



AUSTRALIAN SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-EIGHTH REPORT

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CONSIDERATION OF DRAFT LEGISLATION  
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JUDICIAL REVIEW OF ADMINISTRATIVE ACTS  
LEGISLATION CONSIDERED 1979

NOVEMBER 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.

## STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

### SIXTY-EIGHTH REPORT

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

- 2 This Report deals with a number of matters arising from the Committee's consideration of particular pieces of legislation, and with legislation considered by the Committee during the second half of 1979.

#### POWERS OF THE COMMITTEE

- 3 On 23 August 1979 the Senate, on the recommendation of the Committee, amended Standing Order 36A so that the Committee is now formally empowered to examine all delegated legislation which is subject to disallowance. As was indicated in the Sixty-second Report, this has not made any alteration to the manner in which the Committee works at present, since the Committee had already adopted the practice of examining delegated legislation other than regulations and ordinances. The Parliament has passed a number of Acts providing for the making of instruments subject to disallowance, and the Committee will now be able to determine in respect of each type of instrument whether it is legislative in character and requires scrutiny by the Committee.

#### STATUTORY PROVISIONS FOR DISALLOWANCE

- 4 The Committee has observed that a number of Acts providing for the disallowance by either House of the Parliament of statutory instruments made under those Acts do not contain certain desirable provisions applying to regulations in the Acts Interpretation Act. The Committee regards the following provisions for disallowance in the Acts Interpretation Act as conducive to effective parliamentary control, and they ought to be included in other disallowance provisions unless there are good reasons for variation:
  - (i) regulations are void and of no effect if not presented to each House of the Parliament within 15 sitting days after making;
  - (ii) a notice of motion for disallowance must be resolved after 15 sitting days, otherwise the regulations are deemed to be disallowed;

motion was omitted. The Minister for Aboriginal Affairs has now proposed, and the Senate has accepted, an amendment to the Act to insert this provision. It is to be noted that declarations under the Act do not come into force until the time for disallowance has passed. Such a provision is favourable to parliamentary control, but is not suitable for application to all instruments, because it would impose long delays upon their coming into force.

- 7 The Committee recommends that for the effective parliamentary control of delegated legislation, the Parliament should amend all statutes providing for the disallowance of statutory instruments so as to incorporate the provisions listed above.

#### NOTIFICATION OF RIGHTS AND DUTIES

- 8 The Chairman of the Australian Law Reform Commission has suggested to the Committee that in its scrutiny of delegated legislation it should give particular attention to the need for provisions where appropriate to compel authorities to notify persons of the rights and duties which are granted or imposed by the legislation. This is a matter to which the Committee has adverted in the past in relation to particular pieces of legislation, but not in any systematic way. The Committee intends to adopt the suggestion of the Chairman of the Law Reform Commission, and will have regard to this matter in its scrutiny of delegated legislation. The Committee considers that this can be done under its existing principles.

#### ALTERATION OF ENTITLEMENTS BY REGULATION

- 9 During the debate in the Senate on 19 September 1979 on the Compensation (Commonwealth Government Employees) Amendment Bill 1979 the question was raised of the alteration by regulation of important entitlements under Acts of the Parliament. In the debate the Minister for Social Security suggested that the alteration of entitlements by regulation did not diminish parliamentary control of the matter, because the regulations would be subject to disallowance and would be scrutinised by the Committee. As was pointed out in the debate, however, the power to disallow regulations is of much less force than the power to make or request amendments of the amounts of entitlements in a Bill. Each House of the Parliament would hesitate to pass a disallowance motion which might have the effect of removing entitlements altogether. Moreover, this Committee could not, without a drastic alteration to its long established role, consider the merits of particular entitlements. For these reasons it

If Ministers continue the practice of referring drafts to the Committee the Senate will be asked to consider amending Standing Order 36A so as to explicitly authorise it.

#### EVIDENCE AMENDMENT ACT 1978

- 12 This Act contained a provision empowering various courts to make rules for the purposes of the Act. The Committee, having taken advice upon the matter, considered that there was some doubt whether rules made by courts pursuant to this Act would be subject to disallowance by either House of the Parliament, as are rules made by the various federal courts under other enactments. The Attorney-General considered that rules made under the Act probably would be subject to disallowance, but in order to remove any doubt he undertook to introduce an amendment of the Act so as to make it clear that the rules would be subject to disallowance. The promised amendment was duly introduced in the Evidence Amendment Bill 1979.

#### JUDICIAL REVIEW OF ADMINISTRATIVE ACTS

- 13 The Committee has always followed the principle that where officials are empowered to take action which affects in an important way the rights and liberties of individuals, the legislation empowering such action ought to be so drafted as to allow the merits of the action to be challenged in the courts. This principle was invoked in the case of the Postal Services Regulations which were made in 1975. It appeared to the Committee that these regulations empowered officers to open mail where they considered that the required circumstances, for example, that the mail was posted contrary to law, existed. The Committee insisted that the regulations should be amended so that mail could be opened only where there were reasonable grounds for believing that the specified circumstances existed, so that a person aggrieved by the opening of his mail could contest the reasonableness of the action in the courts. (The Committee also insisted that a person should be notified when his mail was opened and of the reasons for it being opened.) As has already been reported to the Senate the promised amendments of the Postal Services Regulations have not yet appeared due to various circumstances, including the consideration of the opening of mail by the Law Reform Commission and the Royal Commission on Drugs.

## OMBUDSMAN REGULATIONS

- 15 In its Fifty-ninth Report the Committee expressed its concern that these regulations might have the effect of unduly restricting the jurisdiction of the Ombudsman, and thereby restricting the rights of the individual. The regulations excluded from the Ombudsman's jurisdiction a number of Commonwealth statutory authorities and companies on the ground that they are in competition with private enterprise and their commercial operations should not be subject to review. The Committee did not accept this ground for exclusion, and considered that at least the administrative acts of these bodies should be subject to the Ombudsman's jurisdiction.
- 16 In accordance with the undertaking which he gave to the Committee, the Prime Minister referred the Ombudsman's jurisdiction to the Administrative Review Council and has now made available to the Committee the Council's recommendations on the matter. The Committee considers that the Council's recommendations, if carried out, would remove the doubts which the Committee had about the regulations, and the Committee has advised the Prime Minister accordingly.

## AUDIT (EXEMPT ACCOUNTS) REGULATIONS

- 17 The Audit Act, as amended in 1979, empowers the making of regulations to prescribe particular Commonwealth departments and authorities. When a body is prescribed, the responsible Minister is empowered to make a declaration exempting all or part of the accounts of that body from scrutiny by the Auditor-General. When the regulations were made, the Committee was concerned to note that the Department of Business and Consumer Affairs was prescribed by the regulations. The Committee did not consider the prescription in the regulations of the Commonwealth intelligence and security organisations, because the question of whether these organisations ought to be exempt from audit was debated at length in the Senate. The Committee considered, however, that it was its duty to ensure that other bodies were not prescribed under the regulations without good reasons for doing so. In relation to the Department of Business and Consumer Affairs the responsible Minister gave a firm undertaking that the only

that, with the establishment of the Administrative Appeals Tribunal and the system for administrative review, the legislation empowering the licensing of exporters of primary products ought to provide for review of licensing decisions. The Minister has now given an undertaking that he will review all the relevant legislation and some amendments providing appeals to the Administrative Appeals Tribunal in respect of licensing decisions have already appeared.

#### FEDERAL COURT RULES

- 22 In accordance with the Federal Court of Australia Act the Judges of the Court have now made voluminous rules, which appeared as Statutory Rules 1979 No. 140. Bearing in mind the recommendations of the Standing Committee on Constitutional and Legal Affairs that rules of court should be subject to closer parliamentary attention, the Committee not only closely scrutinised the rules, as it would normally do, but asked the various law societies and bar councils for their comments on the adequacy of the rules in protecting the rights of litigants. As a result of the Committee's inquiries some minor suggested changes to the rules were referred to the Chief Judge of the Court for the consideration of the Judges.

required rectification. The Minister has undertaken to make amendments to the ordinance so as to overcome the difficulties pointed out by the Committee, and the Committee has agreed that these amendments may be postponed until a comprehensive review of the ordinance is undertaken by the Department of the Capital Territory and the A.C.T. House of Assembly.

- 26 Section 4 of the ordinance allows the Controller of Fuels to delegate his powers to any person. The Committee has long objected to unrestricted delegation, and the Minister has agreed to restrict the delegation to departmental officers. The ordinance allows service of notices by publication in a newspaper. The Minister has agreed that the normal method of personal service would be more appropriate. The ordinance confers upon officers powers of entry and search at reasonable hours for the purposes of the ordinance even in the absence of a declaration of emergency, and during the period of such a declaration these powers may be exercised at any time. The Minister has agreed to amend the ordinance so that these powers may be exercised only during an emergency and at reasonable hours. The Committee considers that where powers of entry and search are conferred upon specialised officers in legislation of this type, there ought to be provisions to ensure that these powers are used only for the purposes of the particular legislation. The Committee suggested that this might be achieved in this ordinance by the insertion of a provision to the effect that information gained by the powers under the ordinance cannot be used in any prosecution other than a prosecution under the ordinance. Such a provision has been used in other legislation, for example, in the A.C.T. Consumer Affairs Ordinance. The Minister has agreed to this suggestion.

#### NORFOLK ISLAND ORDINANCES

- 27 The Norfolk Island Act 1979 creates a new constitutional situation in that Territory. Whereas previously the laws of the Territory were made by the Governor-General, the Norfolk Island Legislative Assembly, which is fully elected, now has a general legislative power to make laws for the Territory, and in relation to some matters the Administrator is required to act on the advice of the local Executive, which is responsible to the Assembly. Laws made by the Assembly are not subject to disallowance by the Parliament. Under the Act the Governor-General does, however, retain a power to make ordinances for the Territory, and such ordinances are subject to disallowance by the Parliament. In accordance with Standing Order 36A the Committee will scrutinize only those laws made



controlled by permits. The Committee appreciates that it is necessary to control entry into the Territory for the protection of its inhabitants, but considers that the issue of permits ought not to depend upon the discretion of the Government, and that there should be a right of appeal, perhaps to the Administrative Appeals Tribunal, in relation to the issue of permits. This is obviously appropriate in respect of the re-entry of residents of the Territory, and is also appropriate in respect of Australian citizens who may have legitimate reasons for going to the Territory.

- 31 The Minister for Home Affairs agreed to refer the matter of entry into the external territories to the Administrative Review Council for the examination of the question of appeals. The Committee has been advised that the Council has concluded its consideration of this matter, and looks forward to the results of the Council's recommendations.

#### COCOS (KEELING) ISLANDS POSTAL SERVICES ORDINANCE

- 32 This ordinance, which was discussed above in connection with the question of judicial review of administrative decisions, also contained a power to make by-laws for the regulation of the postal service of the Territory. The Committee considered that these by-laws ought to be subject to disallowance by the Parliament, as are the by-laws under the Postal Services Act, particularly in view of the fact that the by-laws may impose penalties by way of fines of \$200 or imprisonment for six months. The Minister for Home Affairs has agreed with this contention, and has undertaken to amend the ordinance accordingly.

#### OUTSTANDING UNDERTAKINGS BY MINISTERS

- 33 Since the Senate passed the resolution expressing its concern about the failure of some Ministers and Departments promptly to carry out undertakings given to the Committee to amend unsatisfactory legislation, there has been some improvement in this regard. Most of the undertakings given to the Committee this year have been carried out with commendable promptness. All of the undertakings listed in the second part of Paragraph 46 of the Sixty-sixth Report have been carried out, with the exception of that relating to the Dried Fruits Export Control (Licences) Regulations. As was noted above, there has been some action on the undertaking given by the Minister for Primary Industry following the Committee's consideration