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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

THIRTY-NINTH REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES

Being a report upon certain regulations
rendered invalid by a judgment of the
High Court

PERSONNEL OF COMMITTEE

Chairman

Senator I.A.C. Wood

Members

Senator J.L. Cavanagh
Senator D.M. Devitt
Senator P.D. Durack
Senator P.E. Rae
Senator J.J. Webster
Senator J.M. Wheeldon

FUNCTIONS OF THE 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 judicial decisions; and
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

STANDING COMMITTEE
ON REGULATIONS AND ORDINANCES

THIRTY-NINTH REPORT

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

Regulations Rendered Invalid by
Judgment of the High Court

2. It has come to the notice of the Committee that certain regulations have been declared to be invalid by the High Court, and that there are other regulations which may also be invalid as a result of the Court's decision.

3. Section 27 of the Apple and Pear Organization Act 1938-1966 provides as follows:

The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to this Act, and in particular for prescribing penalties not exceeding One hundred dollars for any breach of the regulations, not being a breach for which a penalty is prescribed by this Act.

This is the normal language in which regulation-making power is conferred by Commonwealth Acts.

4. Part VI of the Apple and Pear Organization (Election of Board) Regulations, made under the abovementioned Act, purports to confer on the High Court jurisdiction to deal with disputed elections to the Apple and Pear Board, which is constituted by the Act. Regulation 38 of the Regulations is as follows:

The validity of an election or of any statement or notice showing the voting at, or the result of, an election may be disputed by a candidate at the election or by a person who was qualified to vote thereat by petition addressed to the High Court in the prescribed manner and not otherwise.

5. The High Court, in Willcocks vs Anderson ((1971) 4 A.L.J.R. 375) has declared that Part VI of the Regulations is invalid on the ground that the Act does not authorize regulations conferring original jurisdiction on the Court. The Court referred to, but did not decide, the question as to whether the power of the Parliament under section 76 of the Constitution to make laws conferring original jurisdiction on the Court can be exercised by delegated legislation. The Court ruled, however, that, in the absence of any such intention expressly and clearly stated in the Act, it could not be assumed that the Parliament, in granting a general regulation-making power to the Executive, wished thereby to delegate its powers under section 76 of the Constitution.

6. It would appear that, as a result of this decision, the Dried Fruits Export Control (Election of Board) Regulations and the Dairy Produce Export Control (Election of Board) Regulations are also invalid in part. These Regulations contain provisions identical in wording to regulation 38 quoted above. Each of the Acts under which these regulations were made contain the following provision, which is substantially the same as the previously quoted section conferring power to make regulations:

The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular for prescribing penalties not exceeding One hundred dollars for any breach of the regulations.

7. While reporting these facts to the Senate, the Committee wishes to state its position concerning the relationship between regulations and the statutes under which they are made.

8. One of the Committee's principles, on which it has operated since it was established, is that it will scrutinise regulations to ensure "that they are in accordance with the Statute".

9. The Committee observed in its Twenty-seventh Report (paragraph 6), that the question as to whether regulations are validly made under the authorizing statute is a question on which legal opinions may vary, and which can be finally decided only by a court.

10. The Committee believes, therefore, that it would not be a proper interpretation of its role, and that there would be some danger involved, if the Committee delivered legal opinions as to whether regulations are validly made. Instead, the Committee has always interpreted the principle mentioned above as expressing something wider than legal validity. A regulation may be validly made under the Statute but, notwithstanding its lawfulness, the regulation may be regarded as an "unusual or unexpected use of the powers conferred by the Statute", which is the expression used in the terms of reference of the British House of Commons Select Committee on Statutory Instruments, and such regulation may thereby attract the Committee's scrutiny. On the other hand, a regulation which may subsequently be declared to be invalid by a court may not appear objectionable to the Committee because it does not appear to exceed what the Parliament envisaged in granting the regulation-making power contained in the statute

11. The Committee believes that by this interpretation of its principles it can best serve the Senate in its scrutiny of regulations and ordinances.

IAN WOOD
Chairman

Regulations and Ordinances Committee Room,
Thursday, 23 March 1972.