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Clerk of the Senate

THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FIFTY-SIXTH REPORT

RETROSPECTIVE REGULATIONS

MEMBERS OF THE COMMITTEE

Senator I.A.C. Wood (Chairman)
Senator J.L. Cavanagh
Senator S.J. Collard
Senator G. Georges
Senator A.J. Missen
Senator S.M. Ryan
Senator R.C. Wright

Function of the Committee Since 1932, when the Committee was first established, the principle has been followed that the function of the Committee is to scrutinise 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

FIFTY-SIXTH REPORT

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

RETROSPECTIVE REGULATIONS

- 2 In its twenty-fifth Report the Committee gave the following undertaking to the Senate:

Regulations involving retrospectivity in payment of moneys, if extending beyond two years, will be the 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.

- 3 The Committee now reports that the following regulations provided for payment of moneys with periods of retrospectivity of two years or more.

DEPARTMENT OF DEFENCE

Defence Force Financial Regulations

- 4 The amendments of Defence Force (Salaries) Regulations contained in Statutory Rules 1976 No. 3 provided for payment of an air conditioning allowance with retrospectivity of 26 months. The amendments of the Military Financial Regulations contained in Statutory Rules 1976 No. 7 provided for the continuation of certain allowances during leave with retrospectivity of 26 months. The explanation of these regulations as provided by the Minister for Defence is contained in Appendix 'A' to this report. The attention of the Senate is drawn to the fact that a delay of some 16 months during the drafting of the Military Financial Regulations is attributed to a misunderstanding between two departments, while the delay in making the Defence Force (Salaries) Regulations was due to administrative delay.

PRIME MINISTER'S DEPARTMENT

Public Service Regulations

- 5 The amendments of these regulations contained in Statutory Rules 1976 No. 96 provided for the payment of an allowance to officers stationed at Broken Hill with retrospectivity of 27 months. The explanation of these regulations provided by the Prime Minister appears in Appendix 'B' to this report. The delay in making the regulations was principally due to "the need to assess fully the policy implications" of an arbitration decision.

Film and Television School Regulations

- 6 The amendment of these regulations contained in Statutory Rules 1975 No. 196 provided for the payment of fees and allowances to members of the Council of the Film and Television School who are also Members of a State Parliament, with retrospectivity of almost two years. The explanation of the regulations provided by the Prime Minister is contained in Appendix 'C' to this report. The attention of the Senate is drawn to the fact that the need to amend the regulations arose from an error which was not detected for some seven months, and that payments of allowances were made illegally due to this error.

DEPARTMENT OF OVERSEAS TRADE

Trade Commissioners Regulations

- 7 The amendment of these regulations contained in Statutory Rules 1976 No. 171 provided for the payment of an allowance to Trade Commissioners with retrospectivity of 38 months. The explanation of these regulations provided by the Department of Overseas Trade is contained in Appendix 'D' to this report. The delay in making the amendment was largely due to a misunderstanding between departments and a delay of 17 months in the drafting of the amendment. The attention of the Senate is drawn to the fact that payments were made illegally due to a departmental oversight.

- 8 The Committee considers that the retrospectivity of all of these regulations was due to inefficiency on the part of the responsible departments. It is difficult to see how the misunderstandings between departments referred to can arise. As regards the delays in drafting, the Drafting Division of the Attorney-General's Department, in spite of constant criticism by the Committee over many years, does not seem to have developed an effective system of giving priority to simple amendments of regulations in order to avoid undue retrospectivity.
- 9 In all of the above cases the Committee decided not to add to the confusion already existing by recommending disallowance of the regulations concerned. The facts are reported so that the Senate may be aware of the inefficiencies and unjustifiable delays which have occurred. The Committee affirms the principles stated in its Twenty-fifth Report.

IAN WOOD
Chairman

Senate Committee Room

21 October 1976

APPENDIX 'A'



COMMONWEALTH OF AUSTRALIA

MINISTER FOR DEFENCE
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

My dear Senator,

20 APR 1976

I refer again to your letter of 1 April 1976 regarding aspects of the retrospective operation of Statutory Rules 1976 Nos. 3 and 7.

With respect to Statutory Rules 1976 No. 7 (amendments of the Australian Military Regulations), you asked for explanation of -

- the delay between approval given in January 1974 and instructions issued in June 1974;
- the delay between June 1974 and submission to the Minister on 11 November 1975;
- the misunderstanding between Departments.

In relation to the first period, approval for application of the varied conditions to members of the Army was given on 21 January 1974. Army Office requested the Legislation Branch of my Department on 29 May 1974 to have the necessary amendments made to the Regulations and instructions were issued to the Attorney-General's Department on 26 June 1974. Apart from such time as may have been required for the approval to be considered and the necessity for amendments established, there is no useful explanation to account for the delay of four months.

In relation to the period between issue of instructions on 26 June 1974 and receipt of draft Statutory Rules on 28 October 1975 which were submitted to the Minister on 11 November 1975, the explanation is that the matter was with the Attorney-General's Department for that period while the amendments were being drafted.

It was in this period that the misunderstanding referred to arose. Although the instructions had requested that the amendments apply with effect from 28 November 1973, officers of the Attorney-General's Department formed the impression that retrospectivity was not involved. When it became clear to them that retrospectivity was required, the drafting proceeded immediately.

I have referred in earlier correspondence to the extremely heavy pressures on the Drafting Division of the Attorney-General's Department at that time. These pressures, of which I am sure your Committee will be aware, caused considerable delays in drafting, particularly of regulations which did not appear to require priority.

With respect to Statutory Rules 1976 No. 3 (amendments to the Defence Force (Salaries) Regulations), you asked for an explanation of the delay between the approval given in relation to the Public Service in February 1974 and the approval given in relation to the Defence Force in March 1975.

You will recall that these amendments introduced two new allowances: air conditioning allowance (approved for application to the Public Service in February 1974) and high electricity charges allowance (introduced for the Public Service on 10 April 1974).

The reasons for the lapse of time between the two approvals were adverted to in the latter part of my letter of 25 March 1976 about these allowances. I explained there that, although the principles followed in relation to the fixing of remuneration for members of the Defence Force require reviews of salary and allowance levels to have regard to movement in the civilian remuneration structure (including allowances) and the Australian Public Service in particular, such benefits are not automatically transmitted to the Defence Force.

With these two totally new allowances, it was necessary to establish through tri-Service machinery that the allowances were in fact appropriate and to examine the details of implementation before a submission could be put to the then Minister.

The exercise involved consideration of such matters as whether the allowances had practical application in the Services, the interrelationship of the allowances and the geographical areas likely to be involved.

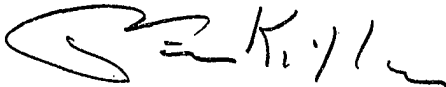
By October 1974 it was agreed that the allowances were appropriate for the Services but considerable difficulty was then encountered in arriving at the likely cost. This was necessary before Ministerial approval could be sought and the process was complicated by widespread rises in electricity tariffs at that time. Final cost estimates were not completed until March 1975 when the submission was put to the Minister.

In relation to both Statutory Rules 1976 Nos. 3 and 7, I would reiterate the point I made in my previous letters that the statutory rules were in the final stages of being made at the time of the change of government on 11 November 1975. But for that event none of the periods of retrospectivity would have exceeded two years. I would suggest that those circumstances were quite exceptional in terms of the

Committee's guidelines for dealing with retrospectivity and disallowance would not be appropriate on that ground alone.

I do, of course, recognize that the details I have set out in this letter disclose delays which might well be regarded as less than satisfactory. Insofar as these matters are within the control of my Department, I referred in my previous letter to the improved machinery which now exists for liaison with the Public Service Board. Action has also been taken to again emphasise to those concerned the importance of expeditious handling of proposals which will ultimately require regulation amendments in order to ensure that retrospectivity is minimised.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'D. J. Killen', with a large, sweeping initial 'D'.

(D. J. KILLEN)

Senator I.A.C. Wood,
Chairman,
Standing Committee on
Regulations and Ordinances,
Parliament House,
CANBERRA. A.C.T.

APPENDIX 'B'



PRIME MINISTER
CANBERRA

2 June, 1976.

Dear Senator Wood,

I refer to your letter of 20th May 1976 which requested certain advice concerning the amendment of the Public Service Regulations contained in Statutory Rules 1976 No. 96.

I am advised that a "Town Allowance" is payable to all employees stationed in Broken Hill other than those employed by the Mining Companies (who receive other payments of a similar kind). The allowance is payable under various Industrial Agreements operating in Broken Hill which do not apply to Australian Public Servants stationed in that city. The "Town Allowance" is reflected in the "Disability Allowance" payable under Public Service Regulation 103B so that Australian Public Service personnel, who are a minority there, are not disadvantaged in comparison with other employees in Broken Hill.

As a result of a decision by a Senior Conciliation Commissioner of N.S.W. on 18th April, 1974 the Broken Hill "Town Allowance" was increased from 1st January 1974. It was also recommended that:

- (i) "any change in the Broken Hill allowance in the future should apply automatically in respect of all agreements containing that allowance".
(Previously, adjustments to the various agreements occurred only when they came up for renewal or negotiation); and that
- (ii) equal payment for adult females should be phased in in three stages commencing from 1st January, 1974 to 30th June, 1975.

I am advised that the delay in the making of the regulation arose from the need to assess fully the policy implications of that decision for the Australian Public Service, given that it involved consideration of approaches to pay for juniors and females not normally applied at that time in the Public Service.

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In seeking the amendment of regulation 103B in the form as it appears in Statutory Rules 1976 No. 96, the Board had regard to the views of the Committee in its 25th Report that:

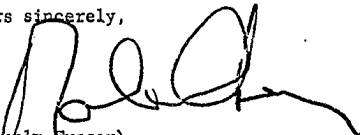
"Regulations involving retrospectivity in payment of moneys, if extending beyond two years, will be subject of report to the Senate and, unless quite exceptional circumstances are established to the Committee's satisfaction, will be the subject of a recommendation for disallowance".

The Board considered that exceptional circumstances existed in this case as not to grant the increases determined by the Commissioner in his decision of 18th April, 1974 would be to make an unjustifiable distinction between public servants and other employees in Broken Hill.

No payments were made prior to the making of Statutory Rules 1976 No. 96.

I attach a copy of a memorandum from the Attorney-General's Department in response to the opinion received by the Committee in relation to the validity of the Statutory Rules.

Yours sincerely,



(Malcolm Fraser)

Senator the Hon. Ian Wood,
Chairman,
Standing Committee on Regulations and Ordinances,
The Senate,
Parliament House,
CANBERRA. A.C.T. 2600



ATTORNEY-GENERAL'S DEPARTMENT

TEL: 61 9111

CANBERRA, A.C.T. 2600

PLEASE QUOTE A/76/2872

YOUR REF: 76/1812

1 June 1976

The Secretary,
Office of the Public Service Board,
CANBERRA, A.C.T. 2600

Public Service Regulations, r. 103B: Broken Hill
Allowance: Statutory Rules 1976 No. 96;
Question of Retrospectivity

I refer to the letter to the Prime Minister dated 20 May 1976 from the Chairman of the Senate Standing Committee on Regulations and Ordinances enclosing a copy of an opinion received by the Committee which raises doubts as to the validity of the amendment to regulation 103B ('Broken Hill Allowance') of the Public Service Regulations contained in Statutory Rules 1976 No. 96.

2. Statutory Rules 1976 No. 96 provides for new rates for the allowance entitlement in respect of the following periods:

1 January 1974 to 29 September 1974
30 September 1974 to 30 June 1975
After 30 June 1975

The opinion questions whether section 97(1)(j) of the Public Service Act 1922-1975 would authorize the prescribing of allowances retrospectively even for much shorter periods.

3. With one exception the amendment increases the rates of allowance payable to officers stationed at Broken Hill in respect of periods after 1 January 1974. In the case of a female officer under the age of 21, upon whom a person is not dependent for support, the rate of allowance is lowered from \$200 per year to \$3.50 per week in respect of the period 1 January 1974 to 29 September 1974.

4. The amendment on its face is a regulation for prescribing the allowances that may be paid to officers within the language of section 97(1)(j) of the Public Service Act. The possibility that the recipient of an allowance might not be in the Public Service when the amendment was made would not deprive the amendment of this character in whole or in part. The new allowance is

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payable, and only payable, in respect of a period of time when the officer was in the Public Service.

5. Invalidity would only arise therefore if there is some special rule against retrospectivity that is relevant. To the extent that the amendment operates to increase the previous allowance, there does not appear to be any such rule of law. On the contrary, sub-sections (1) and (2) of section 48 of the Acts Interpretation Act 1901-1973, particularly when read in the light of their history (see on this the article by Mr C.K. Comans, Q.C., in 27 A.L.J. 231, especially at p. 232), confirms that Commonwealth regulations may confer retrospective benefits. Section 48 is in a form which makes clear that regulations having retrospective effect can be made, so long as they observe the conditions laid down in the section.

6. A question does arise under section 48(2)(a) of the Acts Interpretation Act in relation to that part of the amendment that reduces the previous allowance payable to female officers under the age of 21. Section 48(2)(a) provides:

(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; or

7. The applicability of section 48(2) is a highly technical matter, which is examined at length in Mr Coman's article. Different views may, I think, be taken as to its applicability in the present case, but I have concluded that it should be assumed to be applicable, with the result that, so far as the amendment would operate to reduce the allowance payable before the making of the amendment, it should be regarded as void and of no effect. In other respects, it is legally valid.



(P. BRAZIL)
for Secretary

APPENDIX 'C'



PRIME MINISTER
CANBERRA

4 MAR 1976

Dear Senator Wood,

You wrote to me on 26 February 1976 concerning the amendment to the Film and Television School Regulations contained in Statutory Rules 1975 No. 196.

On 27 August 1974 Regulations were made under the Film and Television School Act 1973 (Statutory Rules 1974 No. 154) prescribing the fees and allowances that shall be paid to members of the Council of the Film and Television School other than the Director.

Those Regulations were deemed to have come into operation on 13 November 1973, the date on which members were appointed initially to the Council.

Paragraph 3 of the above Statutory Rules states "In these Regulations, reference to a member shall be read as references to such a person who is not a member of the Parliament of Australia or of a State of Australia or an officer of the Australian Public Service."

It was intended that members of the Parliament of Australia and officers of the Australian Public Service should be debarred from receiving sitting fees, but not members of a Parliament of a State of Australia.

Amending action was taken with gazettal on 21 October 1975, deleting reference to members of Parliament "of a State of Australia".

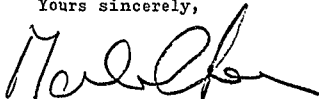
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Before the error was detected in March 1975 payments exceeding \$1,000 were made to the Chairman of the Schcol's Council, who is a member of the Legislative Assembly of Victoria, but no further payments were made until the amendment was gazetted on 21 October 1975.

Retrospectivity is necessary to cover the above payments.

Yours sincerely,



(Malcolm Fraser)

Senator I.A.C. Wood,
Chairman,
Senate Standing Committee
on Regulations and Ordinances,
Parliament House,
CANBERRA A.C.T. 2600

APPENDIX 'D'



DEPARTMENT OF OVERSEAS TRADE

17

TELEPHONE 72 3911

CANBERRA, A.C.T.

12 October, 1976

Senator I.A.C. Wood
Chairman
Standing Committee on
Regulations and Ordinances
The Senate
Parliament House
CANBERRA A.C.T.

Dear Senator Wood,

Statutory Rules 1976 No. 171
Amendment of the Trade Commissioners Regulations

1. The Minister has asked me to reply to your letter of 23 September 1976 requesting an explanation of the retrospectivity contained in amendments of the Trade Commissioner Regulation 23 contained in Statutory Rules 1976 No. 171. You also requested advice as to whether the Regulations are intended to validate payments which have already been made.

2. To provide a satisfactory explanation to the first question it is necessary to go into some detail.

Basis of Trade Commissioners' Allowances

Sections 4(2) and 6(3) of the Trade Commissioners Act provide that the salaries, allowances and conditions of service applicable to Trade Commissioners shall be as prescribed or as the Governor-General in any particular case determines.

Public Servants who are appointed as Trade Commissioners retain all existing and accruing rights in accordance with Section 6(1) of the Trade Commissioners Act, but additional conditions may be applied if they are prescribed or determined under Section 6(3) of the Act.

It is established practice to align conditions under the Trade Commissioners Act with those applicable to Australian Public Servants.

Introduction of Regulation 23

For many years prior to 1974, with the agreement of the Attorney-General's Department, the great majority of overseas allowances and conditions of service for Trade Commissioners were authorised in a series of "Schedules". The Schedules were approved by the Governor-General in Council and amended from time to time. In these circumstances there was seldom any delay or retrospectivity in passing on to Trade Commissioners new or varied salaries, allowances or conditions of service.

During 1972 and 1973 the Auditor-General questioned the validity of the Schedules referred to above. The Auditor-General was not satisfied that the Schedules approved by the Governor-General were valid. It was the Auditor-General's opinion that Regulations were a more appropriate authority for certain of these conditions of service and requested my Department to seek formal legal opinion.

My Department approached the Attorney-General's Department on 14 November 1973 and sought a legal opinion on the views expressed by the Auditor-General. In his reply of 14 January 1974 the Secretary, Attorney-General's Department, expressed the view that sixteen Schedules, including Schedule 9, Special Child Allowance, were more properly the subject for Regulation action.

On 22 February 1974, my Department advised the Attorney-General's Department that the opinion given in January 1974 was noted and the Department requested that the necessary Regulations be prepared.

1974 Increase in Special Child Allowance

On 19 June 1974 the Public Service Board issued Determination 678 of 1974 which increased the rates of Special Child Allowance with effect from 1 January 1974. In the normal course of events my Department would have at this stage approached the Governor-General to accordingly amend Schedule 9 applying these rates to Trade Commissioners, but in view of the action contemplated in the preceding paragraph, action was withheld pending the amendment to the Regulations.

An approach was made to the Attorney-General's Department at this time to try and reflect in the new Regulation 23 the increased allowances granted by the Board in Determination 678 of 1974. However, the advice from the Attorney-General's Department was that the new Regulation 23 currently then under draft would have to be a mirror image of the then existing Schedules and that any amendments necessary would have to be made after the new Regulation was promulgated.

The new Regulation was promulgated in October 1974 by Statutory Rule No. 194. This included Schedule 9 which covered Special Child Allowance, but, as explained in the foregoing paragraph, it merely authorised the rates which were current prior to the issue of Determination 678 of 1974.

In view of the long and protracted negotiations that had been undertaken to get the new Regulation approved, the Department thought that the Attorney-General's Department would, without further request or instructions despite its other drafting commitments and priorities, prepare immediately an amendment of the new Regulation 23 to vary Schedule 9 to bring Special Child Allowance rates up to date and in accordance with Determination 678 of 1974. However, this was not the case and accordingly on 13 March 1975 the Department formally approached the Attorney-General's Department requesting that Regulation 23, Schedule 9, be amended as indicated above.

1975 Increase in Special Child Allowance

On 22 July 1975 the Public Service Board issued Determination 635 of 1975 which further increased the rates of Special Child Allowance for Public Servants with effect from 1 January 1975. On 13 August 1975 my Department requested the Attorney-General's Department to include this further variation in the Regulation.

Drafting Delays

Oral contact was frequently maintained with the Attorney-General's Department on drafting progress concerning these two amendments to the Regulation. In a memorandum of 10 September 1975 to the Attorney-General's Department, my Department requested that priority be given to the preparation of draft Statutory Rules on several outstanding matters including Special Child Allowance. On 11 November 1975 my Department again formally expressed concern to the Secretary, Attorney-General's Department on the delays in preparing draft Statutory Rules and again requested that priority be given to Special Child Allowance. The Department pointed out the extent to which some Trade Commissioners were out of pocket because of the delay in amending the Regulations and of the possibility of objections by the Standing Committee on Regulations and Ordinances to the degree of retrospectivity now involved in this case.

Further reminders were sent at regular intervals and on 11 March 1976 the Attorney-General's Department advised in writing that they were drafting a new Regulation for Special Child Allowance and regretted that the volume of urgent work in the Legislative Drafting Division during the past year caused some delays in dealing with amendments to the Trade Commissioners Regulations.

On 11 May 1976 my Department again sought information as to when draft Statutory Rules for Special Child Allowance could be expected. In a memorandum of 27 May 1976 the Attorney-General's Department advised that a draft of the new provisions for Special Child Allowance would be forwarded within a week. The draft was received on 28 May 1976.

The draft was examined by my Department and returned to the Attorney-General's Department on 8 June 1976, together with suggested amendments. Further discussions with officers of my Department and Attorney-General's Department followed before full acceptance was reached to the amendments contained in Statutory Rules 1976 No. 171.

Summary

Retrospectivity was therefore caused by:-

The retrospective application of the Public Service Board's Determination of 19 June 1974 which was effective from 1 January 1974.

Regulation 23 was made four months after the Public Service Board's Determination. Due to a misunderstanding, a delay of five months occurred before my Department made a formal request for amendment of the Regulation. A further period of seventeen months elapsed before the final draft of the Regulation was completed and its making and promulgation arranged. The time taken in drafting was extended in part by the competing legislative drafting priorities of this and other Departments.

The drafting also took longer than at first expected because, in the initial approach, it was thought that it would be necessary to incorporate detailed provisions in the Regulations along the lines of the present relevant provisions in the Schedule to the Trade Commissioners Regulations and the relevant Determination of the Public Service Board with regard to officers of the Public Service of the Commonwealth.

A lengthy draft was prepared, discussed and revised. It was intended to use that draft as a model for the amendments dealing with other entitlements of Trade Commissioners and Assistant Trade Commissioners. Ultimately, it was decided that entitlements could be given to Trade Commissioners and Assistant Trade Commissioners by reference to the corresponding entitlements of officers of the Australian Public Service.

Although this approach was used in Statutory Rules 1976 No. 171, and is proposed to be used in the amendments still to be made, it still makes it necessary to examine carefully the Determinations made under the Trade Commissioners Act, including the Commissioners Regulations, and the relevant Determinations made by the Public Service Board in relation to officers of the

Australian Public Service.

Many provisions in those Determinations, although found workable by the administering officers, are not in a form satisfactory from the legislative drafting point of view and raise problems, adding to the time required for drafting.

3. Details of Payments Made

(a) Trade Commissioners appointed from the Public Service were paid the 1974 increased rate of Special Child Allowance and also the 1975 increases under the provisions of the Public Service Act in accordance with Section 6(1) of the Trade Commissioners Act.

(b) Trade Commissioners who were not previously officers of the Public Service were inadvertently paid the 1974 increased rates due to a Departmental oversight. However, payment of the 1975 increases were withheld pending approval of Statutory Rule 1976 No. 171.

4. I can assure the Standing Committee on Regulations and Ordinances that the Department is very conscious of the need to reduce retrospectivity to an absolute minimum. We are also, of course, anxious that these delays should be reduced to a minimum as certain Trade Commissioners are unable to be paid the increased rates of allowance until the increase is prescribed by Regulation.

Yours sincerely,



(S. BURTON)
DEPUTY SECRETARY