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AUSTRALIAN SENATE

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STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-SIXTH REPORT

DISALLOWANCE OF A REPEALING INSTRUMENT
ONUS OF PROOF IN CRIMINAL CASES
LEGISLATION CONSIDERED 1978-79

JUNE 1979

THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-SIXTH REPORT

Disallowance of a Repealing Instrument

Onus of Proof in Criminal Cases

Legislation Considered 1978-79

JUNE 1979

MEMBERS OF THE COMMITTEE

Senator A.J. Missen (Chairman)
Senator the Hon. J.L. Cavanagh (Deputy-Chairman)
Senator N.T. Bonner
Senator G.J. Evans
Senator G. Georges
Senator D.J. Hamer, D.S.C.
Senator A.W.R. Lewis

PRINCIPLES OF THE COMMITTEE

The Committee scrutinises delegated legislation to ensure:

Adopted 1932
Amended 1979

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for Parliamentary enactment.

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STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-SIXTH REPORT

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

- 2 This Report deals with two matters, the disallowance of a repealing instrument and the onus of proof in criminal cases, which the Committee has considered and on which recommendations are made, and with various items of delegated legislation considered by the Committee since its Sixty-first Report of June 1978.

DISALLOWANCE OF A REPEALING INSTRUMENT

- 3 The Committee has considered the question of whether the disallowance of an instrument made by the Executive Government under an Act of the Parliament, such as a regulation, which repeals another instrument, has the effect of reviving the repealed instrument. This question was raised in the Senate during the debate upon the Foreign Antitrust Judgments (Restriction of Enforcement) Act on 1 March 1979. The Attorney-General furnished an opinion on the matter, and this opinion was laid before the Committee for its consideration, as it is a matter which intimately concerns the effectiveness of the Committee in scrutinizing delegated legislation. The Attorney-General's opinion is contained in Appendix 1 of this Report.
- 4 The common law rule relating to statutes is that the repeal of an Act which repeals another Act has the effect of reviving the repealed Act. The High Court in Dignan's case (1931 46 C.L.R. 73) made it clear that this common law rule applies to the disallowance of a regulation, so that in the absence of a statutory provision to the contrary the disallowance of a regulation which repealed another regulation would have the effect of reviving the repealed regulation. The rule would presumably also apply to instruments other than regulations.
- 5 The common law rule has, however, been modified by section 7 of the Acts Interpretation Act, which provides that the repeal of an Act which repealed another Act does not have the effect of reviving the repealed Act. Other provisions in the Acts Interpretation Act would seem to clearly indicate that this rule of non-revival also applies to the repeal of a regulation and to the disallowance of a regulation. The relevant sections are contained in Appendix 2 of this Report. Section 48(6) of the Act

provides that the disallowance of a regulation shall have the same effect as the repeal of the regulation, while section 46(a) provides, inter alia, that the Act applies to instruments made under Acts as if such instruments were Acts. The combined effect of these provisions in the Act would clearly seem to be that the rule of non-revival applies to the disallowance of a repealing regulation, and probably to the disallowance of other instruments. The High Court so found in the Women's Employment Regulations case (1943 67 C.L.R. 347).

- 6 Some doubt was thrown over the whole subject, however, in 1974. The Senate had disallowed certain amendments of the Matrimonial Causes Rules which had repealed certain important provisions in the principal rules. If the rule of non-revival applied to the disallowance of these rules a void would have existed in part of the previously existing law of matrimonial causes. The question came before the courts in Mangano (1974 4 A.L.R. 303), and the court obviously felt the need to avoid the undesirable situation of the disallowance leaving part of the previously existing law in its repealed state. The court ruled that the disallowance of the rules did have the effect of reviving the repealed rules. To support this conclusion, the court decided that sections 7 and 46(a) of the Acts Interpretation Act do not apply to the repeal or disallowance of Matrimonial Causes Rules. The court also decided that sections 7 and 46(a) do not apply to the repeal or disallowance of regulations, either. The basis of this was that the Act contains in section 50 a more limited statement of the effect of the repeal of regulations, and this section should be regarded as dealing exclusively with the subject. (Section 50 provides that the repeal of regulations does not affect rights, privileges, obligations, liabilities, penalties, forfeitures or punishments, or investigations, legal proceedings or remedies relating thereto, under the repealed regulations.)
- 7 Not only is the effect of disallowance of a repealing regulation in doubt, but so also is the effect of the repeal of such a regulation.
- 8 It should be noted that the foregoing has no application to ordinances of the Australian Capital Territory. Section 12(6) of the Seat of Government (Administration) Act, which is contained in Appendix 3, provides that the disallowance of an ordinance which repeals a law in force in the Territory has the effect of reviving the previous

law. In other words, the common law principle applies to the disallowance of A.C.T. ordinances. Presumably this provision was enacted so that section 46(a) of the Acts Interpretation Act would not apply to A.C.T. ordinances. (This provision would not have had effect if the A.C.T. Termination of Pregnancy Ordinance 1978 had been disallowed in accordance with the motion debated in the Senate on 9 November 1978 because the law which was repealed by that ordinance had expired by the effluxion of time. Nor was this provision entirely effective in the case of the disallowance by the Senate of the A.C.T. Evidence Ordinance 1971 on 19 August 1971, because part of the law existing before that ordinance was repealed by another ordinance.)

- 9 In his opinion on the orders under the Foreign Antitrust Judgments (Restriction of Enforcement) Act, the Attorney-General has not adverted to the doubt which has been cast over the whole subject by the Mangano case. Instead the Attorney-General relies on section 50 of the Acts Interpretation Act and the concept of a right accruing to a person as a result of a rescission of an order, that is, a right to the enforcement of a judgment of a foreign tribunal, and argues for the rule of non-revival on the basis that the disallowance of a rescinding order could not destroy such a right which had accrued to a person as a result of that rescinding order. This may be a way of overcoming the difficulties raised by Mangano, but it has limited application to regulations and other instruments, and seems at first sight to the Committee to be more tenuous than the principle of non-revival based upon section 46(a) of the Acts Interpretation Act.
- 10 The obvious solution to the whole problem is for the Acts Interpretation Act to be amended so as to explicitly provide for the effect of the disallowance of a repealing instrument. The legislature should clear up the doubt about the whole matter and not leave it to the courts to decide in particular cases. The question of legislative policy which the Committee considered is whether the common law rule of revival should apply to regulations and other instruments as it does to A.C.T. ordinances.
- 11 There are very strong arguments in favour of the common law rule of revival being applied to the disallowance of regulations and other instruments. First, this would avoid

the situation of the disallowance of an instrument creating a "vacuum" in the law, which is embarrassing to the legislature and to the courts and which may cause grave difficulties for would-be litigants and other citizens. Secondly, the revival rule would greatly strengthen the hand of the Parliament in its control over delegated legislation. The non-revival rule means that the Parliament is powerless to prevent the Executive from repealing an instrument which the Parliament may not wish to have repealed, because the disallowance of the repealing instrument does not revive the one which has been repealed.

- 12 There are two arguments which seem to the Committee to be of less force in favour of the principle of non-revival. First, the Parliament in disallowing a repealing instrument may not wish to revive the one which has been repealed. For example, a House of the Parliament may disapprove of a regulation which is intended to replace an unsatisfactory regulation, and may wish to express its disapproval of the new regulation without reviving the old one. Secondly, there is the matter referred to by the Attorney-General in his opinion, namely, that the common law rule of revival would give one House of the Parliament the power to revive a repealed instrument and thus raise the question of the powers of the other House. This argument, however, is somewhat modified by the fact that either House of the Parliament already has the power to veto a Bill and to disallow a regulation regardless of the wishes of the other House in the matter.
- 13 Perhaps the strongest argument in favour of the common law rule of revival is that it already applies to the disallowance of A.C.T. ordinances, and in the two cases, referred to above, in which the disallowance of an A.C.T. ordinance created, or would have created, confusion and difficulty, the confusion and difficulty were due to peculiarities of the law of the Territory which prevented the common law rule as provided in the Seat of Government (Administration) Act from applying.
- 14 On balance, therefore, the Committee has come to the conclusion that the common law rule of revival should by statute be applied to the disallowance of all instruments. The Committee recommends that a statutory provision to the same effect as section 12(6) of the Seat of Government (Administration) Act should be applied to instruments made under Acts of the Parliament.

THE ONUS OF PROOF IN CRIMINAL CASES

- 15 The Committee has considered the law relating to the onus of proof in criminal matters. The Committee was led to this consideration by provisions in delegated legislation which place the burden of proof upon the defendant. In 1975 the Committee examined certain amendments of the Australian Capital Territory Motor Traffic Ordinance. The Committee accepted an undertaking from the then Attorney-General that certain changes would be made to prosecution procedures in the Territory. This undertaking had not been carried out by late 1978, when the present Attorney-General indicated that he was not able to carry out the undertaking of his predecessor, and made submissions to the Committee on matters of law concerned with the onus of proof. In 1979 the Committee examined the Australian Capital Territory Poisons and Narcotic Drugs Ordinance, which also raised questions relating to the onus of proof. Further reference to these two ordinances will be made later in this Report.
- 16 At common law the burden of proof is entirely upon the prosecution in a criminal case. This was finally established by Woolmington (1935 A.C. 462) and clarified by Mancini (1942 A.C. 1). The standard of proof required is proof beyond reasonable doubt. Where a defendant has a defence available to him at common law, with the one exception of the defence of insanity, the defendant must produce evidence of that defence, but the burden of proof remains on the prosecution throughout:

"The accused, either by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes duress a live issue fit and proper to be left to the jury. But, once he has succeeded in doing this, it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion." (Gill 1963 47 Cr. App. R. 166)

This judgment, which was concerned with the common law defence of duress, very clearly expresses the distinction between what has been called the evidential burden, in the case of a common law defence resting upon the accused, and the persuasive burden or the burden of proof properly so called. At common law the burden resting upon the accused is always evidential and not persuasive, with the one exception of the defence of insanity.

- 17 The common law principle that it is the duty of the prosecution to prove the guilt of the accused has been called the "golden thread" of common law (in Woollington), but the principle has been considerably modified by statutory provisions, including provisions in delegated legislation. There are now a considerable number of statutory provisions in the law of the Commonwealth which place the persuasive burden upon the accused in criminal matters.
- 18 There are some statutory provisions which explicitly state that the burden of proving certain matters rests upon the defendant. For example, section 21C of the Crimes Act provides that where lawful authority or permission is a defence to a criminal charge under any law of the Commonwealth, the burden of proving that lawful authority or permission rests upon the person accused. Where a statutory provision explicitly places the burden of proof upon the defendant in this fashion, the courts have held, after some vacillation on the question, that a persuasive burden rests upon the accused. The standard of proof, however, is not proof beyond reasonable doubt but the civil standard, that is proof upon the balance of probabilities (Carr-Briant, 1943 1 K.B. 607).
- 19 Even where a statutory provision provides a defendant with a defence or some other matter which may be raised in his favour, without explicitly imposing the burden of proof upon him, courts have often held that such provisions impose a persuasive burden upon the accused. The interpretation by the courts of what have been called implied statutory reversals of the onus of proof is a complex matter, and this report will not deal with it in any detail. The case law on the subject is by no means consistent, and there seems to be a tendency for the courts to lean more and more towards placing the persuasive burden upon the accused. As one authority has put it:
- "It may be thought....that a judge is justified in finding a statutory reversal of the persuasive burden only where Parliament has used the clearest language to this end. Yet the judges have sometimes expressed themselves as ready to act on quite frail indications." (Glanville Williams, Criminal Law: The General Part, 2nd ed. p. 900).
- In a recent case brought to the attention of the Committee (Johnson 1976 136 C.L.R. 619) the High Court dealt with a provision in a New South Wales statute which, to put it briefly, set down a defence of provocation whereby a finding of murder could be reduced to one of manslaughter. The court held that the persuasive burden rested upon the accused, notwithstanding the absence of any words in the statute to so indicate.

- 20 The provisions in the A.C.T. Motor Traffic Ordinance and the A.C.T. Poisons and Narcotic Drugs Ordinance which were of concern to the Committee established certain defences, and explicitly provided that the defendant is required to prove those defences. These provisions would almost certainly be interpreted by the courts as placing a persuasive burden upon the accused, with the civil standard of proof. As the foregoing discussion indicates, it is by no means easy to frame statutory provisions with the certainty that they will not be interpreted by the courts as reversing the persuasive burden.
- 21 All of the foregoing has been the subject of considerable confusion, some of which has been attributable to the courts themselves. This confusion has apparently extended to the Attorney-General's Department itself, as the following passage from a letter to the Committee from the Attorney-General indicates: "The Committee may still be of the view that provisions of this kind (the provisions, already referred to, in the A.C.T. Motor Traffic Ordinance) constitute a reversal of the onus of proof. This is not the case, as the prosecution must establish the existence of the basic elements of the offence beyond reasonable doubt. The defendant may raise a statutory defence and need only establish its existence on the balance of probabilities. This is a common situation in the criminal law, c.f. the defences of provocation and self-defence to murder." This statement appears to be challengeable on three grounds: first in claiming that the burden on the accused of proving defences upon the balance of probabilities does not amount to a reversal of the onus of proof, secondly in stating that this is a common situation in the criminal law, when in fact it is alien to the common law, and thirdly in citing the examples of provocation and self-defence, which are common law defences.
- 22 There is a strong case for ensuring, as a matter of legislative policy, that throughout the criminal law the burdens placed upon the accused are evidential burdens only and not persuasive burdens. This case was very well stated in the Eleventh Report of the English Criminal Law Revision Committee. The following is a brief summary of the relevant arguments of that Committee in favour of evidential burdens only being imposed on defendants, with two minor exceptions:
- (i) This would be in accordance with the principles of the common law, which, with one exception, has not found it necessary to impose any persuasive burdens upon defendants.

- (ii) It is repugnant to principle that a person should be convicted even though the tribunal of fact is left with a reasonable doubt as to his guilt. This situation can arise where the accused relies upon a statutory defence.
- (iii) The real purpose of placing burdens upon the defence, to relieve the prosecution from having to negative all possible defences in advance of their being raised, is sufficiently served by making the burdens purely evidential.
- (iv) Juries have difficulty in understanding the difference between the burden on the prosecution of proving matters beyond reasonable doubt and the burden on the defence of proving matters on the balance of probabilities.
- (v) Judges have found it difficult to clearly direct juries on the matter.
- (vi) The principle of placing only an evidential burden upon the accused was adopted in England in the reform of the law of theft in relation to the offence of going equipped for stealing, where previously a persuasive burden was upon the accused. (S. 25(3) of the English Theft Act 1968 was followed by s. 91 of the Victorian Crimes Act in 1973; a similar provision was proposed in the Draft Criminal Code for the Australian Territories, 1969, s. 150(2).)

As the English Committee put it, the reduction of all burdens upon the defence to evidential ones is desirable both in principle and for the sake of clarity and convenience in practice.

- 23 It is the belief of the Committee that the persuasive burden should not be upon the defendant in criminal matters, particularly in delegated legislation. The conclusion of the Committee is that this can best be achieved by the enactment of a statutory provision such as was recommended by the English Criminal Law Revision Committee. That recommendation does not seem to have been adopted yet, but that may be due to the disputation about the other more controversial recommendations of that Committee's report. In any case, a lack of action in England should not be a reason for lack of action in Australia.

- 24 The Committee considers that this matter is one of legislative policy which is not strictly within its jurisdiction, and the Committee therefore does not intend to make a firm policy recommendation. The Committee does recommend, however, that the matter of statutory provisions imposing the burden of proof upon defendants in criminal cases be referred to the Standing Committee on Constitutional and Legal Affairs.
- 25 The Committee has put to the Attorney-General its views on this matter. The Committee's consideration of the A.C.T. Motor Traffic Ordinance is effectively in abeyance pending consideration of the legislative policy. In relation to the A.C.T. Poisons and Narcotic Drugs Ordinance, the Committee has received an undertaking from the responsible Minister that if the ordinance cannot be amended to the satisfaction of the Committee, a Bill will be introduced to repeal and replace the ordinance. The Committee will further consider the ordinance in the light of this undertaking, and will report to the Senate in more detail upon it.

HISTORIC SHIPWRECKS REGULATIONS

offences: the defence of reasonable excuse

- 26 These regulations were discussed in the Committee's Sixty-third Report, and were the subject of a recommendation in that report that they be disallowed. They provide that it is an offence, punishable by a heavy penalty, to bring a ship, or a ship bearing certain materials, into a protected zone, or to carry on certain activities in a protected zone. The Committee considered that there was some danger of persons being unjustly convicted under the regulations unless the defence of reasonable excuse was provided. The responsible Minister expressed some doubt whether the regulations could validly add to the defences already provided in the Historic Shipwrecks Act.
- 27 After the presentation of the Committee's report, the Minister gave an undertaking that he would have the regulations amended so as to overcome the objection raised by the Committee, and that to remove any doubt about the validity of such an amendment an appropriate amendment of the Act would be sought. On the basis of this undertaking, a notice of motion for the disallowance of the regulations was withdrawn.

NATIONAL HEALTH REGULATIONS

benefits of approved patients: rights of appeal

- 28 The amendments of these regulations contained in Statutory Rules 1978 No. 178 empower the permanent head of the Department of Health to make a number of decisions affecting

the rights of approved patients according to his satisfaction as to certain things. The Committee noted that the National Health Amendment Act 1978 provides a right of review in relation to decisions which the permanent head is empowered to make under that Act. The Committee considers that the decisions empowered by the regulations are of sufficient importance to warrant a right of review by the Administrative Appeals Tribunal. The Minister for Health agreed with this contention, and gave an undertaking that the regulations would be amended so as to provide such a right of review. That amendment has now been made.

REGULATIONS UNDER THE QUARANTINE ACT

powers of officers: rights of appeal

- 29 The Committee examined the amendments of the Quarantine (Animals) Regulations contained in Statutory Rules 1978 No. 174. The Committee appreciates the importance of these and other regulations under the Quarantine Act in seeking to exclude from Australia exotic and highly dangerous diseases, and the Committee also appreciates that in order to achieve this purpose it is necessary for the regulations to confer upon quarantine officers considerable powers. The Committee notes, however, that these and other regulations under the Act empower officers to take action affecting the rights of persons in accordance with their opinions as to matters of fact. While not pursuing the matter in relation to these particular regulations, the Committee has expressed to the Attorney-General its opinion that this type of provision is clearly appropriate for some kind of review.

SCHOOLS COMMISSION REGULATIONS

payment of allowances: ministerial discretion

- 30 The amendment of these regulations contained in Statutory Rules 1978 No. 81 confer a discretion upon the Minister for Education to pay certain allowances. The Committee can see no reason for the inclusion of this discretion in the regulations, and considers that the conditions of payment of the allowance should be stated objectively, as is done with other allowances under the regulations. The Minister for Education agreed that the discretion is unnecessary and gave an undertaking that the regulations would be amended so as to provide objective conditions for the payment of the allowances in question. That amendment has now been made.

STUDENT ASSISTANCE REGULATIONS

rights of applicants for assistance

- 31 The Committee closely examines the regulations relating to the rights of students to Commonwealth assistance, recalling that the Senate insisted in 1969 on the principle that these rights should be determined by regulations containing objective criteria for the payment of assistance and not by Ministerial fiat or discretion. The rights of students to assistance is also a matter of considerable concern to the community.
- 32 The amendments of these regulations contained in Statutory Rules 1978 No. 264 restrict the relief granted to applicants for assistance whose studies are affected by illness to the situation where the applicant was not suffering from such illness at the commencement of his course of study. The Committee considers that this restriction is reasonable, but that it might operate unfairly where a student was suffering from the illness at the commencement of his studies but the illness had not been diagnosed. The Minister has agreed that the regulations should be amended to remove the possibility of such an unfair effect, and that pending the amendment the regulations will be administered so as to take account of the point raised by the Committee. The Minister has also agreed to amend the principal regulations so as to extend the provisions for the acceptance of late applications to certain applications to which such provisions do not presently apply.

DRIED FRUITS EXPORT CONTROL (LICENCES) REGULATIONS

licences: rights of appeal

- 33 These regulations, as contained in Statutory Rules 1978 No. 284, regulate the export of dried fruits by means of licences. The Committee appreciates that similar licensing provisions apply in relation to other primary products, and that a licensing system has been found to be necessary for orderly marketing of primary products for export. For this reason the Committee has not in the past interfered with such licensing provisions.
- 34 The Committee is of the opinion, however, that since the livelihood of individual producers depends upon their obtaining renewal of their licences, consideration ought to be given to providing some review, perhaps by the Administrative Appeals Tribunal, of decisions in relation to licences. The Tribunal already has the power to review decisions of other licensing authorities.

- 35 The Minister for Primary Industry has assured the Committee that these particular regulations are to be reviewed, and that provision will be made for review of decisions on the granting of licences. While accepting this assurance, the Committee has sought from the Minister some indication of the nature of the review to be provided and of whether review of licensing decisions will be extended to other primary products.

POSTAL BY-LAWS

non-redirectable mail

- 36 Amendment No. 4 of 1978 of these by-laws allows the Postal Commission to provide a special service for non-redirectable mail. A sender may specify that certain mail is not to be redirected. Special envelopes are to be used for such mail, bearing the sender's name and address, and the recipient must be notified that the sender is despatching non-redirectable mail to him.
- 37 This amendment of the by-laws was the subject of considerable controversy because it was contemplated that the non-redirectable mail service would be used by the Department of Social Security, and it was said that this would involve infringement of individual privacy.
- 38 The Committee considers that since this contemplated use of the amendment does not appear on the face of the amendment itself, and since the service to be provided is in itself unobjectionable, it would not be proper for the Committee to take action against the amendment merely on the basis that it might be put to an unacceptable use.

TELECOMMUNICATIONS (GENERAL) BY-LAWS

cancellation of services: right of appeal telephone directories: offences

- 39 Amendment No. 15 of these by-laws empowers the Telecommunications Commission to require a telex subscriber to install an additional service or to cancel an existing service when, in the opinion of the Commission, the existing service is overloaded. The Committee considers that this power given to the Commission is an important one and affects in a fundamental way the rights of subscribers, and that an appeal to the Administrative Appeals Tribunal ought to be provided in relation to this power, as is already done in relation to other decisions of the Commission under the by-laws. The Minister for Post and Telecommunications has agreed with this contention, and the by-laws have now been amended to provide such an appeal to the Tribunal.

- 40 Amendment No. 17 of these by-laws contained a new by-law which prohibited the enclosure of a telephone directory in a cover bearing an advertisement, or the attachment of an advertisement to any part of a directory. This by-law was intended to protect those who pay for advertisements in telephone directories from unfair competition by others seeking to use the directory as a means of advertising without paying for it. In particular, the by-law was intended to inhibit the activities of a firm which was producing adhesive advertising labels intended for insertion in telephone directories.
- 41 The Committee was not concerned with the policy of the by-law, but considered that it was doubtful whether this regulation of the use of directories was authorised by the Telecommunications Act, and was concerned that a person who inserted material in his telephone book for his own personal information and use in his own home might be found guilty of the offence provided by the by-law.
- 42 Following communication between the Committee and the Minister for Post and Telecommunications on this matter, the Telecommunications Commission repealed the by-law and replaced it with a new provision. The new by-law provided that it would be a condition of the supply of a telephone directory that the directory not be placed in a cover bearing advertisements or have advertisements attached to it, and that the Commission might demand the return of any directory so treated. It would be an offence punishable by a fine of \$20 to refuse to return such a directory upon demand. The Committee considered the new by-law and decided that, as it substantially overcame the matters raised by the Committee, no action would be taken in relation to the new by-law. The by-law was, however, the subject of a notice of motion of disallowance in the House of Representatives. As this notice had not been resolved after 15 sitting days of that House, the by-law was deemed to be disallowed.

A.C.T. TERMINATION OF PREGNANCY ORDINANCE

- 43 The amendment of this ordinance contained in Australian Capital Territory Ordinance No. 16 of 1978 was the subject of a disallowance motion and a great deal of debate in the Senate. The ordinance had the effect of prohibiting the termination of pregnancy except in a hospital and it did not alter the substantive law in relation to the termination of pregnancy. The Committee considered that the ordinance did not offend against any of the Committee's principles.

A.C.T. CHILD WELFARE ORDINANCE

government control of children: right of appeal

- 44 In examining an amendment of this ordinance, the Committee observed that where a child is committed to what the ordinance calls "government control" by a decision of the Minister for the Capital Territory, that decision cannot be challenged in the courts until a period of twelve months has elapsed. While children who are in the custody of their parents cannot be so committed without the parents' consent, the Committee regards the twelve months waiting period as an undue restriction of the judicial review of this very important power of the Minister. The Minister has agreed to amend the ordinance so as to allow appeal to the courts at any time. The Minister has also agreed to consider the question of whether the provisions of the ordinance are important enough to warrant an Act of Parliament, in conjunction with his consideration of the report of the Law Reform Commission on child welfare law in the Territory.

OUTSTANDING UNDERTAKINGS BY MINISTERS

- 45 In its Sixty-second Report the Committee expressed its concern about the inordinate delays in the carrying out of ministerial undertakings to amend regulations and ordinances. That report was debated in the Senate on 28 September 1978, 22 February 1979 and 5 April 1979. A Ministerial Statement was made upon the report, and the Senate passed the following resolution:

"That the Senate take note of the statement, and note with concern the failure of some Ministers and departments promptly to carry out undertakings given to the Standing Committee on Regulations and Ordinances to amend unsatisfactory legislation, as recorded in the Sixty-second Report of the Committee."

- 46 The Committee now reports that the following undertakings by Ministers have not been carried out:

A. Reported in the Sixty-second Report

- (i) Postal Services Regulations: provisions allowing the opening of mail by officers: undertaking given 5 November 1975. This undertaking was delayed by the consideration of the opening of mail by the Law Reform Commission and the Royal Commission on Drugs. The responsible Minister has now agreed not to await the reports of those bodies and to proceed with the promised amendments.

- (ii) Regulations under the Customs Act: rights of appeal against administrative acts: undertaking given 16 March 1976. This matter is still under consideration by the Administrative Review Council.
- (iii) A.C.T. Consumer Affairs Ordinance: power of officers to compel documents; self-incrimination of persons supplying information; immunity of officers from court orders and legal proceedings: undertaking given 17 August 1977. The responsible Minister has advised that the promised amendments are still being drafted.
- (iv) A.C.T. Sale of Motor Vehicles Ordinance: powers of registrar to determine disputes: undertaking given 20 October 1977. The promised review of the ordinance has not been completed, but the responsible Minister has assured the Committee that the provisions in question are not being used.

B. Undertakings given since the Sixty-second Report

- (i) Historic Shipwrecks Regulations: absence of defence of reasonable excuse: undertaking given 15 November 1978.
- (ii) Student Assistance Regulations: illness of student affecting studies: undertaking given 28 March 1979. Time limits for applications: undertaking given 19 April 1979.
- (iii) Dried Fruits Export Control (Licences) Regulations: review of licensing decisions: undertaking given 28 March 1979.
- (iv) A.C.T. Child Welfare Ordinance: committal of children: right of appeal: undertaking given 4 June 1979.

47 A number of undertakings by Ministers have been carried out since the Sixty-second Report.

J.L. CAVANAGH
Deputy-Chairman

7 June 1979



ATTORNEY-GENERAL
 PARLIAMENT HOUSE
 CANBERRA ACT 2600

3- APR 1978

Dear Senator Hamer,

During the debate on the Foreign Antitrust Judgments (Restriction of Enforcement) Act on 1 March 1979 you asked me whether a rescinding order by an Attorney-General would be subject to disallowance by either House of Parliament, and whether the disallowance of that rescinding order would revive the original order.

In reply I informed the Senate that in the time that had been available to check on the position my views, and those of my advisers, were that the situation would be covered by the Acts Interpretation Act, that accordingly a rescission order would be tabled and itself be subject to disallowance, but that disallowance of a rescission order would not revive the original order.

I write now to inform you that, having given these questions further consideration, I have concluded that the views I expressed to the Senate are correct.

The Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 does not itself provide expressly for the Attorney-General to be able to rescind an order he has made. However, that power is to be found in s. 33(3) of the Acts Interpretation Act 1901, which for convenience I shall quote:-

"(3) Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument."

This provision does not operate as a separate power; it requires an instrument-making power conferred by another provision, in this case s. 3(2) of the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979, to be construed as including the power to rescind. The rescission power is to be exercised in the like manner and subject to the like conditions as the power to make the original instrument.

It follows from this that a rescission of an order made under s. 3(2) of the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 would need to be effected by an order under the same section, be published in the Gazette, have effect from the date of publication and be subject to disallowance in accordance with the procedure in s. 48 (other than paragraphs (a) and (b) of sub-s. (1) and sub-s. (2)) and s. 49 of the Acts Interpretation Act.

There remains the question whether such a disallowance would have the effect of reviving the original order.

For this purpose it is necessary to apply s. 48(6) of the Acts Interpretation Act to the rescission in like manner as that provision applies to regulations. In the case of a regulation, s. 48(6) provides for disallowance to have the same effect as a repeal of the regulation, and that effect is stated in s. 50. In particular, paragraph (a) of s. 50 provides that, in the absence of a contrary intention, a repeal shall not affect any right accrued under the repealed regulation.

As I have indicated above, a rescission order would have effect from the date of its publication in the Gazette. On that date a right would be acquired to enforce the judgment in question according to its tenor. Applying s. 50 that right would not be affected by the notional repeal of the order by its disallowance.

That appears to me to be the legal position on the questions you raised. The disallowing House would not, in my view, have the legal power to ensure that the judgment in question was unenforceable to the extent provided in the original order. A proposal that it should have that power would plainly raise a number of questions including the powers of the other House. Nevertheless, as I commented in the Senate when you raised the matter, I think the Attorney-General would get the message and honour the reasons given by Parliament.

Yours sincerely,

sgd PETER DURACK

(PETER DURACK)

Senator D.J. Hamer, D.S.C.,
Parliament House,
CANBERRA, A.C.T. 2600

APPENDIX 2

ACTS INTERPRETATION ACT

ss. 7, 46(a), 48(6) and 50

Effect of
repeal of Act.
52 & 53 Vict.
c. 63, s. 11(1).

7. The repeal of an Act or part thereof by which a previous Act or part thereof was repealed shall not have the effect of reviving such last-mentioned Act or part thereof without express words.

46. Where an Act confers upon any authority power to make, grant or issue any instrument (including rules, regulations or by-laws), then—

Construction
of rules,
regulations
and by-laws.
Added by No.
10, 1937, s. 13.

- (a) unless the contrary intention appears, expressions used in any instrument so made, granted or issued shall have the same meanings as in the Act conferring the power, and this Act shall apply to any instrument so made, granted or issued as if it were an Act and as if each such rule, regulation or by-law were a section of an Act;

48. (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.

Effect of
repeal of
regulations.
Added by No.
10, 1937, s. 13.

50. Where an Act confers power to make regulations, the repeal of any regulations which have been made under the Act shall not, unless the contrary intention appears in the Act or regulations effecting the repeal—

- (a) affect any right, privilege, obligation or liability acquired, accrued or incurred under any regulations so repealed; or
(b) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any regulations so repealed; or
(c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act or regulations had not been passed or made.

APPENDIX 3

SEAT OF GOVERNMENT (ADMINISTRATION) ACT

s. 12(6)

12.(6.) Where an Ordinance or a part of an Ordinance is disallowed, or is deemed to have been disallowed, under this section, the disallowance has the same effect as a repeal of the Ordinance or the part of the Ordinance, as the case may be, except that, if a provision of the Ordinance or of the part of the Ordinance amended or repealed a law in force immediately before that provision came into operation, the disallowance revives the previous law from and including the date of the disallowance as if the disallowed provision had not been made.

Inserted by
No. 25, 1959,
s. 3.