. These regulations contain a provision empowering the Minister for Transport, at any time before a Court of Marine Inquiry has delivered its findings, to alter, omit, or add to the questions upon which the Court is to make findings. The Committee considers that the independence of the Court and the rights of persons whose conduct may be under inquiry are adequately protected by the provision that after any such variation in the questions each party must be given the opportunity to call further evidence and address the court in relation thereto.

Statutory Rules 1973 No. 135
Legal Assistance Rules of the Northern Territory
Supreme Court

9. These rules provide that an application and affidavit in support of a claim for legal aid are to be investigated and reported upon by the police before the master of the Court determines the application. It appeared to the Committee to be wholly inappropriate that the police, who may be one of the parties to a case pending, should report upon an application for assistance by another party.

10. The Committee considered the assurance of the Senior Judge of the Court that the police report would be confined to the financial status of the applicant for aid, and could not prejudice the case of the applicant. The Committee considers, however, that the provision is in principle objectionable.

Statutory Rules 1973 Nos 162, 163, and 164
Amendments of the Customs (Prohibited Imports), Customs (Cinematograph Films), and Customs (National Literature Board of Review) Regulations

11. These amendments empower the Attorney-General to delegate his powers and functions under the regulations. The Committee considers that, particularly in view of the importance of the matters provided for by the regulations, there ought to be some specification of the persons to whom the Minister is authorized to delegate his powers. The Attorney-General has undertaken to amend the regulations so as to confine the delegation to specified departmental and statutory officers.

Statutory Rules 1973 No. 197
Amendments of the Banking (Foreign Exchange) Regulations

12. The principle regulations contained a provision empowering a court, in addition to any other penalty, to order the forfeiture of gold, currency, or securities in respect of which an offence against the regulations had been committed. In 1972 the Supreme Court of Western Australia found, inter alia, that because of the reference to penalty, the regulations did not empower an order to forfeit where the offender was not the owner of the money in question. These amendments delete the reference to penalty, and explicitly empower a court to order the forfeiture of money where the offender is not the owner of that money.

13. The Committee considers that the regulations as amended could result in what are in effect extremely harsh penalties being applied, especially in cases where an offence is committed in respect of gold, currency or securities without the consent or knowledge of the owner or where the owner took reasonable steps to prevent the commission of the offence. That the owner is in this position may not be known to the court at the time of the order to forfeit. It is considered that the owner should at least have the opportunity to show cause why an order to forfeit should not be made. The Treasurer has undertaken to amend the regulations so as to protect the rights of innocent parties and to empower a court to order the forfeiture of part of the gold, currency or securities in respect of which an offence has been committed.

Regulations under the Customs Act

14. The various regulations under the Customs Act have at certain times caused concern to the Committee. Prior to 1934 the Act empowered the Governor-General to prohibit the importation of goods by proclamation, but the Senate initiated an amendment of the Act to substitute the word "regulation" for "proclamation", thereby bringing this power under the control of the Parliament. The Customs (Prohibited Imports), Customs (Prohibited Exports) and Customs (Import Licensing) Regulations all contain provisions to the effect that the importation and export of certain goods is prohibited unless ministerial or departmental approval is obtained. The Committee has at various times been highly critical of these provisions, which confer upon ministers and departments a power to control the business of individual importers and exporters. In relation to import licensing and the prohibition on the importation of offensive literature and certain therapeutic substances under the regulations, the Committee's criticisms caused the government of the day to establish appeal provisions (the appeal tribunals relating to import licensing ceased to exist when the 1956 policy of general import licensing was abandoned). (Reference is made to the 8th, 11th, 15th, 19th, and 32nd Reports of the Committee.)

15. Late in 1972 the attention of the Committee was drawn to the use of tariff quotas as an additional means of executive control of trade. The Customs Tariff amendments passed by the Parliament in September 1972 apply a certain duty to some items "as prescribed by by-law" and a higher duty to such of the items as are not prescribed by by-law. The authority of the Minister to make by-laws is contained in section 272 of the Customs Act. The by-laws apply quotas to importers, and importers wishing to import more than their quotas must pay the higher duty on the excess as set down in the Customs Tariff. Thus the power of the Minister in relation to tariff quotas rests upon an Act and a Tariff passed by the Parliament, and not upon regulations. This ministerial power has not therefore been subject to the scrutiny of the Committee.
16. The Committee has put to the Minister for Customs and Excise its view that the various discretionary powers conferred by the regulations under the Customs Act ought to be subject to some form of judicial review. The Minister has undertaken to consider this view in the context of the Government's consideration of an administrative review tribunal.

Defence Forces Financial Regulations

17. In its 42nd Report the Committee observed that regulations providing for changes in Services pay and allowances were still being made with long periods of retrospectivity. The Committee found that this was due to administrative delays in the responsible departments, and the unnecessarily complicated and cumbersome method of determining changes in pay and allowances.
18. While there has been some improvement in this area, regulations occasionally appear with periods of retrospectivity in excess of one year. The Minister for Defence has assured the Committee that steps are being taken to improve the system of pay determination and to minimise administrative delays.

Regulations providing for Allowances of members
of Statutory Authorities

19. Late in 1972 an increase in travelling allowance in the public service was applied to members of various statutory authorities. This was done by a series of regulations, initiated by various departments, and appearing over a period of several months, with long and varying periods of retrospectivity. The Committee found that the great delay in making these regulations was due to administrative failures in the system whereby the Public Service Board notified the responsible departments of changes in allowances.
20. The Committee has been assured by the Board that steps have been taken to prescribe allowances for members of statutory authorities in a single set of regulations, and to eliminate avoidable delays in amending those regulations.

A.C.T. Prices Regulation Ordinance

21. This Ordinance was made in 1949 and has been inoperative since shortly after that time. In May 1973 it was amended so as to transfer administration of it from the Department of Customs and Excise to the Department of the Capital Territory. In accordance with the undertaking given to the Senate in its 43rd Report, the Committee examined the principal ordinance as well as the amendments.
22. The Committee found that the principal ordinance contains many provisions which trespass unduly upon individual rights and liberties, or make the rights and liberties of citizens unduly dependent upon administrative decisions. The sections of particular concern to the Committee are as follows:
- (i) Section 8 - Declaration of secrecy
- Sub-section (4) permits the divulging of information by the Prices Controller to the Commissioner of Taxation and the Tariff Board. Having regard to the extremely wide powers

of the Controller and his officers under the Ordinance, it appears that there is no safeguard against the use of such powers for purposes extraneous to the Ordinance, which may amount to undue invasion of the privacy of individuals.

(ii) Section 9 - Minister and others not compellable witnesses

It appears that the effect of this provision is that where the opinion or belief of the Minister, Prices Controller or Deputy Controller is the basis of an order or direction under the Ordinance, such opinion or belief cannot be challenged in the courts.

(iii) Section 16 - Power to enter and search premises

The very wide powers to enter and search premises under this section may be exercised without a warrant. There is no requirement that the powers can only be exercised where the Controller or officer believes on reasonable grounds that the exercise of such powers is required to detect or prevent a breach of the Ordinance. Original documents can be retained indefinitely without any right of appeal or other remedy on the part of the person aggrieved.

(iv) Section 18 - Prices Controller may require returns to be furnished

Sub-section (1) paragraph (f) authorises the Controller to require a person to furnish particulars of any kind whatever, even if they are totally foreign to the purposes of the Ordinance. This power could be used oppressively.

(v) Section 20 - Determination of maximum prices and rates

Sub-section (10) paragraph (c) provides that a notice sent to the secretary of an association shall take effect in respect of any member of such association upon the expiration of seven days from the receipt of the notice by the secretary. No provision is made for the eventuality that the secretary may not forward the notice to members and a member is not exculpated if he does not in fact receive notification from the secretary as to the contents of such notice. It is considered that it should be a defence on the part of a member that the secretary failed to notify him.

Sub-section (13) provides that the mere production of a "paper purporting to be a copy" of an order shall be evidence in all courts of a number of important matters. This could lead to production of all kinds of copies, some of which may contain mistakes. There appears to be no valid reason why the Gazette containing the order in question should not be required to be produced.

(vi) Section 23 - Power to prohibit certain transactions

Under this section, the Controller can virtually prevent a person from carrying on his business, without any right of appeal or other remedy. The sole criterion for the issuing of a prohibition is the opinion of the Controller.

(vii) Section 25 - Power to prohibit sale of goods

Under this section, the Controller can prohibit the supplying of declared goods or services until the Controller has fixed the maximum price. There is no corresponding obligation on the part of the Controller to fix a maximum price within a specified time or at all.

(viii) Section 36 - Averment of prosecution

This section puts the onus of proof on the defendant. It constitutes a very substantial interference with civil rights.

(ix) Section 49 - Power to search for goods

The very wide powers of entry and search under this section may be exercised without a warrant. The powers may be exercised where goods forfeited or liable to seizure "are supposed to be" in particular premises. It is not stated by whom they are "supposed to be" or that such supposition is based on a belief held on reasonable grounds.

(x) Section 61 - Evidentiary provisions

This section provides, inter alia, that a copy of a document is prima facie evidence that the original was received by the defendant on or about the time at which it would have been delivered in the ordinary course of post if it had been sent on the date borne by the document. There is no requirement in this section that the posting of the document should be proved. This provision could operate to the prejudice of the defendant where the document is not in fact posted on the date borne by it or is not posted at all.

23. In August 1973 the then Minister for the Capital Territory agreed that these provisions are undesirable in their present form, and gave an undertaking that the Ordinance would be amended so that the rights and liberties of individuals will be adequately safeguarded. The Committee has since been informed that the amendments are in the course of preparation.

A.C.T. Ordinance 1972 No. 39
Police (Disciplinary Provisions) Ordinance

24. This Ordinance contains a provision to the effect that a member of the police force who is dismissed from the force as a result of a conviction may be reappointed where the conviction is quashed upon appeal. The member has no remedy against a refusal to reappoint him in these circumstances. The Committee considers that an appeal ought to be provided. It was found that the same deficiency appears in other legislation, including that providing disciplinary provisions for public servants. The responsible departments have given an undertaking that the Ordinance and other legislation will be reviewed in the light of the Committee's views.

A.C.T. Ordinance 1973 No. 9
Companies Ordinance

25. Section 13 of this Ordinance empowers the Attorney-General to license certain types of companies and to exempt them from certain provisions of the Ordinance, and to revoke such an exemption. The Committee believes that this power should be subject to objective criteria set out in the Ordinance, and that a company ought to have a right of appeal against the revocation of a license or an exemption. Section 45 of the Ordinance empowers the Registrar to exempt companies from compliance with the Ordinance. The Committee considers that the Ordinance is defective in not laying down objective grounds for the exercise of this power. Section 66 of the Ordinance provides that certain persons are bound to assist the prosecution by giving information in certain cases involving

offences under the Ordinance. The Ordinance contains no safeguard to the effect that such information as a person is compelled to provide may not be used in a prosecution against him.

26. The Attorney-General has given an undertaking that the Ordinance will be amended so as substantially to overcome the objections raised by the Committee.

A.C.T. Ordinance 1973 No. 17
Consumer Affairs Ordinance

27. Section 16 of this ordinance provides immunity from legal proceedings for certain officers of the Consumer Affairs Council or the Consumer Affairs Bureau in respect of acts or things done by them in good faith.

Sub-section (2) provides:

An act or thing shall be deemed to have been done in good faith if the person by whom the act or thing was done was not actuated by ill-will to the person affected or by any other improper motive.

28. The Committee considers that this provision restricts the ordinary meaning of good faith and thereby extends to an unwarranted degree the protection which is provided for the officers. The Department of the Capital Territory has deferred to this view and undertaken to recommend the repeal of this provision and like provisions in other legislation of the territory.

Christmas Island Ordinance 1973 No. 1
Police Force Ordinance

29. Section 14 of this Ordinance empowers the Commissioner of Police (who is the Administrator of the Territory) to issue a search warrant where a magistrate is not present in the Territory or a sitting of a court cannot be convened. The Committee considers that this provision is not unreasonable having regard to the circumstances of the Territory.
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30. The Committee expresses its appreciation of the undertakings given by the various Ministers of State and their departments to amend regulations and ordinances in accordance with the Committee's principles. The Committee assures the Senate that in accepting these undertakings it does not compromise its independence in its scrutiny of regulations and ordinances on behalf of the Senate.

D.M. DEVITT
Chairman

Senate Committee Room,
Thursday, 29 November 1973