

DEPARTMENT OF THE SENATE
PAPER NO. 632
DATE 21st May, 1964
PRESENTED <i>[Signature]</i>
<i>[Signature]</i> Clerk of the Senate

1964.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

NINETEENTH REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES

(Being the First Report of the 1964 Session, and the
Nineteenth Report since the formation of the Committee.)

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

NINETEENTH REPORT OF THE COMMITTEE

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

2. At its first meeting this year the Committee agreed that it should submit to the Senate a general report on its activities since its last report in November, 1962. This decision was to some extent prompted by the fact that in some quarters the Committee has become more associated with motions for disallowance of regulations than with the less controversial but equally important and effective work carried on by the Committee in its general supervision of delegated legislation. This work regularly involves the hearing of evidence from departmental witnesses, and the exchange of correspondence with Ministers, in relation to regulations and ordinances tabled in the Senate.

3. In accordance with its decision the Committee has selected certain matters with which it has dealt since its last report and reports to the Senate upon them as follows:-

CUSTOMS (PROHIBITED IMPORTS) REGULATIONS.

4. Following the Committee's eighteenth report, the Chairman gave notice on 15th November, 1962, of a motion to disallow Regulations 1 and 2 of the regulations referred to in that report, (Statutory Rules 1962 No. 82) the effect of which was to transfer works or articles which are blasphemous, indecent or obscene from the list of goods the importation of which is absolutely prohibited by law to the list of goods the importation of which is prohibited unless the permission in writing of the Minister has been granted.

5. In the opinion of the Committee, if the prohibition of importation of such material were to cease to be absolute the law should provide proper safeguards limiting the Minister's discretion.

6. After debate, extending over three days, the Minister for Customs and Excise, Senator the Hon. N.H.D. Henty, gave an undertaking to the Senate that he would have the regulations amended to meet the requirements of the Committee. In view of this undertaking the Chairman withdrew his motion, by leave of the Senate, on 4th December, 1962. The regulations were subsequently amended (Statutory Rules 1963 No. 26) as follows:-

1. After regulation 4 of the Customs (Prohibited Imports) Regulations the following regulation is inserted:-

"4A.-(1.) This regulation applies to blasphemous, indecent or obscene works or articles and advertising matter relating to blasphemous, indecent or obscene works or articles.

(2.) The importation of goods to which this regulation applies is prohibited unless a permission, in writing, to import the goods has, after the Minister has obtained a report from the Chairman of the Literature Censorship Board constituted under the Customs (Literature Censorship) Regulations or from the Director-General of Health, been granted by the Minister.

(3.) A permission under this Regulation shall be subject to such conditions imposing requirements or prohibitions on the person to whom the permission is granted with respect to the custody, use, reproduction, disposal or destruction of the goods, or with respect to accounting for the goods, as the Minister thinks necessary to ensure that the goods are not used otherwise than for the purpose for which he grants the permission."

BROADCASTING AND TELEVISION REGULATIONS

7. In May, 1963, the Committee considered an amendment of the Broadcasting and Television Regulations (Statutory Rules 1963, No. 11) relating to the functions of the Australian Broadcasting Control Board in connection with conditions of licences.

8. The amending regulation provides -

"4A.--(1.) The functions of the Australian Broadcasting Control Board include the performance of the duty of duly considering and deciding applications to the Board in relation to matters which, under any condition of a licence under the Act in respect of a broadcasting station or television station, may be the subject of application to the Board.

(2.) In performing its function under this regulation, the Board shall, subject to the Act and the terms and conditions of the licence concerned, proceed in such manner, and after notice to such persons, as it thinks proper, and may inform itself in such manner as it thinks fit."

and it appeared to the Committee that a matter of such importance should be dealt with by substantive legislation rather than regulation. Upon examination of the Broadcasting and Television Act 1942-1962, however, it was found that section 16(1) provides:-

"16.--(1.) The functions of the Board are -

- (a) to ensure the provision of services by broadcasting stations and television stations in accordance with plans from time to time prepared by the Board and approved by the Minister;
- (b) to ensure that the technical equipment and operation of such stations are in accordance with such standards and practices as the Board considers to be appropriate;
- (c) to ensure that adequate and comprehensive programmes are provided by commercial broadcasting stations and commercial television stations to serve the best interests of the general public; and
- (d) to detect sources of interference, and to furnish advice and assistance in connexion with the prevention of interference, with the transmission or reception of the programmes of broadcasting stations and television stations,

and shall include such other functions in relation to broadcasting stations and television stations as are prescribed."

9. The amending regulation expands the functions of the Board considerably, and also gives it authority to act in any manner it thinks fit in relation to its inquiries under the regulation (a power which is not given to it by Division 3 of the Principal Act in relation to other inquiries). The only justification for such a regulation lies in the very wide language of section 16, (inserted in the Act in 1948, and amended by the Parliament in 1956) and the Committee draws to the attention of the Senate this recent example of what can be

prescribed by regulation, even in such a currently controversial field as the granting of television licences, when the Parliament passes legislation containing wide a regulation making power as section 16 of the Broadcasting and Television Act.

MARRIAGE REGULATIONS

10. In August, 1963, the Committee considered the first Marriage Regulations made under the Marriage Act 1961. (Statutory Rules 1963, No. 31). It appeared to the Committee that Regulation 60, dealing with the furnishing of information relating to the re-registration of the births of legitimated children, gave to the registering authority an unlimited authority to seek information, and that this might be an infringement of personal rights and liberties.

11. The Committee discussed the matter with the then Attorney-General, who agreed that no such intention lay behind the regulation. As a result of the discussions with the Minister a letter was received from the Secretary, Attorney-General's Department, in the following terms -

"I am instructed by the Attorney-General, following his discussion with the members of your Committee this morning, to inform your Committee that, in the view of the Attorney-General, the information which could be specified in a notice under regulation 60 (1.) of the Marriage Regulations would be limited to information of the kind set out in Form 21 scheduled to the regulations, and that, by the general law, a refusal of information on the ground that to furnish it would incriminate the person required to give it would not be a breach of the regulation.

2. However, the Attorney-General appreciates the concern of the Committee and desires to assure it -

Firstly, that the regulation will be administered so as to confine the information sought under it to the information provided for in Form 21 (other than the paternity of the child) and that he will so instruct the registering authorities, and

secondly, that on the first occasion the Marriage Regulations are amended, regulation 60 will be amended to make express the limitation as to information and the exception of incriminating answers to which the Attorney has referred.

For the words now appearing in sub-regulation (1.) "information relating to the legitimation of the child" would be substituted words such as "the information relating to the legitimation of the child as set forth in Form 21". After the words now appearing in sub-regulation (5.) "shall not" would be inserted the words "without lawful excuse",.

and the Committee agreed to take no further action in the matter.

A.C.T. DENTAL REGULATIONS AND MEDICAL PRACTITIONERS
REGISTRATION REGULATIONS.

12. In September, 1963, the Committee considered these regulations, dealing, inter-alia, with permitted advertising by members of the dental and medical professions. The regulations contained the widest and most detailed restrictions possible, and appeared to the Committee to be unnecessarily extensive and restrictive of the rights and liberties of citizens, in this case the members of the two professions.

13. The Committee heard evidence from the Director-General of Health, and subsequently the Chairman gave notice in the Senate, on 8th October, of a motion to disallow the relevant portions of the Regulations. Following this action, members of the Committee had further opportunity to discuss the matter with the Director-General and, as a result, the following letter was received from the Minister for Health, Senator the Hon. H.W. Wade -

"My Director-General has acquainted me with the tenor of his discussion with you on the "advertising" regulations, the subject of your Notice of Motion currently on the Senate Notice Paper.

Upon consideration of the matter I think it best to repeal the regulations and replace them with others which, in general terms, would permit advertising by medical practitioners and dentists to the limits sanctioned by the accepted customs and usages of the medical and dental professions. Under these regulations it would be the function of the Medical and Dental Boards to see that the bounds fixed by custom were not exceeded.

The Director-General has arranged for draft legislation along these lines to be prepared by the Parliamentary Draftsman as a matter of urgency.

In these circumstances I feel that you might wish to withdraw the Notice of Motion as the reason for debate in the Chamber would by this action largely disappear."

14. The Chairman withdrew his motion by leave of the Senate on 15th October, and subsequently new regulations were introduced (Nos. 6 and 7 of 1963) repealing those objected to by the Committee and providing generally that permitted advertising by the members of the two professions should be of a kind which conforms to the accepted customs and usages of their respective professions. These provisions adequately overcame the objections originally raised by the Committee.

LAKE BURLEY GRIFFIN (TEMPORARY CONTROL) ORDINANCE.

15. On 19th March, 1964, the Committee considered the Lake Burley Griffin (Temporary Control) Ordinance 1963, (A.C.T. Ordinance No. 20 of 1963), section 6 of which gives to the Minister for the Interior the absolute and unrestricted power of prohibition on use of Lake Burley Griffin in Canberra.

16. The Committee resolved to write to the Minister for the Interior asking for an explanation of the circumstances which, in his view, justified the granting of such a power, and pointing out also that, although the title of the Ordinance refers to the temporary nature of the Ordinance there is no provision in the body of the legislation to limit its operation.

17. The Minister replied to the Committee explaining that the ordinance had been made to protect the public from injury by concealed hazards during the construction period of the Lake, and that weather conditions had already caused the ordinance to be in operation longer than had been anticipated. As soon as the Lake filled and the danger from concealed hazards no longer existed, the ordinance would be repealed.

18. The Committee noted that since the receipt of the Minister's letter the Lake had in fact filled and the prohibition on its use had been lifted. In the circumstances, the Committee decided to proceed no further on the question of the arbitrary power granted under the Ordinance.

19. To complete this report, the Committee refers to two subjects which have been of concern to it for a considerable time, namely, the Committee's responsibility with regard to Ordinances and Regulations of the Territory of Papua and New Guinea and the Northern Territory and the question of the retrospective operation of regulations. The Committee has referred to these matters in previous reports and does so again in the belief that they are matters of continuing importance.

ORDINANCES AND REGULATIONS OF THE TERRITORIES.

20. In its Fifteenth Report, tabled in the Senate on 22nd September, 1959, and subsequently debated on 7th and 8th October of that year, the Committee stated that, as legislative developments in the Territory of Papua and New Guinea and the Northern Territory had resulted in the creation of representative legislatures, it was inappropriate for the Committee to assume the function of supervision over measures enacted by those legislatures. The then Minister for Territories, in a statement read in the Senate by the Minister representing him (Senator the Hon. Sir Walter Cooper), agreed with the Committee's contention.

21. Subsequent developments in both Territories, resulting in even greater independence from Commonwealth control, and, in the case of Papua and New Guinea the recent election of a new Legislative House of Assembly, have re-inforced the Committee's view that it should be discharged from any responsibility in relation to their legislative enactments and that formal action should be taken to have them removed from its scrutiny.

22. Following the Committee's earlier report, action was taken to refer to the Senate Standing Orders Committee the question of the advisability of amending Standing Order 36A to exclude all Ordinances and Regulations of the two Territories from reference to, and scrutiny by, this Committee. At the present time it is understood that the matter has been considered by a sub-committee of the Standing Orders Committee.

23. It may be that the most appropriate method of achieving the Committee's wish in this matter would be to repeal the statutory requirements relating, as far as Ordinances and Regulations of these two Territories are concerned, to tabling in, and disallowance by either House of the Parliament, but this would be a matter of Government policy. An amendment by the Senate of Standing Order 36A in the manner suggested by the Committee would, however, also achieve the Committee's purpose.

RETROSPECTIVITY OF REGULATIONS

24. The Committee has continued its close interest in the delay which occurs in the promulgation of regulations, and the retrospective operation necessitated thereby in many cases. In an attempt to alleviate the position the Committee received evidence from the Parliamentary Draftsman and representatives of various departments, particularly the Service Departments and the Public Service Board. It is clear to the Committee, as a result of this evidence that some delay is unavoidable. The Committee, over the years, has pursued its interest in this matter, and has from time to time drawn attention to cases of what it regards as exceptional retrospectivity. Written assurances have been received from certain Ministers that their Departments have been instructed to avoid delay and consequent retrospectivity. The Committee is pleased to report that it has noted a distinct improvement in this matter.

25. A recent example of the Committee's activity in this field of retrospectivity is as follows:-

In October, 1963, the Committee had before it for consideration Statutory Rules Nos. 88, 89, 90 and 91, relating to determinations, directions or approvals made or given by the Naval Board, the Military Board or the Air Board in connection with payment of certain types of pay, allowances and other financial entitlements.

under the relevant regulations. In each case a new regulation was inserted in the Regulations including the following sub-regulation -

"(2) A determination, direction or approval takes effect from the date on which it is made or given or, if it is expressed to take effect from another date specified in it, from that other date."

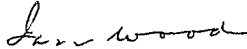
26. This provision was obviously capable of giving rise to excessive retrospectivity and the Committee sought information on the matter from representatives of the three Departments concerned. Following evidence from these representatives, during which the difficulties experienced by the Administration were explained, the Chairman wrote to the respective Ministers stating, inter alia,

"The Committee believes that the power to give retrospective effect to determinations, directions and approvals of the respective Ministers or Boards is capable of too extensive an operation, and that it should contain a greater limitation than at present applies. A maximum limitation of two years retrospectivity would appear to be appropriate, in the circumstances explained by the departmental officers; not as a guide for the ordinary case but to be used only in exceptional cases. The Committee suggests that there be included in the regulations, by way of amendment, the words 'not exceeding however in any case a total period of two years!'"

27. As a result of this suggestion further amendments were made in the regulations (Statutory Rules 1964, Nos. 5, 6, 9 and 14) providing that a determination, direction or approval shall not be expressed to take effect from a date that is more than two years before the date on which it is made or given.

28. The Committee repeats what the Chairman stated in his letter to the Ministers that the Committee's recommendation in this instance was based on a desire to avoid any possibility of adversely affecting the rights of servicemen serving in overseas areas, and that the two years period is not to be taken in any way as a future criterion for retrospectivity. On the contrary, the Committee believes that retrospectivity

beyond a few months is objectionable, and will continue its scrutiny on this basis.

A handwritten signature in cursive script that reads "Ian Wood".

Ian Wood
Chairman

Regulations and Ordinances Committee Room,
20th May, 1964.

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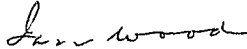
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Chairman

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