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THE SENATE.

TENTH REPORT

FROM THE

STANDING COMMITTEE

ON

REGULATIONS AND ORDINANCES

(BEING THE FIRST REPORT OF THE 1956 SESSION, AND THE TENTH REPORT SINCE THE FORMATION OF THE COMMITTEE).

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REGULATIONS AND ORDINANCES COMMITTEE

MINUTES OF EVIDENCE

(Taken at Canberra)

WEDNESDAY, 16TH MAY, 1956

PRESENT:

ACTING CHAIRMAN (Senator Arnold)

Senator Byrne Senator Willesee

Senator Laught Senator Wright

Senator Seward

OBSERVERS:

Mr. Ewens, Parliamentary Draftsman.

Mr. Hewitt, Treasury

Mr. Cox, Treasury.

FRANCIS JOSEPH MULROONEY, Assistant Secretary, Department of Air, Melbourne - sworn and examined.

THE CHAIRMAN. - Gentlemen, before we commence taking the evidence of Mr. Mulrooney perhaps, in order to make the matter clear, I should outline the purpose for which we are gathered this morning. This committee has been constituted according to the Standing Orders and all regulations and ordinances laid on the table of the Senate stand referred to this committee for consideration and, if necessary, report. Since 1932 the functions of the committee have been to scrutinise regulations and ordinances and to ascertain first, if they are in accordance with the Statute, secondly, that they do not trespass unduly on personal rights and privileges, thirdly, that they do not unduly make the rights and liberties of citizens dependent on administrative rather than judicial decisions, and fourthly, that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment. Mr. Mulrooney's presence here today is a result of a request made to the Minister for Air for an officer of his department to be made available to the committee to explain the reason and purpose of Statutory Rules 1955, No.92. When we examined this regulation previously it left grave doubts in the minds of the committee that it may transgress some of the four principles that I have read this morning. I understand that Mr. Mulrooney is aware of the correspondence that has passed between the committee and his department, and that the Parliamentary Draftsman is also clear about the whole matter. Perhaps now Mr. Mulrooney might set out to the committee the reasons why his department has made the regulation and whatever views it might have about it. After he has made the statement, the members of the committee may question him on any point that they feel should be cleared up.

THE CHAIRMAN. - Would you make a statement to the committee, Mr. Mulrooney, about the views of the Department of Air?-

Yes, I appreciate the reasons behind this investigation by the Senate Committee on Ordinances and Regulations, and therefore I think that I should start at the beginning of this matter. The principle in the regulation is not a novel one being injected into the Air Force Regulations. In fact, in 1928 by Statutory Rules 109 of 1928, Regulation 163A was inserted into the regulations. That regulation provided that where any loss or improper expense has in the opinion of the Air Board been caused or incurred by any member, there shall be chargeable against the pay and allowances including deferred pay of that member such amount as, ⁱⁿ the opinion of the Air Board, is necessary to re-imburse the C'wealth in respect of the loss or expense or any expenditure, and that amount may be stopped by the Air Board out of the pay and allowances of the member. That regulation continued in force until 1940 when it was repealed. The reason for the repeal was that in 1939 the Air Force Act 1923 was amended to provide for the application to the R.A.A.F. of certain parts of the Imperial Air Force Act. That decision was taken to bring the R.A.A.F. into line with the other Australian defence services which had had applied to them imperial legislation. That meant that we had to omit from the Air Force regulations all those regulations which related to discipline and which might be in conflict with or might duplicate some provision in the Imperial Air Force Act. The provision which enables substantially that principle to be continued in the Air Force legislation is contained in section 137 of the Imperial Air Force Act which provides for what is called penal deductions. That section reads, in part, as follows -

The following penal deductions may be made from the active pay due to an officer of the Permanent Air Force or the Citizen Air Force when called up for war service...

The particular paragraph of the section - 4 - states :-

The sum required to make good any loss, damage, or destruction of public or service property or property belonging to the Navy, Army and Air Force Institutes which, after due investigation, appears to the Air Board to have been occasioned by the wrongful act or negligence on the part of the officer.

In reading that regulation, I have modified and adapted it in accordance with the schedule to the Air Force Regulations. It does not read in that way, of course, in the original Imperial Air Force Act. That section applied, therefore, and continued the same principle substantially which had been included in Air Force Regulation 163A which I quoted to the committee earlier. There was one difference, however, and that was that while Regulation 163A applied to officers and airmen, Section 137 of the Imperial Air Force Act applied only to officers. In relation to airmen section 138 of the Imperial Air Force Act, the relevant section, as modified and adapted in accordance with the Air Force Regulations, provided that:-

The following penal deductions may be made from the ordinary pay due to an airman of the permanent Air Force or of the citizen Air Force when called out for war service.

(3) The sum required to make good such compensation for any expenses, loss, damage, destruction occasioned by the commission of an offence as may be awarded by the Court Martial by whom he is convicted of such an offence, or by the authority dealing summarily with the charge under Section 47 of this act, or if he is on board one of His Majesty's ships, by the Commanding Officer of that ship, or where he has confessed the offence and his trial is dispensed

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with by order under Section 73 of this act as may be awarded by that order or by any other order of a competent Air Force authority under that section. The committee will see, therefore, that the penal deduction could only be made where the airman was being dealt with for an offence.

SENATOR BYRNE. - Did I understand you to read "where he is called out for war service"? - That is, a member of the Permanent Air Force or of the Citizen Air Force called out for war service. That means to say, when he is on full time duty. War service means service during time of war or at a time in respect of which a proclamation has been issued declaring that a state of war exists.

SENATOR BYRNE. - It has a limited application? - Yes.

MR. EWENS. - But only as regards the Citizen Air Force? - Yes. I thought that Senator Byrne meant that by his question. To explain the matter, Section 138 states:-

The following penal deductions may be made from the ordinary pay due to an airman of the Permanent Air Force or of the Citizen Air Force when called out for war service.

Complaints had been made by the Auditor-General that Courts Martial and Commanding officers, when dealing with offences, were not adverting to the requirements of that section. When airmen were convicted of charges, either by a Court Martial or a commanding officer, they certainly received punishment, but that punishment did not provide also for penal deductions from their pay. That was one of the complaints.

SENATOR WILLESEE. - Although the power was there, was it not? - Yes, although it was there. That position, of course, obtained until this present regulation was gazetted in December 1955. In 1946, the Treasurer gave a direction as to how the people who were guilty of misconduct or negligence in regard

to their handling of public moneys and stores etc., should be dealt with, and on the 9th October, 1946 the Treasurer issued a memorandum stating:-

I have to advise (in relation to previous correspondence) that the Treasurer has now approved that action on the following lines be taken:-

- (a) that authority be provided in the regulations of the Navy, Army and Air conferring power on the Service Boards to require the recovery of a loss or deficiency by deduction from pay of the member responsible (such a provision already exists in Naval Financial Regulation 143A);
- (b) That a decision in regard to recovery may be taken by a Service Board without necessarily requiring as a preliminary a judicial investigation by a board of inquiry or a court martial.

The memorandum then goes on to give quite a number of detailed conditions and procedure in regard to the adjustment of these losses and deficiencies. It is some two pages in length, and I shall not read it unless the committee wishes me to do so.

SENATOR BYRNE. - Is there any part of it that you think is significant? - No. I think the principles are laid down in that paragraph I have just read.

SENATOR WRIGHT.- The witness might read the first two paragraphs as a sample for the benefit of the Committee. Could that be done? - The first paragraph reads as follows:

In regard to detailed procedure to be followed on the adjustment of losses or deficiency, it is suggested a routine as broadly outlined hereunder would be satisfactory when the abovementioned amendments to the regulations have been effected:

- (a) a member to be responsible to make good the amount of any loss or deficiency in public moneys entrusted to him;
- (b) unless special circumstances or good reasons exist, a member shall make good the amount of any such loss or deficiency without delay, deduction being made from pay if necessary.

That is the sort of provision contained in the statement. The member may submit reasons why the deduction should not be made etc. The regulations, or the conditions, were the subject of protracted negotiations between the Departments. The three Service Departments considered them in relation to their own requirements. The Service Boards had their own views on the matter. These were reconciled at conferences with the Treasury in Melbourne and, eventually, Regulation 515 came into being. I do not think that I need go into the details of the departmental controversy. That does not affect matters so far as this Committee is concerned.

SENATOR WRIGHT.- Did it operate over the whole of the nine years? - I would not say that it did. Quite a number of circumstances held it up in different places.

THE CHAIRMAN.- Members of the Committee have heard Mr. Mulrooney and they will now have an opportunity to ask him questions.

SENATOR SEWARD.- You have said that an airman has a right to appeal against decisions. To whom would the appeal be made? - Under the law as it was before Regulation 515 was enacted, he would be dealt with by a court martial or by his Commanding Officer. Under the law, he had the right of appeal ultimately to the Air Board, and he had the right to petition for a review of that sentence or punishment to the Governor-General; that is, if convicted by a court martial. If he were convicted by his Commanding Officer, he had the right to have the conviction reviewed up to the Air Board stage. In fact, the Air Board or an officer reviews summary punishments to ensure that they are consistent and not excessive.

SENATOR BYRNE.- As "of course" they review them?
- Yes.

SENATOR SEWARD.- What is the difference between a hearing by a court martial and by a commanding officer? Does it apply to a limitation of severity of the case? - It all depends on the severity of the case and whether the airman elects to be tried by court martial.

SENATOR BYRNE.- I examined this regulation and the correspondence that has been presented between the Treasury, the Auditor General and the Service Departments. The problem as I see it was the Departments' and, possibly, within their responsibility they are trying to improve the administrative efficiency which is under their control. Apparently, losses have been experienced and not recovered. The Auditor General pressed the Treasury, and the Treasury pressed the Departments. On one side, there was desire to have administrative efficiency, but on the other side, we have the responsibility to ensure that, in that drive, individual rights and liberties are not unduly impaired. My approach was that this regulation has tended to disturb reasonable balance between the two, and it appears that this Committee might assist to have the balance restored. That was

my approach which was confirmed when I saw the impetus behind this matter which was at the administrative level for certain purposes. It appeared to me that these are not primarily penal contingencies. It is a provision aimed at indemnifying the Government, recouping losses and protecting the Commonwealth. I was interested in the British Statute which spoke of penal recovery as though the matter had both categories. I think that in the part of the regulations into which this was being written, and the part of the regulations into which similar provisions had been written, the imposition of these recoveries were not penal in character but purely of an indemnity nature to protect Commonwealth property. I was not aware of the history of this matter as Mr. Mulrooney has given it and as it emanates from the Imperial Air Force Act. The Commonwealth Defence Act, Section 8 had been carried into Regulation 435. Section 58 is something which is receiving the statutory attention and recognition of the Commonwealth, and with that recognition it sets out where protection is required to property in one of the Services. If any loss occurs in the circumstances set down, judicial procedure is insisted upon. Now we find the regulation being introduced which has not received that statutory recognition of the Parliament as Section 58 would have, and which imports a duty towards determination of the quantum and the reference of guilt to an administrative tribunal.

SENATOR BYRNE. - It appeared to me, therefore, that this was something which was being introduced without parliamentary consideration or statutory establishment. I do not wish to occupy the whole of the time of the Committee, but I will run through the points I had in mind briefly. Section 58, which received the attention of the Commonwealth Parliament, established the principles of recovery by judicial procedure through the Courts and that it must be unit property. Does not Regulation 515 go beyond Section 58? Section 58 purports to deal only with Commonwealth property and more particularly property entrusted to a unit. Regulation 515(1)(a) goes right beyond that sphere in its effect, doesn't it? - I do not consider it does. In my view, the provisions in Regulation 515 and in Section 58 are mutually exclusive and I suggest that the Air Board would not be offending against Section 58 by proceeding under Regulation 515.

SENATOR BYRNE. - I agree they are mutually exclusive. That is my point; they deal with different things, don't they? - Yes.

SENATOR BYRNE. - One deals with Commonwealth property and its protection as unit property and the other deals with any loss, damage or expense, whatever the terms are, occurring to the Commonwealth by neglect or misconduct. Is that right? - Yes.

SENATOR BYRNE. - My point was that the first principle only had received express statutory recognition in the Commonwealth, that is, it had to be Commonwealth property and a judicial procedure was prescribed. Now you go right beyond that. This could be the property of a stranger. I instanced in a review that was made for the Committee a case which extraordinarily found a parallel yesterday. I instanced the case of an airman disobeying Air Force instructions, flying below a prescribed ceiling damaging the property of a citizen who claimed successfully against the Commonwealth and the Commonwealth establishes a debt against the airman, which could be recovered. There is no Commonwealth property involved though it is expense incurred to the Commonwealth. Yesterday we had the case in Sydney of an aircraft flying over a

ship, which is almost a complete case in point. Does not Regulation 515 in that part go completely beyond what is contemplated in Section 58 where a judicial procedure is proscribed in a limited area where no judicial procedure is proscribed here in a vastly widened area? - Yes. Regulation 515 does not purport to be made under the Defence Act, of course; it purports to be made under the Air Force Act, 1923-52. In that Act, of course, certain parts and Sections of the Defence Act are applied to the Air Force, subject to the Act, and the Act includes the Regulations. I think this Committee has already had an opinion from the Parliamentary Draftsman on that matter.

SENATOR BYRNE. - That is right. We acknowledge that, but it might be queried. The point is that there is a section 58 of the Defence Act which still applies to the Air Force? - Yes.

SENATOR BYRNE. - It establishes certain principles by legislation? - Yes.

SENATOR BYRNE. - Within the authority you have just sketched a regulation is made which departs from that principle and extends it by regulation. There you have the two things; you have Parliament advertent to one principle and insisting on it, and you have a regulation which has not received the scrutiny of Parliament establishing a different and wider principle, perhaps within the competence of the statute? - As I said a moment ago, the Legislature also said in the Air Force Act that the Defence Act would apply subject to the Air Force Act, which included Regulations which might be made under that Act.

SENATOR BYRNE. - We agree with that. There is an overall statutory authority to do something like this, perhaps, but it is done by regulation ultimately although there is a standing statutory provision which still applies in very parallel circumstances which insists on a different principle? - Yes.

SENATOR BYRNE. - In other words, there has been by subordinate legislation a by-passing of a statutory established principle still applying to the Air Force. That is it in effect, is it? - That is so.

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SENATOR BYRNE. - Section 58 refers to the protection of articles, the property of the Commonwealth. When you come to Regulation 515, you find the same sort of provision is made in Regulation 515 (b). If you look at Section 58, there is a procedure there which is mandatory. In other words, civil proceedings must be taken. If the Minister or the appropriate person elects to recover, he must proceed.

MR. EWENS. - I am afraid I do not quite follow what Senator Byrne says when he says the procedure in Section 58 is mandatory.

SENATOR BYRNE. - If he elects to recover, he must do so in the way laid down.

MR. EWENS. - Off hand, I would not agree with that. It says that the loss may be recovered by the Commanding Officer. It gives him the power to sue but it does not say he must sue. It is facultative, not mandatory.

SENATOR WRIGHT. - It says, "Recover by the Commanding Officer by action in any Federal or State Court".

MR. EWENS. - I understood Senator Byrne to say that he must recover.

SENATOR BYRNE. - No, if he recovers, he must recover in that way.

SENATOR WRIGHT. - Mr. Chairman, I should like to have the witness questioned. The standing orders require us to conduct deliberations in the absence of strangers and I should like the witness to be questioned by each member in turn so that we could conclude in time.

SENATOR ARNOLD. - You would rather not have any explanations from the draftsman at the moment?

SENATOR WRIGHT. - The Draftsman will give us his views later in proper sequence.

SENATOR BYRNE. - That was my interpretation. If it were a requirement that the Commanding Officer recover in that way, if he elects to recover, regarding Commonwealth articles, there would

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then be a conflict between that and Regulation 515 in the place I
have referred to.

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SENATOR BYRNE. - No. 515B gives an optional procedure. If that is the correct reading of Section 58 there would be a conflict between that and 515B.? - Yes, if your view of the section is correct.

SENATOR BYRNE. - Looking at the Treasury minutes submitted to us, that is the minute from the Treasury to the Treasurer, we find that paragraph 5 reads - "The substantial matter at the conference was that a member should be required to make good" and so on. You have attempted to carry that principle precisely into this regulation? - Yes.

SENATOR BYRNE. - There has been an intent in this regulation to avoid the barriers of formal proceedings where an offence is involved? - We would regard any decision of the Air Board under this regulation as a purely administrative decision, and I believe that it is a procedure which is quite common in the administration of a service such as the R.A.A.F. There are many administrative decisions made by the Air Board which are penal in their nature. For example, an airman might want to take out his discharge because he may have an opportunity to obtain a position outside which might be worth twice the salary he is getting in the Air Force. In such a case the Air Board has the right to refuse the discharge until the airman has completed the term of his engagement. The airman pleads that he should get the discharge, and not getting it might result in him losing a considerable amount of money.

SENATOR BYRNE. - Is that not a matter of contract? - No, under the Defence Act and the regulations of the Air Force there is no contract.

SENATOR BYRNE. - It is contractual by nature? - Yes.

SENATOR BYRNE. - In a case where Section 515 is complied with by an airman and he disobeys an instruction or contravenes a regulation and loss or damage is incurred or property destroyed, the Air Board makes this determination? - Yes.

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SENATOR BYRNE. - In doing that, does it not also determine who is guilty in that offence? - The Air Board would not regard the member as having committed an offence.

SENATOR BYRNE. - Does not the Air Board, in the process of establishing the member's liability to pay, also establish that he has contravened the Defence Act or Regulations or has disobeyed a lawful order or instruction? - I would not regard the Air Board's decision as a decision that the member has been guilty of an offence.

SENATOR BYRNE. - Not of a violation of the provisions of D? - Obviously, yes.

SENATOR BYRNE. - If there were a loss of property through a man disobeying a lawful order, he would be charged under a very formal procedure under which he would be heard? - Yes.

SENATOR BYRNE. - But you are casting all that procedure aside in this regulation and determining a breach as ancillary to certain action without following out those procedures in a substantive charge? - I do not think that is a fact. There are cases in which we should have to charge a man with losing by neglect, but I have brought with me a register of penal deductions made since August 1954 under the old section 137, and I shall read some of the entries - "Error of judgment by experienced pilot causing damage to Vampire aircraft to the extent of £2 - £5 deduction from pay and allowances." I think that £2 mentioned there is an error, but that is the type of entry in the book. Another one is - "Negligence in performance of duties, loss of public money - £3 deduction from pay under Section 137". Another is - "Negligence in respect of performance of duty, loss of public moneys £51 - £3 deduction from pay". Another one - "Negligence which resulted in the loss of an 8-day clock, a barometer and a thermometer - £10 deduction from pay".

SENATOR BYRNE. - Do you not in fact establish a breach against a man without charging him or following the normal procedures? - If a man were negligent and lost an 8-day clock

we would not necessarily charge him with an offence, we would adjust his pay to obtain a reimbursement.

SENATOR BYRNE. - If he disobeyed a lawful order or instruction in a serious manner, what would happen to him? - He would be dealt with by court martial.

SENATOR BYRNE. - You think that would be owing to him? Yes.

SENATOR BYRNE - If loss or damage occurs to the property of the Commonwealth, the Air Board only has to establish to its own satisfaction that there has been a breach and that losses have occurred? - Yes.

SENATOR BYRNE. - But have you not established that breach against him without using the procedures of the Air Force? - It depends on the nature of the act. For example, certain persons had revolvers issued to them. They were supposed to keep them in a drawer under lock and key. Some of them probably forgot to lock the drawer and lost their revolvers. That sort of thing was quite common. Perhaps they were occupying a tent and the security was not too good and the revolver disappeared. The airmen in that case were deducted to the value of the goods lost. You would not regard those people as having committed an offence. It was almost a quasi civil action and there is a distinction between a quasi civil action and a quasi criminal charge that you suggest is made against him.

SENATOR LAUGHT. - Senator Willesee suggested that there was a certain power held by the Air authorities to recover money for the Commonwealth in the case of loss or damage, and the witness said that that power was there but was not used. I now ask whether the witness knows the reason why that power was not used first, by commanding officers, and secondly, by courts martial? - No, I am afraid I cannot give that information. I think it may have been due to the fact that Section 137 was a little removed from the other parts of the manual of Air Force law and members of courts

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may not have known all the law, or may not have been properly advised by the Judge Advocate assisting the court. That is why they may have failed to do it.

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On the other hand, if the Court were inflicting a punishment it may have felt that it should not inflict any further punishment in the nature of a penal deduction. They are the possibilities,

SENATOR LAUGHT. - To your knowledge, before putting out this new regulation, that question was not fully investigated, was it? - I will say that from time to time letters were sent to the Commands and to commanding officers pointing out to officers generally that they should advert to Sections 137 and 138 when they were trying a man.

SENATOR LAUGHT. - Do you know what the general answer was to those letters or recommendations? - Yes, I think there was some slight improvement. I point out, however, that the discussions which take place when a Court Martial proceeds to consider sentence are not recorded in the same way as the evidence is recorded.

SENATOR LAUGHT. - Do you have conferences at any time with the legal officers of the Air Force to discuss legal problems that arise at courtmartial? Do you ever gather them in and have a chat to them on these matters? - From time to time courses are held for officers. They might do staff courses or training courses, and an element of legal instruction is given at those courses by the Director of Legal Services.

SENATOR LAUGHT. - But you consider that the only way to overcome your difficulties is by means of the amendment that has been put forward? - Well, to have it in addition.

SENATOR LAUGHT. - To add 515? - Yes, to have it in addition.

SENATOR LAUGHT. - Could you give me any rough figures to indicate how many cases of restoration are made each year through the action of commanding officers or of Courts Martial? - No. When I received the summons to attend this committee, I tried to have

taken out details of the penal deductions which may have been made ^ by commanding officers. I have some records here of the sentences inflicted by courts martial which in some cases do and in other cases do not include this penal deduction. I do not know whether the committee would like me to refer to them.

SENATOR LAUGHT. - I think we can short-cut my interest in this matter by asking whether it would be a matter of a hundred, a dozen or only three or four a year? - There were 20 during the period 1954/55.

SENATOR LAUGHT. - That is, 20 cases in which courts martial did not award stoppage of pay to compensate for loss to the Commonwealth or other persons? - Yes, in two years. I have here also details of cases in which stoppages were awarded to compensate the Commonwealth after sentences by courts martial. Between June 1954 and March 1956, a period of about two years, there were 11 cases.

SENATOR LAUGHT. - Could you let me know how many instances of loss there were in that period that were, because of faulty regulations, not dealt with? - No, I am afraid I have not got those details. I know that from August 1954 to October 1955, 25 cases of all sorts, dealing with penal deductions, were dealt with by the board. The amounts included sums of £3, £10, and again £10. There is reference to a case of negligence in performance of duties which resulted in the disappearance of £500 from monies for pay. The officer concerned was a Flight Lieutenant, and the amount of the award by the Air Board was £100.

SENATOR LAUGHT. - So that no full compensation is ever awarded, apparently, in the cases you have cited. A token amount is awarded? - Yes, that is so. Here is another one. I think it concerns the loss of the £500 to which I have referred. The officer concerned had an award of £10 made against him. Two officers were concerned in the matter, and the Air Board

said, "Well, the degrees were different." Those were the deductions that were made. There is reference to another one here: heft of public monies, £40.

SENATOR WRIGHT. - Would you tell us whether or not you regard the jurisdiction of a court martial as disciplinary? - Certainly, yes.

SENATOR WRIGHT. - And that is its only purpose? - Yes.

SENATOR WRIGHT. - Do you regard the purpose of this regulation as disciplinary or compensatory? - I would call it compensatory.

SENATOR WRIGHT. - Would you agree, then, that the purpose of the court martial procedure and the purpose of this Regulation 515 are entirely different? - Yes.

SENATOR WRIGHT. - Is it the intention of your department, when framing this regulation, to provide for compensation being recovered from an officer by decision of the Air Board only? - Oh, no. If the officer is dealt with by disciplinary court martial and that court properly exercises its function it will then make a penal deduction in accordance with the law.

SENATOR WRIGHT. - What law? - Section 137.

SENATOR WRIGHT. - How would the jurisdiction of Regulation 515 be exercised? - It would be exercised in this way: The deficiency, loss or other incident mentioned would be reported by the commanding officer.

SENATOR WRIGHT. - That is, in a case where it required disciplinary action before a court martial? - No, not necessarily, if it occurred in the unit it would have to be reported. If there is any loss, the Audit Act requires some report to be made.

SENATOR WRIGHT. - Yes, but my question was: How is this authority under Regulation 515, which you agree is of a compensatory nature and different altogether from the disciplinary

power of court martial, authorized other than by decision of the Air Board? It is quite obvious, is it not, that it is a decision of the Air Board and nothing else? If there has been a court martial, of course the evidence before it will be taken into account by the Air Board? - Yes.

SENATOR WRIGHT. - Does not the regulation say that if the Air Board considers that the loss is due to certain things the officer shall be liable to pay to the Commonwealth such amount as the Air Board directs shall be paid? - On a strict reading of the regulation I would say that there is no need for the Air Board to have regard to any court of inquiry or investigation by the commanding officer.

SENATOR WRIGHT. - Exactly. There is nothing in the regulation to require any procedures to take place before the Air Board makes its decision? - No.

SENATOR WRIGHT. - Does your department intend the scope of this regulation to cover not only loss of service monies and service property but also to cover third party claims? - It could cover those.

SENATOR WRIGHT. - I am asking does your department, as evidenced by that correspondence over a number of years, since apparently the Treasury direction of 1946, intend this regulation to embrace within its scope not only compensation for departmental monies and stores but also third party claims? - I think that the department or the Air Board would consider each case that came before it on its merits.

SENATOR WRIGHT. - But that is a question of the exercise of the regulation. In framing this regulation as a law, giving the limits of your authority, does your department intend to take authority for recovery from a service member, compensation for third party claims which, by neglect or misconduct or breach of order, he incurs? - I could not say that they intend to do it, but they have ^{NOT} actually adverted to

that when the regulation was being made.

SENATOR WRIGHT. - Would you not agree that an extension of your jurisdiction to that degree would be a very substantial amendment to the law as defined by Sections 137 and 138 of the Imperial Air Force Act or Section 58 of our Defence Act? - I would not say it was a considerable extension of Section 137.

SENATOR WRIGHT. - Do you regard Section 137 of the Imperial Air Force Act as establishing authority to recover compensation for third party claims incurred by the member? - Yes, I would say it would.

SENATOR WRIGHT. - Would you read it again? - "The following penal deductions may be made from the active pay ..."

SENATOR WRIGHT. - Pausing there, does it not refer to penal deductions only, indicating that the deductions are of a disciplinary character and not of a compensatory character? - Yes, it does. "Penal" is rather a severe word.

SENATOR WRIGHT. - You would never suggest that if a man ran into a civilian aeroplane and destroyed it, so that there was a £13,000 claim, under that regulation the Air Board would have the right to make deductions from his pay to the extent of £13,000? - No, I doubt that that would ever be done.

SENATOR WRIGHT. - Well, would you not readily agree that an attempt to bring within the authority of the Air Board authority to recover from its service personnel compensation - not a disciplinary payment, but compensation - for a third party claim is a substantial amendment of the present law? - I have never regarded it as such.

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SENATOR WRIGHT.- You have agreed that at present you have only disciplinary powers and not compensatory powers? - No, I have said that we have compensatory powers under Section 137.

SENATOR WRIGHT.- Does it not apply to penal deductions? - Yes.

SENATOR WRIGHT.- Do you suggest that it applies to the extent that it imposes a penalty for indiscipline? - I think it is a very unhappy word, and the English drafting is not like ours. There are a lot of other things in Section 137 which are called penal deductions, but could not be regarded as penal deductions. If I might amplify that, I wish to state that the Imperial Air Force Act was the subject of an investigation by a Select Committee of the House of Commons. Arising out of that report a new Act was passed named the Air Force Act 1955 which took note of this very problem. The Select Committee was assisted by a departmental committee which referred to this matter and the report stated:

The existing sections 137 and 138 set out so-called penal deductions which may be made from the pay of officers and soldiers respectively. They include, however, deductions in respect of maintenance of families, and deductions which may be awarded as punishments by courts-martial or summarily. These are dealt with elsewhere. The remaining deductions under sections 137 and 138 are all of a penal nature in that though they may not be awarded as punishments, they are all to some extent, penalties for wrong doing, for negligence or failure to fulfil obligations. It is to this last category of deductions that your Committee has confined clauses 145-148; they have, at the same time, removed the present anomalies between sections 137 and 138 by applying all future deductions to both officers and other ranks.

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SENATOR WRIGHT.- What point are you making? - I was making the point that the word "penal" is not a very happy one, and would not be used in our own legislation.

SENATOR WRIGHT.- You would not have referred to this matter in your evidence-in-chief unless you thought it was a substantial matter. If you think we should have it, go ahead. Is there anything to suggest that, before Regulation 515, the Air Board had the right to recover compensation as distinct from imposing a penalty for indiscipline? Is there any law to which you could refer to show where, before Regulation 515, the Air Board had the power to order payment of moneys as compensation as distinct from imposing a penalty for indiscipline? - I would say that the Air Board has always relied upon Section 137 (4) which I have quoted.

SENATOR WRIGHT.- In the actual operation of that Section, the instances you have cited are such as that of the 29th September, 1955 where a pilot officer was brought up under Section 39(a)(1)(b) in respect of damage of £13,000. He got a severe reprimand and forfeiture of 18 months seniority? - That was by court martial sentence.

SENATOR WRIGHT.- In other cases, where the loss has been £90, pay was forfeited for 14 or 10 days or for a period to cover some more or less nominal fraction of the loss? - You are looking at papers relating to courts martial proceedings and not to the proceedings - if you could call them such - taken by the Air Board under Section 137(4).

SENATOR WRIGHT.- If a man is arraigned for committing damage totalling £13,000 and the court martial is considering disciplinary measures, obviously it would be completely destructive of discipline to forfeit his pay in the future until £13,000 was recovered. Therefore in exercising disciplinary measures, the prime purpose

is not to reimburse the Commonwealth but to inflict such a penalty as will bring the man up to a standard of discipline in future? - Yes, it may go further because if he is reduced in rank, he loses a lot of money.

SENATOR WRIGHT.- If the Air Board, under Section 515, has, as its chief purpose, compensation and it is a case where a man has done £13,000 worth of damage, can you suggest where, under the regulation, we could find anything that expresses the considerations by which the Board will determine whether the full amount, or part of the amount only, should be directed to be recovered from the Service member? - Yes. Sub-regulation (2) of Regulation 515 states:

In determining the amount payable by a member under this regulation, the Air Board shall take into consideration -

- (a) the gravity of the member's neglect, misconduct, failure or contravention;
- (b) the extent to which that neglect, misconduct, failure or contravention caused or contributed to the loss, damage, expense or deficiency;
- (c) the rate of pay of the member; and
- (d) any other relevant matters.

SENATOR WRIGHT.- The power is unlimited so far as the regulation is concerned? - Yes.

SENATOR WRIGHT. - You are aware that Parliament passed a Courts Martial Appeals Act last year? - Yes.

SENATOR WRIGHT.- That provides for an appeal to a tribunal only from a conviction recorded by a court martial? - Yes.

SENATOR WRIGHT.- Is there any similar right of appeal to any tribunal, judicial or otherwise, from a direction of the Air Board made under this regulation? - Not at present but perhaps I might supplement that answer by saying that

since the passing of that regulation, this matter has been the subject of consideration at both the Ministerial and the Departmental level. As a result, I submitted to the Parliamentary draftsman a further sub-regulation to be inserted in that regulation in the following terms:

Where a member is dissatisfied with any direction made under this regulation he may, within three months after the making of the direction, appeal to the Governor-General who, after such investigation as he considers equitable, may order:

- (a) that the directions stand;
- (b) that the direction be cancelled; or
- (c) that the direction be valid to the extent that a lesser amount be paid to the Commonwealth by the member.

SENATOR WRIGHT.- Has the Parliamentary draftsman rejected that submission? - No. It is being considered at present.

SENATOR WRIGHT. - It is not in your submission? - No. The letter was written on the 23rd March, 1956.

SENATOR WILLESEE.- What do you anticipate will be the effect of suddenly including this section 515? Is it desired to recoup more money which was not being done under Section 137? - I should say that the Air Board will not vary the procedure and policy which has been adopted under Section 137 of the Imperial Air Force Act. That is the power that it had previously. It could do so, but, from my long knowledge of the working of the Air Board, I suggest that it would not.

SENATOR WILLESEE.- Why alter the law if the policy is not to be changed? I am hazy about the transfer from Regulation 137 to Regulation 515. The fact that they were not doing it might be because of the way in which the Manual

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was constructed? - It was not altogether that. The Auditor General felt - and apparently the Treasury felt also in 1946 - that proper attention was not being given to this matter by those who should give it attention - the court martial or the commanding officer, in respect of airmen. I am only speaking in respect of airmen as distinct from officers because, in our view, officers had always been covered by the administration determination principle under Section 137. Airmen were covered only in so far as they could be dealt with for an offence and an offence was disclosed.

SENATOR WILLESEE.- I remember in the case of the public service, the Bailey appeal when the question of seniority in the Public Service was examined. All that the Bailey appeal did was to underline the Act as it stood, but, throughout the Commonwealth Public Service it shattered the whole policy of promoting officers. Therefore, I have taken the view that, even if you are only underlining Regulation 137, it cannot fail to alter policy completely.

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SENATOR WILLESEE. - After all, the personnel of Courts Martial will change, and they will suddenly say that at a point the Regulations were swept aside and new powers provided, as Senator Wright pointed out, with no limit. What are your thoughts on the question of a limit of money? - I would be quite prepared to recommend that a limit be placed on it. There is a limit in the Regulation now, of course, in respect of lower authorities than the Air Board.

SENATOR BYRNE. - Paragraph 2 of the Treasury Minute to which I referred says that as regards the Army the outstanding weakness has been that no deduction from a member's pay in respect of any such loss is ordered unless he has been convicted by judicial tribunal and restitution in whole or part is included in the sentence. That is the difficulty, is it not, as the Treasury saw it? - Yes. You can see from the register that is maintained in our office here that we do exercise some powers under that, or we did exercise powers under Section 137.

SENATOR BYRNE. - Is not it evident that with the Treasury's impotus the whole intent of this Regulation has been to avoid the obstacle presented by a prior conviction, to attain the same end without the intervention of what has been regarded as a procedure that cluttered up ultimately the ability to recover and deduct? That is the Treasury's submission, is it not? - Yes, what you have read there.

SENATOR BYRNE. - And this Regulation in fact carries that out? - Yes.

SENATOR BYRNE. - It is to by-pass the charging of a man formally to the point of conviction? - Yes. But of course there may be no offence disclosed as such. The negligence might well be the negligence of the civil law, not of the criminal law.

SENATOR BYRNE. - I thought it would be a breach of what we might call Air Force Law, not necessarily Criminal or Civil Law. At least, that is the type of law that you have made the condition precedent in this Regulation, a breach of the Defence Act, the Regulations or a lawful order. That is what might be called

service law? - Yes.

SENATOR ARNOLD. - At the moment there is no appeal against this Regulation other than the appeal that has not yet been approved, what has been submitted to the Draftsman, and in fact that appeal may never see the light of day? - We have asked the Parliamentary Draftsman to prepare this. The Minister has approved that appeal being given effect to and I see no reason why it will not come into being at an early date, as soon as we get the amendment from the Parliamentary Draftsman.

SENATOR ARNOLD. - Would the Department have any feeling about withdrawing this Regulation until the appeal regulation is embodied in it? - Withdrawing the regulation?

SENATOR ARNOLD. - Until it was covered by this new regulation embodying the appeal? - I suppose we could say we would withdraw it. But would it not be better to put it this way, that we will give an undertaking that the right of appeal will be injected into the regulation.

SENATOR ARNOLD. - The Air Board, in deciding the extent of negligence or guilt, has regard to the ordinary legal considerations that apply to the ordinary Courts, does it? - We have had no experience with this regulation yet, because, as you know, it has only recently come in. All these other deductions which have been made are referred to, considered by and recommended upon by the Director of Legal Services as a matter of departmental administration. The Director of Legal Services is an officer of the Air Force who is responsible for all legal questions affecting discipline. The matter is as of course referred to him for his advice. Whether that advice and his recommendation is accepted is another matter.

SENATOR ARNOLD. - Does it leave with the airman the feeling that he does not receive the same protection of law through the Court Martial that he would receive in a normal Court of Justice? - You raise a very interesting point. In this review of the Imperial Air Force Act by the Select Committee of the House of Commons, one of the points made was that the old Act

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made a distinction between officers and airmen in that the Air Council could make a deduction from the pay of an officer but could not make a deduction from the pay of an airman. That had to be done, as I said earlier, by a Court Martial or a Commanding Officer when dealing with an offence. It was said, and with a lot of truth, that the airman would prefer on many occasions to have a deduction made rather than have all the worry of being tried by Court Martial and having a conviction recorded against him. Furthermore, from the point of view of the discipline of the service, the airman as such, that is the average man in the ranks, does not come into contact very much with this Regulation, but the Warrant Officer and the Non-Commissioned Officer might well come into contact with it. If by, shall we call it, civil negligence, he is responsible for some loss and has to be tried by Court Martial the disciplinary control of the service is becoming affected. Quite often the Warrant Officer ^{and} Non-Commissioned Officer is quite prepared to pay the amount that he knows probably the Air Board would award against him rather than go through all the worry and trouble that would result from a Court Martial conviction.

SENATOR WRIGHT. - Has Mr. Mulrooney any preference as to whether we peruse the correspondence that took place over the period of nine years to see the objections and counter objections that may have been voiced at different times to this procedure recommended by the Treasury? I do not ask for the file. If he offers it voluntarily I should be quite interested to see it. I do not ask for it to be submitted. - The file could be made available if the Committee so requires it, but quite often a lot of the comments might be made by people at particular levels which could only be regarded as obiter and which would not have any real bearing on the ultimate decision that was taken at the higher level by the Air Board, the Department, or the Treasury. While I have no objection to the file being made available for perusal, I am just a bit doubtful as to whether the Committee without some assistance would be in a position to interpret the importance of the opinion

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which might have been recorded at some stage on the file.

SENATOR WRIGHT. - You do not give us credit for much perspicacity then? - Well, sir, no. If I have not chosen my words well -

SENATOR WRIGHT.- No, you just say that perhaps we would not evaluate the importance of the person giving the opinion. - It is sometimes not evident from the face of the document.

SENATOR WRIGHT. - I leave that as a suggestion only.

SENATOR ARNOLD. - Mr. Mulrooney, I am sure the Committee would want me to say that we appreciate very much your presence with us this morning and the way in which you have frankly expressed your views to the Committee and tried to inform us on the matter to which we are trying to find a solution. We are grateful to you for being here and we hope that we will be able to come to some determination satisfactory to everybody.

MR. MULROONEY. - Thank you very much. If I might just in reply say that I have appreciated the many courtesies and restraint that the members of the Committee have exercised in my favour. It is a bit of an ordeal to come before such a panel as this and I have appreciated the kindness extended to me.

SENATOR ARNOLD. - I think we will adjourn now to another date.

MR. HEWITT. - I dislike raising personal difficulties, but I have a problem. I received the request to attend this meeting at 8.30 last night and I prepared myself. After an interval of several years, I have been trying to take my children away for a holiday and I had planned to take them tomorrow. But I shall return on Friday if I am required.

SENATOR ARNOLD. - Very well, we shall continue for the time being.

CYRUS LENOX SIMSON HEWITT, First Assistant Secretary to the Treasury - sworn and examined.

THE CHAIRMAN. - Have you prepared a statement for the Committee? - I have not prepared a statement, I could address the Committee and then answer questions, if that course is satisfactory. Perhaps I could preface my remarks by going further back than Senator Wright and saying that this matter commenced, at least for the Treasury, in 1943. That is in my branch of the Treasury. There is another branch located in Melbourne which is called the Treasury Defence Division and which is also intimately associated with this matter. I was unable in the remaining time last night to obtain an officer from that branch, but I can give the Canberra end of the story. If it is necessary an officer can come from Melbourne and give his evidence to the Committee and then perhaps I could elaborate on what I am about to say. Our actions in this matter started about 13 years ago, long before my own association with the Treasury commenced. In view of Senator Wright's comments and also the comments of Senator Byrne, I should say that the action in this matter was not initiated by the Treasury. When Mr. Abercrombie was the Auditor-General, he signed the Auditor-General's report of 21st March, 1944, for the financial year 1942-43, which included this matter. Therefore the matter goes back to that time, and indeed to before that time. In paragraph 109 of his report the Auditor-General of the day stated -

Losses of cash and stores by default and other causes consequent upon inadequate safeguards and inefficiency have been numerous in the Department of the Army during the year. The apparent leniency of the courts of inquiry in dealing with such matters was a rather disturbing feature in a number of instances. It is felt that Commonwealth interests are not sufficiently protected by the existing military regulations as related to procedure. By the application and interpretation of the regulations Army personnel not infrequently obtained freedom from action for blame where, in relatively similar circumstances in the Civil Service the existence of inefficiency would have established negligence.

A little before that was published, but arising from the contemporary departmental action in the Department of the Army, the Secretary of the Department of the Army wrote to the Treasury on 8th November, 1943, and quoted the terms of a minute placed on a file by the then Minister for the

Army expressing concern as to the position developing regarding the responsibility of officers of the Australian Military Forces for public funds entrusted to their care.

The Minister thought that the position should be investigated to ascertain whether control could not be introduced to place definite and final responsibility under regulations on officers charged with care of public moneys held by them and for the failure to account for the moneys to be a military offence. He asked that the terms of the minute be brought to the notice of the Treasurer.

SENATOR SEWARD. - The word "officers" is used in the strict military sense? - No, in reference to all personnel of the Army. The date of that is 26th October, 1943 - the Minister's minute. There followed a series of discussions and reports to the Treasury of particular cases, and a considerable amount of time was taken up in examining the defects in the court-martial procedure and, in particular, defects in the appropriate military regulation 294A. It was represented by the Department of the Army that there were two particular difficulties. The first was that Sub-section 1 of the Regulations did not enable the Military Board to impose a monetary penalty representing part of the loss, but required it to impose a penalty representing the amount of the loss or damage. So they would have had to impose the £15,000 that Senator Wright referred to, and that was considered to be defective. There was a second Sub-section which provided that the regulations should not be applied by the Military Board to any loss, damage or expenditure which could have been the subject of an order by a court-martial. There was a description by the Department of the Army of the difficulties of Sub-section 2, including, so far as I can recollect, the difficulties in inserting into the charge to be placed before a court-martial the precise sum representing the loss or damage caused in a particular case. The Department of the Army at that time was proposing that Sub-section 2 of this existing Army regulation should be repealed.

There is then on our file a series of continuing audit letters, the obtaining of legal advice and consideration of the precise application to members of the services of three Sections of the Audit Act of a similar character, the Army regulation, the existing Navy regulation, and the 1955 version of Air and Navy regulations. Then, in November, 1945, there was a

departmental conference in Melbourne at which my colleagues from the Melbourne section of the Treasury were present, together with senior representatives of the Navy, Army and Air Force, at which the problem, which started with the Auditor-General and the Minister for the Army, was discussed and examined at great length. From that came a consensus of opinion that weaknesses in regulation 294A of the Army should be eliminated by the removal of sub-section 2 and alteration of the mandatory amount in sub-section 1. Air said that it would give consideration to the reintroduction of Regulation 165A which dated, as Mr. Mulrooney said, from 1926, and the Department of the Navy said that the Department needed to take no action because their standing and existing regulation 143A did all that was necessary to enable the Navy Board to make deductions from pay and allowances.

It was the report of that conference and that consensus of opinion which was the genesis of the Treasury memorandum of 24th September, 1946, that the Secretary gave to the Committee. I wish to stress that far from this matter having been conceived by the Treasury, it followed from action by two people outside the Treasury, and came after a complete inter-departmental discussion from which emerged a consensus of opinion.

I want to make quite clear the part of the Treasury in the matter. The Treasurer's decision of 1946 was conveyed to the Service Departments, and thereafter, until 1953, discussions proceeded about the form that the various amendments should take. At the time, I think there were various thoughts and suggestions that the regulations ought to be uniform since they were dealing with a problem common to all three services. The Draftsman provided a draft of the regulation in 1952, following, I presume, instructions given to him by the Departments. The Treasury submitted a draft of this uniform regulation to the Auditor-General. He raised certain queries about it which were considered in the Treasury. The drafts were considered in the Departments, as I recollect it, and they also had suggestions to make. My own association with this matter commenced in December, 1953, in considering what had been put forward in the draft from the Parliamentary Draftsman. I then said, so far as the Treasury was concerned, that the goal of uniformity might be put on one side and that a particular form of the Army regulation, the Navy regulation,

and the Air Force regulation met problems as they had been put to the Treasury and met the Treasury's point of view. We so advised the Draftsman and the Departments.

I do not think I can helpfully volunteer any more information, but I shall do my best to answer any questions on this problem. My final comment concerns the annual return to this subject by the Auditor-General and his continuing dissatisfaction with the state of affairs, which concerns not only power under the regulations but also civil rights. For our part, we were anxious to remove the weaknesses and the need for the regular annual complaint - a reasonable complaint - of the Auditor-General. The Navy regulation was put through, I think, just at the close of the 1954-55 financial year, and the Army has still not reached a final decision.

SENATOR BYRNE. - I acknowledge your assurance, Mr. Hewitt, that that is how the matter originated. It appears to me that the consensus of opinion at that conference was that it was necessary to deal with monies and property entrusted to service personnel. Would that be correct? - I do not think so. There was a reference in a Minister's minute on the file to monies, but I think that by 1945 it had widened in terms of the authority given to the Navy by their standing regulations.

SENATOR BYRNE. - I take it that paragraph 5 of this minute of the 24th September, 1946 epitomizes the conference and the conclusions which had been arrived at? It reads:-

The substantial matter of agreement at the conference was that a member would be responsible to make good any loss or deficiency of public monies entrusted to him.

That seems to be the guiding principle - "entrusted to him". If paragraph 5 epitomizes the general conclusions of the conference, do you not think that regulation 515A goes far beyond that? - It goes beyond paragraph 5, and picks up the separate definition of stores and public monies in the Audit Act. The Treasury specifically reverted to the wording when the regulations were first drafted. Quickly, looking at the summary of the meeting in November 1945, I should have thought that monies were loosely considered as including Government property, and that that included stores also. But I may be wrong.

SENATOR BYRNE. - It is not only money. The regulation says "the Commonwealth has suffered or incurred loss, damage or expense", which again is a different thing from monies? - That is, I think, a change of former policy which occurred as various drafts were being considered, but the words are included in the Navy regulation and the words of the Audit Act are of long standing, and it was thought to be consistent with the originating complaint of the Auditor-General, who spoke specifically of loss of cash and stores by theft and other causes.

SENATOR BYRNE. - That goes back to something that we might call physical. Regulation 515(a) contemplates the process of indemnity when anything of a physical character owned by the Commonwealth is concerned? - This is included in one section of the Audit Act. Whether it has been administered in that way, one may go back to the regulation and the practice of the Navy which has not been changed.

SENATOR WRIGHT. - Do the files disclose since 1943 any recommendation that this matter be submitted to Parliament for legislation? - Not in my recollection.

SENATOR WRIGHT. - Can you conveniently prepare an annual list mentioning the faulty accounting of which the Auditor General complains in his report since that date? - I could not do that. I think the Auditor General would have to be asked that question. In each year running from 1942-43 he has referred in his reports to that. I assume that he did not do that if everything had been to his satisfaction. The Auditor General must have had some reason or he would not have referred to them.

SENATOR WRIGHT. - Nobody took any notice? - The Departments do.

SENATOR WRIGHT. - Does the Treasury? - The Treasury has been endeavouring, with the Departments, to bring this matter to a close.

SENATOR WRIGHT. - The basis of that would seem to be to get a list of moneys which have been deficiently accounted for. Has not that been done by the Treasury? - My colleague in Melbourne would know that.

SENATOR WRIGHT. - With or without convenience, can you indicate how difficult it would be to supply this Committee with the annual list of monies, the deficient accounting of which has been complained of under this head by the Auditor General since a conference of Service personnel was of the opinion that some tightening up was required? I mean not later than 1946. -

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The complaints would be addressed by the Auditor General first to the departments. We will ask them to provide a list.

SENATOR WRIGHT. - When the Treasury took an interest in this matter, did it intend that this regulation should be operated so as to obtain recovery from the Commonwealth of Third Party Claims? - The matter, in those terms, is not referred to in the files, and no discussion is shown in the files at all; not in these files.

SENATOR WRIGHT. - From your reading in the files using your judgment and experience, did you infer that that was the intention? - My inference would not be that that was the positive intention. It could be that there was never any positive intention to exclude.

SENATOR WRIGHT. - There are too many negatives in that statement. I put it again. From your re-perusal of the files, exercising your experience and judgment, did you infer that it was, or that it was not, the intention of the regulation to embrace the recovery of third party compensation payable by the Commonwealth? - I did not infer that it was the positive intention specifically to include it, or that it was the positive intention that it should ever be excluded, rather that the provision was always measured against the existing statutory powers under the Audit Act and the authority in the long-standing Navy Regulation 143A which included it.

SENATOR WRIGHT. - You draw the inference that the files did not disclose such an intention. There is no express reference particularly to third party claims, is there? - Not that I recall.

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SENATOR WRIGHT. - At the moment, without re-perusing in detail the files, you say that if the matter of third party claims is, on proper consideration, included in Section 515, it is there without specific consideration? - Without specific consideration, but in the knowledge that Navy Regulation 143A contained it and I think, on a proper consideration, Section 42 of the Audit Act contains it.

SENATOR WRIGHT. - I ask you to read again Regulation 143A of the Navy Regulations, if you would? - I have been reading from a quotation of it here and not from the exact form. I am speaking of a regulation that was in existence in 1926. The full text of Regulation 143A is:

143A (1) Where a loss (including loss of stores or material) or improper expense has, in the opinion of the Naval Board, been caused or incurred by the neglect or misconduct of any officer or rating, there shall be chargeable against the pay and allowances (including deferred pay) of that officer or rating such amount as, in the opinion of the Naval Board, is necessary to reimburse the Commonwealth in respect of the loss or expense or any expenditure occasioned thereby, and that amount may be stopped by the Naval Board out of the pay and allowances of the officer or rating.

(2) In determining the amount to be stopped from pay in accordance with sub-regulation (1) of this regulation, the Naval Board may take into consideration the gravity of the neglect or carelessness of the offender and may vary the charge accordingly at their discretion.

SENATOR WRIGHT. - Can you tell the Committee where, in the administration of that regulation, it has been applied to a case of recovery of third party claims? - I have no knowledge at all of the administration of the Regulation. It would be in the Department of Navy.

THE CHAIRMAN. - So far as the Treasury is concerned, all you want done is to recover what the Auditor General has reported to you as being wrong, and you want that covered in the future to

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comply with the Auditor General's report? - And the original view of the Minister of the Army when the Treasury had satisfied itself that there was a need to correct the existing situation.

THE CHAIRMAN. - You feel that this regulation does that so far as the Treasury is concerned? - Yes.

THE CHAIRMAN. - Would the Treasury have any interest as to whether this was done by regulation or by Act of Parliament? - No.

The Committee adjourned.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

MINUTES OF EVIDENCE

(Taken at Canberra).

THURSDAY, 17TH MAY, 1956

PRESENT:

ACTING CHAIRMAN	(Senator Arnold)
Senator Byrne	Senator Willesee
Senator Laught	Senator Wright
Senator Seward	

OBSERVERS:

Mr. F. H. Cox, Department of Treasury.
Mr. F.J. Mulrooney, Department of Air.

JOHN QUALTROUGH EWENS, Parliamentary Draftsman, - sworn and examined.

THE CHAIRMAN. - I understand you have not had time to prepare a statement, but you could give the Committee some thoughts that you have generated overnight; is that so? - Mr. Chairman, there is very little I want to say unless the Committee wishes to ask me some questions. In the first place, I would like to refer to something which appears on page 26 of yesterday's transcript. Mr. Mulrooney said in his evidence, which appears towards the top of the page, "As a result, I submitted to the Parliamentary Draftsman a further sub-regulation to be inserted in that regulation" and then indicated its terms. About the middle of the page, Senator Wright asked the witness, "Has the Parliamentary Draftsman rejected that submission" and Mr. Mulrooney answered, "No, it is being considered at present." I think I should clear up any misconception which there might be in the minds of members of the Committee about the functions of the Parliamentary Draftsman. It would not be the function of the Parliamentary Draftsman to reject a proposed regulation. He is not concerned with questions of policy and it would be an intolerable position if the only regulations that were made were those that the Parliamentary Draftsman approved of. My function is simply to take instructions that are given to me and to deal with them simply from a drafting point of view. On the question of the validity of the regulations, I submitted to the Committee's secretary a memorandum on the 18 April last and I do not wish to say any more about that. I have expressed my view as to the validity of the regulation in that memorandum, and, apart from that, I do not wish to volunteer any matters to the Committee.

SENATOR BYRNE. - Mr. Chairman, I think Senator Wright may have had in mind to discuss with the Parliamentary Draftsman the competence of the regulation and the statutes, in which case, he might briefly mention that now, if he wishes.

EXAMINED BY SENATOR WRIGHT.

SENATOR WRIGHT. - No. I only thought that Mr. Ewens might care to take the opportunity of amplifying the basis of his view that the regulation is not in conflict with S.58. I understand his opinion to be that, in as much as section 3(3) of the Air Force Act states that section 58 of the Defence Act shall apply "subject to this Act", the term "this Act" (referring, of course, to the Air Force Act) by virtue of the Acts Interpretation Act,

should be read as "subject to the Air Force Act and the regulations made thereunder". - Not by virtue of the Acts Interpretation Act.

SENATOR WRIGHT.- By virtue then of what? - By virtue of the Air Force Act itself.

SENATOR WRIGHT.- But, in the Commonwealth sphere, when you refer to "this Act", what is the authority for saying that the term "this Act" means not only the text of the Statute but the regulations made under it? - There is no such general principle, but section 2 of the Air Force Act defines the expression "this Act" as including the Regulations made under the Act.

SENATOR WRIGHT.- In most States, that same meaning is attributed to the expression "this Act" by virtue of an Acts Interpretation Act, is it not? - I could not say. I have not studied the Acts Interpretation Acts of the States.

SENATOR WRIGHT. - It is by definition under section 2 of the Air Force Act that the Act includes all regulations made thereunder? - Yes.

SENATOR WRIGHT. - When the Act says that section 58 of the Act shall, subject to this Act, continue to apply in relation to the Air Force, it is then your view, that, by virtue of that expression, it would be competent for the Executive to make regulations under the Air Force Act which would have the effect of completely negating section 58? - Yes. I think that is perfectly clear from the Act. Section 3(3.) says that certain provisions of the Defence Act shall, subject to this Act, continue to apply to the Air Force; and the expression "this Act" which occurs in sub-section (3.) of section 3 by definition includes the regulations, so that section 3(3.) has to be read as meaning that certain provisions of the Defence Act shall, subject to this Act and the regulations under this Act, continue to apply to the Air Force. Perhaps I should say this: That the Air Force Act is a skeleton Act; it is not a detailed Act. The whole object of the Act is to enable the regulation of the Air Force by means of regulations. It is not an Act like the Defence Act or the Naval Defence Act which goes into the matter in detail. As I said, it is a skeleton Act and I think it is perfectly clear that the regulations made under the Air Force Act can override or modify or amplify the Defence Act in its relation to the Air Force. That is the whole purpose of the Act.

SENATOR WRIGHT. - And you would regard it as competent for a regulation to be made to this effect: "Section fifty-eight of the Defence Act shall not apply"? - I think there are plenty of Air Force Regulations which say that.

SENATOR WRIGHT.- I am not concerned with that. You would regard it as competent for a regulation to say that section 58 of the Defence Act would not apply? - Yes, clearly.

SENATOR WRIGHT. - I did not propose to cross-examine until the challenge was laid down, but I will. Can you cite any authority for a paramount interpretation of the expression "subject to this Act"? - I am afraid I do not follow that question.

SENATOR WRIGHT. - Can you find any decision of any Court expounding such an interpretation of the expression "subject to this Act"? - I would have to look. I cannot quote any authority offhand.

SENATOR WRIGHT. - You cannot at the moment? - No, certainly not.

SENATOR WRIGHT. - You have not resorted to any for the purpose of your opinion? - I do not know of any. I would not expect to find any.

SENATOR WRIGHT. - Neither would I. Now, would you turn your attention to section 9 - ? - Perhaps, before Senator Wright passes on, I should add that I would not like to be misunderstood on that. When I say I would not expect to find any, I mean not merely that I would not expect to find any decision on the point giving a particular result, but any decision on the point at all.

SENATOR WRIGHT. ~ But what I said was "expounding an interpretation paramount or to the same meaning as you attribute to the expression". I would not expect to find any decision precisely upon an interpretation of section 3(3.) of the Air Force Act, but the expression "subject to this Act" is a most common expression, is it not, in all States? - Yes.

SENATOR WRIGHT. - Can you cite to the Committee any judicial decision interpreting that expression in the sense that you have interpreted it for the purpose of advising the Committee? - I cannot cite any decisions.

SENATOR WRIGHT. - Would you turn your attention to section 9 of the Air Force Act itself? You will notice that it says, "the Governor-General may make regulations not inconsistent with this Act". Do you read the expression "this Act" there as including the text of the Statute plus

the Regulations? - No - only the text of the Statute. It obviously cannot be read there as including the Regulations because it would make nonsense of the section.

SENATOR WRIGHT. - Yes, and it is the tenets of common sense that reject that construction there, is it not? - Well, I think one of the general principles of Statutory construction is that you must read an Act so as to make sense of it and ^{not} nonsense.

SENATOR WRIGHT. - And the expression "this Act" at the end of section 9: Do you interpret that to include the text of the Statute and the Regulations? - No, I should not think you would read it there, either.

SENATOR WRIGHT. - The only other thing I wish to ask refers to your remarks leading up to your evidence. You referred to my question on page 26 of the transcript, "Has the Parliamentary Draftsman rejected that submission?" Why do you consider that that question is attributing to you a basis of policy for rejection? Would it not be regarded as your function to reject a departmental suggestion if, in your legal opinion, you considered it as suggesting a regulation not warranted by the Statute? - It is not my function or within my power to reject it.

SENATOR WRIGHT. - When you advise that it is not lawful to make a regulation, you are not offended by the suggestion that that is rejecting it from the point of view of the Parliamentary Draftsman, are you? - I do not understand the word "reject" in that sense. So far as I can see, there would be nothing unlawful about the sub-regulation that we have been asked to add and, so far as I know, that question has not been raised. I thought the question had in it the implication that the Parliamentary Draftsman had the power to reject a proposal by a Department to make a regulation; and that, of course, is not so.

SENATOR WRIGHT. - But you were aware when you considered that transcript that members of this Committee entertained the view that legally regulation 515 was not warranted by the authority of the Statute, were you not? - No.

SENATOR WRIGHT. - Had you not read Senator Byrne's memorandum on the regulation? - No, I have not seen it.

SENATOR WRIGHT. - You would agree that, in the question referred to on page 26 of the transcript there is nothing inconsistent with the

suggestion that the Parliamentary Draftsman was simply advising that it was not lawful, would you not? - I would not use the word "reject" to describe that state of affairs. I do not think it is the appropriate word to describe that situation at all. If I thought a regulation were invalid and I said to the Department that the regulation was invalid, I would not regard myself as rejecting the regulation or rejecting the submission. In fact, even in that extreme case, it is not within my power to reject it. I can advise a Department that a regulation would be invalid but, if the Minister insists on submitting it to the Governor-General, it is not within my power to stop him.

SENATOR WRIGHT. - In the Boilermakers' Case, is not that the very expression the Court used when they rejected one of the fundamental contentions as a matter of law? - I do not remember that expression being used.

SENATOR WRIGHT. - Do you deny it is a completely proper expression to use when you disagree with the legal opinion that you reject a legal contention? - I was not dealing with the propriety or impropriety of it. I simply said that I myself would not use the word "reject" to describe the operation of telling a Department that a regulation was unwise or might be invalid.

SENATOR WRIGHT. - Do you not agree on reflection that there is nothing in the transcript that attributes to you any province of policy at all? - It attributes to me, as I read the transcript, the ability to reject a regulation - -

SENATOR WRIGHT. - On any other than legal grounds? - There is no mention of any grounds.

SENATOR WRIGHT. - Why should you assume, then, that it would be an irrelevant ground of policy instead of the relevant and proper ground of legal opinion? - I think I probably thought of that because I do not see how one could possibly reject the proposed new sub-regulation on any legal ground at all. I have not studied it at all but, offhand, it seems to be to be a perfectly valid provision to add to the regulation provision for an appeal from the Air Board to the Governor-General and the only possible ground on which one could reject it would be that one somehow did not agree with the proposal, not as a matter of law, but as a matter of wisdom or policy.

SENATOR WRIGHT. - You say you cannot conceive of any legal ground upon which an opinion could be held that the proposed regulation would be unlawful? -- Proposed new sub-regulation. The evidence to which I referred is only dealing with the sub-regulation proposed to be added, not with the existing regulation.

SENATOR WRIGHT. - When you are considering a limb, you consider the tree on which it is growing, do you not, and if you are adding an appeal to a substantive regulation you could not consider the appeal except considering the validity of the primary basis, could you? - One would assume the validity of the existing regulation. - the Minister has chosen to make it whether it is valid or not - and one cannot say that the addition of the sub-regulation would make it invalid,

SENATOR WRIGHT.- Do you say to the Committee that you cannot conceive of any basis on which the proposed regulation would be considered illegal? - Are you referring to the whole regulation or the proposed sub-regulation?

SENATOR WRIGHT.- Do you suggest that a lawyer would not have to consider the whole regulation in its entirety to consider the validity of the sub-regulation? - I do not know that you can answer that question "yes" or "no", but it must be remembered that we had already considered the validity of the regulation and were satisfied that it was good.

SENATOR WRIGHT.- That is all I wish to ask.

EXAMINED BY SENATOR BYRNE:

SENATOR BYRNE.- Mr. Ewens was present yesterday and heard some questions on Section 58 as to whether it applies as it stands or whether it applies in view of the rather contrary interpretations held by Mr. Ewens and Senator Wright "subject to the Air Force Act and the regulations". I put to Mr. Mulrooney yesterday the question of an apparent conflict between Section 58 and the regulation.

(To witness): Mr. Ewens; may I put this to you. If Senator Wright's submission were correct, perhaps hypothetical in view of your stand, would there be any conflict between Section 58 and Regulation 515 or Regulation 435 of the Air Force Regulations (which embodies Section 58 in the Air Force Regulations) and Regulation 515? - I am reluctant to express opinions on that offhand. I think it would be unwise.

SENATOR BYRNE. - I indicated to you yesterday what my interpretation of Section 58 was - that the procedure there was mandatory; that if the Commanding Officer or the Minister or an appropriate person decided to recover property, he was required to follow the procedure of Section 58. Have you contrary views? - Again, it is a matter of words. I would not use the word "mandatory" to describe the situation you have in mind. If I might say so, I think what you had in mind was that the section covers the field. It is not mandatory. "Mandatory" means it imposes a duty or an obligation, and there is nothing in the section which imposes any duty or obligation.

SENATOR BYRNE. - I will put it this way, Mr. Ewens. A procedure is made available under Section 58. Is that the only procedure made available under Section 58 on your reading of this section? - I am not sure that I understand that question. The section, of course, makes no procedure other than what it provides itself. The question you are really asking is, does Section 58 cover the field.

SENATOR BYRNE.- I am trying to ask this question. Is a Commanding Officer who wishes to recover property limited to that mode of recovery mentioned in Section 58? - I know of no other provision.

SENATOR BYRNE.- If that is so, then would not there be an obvious conflict between that provision and Regulation 515, which provides an alternative procedure? - No, I do not think there is. You can only say that there is conflict if you first say that the particular section covered the field.

SENATOR BYRNE.- Well, it comes back to Senator Wright's view, that is, providing the regulation is competent. But if Section 58 is still the operative section, would there then not be a conflict? - I do not think in any circumstances that there is a conflict. There may be two alternative ways of suing for the money owed; then, as in a common law matter, you might sue for the price of goods sold or you might sue on an account stated, or if the debtor is given a bill of exchange which has been dishonoured, on the bill of exchange. These are complementary and alternative ways of recovering money. I would say that you could not recover the same money twice having recovered it once.

SENATOR BYRNE.- The procedure that has received statutory attention is the one expressly mentioned in 58. This other alternative procedure or

complementary procedure has not come before the Parliament except indirectly, and has received little by way of Parliamentary scrutiny - There is no suggestion that the regulation is made completely without any statutory authority.

SENATOR BYRNE.-- Would you be prepared to give the Committee your views on a point I raised in Committee discussions; namely that while under the Air Force Regulations and probably the court martial procedures, an air force member who commits an offence has available to him the procedures set down, the application of this regulation could, in effect, achieve the conviction of a member for an offence without charge or hearing. Para.1(c) and para 1(d) contemplate conduct implicit in which could be acts or omissions which are in their own right substantive offences probably under the Defence Act and the Air Force Act, and regulations made under either. For example, failure to comply with a lawful order or instruction, or failure to comply with a Regulation, if charged as a substantive offence, would, no doubt, entitle the member to all the procedure available - probably to courtmartial in certain circumstances, or civil trial. That would be so would it not? - I am not sure that it would. Regulation 515, as I understand it, provides a civil means of recovering loss or damage. I find some -

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SENATOR WRIGHT. - For loss of money and stores as well as third party claims? - You are asking me now about the interpretation of 515. I would regard that as covering third party claims. As I understand it, regulation 515 gives a civil method of recovering loss or damage. I find it very difficult to say that a judgment, if you like to call it that, against a person for the recovery civilly of loss or damage in effect amounts to a conviction of a person for an offence without charge or hearing.

SENATOR BYRNE. - In order to let 515 operate to enable the Air Board to proceed and make a determination, certain prerequisites have to be fulfilled, one of which is that it has to be established, does it not, to the satisfaction of the Air Board, that loss or damage etc. has occurred by the neglect or misconduct of a member, by the failure of a member to apply, etc. In view of that, is it not obvious that, if the Air Board makes such a determination, it has determined one or other of those conditions? - It

must have determined one or other of those conditions, but I am not at all clear that the determination of one or other of those conditions is the same thing as saying that he has been convicted of an offence.

SENATOR WRIGHT.- If it is a breach of an order or a section of the Statute? Regulation 515 refers to those two matters, does it not? - As I understand Senator Byrne, what he means is that a successful action under 515 would have the same effect as a conviction.

SENATOR BYRNE. - Not, perhaps, with the consequences as regards imposition of discipline. - That is just the point. It just does not have all the consequences of a conviction.

SENATOR BYRNE. - But a finding would be made by the Air Board, would it not, that this man has fulfilled one of the conditions prerequisite. - But only those mentioned in 515. The Air Board might act under 515.

SENATOR BYRNE. - Are you often aware of cases where a crime or misdemeanour is alleged in civil proceedings? - Yes.

SENATOR BYRNE. - The type of thing I have in mind is where an allegation of murder is made in a testamentary action. In that case, the civil Court would find as a fact that the beneficiary had, in fact, murdered the testator. - That is so. But that would not have the same effect as a conviction of murder.

SENATOR BYRNE. - Nevertheless, they do, in fact, establish that? - Yes.

SENATOR BYRNE. - But, under regulations and court martial procedure, if that were alleged as a substantive fact, certain procedures would be available to the Commanding Officer and for the protection of the member - charge, response, hearing. Would that not be so? - If he is charged with an offence, the provisions relating to offences would apply.

SENATOR BYRNE. - There is no such provision in the operation of 515? - No.

SENATOR BYRNE. - The only consequences that might flow either from a charge of a substantive offence or the procedure in this case could be the same - imposition of a pecuniary penalty; as Mr. Mulrooney instanced yesterday in evidence, that was the outcome of most of them. - Only broadly. I do not regard 515 as involving any criminal penalty. It is only civil.

SENATOR BYRNE. - The detriment to the member in most cases would be a pecuniary imposition? - Yes, it could be.

SENATOR BYRNE. - A deprivation? - Yes.

SENATOR BYRNE. - If he were charged then with this breach as an offence, he would have procedures available to him and the outcome could be the avoidance or the submission to a pecuniary imposition? - Yes.

SENATOR BYRNE. - In this regulation, the procedures are not available to him. The outcome would probably^{be}/the same, but he is deprived of virtually any opportunity of defending himself. Would that not be right? - I cannot say he is deprived of every opportunity of defending himself. I would say that the Air Board or other person authorized to act under this regulation would give him an opportunity of stating his case and of being heard before any action were taken.

SENATOR BYRNE. - Leaving that other point and coming to what you are now saying, in view of that, do you not think that the regulation might have set down procedures in some form to be available? - I do not know that I can answer that question. I suppose it might have. If you asked me whether I think it should have, I would reply, "Is my opinion very important?"

SENATOR BYRNE. - Well, it is, I suppose. I will take it that your function as Parliamentary Draftsman would not only be, in strict law, to advise the Department, but to sort of be a friend to them, to warn them against unwise regulations? - We would tell them if we thought a regulation were unwise or impolitic.

SENATOR BYRNE. - Or in its operation unfair? - Yes.

SENATOR BYRNE. - Would you not think this regulation, in view of the fact that its consequences are serious and in alternate circumstances procedures are available, could and should have set down procedures to be available? - They could have. I would not like to say they should have, because that raises questions of policy.

SENATOR BYRNE. - I had the same thought on looking at sub-regulation (2.) of the regulation. In determining the quantum of guilt as translated into money, certain canons have been set down. That is right, is it not? - In sub-regulation (2,) that is so.

SENATOR BYRNE. - I suppose of the two - the question of quantum and the question of guilt - quantum would possibly be less important? - I am not sure that I follow that question. Before the Air Board would take into consideration the amount to be paid by the member, they would have

to come to a determination that they could claim - - -

SENATOR BYRNE. - That is what I say. At least, if it is not more important, it is certainly prior in time. - I thought you put it the other way.

SENATOR BYRNE. ^{No. . .} - Certainly more important in time.

SENATOR BYRNE. - Now, canons have been set down for determining quantum, canons which certainly shall bind the Air Board, in sub-regulation (2.). To come back to my point, would it not have been at least logical to have set down canons which would guide the Air Board in determining the offence? - I do not think so. The question of whether there has been a contravention is a question of fact. The question of the amount of damages is a matter for discretion and certain provisions are laid down as to the exercise of that discretion. I am not certain whether your question amounts to this: Whether we might not have included a sort of code of evidence - in considering whether the man is liable, certain evidence is admissible or is not admissible. That seems to me to be the parallel.

SENATOR BYRNE. I had no firm view on it, but I do feel that the Air Board is left in a position of making big decisions without guidance. Where proceedings are taken under the Court Martials Act or Regulations for derelictions of duty, procedures are prescribed. Is there anything like that here - canons which shall guide the tribunal? - No. It is analagous to ordinary law and the rules of evidence which apply, of course.

SENATOR BYRNE. - That would not be prescribed by Statute. The tribunal would just be expected to follow that. Would that be right? - I could not answer that offhand.

SENATOR BYRNE. - Earlier, you said that this was in the nature of a civil action. - That is right.

SENATOR BYRNE. - What about all those defences which are available in a civil action on the question of contributory negligence and things of that nature? - I would expect the Air Board to take that into account.

SENATOR BYRNE. - Could the Air Board be expected to operate along these judicial lines? - Could it be expected by whom?

SENATOR BYRNE. - Expected by you or me or anybody. - Well, it certainly would be expected by me. I would be astonished if they did not act along those lines.

EXAMINED BY SENATOR LAUGHT:

SENATOR LAUGHT. - In other branches of Commonwealth law, are boards entitled to make assessments of damages without recourse to ordinary courts of law, in your experience. - I think you probably could find others.

SENATOR LAUGHT. - I was just wondering if you could call any to mind and let us know. - I think, in relation to the Public Service Board. All these people are servants of the Crown. It is pretty clear I think that the determination of the relations of the servant as against the Crown do not involve the use of any judicial power. Under the Public Service Act and indeed, in accordance with the court martials, this, as the High Court has held, does not involve the exercise of any judicial power. They are simply master and servant relations. It is not a breach of that provision of the Constitution which vests judicial power in Courts only to give the Commonwealth the power to impose fines as under the Public Service Act or to recover money civilly, without recourse to a court.

SENATOR LAUGHT. - Which decisions are they? - There were two or three decisions during the war. Elias and Gordon's case, is one I think. The objection was taken to a decision of a court martial on the ground that the court martial had exercised part of the judicial power of the Commonwealth, which, under the Constitution, could only be vested in Federal Courts and States Courts. The High Court rejected that contention.

SENATOR LAUGHT. - If the Public Service Board desired to recover money would it act in a way similar to the way contemplated in Regulation 515? - I would think it would. I am not to be taken as advising without qualification that the Public Service Board has that power. But I would expect it to act in that way.

SENATOR LAUGHT. - You have had no experience in your Crown legal capacity on that point that you can recall to the Committee? - No. I have had experience of quasi criminal proceedings by departments and by the Public Service Board, but I do not recall any civil proceedings similar to what is provided in 515.

SENATOR LAUGHT. - Can you recall whether you got any help in drafting 515 from other regulations and if so, what was the source of that help? - I had no personal hand in drafting 515. I knew nothing of it.

personally. The history of it extends over twelve or thirteen years and it was the subject of considerable discussion and consideration among two or three departments. This was the upshot of it and that decision was taken as a matter of policy that that regulation was to go in.

SENATOR LAUGHT.- It is not a copy of some Imperial regulation or some Civil Service regulation? - No, it is not a copy of a Civil Service regulation. I do not know whether it is similar to something which exists elsewhere or not, except in the Naval Financial Regulations.

SENATOR WRIGHT.- I misunderstood you. You were not saying that the Commonwealth did not have an Acts Interpretation Act, but that the expression "this Act" was not defined? - There is nothing in our Acts Interpretation Act which says that in an Act the expression "this Act" includes the regulations. If we wish to bring about that result we bring it about as we have done in the Air Force Act by specifically saying in the Act that this Act includes the Regulations.

SENATOR WRIGHT.- What is the practice as to Minister's submitting regulations. I direct your attention to the Fourth-report of this Committee submitted in 1938 as to a Bill to amend the Acts Interpretation Act so as to require a certificate from the Attorney-General's Department that they were in accordance with law. That Bill, I understand, failed to be passed, but the Attorney-General of the day gave an undertaking that submissions to the Attorney-General's Department had always been made. Is that the practice? - That is the practice. They are submitted to the Parliamentary Draftsman's Office. All Departments are required to submit all proposed regulations to the Parliamentary Draftsman to settle them. Since that undertaking was given in 1938, there have been two or three cases when a Department has overlooked that and they were promptly reminded of it. Those cases were in the early days shortly after that undertaking was given and before it had become generally known.

EXAMINED BY SENATOR WILLESEE:

SENATOR WILLESEE. - You realize that, if this had come before Parliament by way of an amendment to the Act, this Committee would not have been interested. - That is so.

SENATOR WILLESEE. - The thing that impresses me is this: You just said that the Departments, now that the undertaking has been given, submit all regulations to your Department. - To the Parliamentary Draftsman, yes.

SENATOR WILLESEE. - At what point does the responsibility rest to say whether a thing should be by way of regulation or by amendment? - That rests with the Minister administering the Department concerned.

SENATOR WILLESEE. - Do you not think there appears to have grown up a weakness in responsibility there, because I would say that, arising out of the report of this Committee in 1938, there would be an implied responsibility placed on your Department? - No. I do not think so. I think you are speaking of a different thing in the first place from the 1938 Report. That was on the question of inconsistency. You are speaking of the question whether a particular provision should be made by regulation or by Act, which is a different thing.

SENATOR WILLESEE. - Well, omitting the reference to the 1938 Report, you say that the Minister is responsible - in other words, the Department. - The Government.

SENATOR WILLESEE. - I know it flows from Ministerial responsibility. This, to me, is most interesting. One of the things I have noticed in the last two days has been a complete defence by the Departments not only on the necessity for 515, but for it to be in the exact form in which it has been submitted. The only breaking down of that was Mr. Mulrooney's evidence that there is something afoot to apply for an appeal. My own thought on that, incidentally, was that, if it is thought necessary now, the appeal should have gone in then. That is one of the things brought to the attention of this Committee. You say that completely rests on the Minister? - It could not possibly rest on the Parliamentary Draftsman.

SENATOR WILLESEE. - I am not suggesting that, but I just want to know. - Perhaps I should amplify this a little bit. Let us trace the imaginary course of a particular matter.

A proposal for a regulation is submitted to the Parliamentary Draftsman and he thinks either that it is unwise or inconsistent with the Act under which it is proposed to be made. He writes to the Department and tells them.

SENATOR WILLESEE. - You would consider it his function to say if he thought it unwise? - Yes, definitely.

If I can just interrupt the course of this example, he can tell them it is unwise, but he cannot compel them to accept the advice.

SENATOR WILLESEE. - But, of course, a Minister or the Government need not accept it? - That is why I say it cannot rest on the Parliamentary Draftsman.

Let me continue with the example. He advises the Department that a particular regulation would either be unwise or inconsistent with the Act, or there may be some other ground of objection to it. The Department concerned receives that and they submit the remarks of the Parliamentary Draftsman to their Minister and the Minister says, "I have taken that into account and I nevertheless propose to submit this regulation to the Executive Council."

The Department writes to the Parliamentary Draftsman and says the Minister has considered it and proposes to submit it to the Governor-General. My next step would be to bring the matter to the notice of my own Minister the Attorney-General, and I imagine the Attorney-General would then discuss the proposed regulation with his colleague, the Minister administering the Department concerned. If the Attorney-General agreed with my view that it was unwise and the other Minister persisted, the matter would be resolved by going to Cabinet. But the Parliamentary Draftsman cannot resolve it.

SENATOR WILLESEE. - That is when it is an extreme case. - I took an extreme case as an example. I do not want to convey the impression that that is what always happens. There are dozens of instances when the Parliamentary Draftsman says to a Department that a proposed regulation would be unwise or would be inconsistent and the Department says, "In view of that advice, the Minister has decided not to proceed with the regulation."

SENATOR WILLESEE. - Would you think there would be many cases where you would advise the Department and say, "this is outside the statutory powers of regulations and it should be an amendment to a Bill"? You would feel that was one of your implied duties at least, would you not? - There is no doubt about it being our duty, but you asked me would there be many cases.

SENATOR WILLESEE. - Would there be many or few? - It would be

very difficult to give an exact figure. Perhaps, on the average, once a week. Not more than once a week. Not more than perhaps fifty times in a year would be the average. Something between once a week and once a month.

SENATOR WILLESEE. - Following these inquiries over the last couple of days, in answer to Senator Wright, you said that in your view third party claims would be recoverable under reg. 515. - Yes.

SENATOR WILLESEE. - It was my impression yesterday when Senator Wright was cross-examining that this question of third party has never been clearly dealt with by any of the Departments. - I am not sure what that means - it has never been clearly dealt with by any of the Departments. I think it was almost certainly under consideration at some stage in the discussion concerning this regulation beginning in 1943.

SENATOR WILLESEE. - That never came out in evidence yesterday, did it? - I do not know that that precise question was asked.

SENATOR WILLESEE. - My word it was. I remember asking the Treasury gentleman, Mr. Hewitt, that precise question and he took some time to answer. I thought we had gone into a yogi session for a while. Finally, Senator Wright asked the question again. It left no doubt in my mind and I think Mr. Hewitt's words were that there was no specific discussion on it. - I cannot say.

SENATOR WILLESEE. - You cannot say, but I am worrying about the future of the Committee as well now when I see so much of this. - I think there is not a shadow of doubt, as a question of law, that it is covered.

SENATOR WRIGHT. - If the regulation is valid, yes.

SENATOR WILLESEE. - I agree with your answer to Senator Wright that that was one of the reasons why this inquiry has taken place - because of this question.

To move on to one other matter, you were dealing a few moments ago with the question of the Public Service and the recovery of moneys. - I qualified that in some way. I said I was not certain about that.

SENATOR WILLESEE. - Even in the Public Service I recollect recent cases where actions have been taken by different Departments in civil Courts. A postman might steal some registered letters or a postal clerk takes money. - Do you mean a prosecution in a civil Court?

SENATOR WILLESEE. - In what cases does the Public Service recover goods and property, and is it unlimited? - I do not think there is any very extensive power in the Public Service or in the Crown. It would not be the Public Service Board that would be the plaintiff. When the Crown recovers money civilly, the procedure is to sue in a normal Court. That, of course, is different from a prosecution.

SENATOR WILLESEE. - For punishment, yes. On the recovery of money, generally, an agreement is entered into and it is taken from whatever moneys are due to the officer. That is generally the way the Public Service recovers money. Then the amount is limited to the amount of superannuation that is due to him. - No, that is not so. What often happens is that a Public Servant commits an offence which is also a breach of the civil law. He steals £50 for instance. He would be charged under the Public Service Act with an offence and we will take it he is dismissed from the Service. The Commonwealth would then have a common law claim against him for £50 and it would deduct that £50, or it would be open to the Commonwealth to deduct that, from any moneys due to that man whether by way of refund of superannuation, salary, refund of income tax or any other debt due by the Crown to him. His debt to the Crown would be set off.

SENATOR WILLESEE. - But then it is limited to moneys at that point. - That is true. They are moneys owing by the Crown to him in some particular way, but it is not limited to moneys owing in any particular way.

SENATOR WILLESEE. - But the amount is limited. - In practice, it may be; but in law, it is not. The debtor and creditor set off their respective debts of unlimited amounts.

SENATOR WILLESEE. - Carry on with this case. He has stolen £5,000. - I said he has stolen £50 and that would be set off against any money, whether superannuation, salary, refund of income tax or any other type of money owing by the Crown to him. He would then be paid the difference between the amount of £50 and the amount owing to him by the Crown.

SENATOR WILLESEE. - Now take the case where it is a larger amount than the moneys due to him. - If the amount that the Commonwealth owed him were less than the amount he owed the Commonwealth, it would be open to the Commonwealth to take proceedings to recover the balance.

SENATOR WILLESEE. - I realize that is the legal position. The amount of moneys open to the Commonwealth at that stage is limited. I know they can then go to a civil Court, but how often do they do it when it is only an amount of £50 or £60 and a man is out of work? - They do it quite regularly.

SENATOR WILLESEE. - But there are a lot of cases in which they do not. - I do not know.

SENATOR WILLESEE. - Well, I think I do. It is probably not important. - I can say this: that an officer in the Deputy Crown Solicitor's office in Melbourne recently embezzled or got away with a very considerable sum of money running into four figures and he was charged with an offence before a jury in Victoria and he was acquitted, although there was no doubt that he had taken the money. It is now open to the Department to take action. I am not sure whether we have actually issued a writ, but we are contemplating civil proceedings to recover the amount he unlawfully took from the Commonwealth.

FURTHER EXAMINED BY SENATOR WRIGHT:

SENATOR WRIGHT. - Would you be so good as to refer to Section 3(3.) of the Air Force Act, which says that Section 58, amongst others, of the Defence Act shall, subject to this Act, continue to apply to the Air Force. Now, turn to Section 5 and you see that the Air Force Act, in force at the date on which the Air Force Act 1959 came into operation, shall, subject to this Act, and to such modifications, adaptations and exceptions, if any, as are prescribed, apply in relation to the Air Force. The expression "as prescribed" is defined by the Acts Interpretation Act to mean "prescribed by the Act or by regulations", is it not? - Or by regulations under the Act.

SENATOR WRIGHT. - Did you consider if the expression "subject to this Act" in Section 5 has the effect of including regulations, the parallelism between it and the expression "subject to this Act" in Section 3(3.) in giving your opinion? - Yes. I do not think what is enacted in Section 5 would cause me to change my opinion.

SENATOR WRIGHT. - Did you consider it? - Yes, we considered the whole of the Act.

SENATOR WRIGHT. - It is not referred to in your opinion. - No. I do not regard it as having any bearing on the question, really.

SENATOR WRIGHT. - You do not? - No.

SENATOR WRIGHT. - So that, where you have in Section 3 an enactment that Section 58 of the Defence Act shall, subject to this Act, apply, and you have an exactly similar provision with regard to the Air Force Act that it, subject to this Act, shall apply, and where in Section 5 the Draftsman considered it necessary when he intended to make sub-section (5.)'s effect subject also to modifications and adaptations to be effected by regulations, he expressly said so, you nevertheless do not think it is relevant to consider that for the purpose of an opinion as to the meaning of "subject to this Act" in Section 3. - I did not say it was not relevant to consider it. I said I did not think it had any bearing on it.

SENATOR WRIGHT. - You draw a distinction between the two - that it is not relevant to consider it and that it does not have any bearing on it? - I did not say it was not relevant to consider it. I said that, having considered it, it was not thought to have any bearing on it. Your point, if I might say so, attributes a consistency in drafting which is very seldom obtained in practice.

SENATOR WRIGHT. - But is not one of the primary principles of interpretation of Statutes that you will attribute to the same expression in the one Statute the meaning unless there is context to require a different meaning? - Yes, that is so, in general.

I do not think that rule is, by any means, a governing rule in a context of this sort. I agree that, if you had the expression "the Governor-General" or "the Attorney-General" in a Statute, it would, prima facie, have the same meaning throughout the Statute; that is, you identify the same person in each case by the words used. But I think the context here is different from that kind of thing.

SENATOR WRIGHT. - Through you, Mr. Chairman, if there are any judicial decisions to support that view, I, as one member of the Committee, would be most obliged to have reference to them.

EXAMINED BY THE CHAIRMAN:

THE CHAIRMAN. - There are one or two points that I would like you to amplify. You say that part of your duties is to scrutinize regulations, to scrutinize what is given to you by Ministers to put into regulations and soe, in effect, that the four heads of power under which we operate are not

infringed. - Yes. We are not limited to the four heads of power under which the Committee operates.

THE CHAIRMAN. - You are not limited to them but at least you do consider those four and you do, in effect, act as a watch-dog, as it were. - Yes, very definitely. We regard this duty most seriously and we endeavour to exercise it, not exactly in a watch-dog fashion, but, while we have no compulsory powers over the Department, we do try to our utmost to see that they take the advice we give them in a sense that it could become unpleasant for them if they do not. If there is any suggestion that we are completely oblivious to those considerations, that suggestion would be quite wrong. We go to great pains over this. For instance, we get all the reports of the corresponding Committee of the House of Commons and they are studied and circulated to senior officers. I think their terms of reference are wider than those of this Committee, speaking from memory. There are a good many points that are not taken by this Committee which would be taken by the House of Commons Committee. Those reports are circulated among the senior officers of the Parliamentary Draftsman Division; that is, those officers who have the responsibility for finally settling regulations. We discuss them among ourselves and take them into account in deciding what advice we shall give to Departments as to the unwisdom or the invalidity or any other ground of objection to a proposed regulation. And, of course, many of them are discussed with the Attorney-General as well.

THE CHAIRMAN. - It would suggest to me that, to a large extent, the work of this Committee might be redundant other than to scrutinize those regulations to which you have drawn the attention of the Attorney-General but which the Minister in charge of that particular Department insists on pressing and Cabinet agrees that the regulation shall go through in any case. - I would not say that the Committee was redundant, for two reasons. It is perfectly open to the Committee to take a different view from the view I might take as to the wisdom or otherwise of a particular regulation. The members of the Committee would be actuated by different motives in some cases. The second reason is that I might advise the Department strongly that a particular regulation is unwise and, notwithstanding that advice, the Department might go ahead and make it. It would then be the function of this Committee to pick up any objection to

the regulation and draw public attention to it.

THE CHAIRMAN. - What value do you see in this Committee retaining a legal adviser to scrutinize the regulations after they have gone through your Department, which should be much more skilled in seeing that they conform to these four heads of power that are laid down?

SENATOR WRIGHT. - On behalf of private Counsel, of course, I reserve leave to question some of your remarks, Mr. Chairman.

MR. EWENS. - I think a lot would depend on the gentleman you gave it to. Picking up these points requires a lot of experience and certainly a man who had never encountered this sort of work before would be in a good deal of difficulty. I would say that for every point he found we would find ten and probably do find ten.

THE CHAIRMAN. - So that what has escaped you, it would be rather odd if he were to find?

SENATOR WILLESEE. - With the exception of where your advice was rejected.

MR. EWENS. - Yes. The case of regulation 515 is the kind of thing I have in mind. I do not know whether the Committee picked up the points it has been making of its own responsibility or whether they were pointed out. This had a long history. It had years of history and it was agreed by everybody concerned that this regulation ought to be made and, by that time, what the draftsman thought had become irrelevant. It was a matter of policy to make it.

THE CHAIRMAN. - The point I was coming to was this: I would ask you did your Department advise that an appeal should be added to this regulation. - I cannot say that offhand. As I say, I personally had no hand in this and I could not say what we advised.

THE CHAIRMAN. - It does appear to me that your Department has not picked up the point that the Committee, in considering the regulation, laid great stress upon, namely, the fact that there is no appeal and that this does not conform to the normal procedure. - I think I could safely say that, if this regulation had had no history behind it and had simply come to us from the Department to make a regulation in these terms, we would certainly have drawn attention to some of its features; but, coming to us as it did, as an agreed proposal of policy evolved out of years of

discussion, I think it was natural to look at it in a different light.

THE CHAIRMAN. - Why has the appeal not yet been framed in a regulation? What is the cause of the delay? - I would not say there is any delay. At the present time, it is approximately two months from the time any draft reaches us before we are in a position to take it in hand. This one is within two months. I would expect it to be taken in hand next week. A few years ago, we were two years behind with our work but now we are only two months behind. It is not a matter of delay. Of course, it depends on how you define "delay".

The position is that we are not able to proceed with a draft immediately we receive the instructions. Under instructions from the Attorney-General, except in the case of something especially important or urgent, all jobs are attended to in the order in which the instructions are received, and this one will be taking its place with those others, I expect. At the present time, that takes about two months. We have not got anything like our authorized staff. It is almost impossible to get a suitable man to do this sort of work. They take years of training, and we have not been able to get them for that reason.

THE CHAIRMAN. - It would appear that the appeal came from the Department and not from your own Department? - I think the instructions came from the Department of Air. As far as I know, our Department had no part in it.

THE CHAIRMAN. - Your Department was prepared to allow regulation 515 to go through as it stood and was satisfied that it was in order without any appeal? - I do not know that you could say that we were satisfied that it was in order. It did go through in that form, but I think it was because of the history behind it, and I would think it would be a point which would have been taken if the thing had come to us fresh without any proposal for consideration and without any history.

SENATOR SEWARD. - You said that if this had come to you as a fresh question, without any history behind it, you would have treated it differently from the way you did treat it, coming to you as it did - What I meant is that all the considerations involved in the making of this regulation had already been considered by the policy-making people. It would have been open to us at that stage to raise the matters.

SENATOR SEWARD. - I would imagine that would have been one of your prime duties - to draw attention to it and see that these things had not been overlooked. - I would agree that it might have been desirable for me to say to them, "although this is the agreed result of consideration by two or three parties, you realize what you are doing. You realize you are making a regulation in these terms"; but, in fact, that was not done. This, of course, only emphasizes what I raised a few minutes ago - that it is very difficult to get suitable people to do these jobs. They just do not exist.

Although the officers at the top try to train them as well as we can, it is inevitable that officers, particularly the more junior officers who might not have the confidence that a senior officer has, will allow a thing to go through whereas a senior officer might have felt it ought to have some attention drawn to it.

SENATOR BYRNE. - Can you suggest any reason why, when Section 58 of the Defence Act was being imported into the Air Force Regulations in regulation 435, action at the instance of the Minister was substituted for action at the instance of the Commanding Officer. - No, I am afraid not.

SENATOR BYRNE. - Regulation 435 of Air Force Regulations, reads as follows :-

"435, The commanding officer of any unit shall be Responsibility
responsible for the safe keeping and good order of all of commanding
articles, the property of the Commonwealth, supplied to officer for
his unit, and the value of any of these articles may if unit property,
lost or damaged while in possession of the unit other-
wise than through fair wear and tear and other unavoid-
able accident, be recovered by the Minister in any court
of competent jurisdiction from the member by whom the
loss or damage was occasioned."

When they carried Section 58 into the Air Force Regulations in almost precise terms, it was written in with action to be taken by the Minister. - I do not know why that was so.

SENATOR BYRNE. - Would it be any matter of legal facility, or do you think it might have been to bring it to the top level? - I think, myself, that a Minister is more appropriate. I do not think the provision in the Defence Act as to the Commanding Officer is the more appropriate of

the two. Really, it should be the Commonwealth which takes the proceedings; it should not be *Townley v. Brown* or *Smith v. Brown*, if that happens to be the name of the C.O. All through, the Constitution refers to actions by and against the Commonwealth.

SENATOR BYRNE. - I asked the question because, if there was any real significance in that to bring the matter to top level, apart from any legal facility, we again depart from that here by giving authority to a C.O. to proceed under regulation 515. And what would be the effect of regulation 515(3.) - "shall be deemed to be due and owing by the member" ? What would be the normal procedure from that point if the Air Board determined \$1,000 to be owing? - If there were no money owing by the airman to the Commonwealth.

SENATOR BYRNE. - Or they elected not to pursue that. - We would then have to issue a writ claiming that amount and the cause of action would be that it was determined as owing under this regulation.

SENATOR LAUGHT. - You would not have to prove your case? - No, you merely have to prove that the Air Board had considered the matter and had determined that the amount was owing. Of course, the defendant in those proceedings would not be completely without defence in appropriate cases. He could raise any defences that were open to him - not the merits, but he could say that the Air Board had acted outside the scope given by the regulation or

SENATOR LAUGHT. - The merits would be lost to him? - Not altogether.

SENATOR WRIGHT. - It would be an arbitrary decision of the Air Board? - It could be challenged in much the same way as the decision of a jury or the decision of a magistrate could be challenged on the ground that there was no evidence. Senator Wright is shaking his head. It would not be a re-hearing. I take the view that it would be open to the Court to find that there was no possible basis in law on which the Air Board could have come to the conclusion.

SENATOR WRIGHT. - You suggest it would have been open to the Air Board to invalidate the decision if it was against the weight of the evidence? - No. If, for example, the Air Board had applied any wrong principle or there had been a mistake as to the identity of the person

concerned.

SENATOR WRIGHT. - A very much narrower category of invalidity than a new trial? - Certainly.

SENATOR BYRNE. - Perhaps Mr. Mulrooney might like to indicate the reason for the transfer of the power of proceedings from the C.O. to the Minister.

MR. MULROONEY. - That goes back a long way. It goes back to 1927 when these Regulations were first gazetted and, at that time, the Air Force Act 1923 provided that the Defence Act, subject to such modifications and amplifications as are made by regulations - and I think the section goes on to say, "which regulations the Governor-General is hereby empowered to make, shall apply in relation to the Air Force". Under that Act, we then proceeded to incorporate into the Air Force Regulations all the sections of the Air Force Act which we considered should apply to the Air Force, plus or with any modifications and adaptations that we considered necessary for the particular occasion. I just cannot remember that regulation.

I remember the circumstances of the regulations because I drafted them myself in 1927, but I cannot remember the transposition of that regulation. I may have the original documents in my office.

SENATOR BYRNE. - It might not be material, but I thought you might know.

SENATOR WRIGHT. - Have you, since yesterday, from your perusal of the files, come across any specific references to the inclusion in this method of recovery of a third party claim?

MR. MULROONEY. - No, I have not perused the files since yesterday.

SENATOR WRIGHT. - Yesterday, in referring to Section 137 of the Imperial Air Force Act, I understood you to say that it applied to officers and entitled recovery without court-martial proceedings.

MR. MULROONEY. - That is so.

SENATOR WRIGHT. - I draw your attention to Section 137(2.) under which penal deductions may be made from the pay due to an officer "to make good such compensation for any expenses, loss, damage, or destruction occasioned by the commission of any offence."

MR. MULROONEY. - That is so. That is the provision which covers

him if he is tried by court-martial, but paragraph 4 of that Section provides that the penal deductions may be the sum required to make good any loss, damage or destruction of public or Service property, or property belonging to the Navy, Army and Air Force Institute which, after due investigation, appears to the Air Board to have been occasioned by any wrongful act or negligence on the part of that officer. That is the provision under which we make these penal deductions.

SENATOR WRIGHT. - But sub-section (4.) is only concerned with the question of amount. The definition of quality and nature of the sum for which recovery can be made is in sub-section (2.).

MR. MULROONEY. - No, they are quite distinct provisions, sir.

SENATOR WRIGHT. - I am obliged to you for that view, but it will have to be considered. The Secretary has been good enough to bring me the Air Force Act 1923. The provision to which you refer is Section 3(3.) and it says, "the Defence Act, except Part XV. thereof (reads) and the members thereof who are outside the limits of the Commonwealth."

MR. MULROONEY. - That is the Section. Under that Section, we made some 478 regulations.

SENATOR WRIGHT. - I wish to add, so that the information will be complete, there is no such provision as Mr. Ewens relies upon in this Act of 1923, saying that the expression "this Act" includes all regulations made thereunder.

MR. MULROONEY. - No, it is not in the Act.

THE CHAIRMAN. - The Committee want me to express our appreciation to you for coming along, Mr. Ewens, and being of so much assistance to us.

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PERSONNEL OF COMMITTEE.

Chairman:

Senator Ian Wood.

Members:

Senator J.J. Arnold.

Senator C.B. Byrne.

Senator K.A. Laught.

Senator the Hon. H.S. Seward.

Senator D.R. Willesee.

Senator R.C. Wright.

Functions of Committee.-

Since 1932, when the Committee was first established, the principle has been followed that the functions of the Committee are to scrutinize regulations and ordinances to ascertain -

- (a) that they are in accordance with the Statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative rather than upon judicial decisions;
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES.

TENTH REPORT.

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

2. The purpose of this Report is to acquaint the Senate of the Committee's inquiries in regard to its scrutiny of Statutory Rule No. 92 of 1955. On Thursday, 10th May, 1956, Senator I.A.C. Wood, the Chairman of the Committee, gave notice of motion for the disallowance of the Regulation. The motion is listed on the Notice Paper for consideration this day.

3. The explanatory statement circulated by the Department of Air in relation to the regulation reads as follows :-

"The purpose of this amendment to Air Force Regulations is to provide adequate authority for the Air Board to make deductions from the pay of members of the R.A.A.F. for losses of public money or property or for damage to property occasioned by their neglect or misconduct. The amendment makes provision for delegation of the Air Board's authority."

4. Having considered the Regulation, the Committee is of the opinion -

- (1) That the Regulation is not authorised by the Act;
- (2) That the Regulation includes provisions of substantial alterations of the law appropriate only to enactment (if at all) by Parliament;
- (3) That the Regulation authorises deductions from a member's pay -
 - (a) not only for deficiency of stores and materials but also for third party claims,
 - (b) of unlimited amounts,
 - (c) without appeal,
 - (d) without providing the member with any procedure (such as Court Martial or Civil Court action) to be heard, and
 - (e) without protecting any proportion of the member's periodical pay -

notwithstanding that the Air Force Act 1923-1952, section 3 (3), specifically enacts that, subject

to the last mentioned Act, section 58 of the Defence Act shall continue to apply in relation to the Air Force.

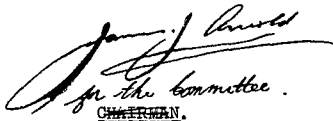
5. Section 58 of the Defence Act is as

follows :-

Responsibility of commanding officer. "58. The commanding officer of every corps, ship's company or air-force unit or station shall be responsible for the safe keeping and good order of all articles, the property of the Commonwealth, supplied to his corps, ship's company or air-force unit or station, and the value of any of those articles may, if lost or damaged while in possession of the corps, ship's company or air-force unit or station otherwise than through fair wear and tear or unavoidable accident, be recovered by the commanding officer by action in any Federal or State Court of competent jurisdiction from the officer or man by whom the loss or damage was occasioned."

6. For the further information of the Senate, the following documents are attached -

- (1) Copy of Statutory Rule No. 92 of 1955;
- (2) Copy of the correspondence entered into with the Department of Air and the Attorney-General's Department; and
- (3) Copy of the evidence taken from the Parliamentary Draftsman and officers of the Department of Air and the Department of the Treasury.


for the committee.
CHIEF CLERK.

Senate Committee Room,
22nd May, 1956.

STATUTORY RULES.

1955. No. 92.

REGULATION UNDER THE AIR FORCE ACT 1923-1952.*

I THE GOVERNOR-GENERAL in and over the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulation under the *Air Force Act 1923-1952*.

Dated this twenty-third day of December, 1955.

W. J. SLIM
Governor-General.

By His Excellency's Command;

ATHOL TOWNLEY
Minister of State for Air.

AMENDMENT OF THE AIR FORCE REGULATIONS.†

After regulation 514 of the Air Force Regulations the following regulation is inserted:—

“ 515.—(1.) Where—

- (a) the Commonwealth has suffered or incurred loss, damage or expense; or
- (b) there is a deficiency in the stores or materials of the Commonwealth which is not accounted for to the satisfaction of the Air Board,

Liability of members for loss, damage or expense caused to the Commonwealth by their neglect or misconduct.

and the Air Board considers that the loss, damage, expense or deficiency has been caused or contributed to by—

- (c) the neglect or misconduct of a member; or
- (d) the failure of a member to comply with, or a contravention by a member of, the Defence Act or the Act, a regulation made under either of those Acts or a lawful order or instruction;

the member shall be liable to pay to the Commonwealth such amount, not exceeding an amount which the Air Board considers sufficient to reimburse the Commonwealth for the loss, damage, expense or deficiency and any expenditure incurred by the Commonwealth as a result of the loss, damage, expense or deficiency as the Air Board directs to be paid by the member.

“(2.) In determining the amount payable by a member under this regulation, the Air Board shall take into consideration—

- (a) the gravity of the member's neglect, misconduct, failure or contravention;

* Notified in the *Commonwealth Gazette* on 12th January, 1955.

† Statutory Rules, 1927, as amended to date. For previous amendments of the Air Force Regulations, see footnote † to Statutory Rules 1955, No. 85, and see also Statutory Rules 1955, No. 41.

- (b) the extent to which that neglect, misconduct, failure or contravention caused or contributed to the loss, damage, expense or deficiency;
- (c) the rate of pay of the member; and
- (d) any other relevant matters.

"(3.) An amount which the Air Board directs under this regulation to be paid by a member shall be deemed to be a debt due and owing by the member to the Commonwealth and, without prejudice to the right of the Commonwealth to recover the amount by other means, may be deducted in such instalments, and in such manner, as the Air Board directs from the pay, allowances and other moneys which are, or which may become, payable to the member by the Commonwealth under the Defence Act or the Act.

"(4.) The powers and functions conferred on the Air Board by the preceding provisions of this regulation may be exercised and performed by an officer authorized by the Air Board for that purpose, but, in the exercise and performance of those powers and functions an officer so authorized shall not, in respect of a particular loss, damage, expense or deficiency, direct the payment to the Commonwealth by a member of an amount which exceeds an amount equal to the pay and allowances of the member for a period of twenty-eight days.

"(5.) Where an officer so authorized by the Air Board has directed that an amount be paid to the Commonwealth by a member—

- (a) the commanding officer, if any, of the officer;
- (b) the air or other officer, if any, commanding the command in which the officer is serving;
- (c) if the officer is outside Australia or on war service in Australia, the officer, if any, in chief command of the force to which the officer belongs; or
- (d) the Air Board;

shall, at the request of the member, review the direction and may, in his or its discretion—

- (e) confirm the direction;
- (f) cancel the direction; or
- (g) direct that a lesser amount be paid to the Commonwealth by the member.

"(6.) A direction by an officer made by virtue of sub-regulation (4.) of this regulation or the last preceding sub-regulation shall, for the purposes of this regulation, have the same force and effect as a direction by the Air Board."

COPY

29th March, 1956.

The Secretary,
Department of Air,
MELBOURNE, VIC.

Statutory Rules 1955 No. 92.

The abovementioned Statutory Rules and the Explanatory Memorandum furnished by your Department were recently considered by the Senate Standing Committee on Regulations and Ordinances.

The Committee has queried whether Regulation 515 is consistent with that portion of Section 3(3) of the Air Force Act which provides that Section 58 of the Defence Act shall apply.

By constituting the Air Board a court to determine damage without a trial or hearing, Regulation 515 would appear to cut across Section 58 of the Defence Act which provides for claims for damage or loss to be brought before a Court of Law.

Your departmental comment in regard to the query would be appreciated.

(Sgd.) R.E. Bullock
Secretary,
Regulations and Ordinances Committee.

Minuted to -

The Secretary,
Attorney-General's Department,
CANBERRA, A.C.T.

Forwarded for favour of comment please.

(R.E. Bullock)

COPY.

ATTORNEY-GENERAL'S DEPARTMENT.

PARLIAMENTARY DRAFTSMAN.

CANBERRA, A.C.T.

No. 54/2013.

18th April, 1956.

MEMORANDUM for -

The Secretary,
Senate Standing Committee on
Regulations and Ordinances,
Parliament House,
CANBERRA, A.C.T.

Statutory Rules 1955, No. 92.

I refer to your minute to the Secretary, Attorney-General's Department, with which you forwarded a copy of your memorandum dated 29 March, 1956, addressed to the Secretary, Department of Air.

2. In your memorandum, you state that the Senate Standing Committee on Regulations and Ordinances has queried whether regulation 515, which was inserted in the Air Force Regulations by the abovementioned Statutory Rule, is consistent with that portion of section 3(3.) of the Air Force Act, which provides that section 58 of the Defence Act shall apply to the Air Force. The Committee states that "by constituting the Air Board a court to determine damage without a trial or hearing, regulation 515 would appear to cut across section 58 of the Defence Act which provides for claims for damage or loss to be brought before a court of law".

3. For the reasons stated in the following paragraphs, I do not think that regulation 515 of the Air Force Regulations is inconsistent with section 3(3.) of the Air Force Act. That section, so far as is relevant, reads as follows:-

"(3.) Part 1., sections thirty, forty-three, forty-six, forty-seven, fifty-one, fifty-three and fifty-eight and Part IV. to XIV. (both inclusive) of the Defence Act shall, subject to this Act, continue to apply to the Air Force:

Provided that.....".

4. Section fifty-eight, it will be seen, is not applied unconditionally to the Air Force. It is, by the express terms of section 3(3.) applied "subject to this Act". The expression "this Act" is defined by section 2 as including all regulations made under the Act. Applying the defined meaning of the expression to section 3(3.), the section means that section fifty-eight of the Defence Act applies to the Air Force "subject to this Act and the regulations made under this Act".

5. Section 9 authorizes the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for securing the discipline and good government of the Air Force and the members thereof whether within or beyond the limits of the Commonwealth, or for carrying out or giving effect to the Act. I do not think

there is any doubt that the regulation is a regulation which is convenient to be prescribed for securing the discipline and good government of the Air Force. Consequently, those portions of the Defence Act which, by section 3(3.) of the Air Force Act, apply in relation to the Air Force apply subject to regulation 515.

6. The view expressed above has been held and applied consistently by this Department since section 3(3.) was enacted in its present form.

7. Moreover, it is by no means beyond doubt that regulation 515 would be inconsistent with section 58 if the section were not subject to the regulation. Further, I do not think that the Committee's statement that the Air Board has been constituted a Court to determine damage without a trial or hearing correctly represents the effect of the regulation.

J.Q. Ewens. (Sgd.)

Parliamentary Draftsman.

DEPARTMENT OF AIR

Ref: 83/1/943.

MELBOURNE, S.C.1.

24th April, 1956.

Secretary,
Regulations and Ordinances Committee,
The Senate,
CANBERRA, A.C.T.

STATUTORY RULES 1955, NO.92.

(Your letter 29th March, 1956)

Since the receipt of your letter of the 29th March, concerning the legality of Air Force Regulation 515, I have received a copy of a memorandum dated April, 1956, (reference 54/2013) setting out the views of the Parliamentary Draftsman, Attorney-General's Department, on the subject matter. The views expressed are concurred in by this Department.

E.W. Hicks
Secretary.