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<i>J. R. Odgers</i>
Clerk of the Senate

FORTY-THIRD REPORT

From

THE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

GENERAL REPORT

T H E S E N A T E

FORTY-THIRD REPORT

FROM

THE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

General Report
upon the activities of the Committee
since its Thirty-eighth Report

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. Rac

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 scrutinise 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; 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

FORTY-THIRD REPORT

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

2. The purpose of this Report is to acquaint the Senate with the Committee's consideration of certain regulations and ordinances since its last general report (Thirty-eighth Report), which was tabled in August 1971.

3. The Appendix to this Report consists of a paper which was circulated by the Chairman for public information on the occasion of the Committee's visit to Norfolk Island during its inquiry into Norfolk Island Ordinances. Although the paper consists largely of material from previous Reports of the Committee, the Committee considers that there is some value in making it more widely available.

Retrospective Scrutiny of Regulations and Ordinances

4. On 2 November 1971 it was suggested in the Senate (Hansard, p.1575) that the Committee should consider reporting upon those regulations and ordinances, some made many years ago, which are no longer subject to disallowance, but which would be considered objectionable if they came before the Committee at the present time. Such action would be in accordance with Standing Order 36A, which provides that all regulations and ordinances tabled in the Senate, with the exception of those of the Northern Territory and Papua New Guinea, shall stand referred to the Committee.

5. The Committee considers that such a review of all existing regulations and ordinances is warranted. The number of regulations and ordinances in force is enormous, and it is impossible for the Committee to undertake a scrutiny of all such legislation without additional facilities, including the services, until the completion of the undertaking, of a full-time legal adviser dealing specifically with this matter. It frequently happens, however, that the Committee has occasion to examine regulations and ordinances which are amended by, or have some bearing upon, current delegated legislation, and the Committee will report to the Senate upon any provisions in such regulations and ordinances which it considers warrant the attention of the Senate.

1971 REGULATIONS AND ORDINANCES

Statutory Rules 1971 No. 78

Amendments of the Air Force Regulations

6. These regulations inserted in the Air Force Regulations the following new subregulation:

"534.—(1) Where war service leave may be granted to a member under regulation 129A of these Regulations, an officer authorized to grant leave to the member may, instead of granting to the member war service leave for a specified period, being a period equal to or less than the period of war service leave that may be granted to the member, authorize payment to the member of an amount not exceeding the amount of the pay and allowances that would be payable to the member in respect of that specified period of war service leave if the member were to be granted war service leave for that specified period.

7. It appeared to the Committee that under this subregulation the authorizing officer was bound by no criteria in determining whether a member would receive payment in lieu of all or part of his war service leave. The regulation would allow payment to be made in lieu of leave against the wishes of the member concerned and without any reason for this being done. While the Committee did not expect that the authorizing officer would exercise his discretion in that fashion, the Committee believed that the regulation should preclude the possibility of unfair treatment of the members concerned.

8. After the Committee had had correspondence with the Minister for Air concerning the regulation, and had taken evidence from departmental officers, the Minister expressed his intention to remake regulation 534(1.) so as to overcome the objection of the Committee. The remade/^{Sub-}regulation, as contained in Statutory Rules 1972, No. 16, is as follows:

"334.—(1.) Where a member to whom war service leave may be granted under regulation 129A of these Regulations applies to an officer authorized to grant that leave for payment in lieu of a specified period of war service leave, being a period equal to or less than his war service leave credit, and the exigencies of the service do not permit the member to be absent from duty for the specified period, the officer shall authorize payment to the member of an amount equal to the amount of the pay that would be payable to him in respect of the specified period if the member were to be granted war service leave for the specified period.

9. The Committee regarded this regulation as overcoming the objection to the previous regulation in that it provides for application by a member for payment in lieu of leave, a criterion is specified to establish whether the member is prevented from proceeding on leave, in which case payment in lieu of leave will be made, and the amount to be paid is identifiable.

Statutory Rules 1971 No. 87
Amendments of the Public Service Regulations

10. These regulations contained a provision to the effect that certain officers were to be paid an allowance if it was certified by an Assistant Director of the Telecommunications Division of the Postmaster-General's Department that such officers were required in the performance of their duties to send and receive messages in morse code.

11. A similar regulation was dealt with in paragraphs 30 and 31 of the Committee's 38th Report. As in that case, the Committee believed that the conditions for the payment of allowances under regulations ought to be stated objectively and not made to depend upon the discretion of an officer.

12. This view was put to the Prime Minister, who agreed to have the regulation amended so as to provide an objective statement of the condition for payment. This was done by Statutory Rules 1971, No. 147.

The Prime Minister advised the Committee that he had been assured that the Public Service Board when drafting regulations takes into account the Committee's principles and the Committee appreciates this assurance.

Australian Capital Territory Ordinances

13. Since its last general report the Committee has been concerned with a number of Australian Capital Territory ordinances and regulations, some of which are discussed below. In all cases the legislation was explained to the Committee's satisfaction or was amended so as to overcome objections to it by the Committee.

14. The Committee wishes to record its appreciation of the courtesy and co-operation extended to it by the Minister for the Interior and his Departmental officers.

A.C.T. Ordinance 1971, No. 13 Motor Traffic Ordinance 1971

15. Section 7 of this Ordinance inserted in the Principal Ordinance a new section 13A, which empowered the Court of Petty Sessions to order the issue of a special driver's licence to a

person whose licence had been suspended or who had been disqualified from driving. Sub-section 2(c) laid down as one of the conditions necessary for the Court's order the presence of a certificate by the Registrar of Motor Vehicles certifying that he had no ground under sections 10, 11 and 12 of the Ordinance for refusing to grant a licence to the person concerned. (The sections referred to laid down conditions, such as age limits and competency to drive, for the grant of a licence by the Registrar.)

16. It appeared to the Committee that the wording of this section did not preclude the possibility of the Court being unable to order the issue of a special licence because the Registrar, upon whom the Ordinance imposed no obligation to issue the necessary certificate, refused to do so, although no relevant ground existed. The section appeared to render the rights of the individual unduly dependent upon the Registrar's unchallengeable discretion.

17. After the Committee had heard evidence from Departmental officers, the Minister stated his intention to amend the Ordinance so as to provide that, upon receipt of notice of a hearing of an application for a special licence, the Registrar would be bound either to certify that he had no ground for objecting to the grant of the licence, or to give notice that he intended at the hearing to oppose the application. The Minister also proposed to amend the Principal Ordinance so as to provide that a person aggrieved by any decision of the Registrar under the Ordinance could appeal to the Court of Petty Sessions, instead of to the Minister as previously provided.

These amendments were made by the Motor Traffic Ordinance (No. 3) 1971, contained in A.C.T. Ordinance 1971, No. 37, and were welcomed by the Committee in that they made the rights of

individuals under the Ordinance dependent upon judicial rather than administrative decisions.

A.C.T. Ordinance 1971, No. 16

Presbyterian Church Trust Property Ordinance 1971

18. The Committee was concerned with section 10 of this Ordinance, which empowers the General Assembly of the Presbyterian Church in New South Wales to vary or set aside a trust to which Church trust property in the Territory is subject, where, in the opinion of the Assembly acting at the request of the trust, it is no longer possible or expedient to carry out or observe the trust.

19. The Committee was satisfied, however, that the Ordinance adequately lays down the circumstances in which the Assembly is to exercise its power, and therefore provides adequate grounds upon which any person aggrieved by a decision of the Assembly can challenge that decision before a court.

A.C.T. Ordinance 1971, No. 23

Milk Authority Ordinance 1971

20. The Committee was concerned with a number of subsections of this Ordinance which each provided that it was an offence for a person to carry on a business connected with the processing or sale of milk in the absence of a certificate, issued by the Director-General of Health or the Secretary of the Department of the Interior, indicating compliance by the person concerned with certain regulations or provisions of a lease of land. The Committee considered that the constitution of an offence by reference to the existence or non-existence of a certificate, issued at the discretion of the relevant authority, made the rights of the person concerned unduly dependent upon administrative rather than judicial decisions.

21. Section 31(1.) of the Ordinance provided, amongst other things, that the Milk Authority could revoke a licence or a vendor's permit if the Authority was satisfied that certain circumstances existed. Although the Authority's decisions were explicitly made subject to challenge in a court, the Committee considered that the conditions for the revocation of a licence or permit ought to be stated objectively and not made to depend upon the opinion of the Authority. A provision so expressed as to allow the Authority to act according to its opinion of the facts would seem, on the face of it, to be beyond challenge, because an aggrieved person would have to dispute before the court, not the facts alleged by the Authority, but the opinion of the Authority.

22. After the Committee had taken evidence from Departmental officers, the Minister for the Interior stated his intention to amend the Ordinance so as to provide that the conditions under which persons could engage in business, or under which the Authority could revoke licences or permits, would be stated objectively and not made to depend upon the discretion of the relevant person or body. This was done by A.C.T. Ordinance 1972, No. 15, and was welcomed by the Committee.

A.C.T. Ordinance 1971, No. 25

Film Classification Ordinance 1971

23. Section 8 of this Ordinance contained the following subsections:

(2.) Where—

- (a) a film to which this section applies is, or is about to be, exhibited to persons on payment of a charge or on presentation of a ticket or other token; and
- (b) a person whose age is between six years and eighteen years is in a place from which the exhibition of the film is, or will be, capable of being seen,

the person who has the management of the place at which the film is, or is about to be, exhibited and each person who receives or is entitled to receive any of the proceeds from the exhibition of the film are each guilty of an offence against this Ordinance and are liable on conviction to a penalty not exceeding Fifty dollars.

(3.) It is a defence to a prosecution for an offence against the last preceding sub-section if it is proved that—

- (a) the person charged with the offence took reasonable precautions designed to ensure that persons whose ages were between six years and eighteen years were not admitted to the exhibition; and
- (b) the person named in the charge as being the person whose age was, on the relevant date, between six years and eighteen years might be believed, on reasonable grounds, to have been of an age other than an age between those ages.

24. It appeared to the Committee that these provisions would render liable to a penalty any person who had any share in the proceeds from the exhibition of a restricted film regardless of how remote was the connection between that person and those who arranged the exhibition, and in spite of the fact that the person concerned had no knowledge of or control over the conditions of exhibition. The provision therefore seemed to involve an undue infringement of the liberty of the subject.

25. This view was submitted to the Minister for the Interior, who, after consideration of the matter, decided to have section 8 of the Ordinance amended so as to provide that only the management of the place at which a restricted film is shown should be guilty of an offence. This was done by A.C.T. Ordinance 1972, No. 14.

A.C.T. Ordinance 1971, No. 29
Canberra Retail Market Trust Ordinance 1971

26. This Ordinance provided for the licencing by a Trust of persons to occupy and sell goods from, stalls at the Canberra Market.

The Committee was concerned at the absence of provision for an appeal to a court by a person aggrieved by the refusal of the Trust to grant or renew a licence.

27. The view was put to the Committee that the licences were intended to be ephemeral and of no commercial value in themselves, and that it was unlikely that any proprietary interest could be vested in them. Moreover, decisions of the Trust concerning licences would be made on a purely commercial basis, having regard to the economic operation of the Market.

The Committee considered, however, that a person who had held a licence for some period of time could suffer considerable loss as a result of a refusal by the Trust to renew his licence, and should have some appeal against such a decision of the Trust.

28. The Minister for the Interior, after considering this submission, agreed to amend the Ordinance so as to provide a right of appeal against a refusal of the Trust to renew a licence, where the licensee had occupied a stall for not less than four successive weeks. This amendment was made by A.C.T. Ordinance 1972, No. 30, and was regarded by the Committee as overcoming its objection to the previous Ordinance.

A.C.T. Ordinance 1971, No. 30
Electricity Ordinance 1971

29. The Committee was concerned mainly with section 33 of this Ordinance, which was as follows:

33.—(1.) Where the Authority considers that any tree, shrub or other natural growth growing on a parcel of land is interfering or may interfere with a wire, cable or other apparatus by which electricity is transmitted, the Authority may, by notice in writing under the hand of the Chairman served on the owner of the parcel of land and, if the

owner of the parcel of land is not the occupier of the parcel of land, on the occupier of the parcel of land, on which the tree, shrub or natural growth is growing, require him or them to fell, lop, prune or trim the tree, shrub or other natural growth within such period, not being less than seven days, as is specified in the notice.

(2.) If the requirements of a notice duly served under the last preceding sub-section are not complied with within the period specified in the notice, the Authority may, by its employees, enter upon the parcel of land and fell, lop, prune or trim the tree, shrub or other natural growth.

(3.) Where, in pursuance of the last preceding sub-section, the Authority, by its employees, enters upon a parcel of land and fells, lops, prunes or trims a tree, shrub or other natural growth, the expenses incurred by it in so doing are payable to the Authority by the person or persons on whom the notice under sub-section (1.) of this section was served on demand in writing by or on behalf of the Authority and, in default of payment, are recoverable in a court of competent jurisdiction as a debt due to the Authority from him or them.

(4.) In this section, "owner", in relation to a parcel of land, means—

- (a) if the land is held in fee simple—the person in whom the fee simple is vested;
- (b) if the land is held from the Commonwealth under a lease for a term of years—the lessee under the lease; and
- (c) if the land is held under a tenancy from the Commonwealth—the tenant of the land.

30. The Committee noted that the condition that a plant be interfering with electrical apparatus was not stated objectively but was expressed in terms of the Electricity Authority's opinion; that the occupier of the land had no opportunity to appeal against a determination by the Authority that a tree should be lopped; and that the cost of lopping trees was to be borne by the occupier of the land even where the trees existed prior to electrical apparatus being established.

31. It was fully realised by the Committee that provisions similar to the above-quoted section are not uncommon, and that many local and other authorities have powers similar to the power conferred by this section. It was also realised that the main purpose of section 33 was to ensure the safety of the community. The Committee considers, however, that the frequent occurrence of similar provisions is not a good reason for continuing and perpetuating such provisions, and that, as a principle, authorities

should not be empowered to enter upon and damage a person's property without that person having some opportunity to challenge such action or to seek redress.

32. After the Committee heard evidence from Departmental officers, the Minister for the Interior agreed to have the Ordinance amended by omitting the words "the Authority considers" from the first line of the section, and other amendments would provide that where the Electricity Authority gives notice pursuant to section 33 to an occupier of a parcel of land requiring him to fell, lop, prune or trim a tree within such a period, not being less than seven days, as is specified in the notice, the occupier of land may ask the Court of Petty Sessions to review the notice on the grounds that the notice is unreasonable. It would also be provided that the cost of lopping trees which were on the parcel of land before electricity wires or cables were established would be borne by the Electricity Authority and not by the occupier of the land.

33. The Committee hopes that the safeguards given to the individual citizen by these amendments of the Ordinance will serve as an example for similar legislation in the future, and that the wide and unchallengeable powers of entry given to various authorities will not be uncritically accepted simply because they have become common.

34. The Committee also raised with the Minister certain other provisions of the Ordinance which appeared to some extent to infringe the rights of individuals, namely:

- . under Section 27 (1.) (g) (ii), the Authority could cancel an electrical contractor's licence if after three months from the grant of the licence he became the employee of another person;

- . section 13(2.) prevented the holder of an electrician's licence, Grade B, from carrying out electrical wiring work for another person when no payment was made for the work;
- . section 15(d) prevented a person from holding an electrical contractor's licence unless he had experience in the direction and supervision of persons engaged in wiring work.

35. The Minister agreed to have the Ordinance amended so that section 27 (1.) (g) (ii) would provide for an electrical contractor's licence to be cancelled if he ceased to carry on business as a contractor; the holder of a Grade B electrician's licence would be allowed to carry on wiring work for any person without payment; and a person could obtain an electrical contractor's licence by virtue of his suitability, as distinct from experience, in the direction and supervision of persons engaged in electrical wiring work

The amendments proposed by the Minister were made by A.C.T. Ordinance 1972, No. 27.

A.C.T. Ordinance 1971, No. 39
Motor Traffic Ordinance (No. 4) 1971

36. This Ordinance contained another case of the rights of the individual being made dependent upon the existence or non-existence of a certificate issued at the discretion of an authority. Section 164D(2.) (a), inserted in the Principal Ordinance by this Ordinance, provided that a person prosecuted for failing to wear a car seat belt had a defence if he possessed a certificate, issued by the Registrar of Motor Vehicles, certifying that the person was, in the opinion of the Registrar, unable, by reason of his physical

characteristics, to wear a seat belt. Thus the defendant's defence depended upon the existence of the certificate stating the Registrar's opinion.

37. The Minister for the Interior, upon considering the Committee's submission, undertook to amend the Ordinance so that section 164D(2.)(a) would be revised by omission of the words "in the opinion of the Registrar", and an appeal to a court would be provided where a driver has been refused a certificate by the Registrar.

Norfolk Island Ordinance 1971, No. 4
Companies Ordinance 1971

38. Subsections 4 and 6 of section 71I of this Ordinance provide respectively that the Administrator may, if he is of the opinion that it is necessary in the public interest so to do, print and publish an inspector's report concerning a company, and further that if it appears to the Administrator that proceedings should be brought for the recovery of damages or property, they may be brought. The result is that proceedings of the type to which section 71I(4) refers may be brought against a person charging fraud, misfeasance or misconduct, notwithstanding the fact that previous publicity may have been given to those very facts in the report published under subsection 4. Such a publication could prejudice a person's defence in the proceedings launched against him. The Committee considered that, should proceedings be contemplated, the Administrator should be compelled not to publish the report or the relevant part of it before the termination of those proceedings.

39. Section 71S of the Ordinance authorizes the Administrator by notices published in the Gazette to direct that certain shares are subject to restrictions on their transfer, voting rights and calls, and that no further shares are to be issued in right of those shares. This power arises where it appears to the Administrator that there is difficulty in connection with an investigation in finding out the relevant facts about the shares, and that that difficulty is due to the unwillingness of persons concerned or some of them to assist the investigation. From that decision an appeal lies to the court. However, subsection 4(b) provides that where shares are the subject of a restriction and a person votes in respect of those shares, he is guilty of an offence against the Ordinance. Subparagraphs (a) and (c) require before a person is guilty of an offence the possession of the knowledge by him of the restrictions imposed. Paragraph (b) does not. The result is that an offence may be committed against it by a person unaware that his act is criminal. The Committee considered that the offence constituted by paragraph (b) of Section 71S(4) should be so framed as to require the possession of knowledge by the guilty party of the restrictions upon the shares concerned.

40. The Minister for External Territories, in response to these points of the Committee, stated that amendments to the Uniform Companies Legislation along the lines suggested by the Committee's comments had been under consideration by the States and the Commonwealth, that there was general agreement on the need for such amendments, but no final agreement on the form of the amendments, and that as soon as such final agreement was reached steps would be taken to have the Norfolk Island Companies Ordinance amended accordingly.

The Committee was satisfied with this assurance.

Norfolk Island Ordinance 1971, No. 11
Spear Guns Control Ordinance 1971

41. The Committee was concerned with sections 5(b) and 8(1.) (c) of this Ordinance which, in conjunction, provided that a person was required to give an inspector information relating to an offence or suspected offence against the Ordinance where the inspector believed, on reasonable ground, that the person possessed such information, and failing to give information or giving false or misleading information in such a case constituted an offence.

42. The Committee regarded these provisions as a violation of the normal civil liberties of the citizen. A person is not normally required, for example, to give information to a police officer, even when arrested. This right to refrain from answering questions is an important safeguard for accused or suspected persons, and ought not to be taken away by delegated legislation.

43. After discussion with the Committee, the Minister for External Territories agreed that these sections should be repealed; this was done in relation to section 5(b) by Norfolk Island Ordinance 1972, No. 2.

44. The Committee wishes to record its appreciation of the courtesy and co-operation extended by the Minister and the Norfolk Island Council in relation to this matter.

1972 REGULATIONS AND ORDINANCES

Statutory Rules 1972 No. 51Amendment of the Conciliation and Arbitration Regulations

45. This amendment repealed regulation 138 of the principal regulations and replaced it with a new regulation, whereby the Attorney-General could authorize the payment of financial assistance with respect to certain proceedings under section 140 or 141 of the Conciliation and Arbitration Act, where the Attorney-General was satisfied that hardship would be caused to the litigant concerned if financial assistance were not given by the Commonwealth. The Attorney-General was also given a discretion to refuse financial assistance where he was satisfied that the proceedings involved the same questions of law or fact as were involved in other proceedings or where it would be contrary to the interests of justice to grant assistance.

46. The inclusion in subordinate legislation of discretionary powers of this character would normally be regarded by the Committees as a matter requiring close scrutiny, but, as the Attorney-General submitted to the Committee, the amendment of the regulation was a temporary measure pending consideration by the Parliament

of the same provision in a Bill (which eventually became the Conciliation and Arbitration Act 1972). For this reason the Committee took no action with regard to the amendment of the regulations.

Statutory Rules 1972, No. 66

Amendments of the Native Members of the Forces (Torres Strait Islands) Benefits Regulations.

47. These regulations contained a provision to the effect that a child of a member of the forces might receive a pension if the Pensions Board or the Repatriation Commission was satisfied that the child was not being maintained by other persons. There is no provision for an appeal against a decision by the Board or Commission in relation to this matter.

48. The Committee considered that the condition for payment of the pension should be stated objectively and not made to depend upon the discretion of the Board or Commission. The Committee was aware that the regulation was drafted with beneficial intent, and was to be interpreted accordingly. The Committee was also aware that a virtually identical provision is contained in the Repatriation Act, again with no provision for appeal, and that by adhering to its view the Committee could cause different standards to be applied to regulations

than are applied to substantive legislation. The Committee maintains, however, that regulations should preclude the possibility of discriminatory treatment of the persons whose rights are effected, and that matters which are included in substantive legislation are not necessarily appropriate to subordinate legislation.

49. The Minister for Repatriation, upon consideration of these views, stated that he was willing to amend the regulations so that the condition for payment of the pension was stated objectively. The Committee welcomed this decision.

Statutory Rules 1972 No. 76

Amendments of the Meat Export Control (Licences) Regulations

50. These amendments contained a new sub-regulation, with the following provision:

" (1A.) Where a person, being a licensee, proposes to export meat on his own behalf or on behalf of another person, including another person who is also a licensee, he shall furnish a return of, and in relation to, that meat, in accordance with a form approved by the Board, setting out—

.....

(j) such particulars of—

- (i) the meat;
- (ii) the cartons in which the meat is packed; and
- (iii) the manner in which the meat is packed,

as he is required to give in accordance with the directions in the form.

51. The Committee expressed to the Minister its concern that sub-paragraph (i) of paragraph (j) of the new regulation would allow the Meat Board to require a licensee to furnish almost any information without relevance to the purposes of the regulations.

52. The Minister, in reply, stated that the new regulation was made at the request of the licensees to simplify the requirements imposed upon them, and that he would communicate to the Meat Board the Committee's view that the particulars required by the form should be restricted to matters relevant to the purposes of the regulations. The Committee was satisfied with this action.

Statutory Rules 1972 No. 101

Amendments of the Telephone Regulations

53. These amendments provide that a person may order a trunk telephone call and request that the call be debited to the account of another telephone number. Penalties are provided for the offence of charging a trunk call to another person's account without the consent of that person, or to a fictitious telephone account.

54. The Committee pointed out to the Postmaster-General that although the amendments provided that a telephonist could reject a request that a call be charged to another account, no criteria governing this decision appear in the regulations. Moreover, there did not appear to the Committee to be any ready means of

detecting offences and apprehending offenders under the amended regulations.

55. As regards the first point, the Postmaster-General replied that the criteria governing the decision by a telephonist were not included in the regulations partly because this information could be of use to persons intending to make fraudulent use of the service. The Minister also informed the Committee that there are means of detecting such fraudulent use of the service and of identifying offenders. The Committee felt that the amendments of the regulations had been satisfactorily explained so far as the purposes of the Committee were concerned.

A.C.T. Ordinance 1972 No. 20

Trespass on Commonwealth Lands Ordinance

56. This Ordinance constitutes certain offences with respect to camping on unleased land, which is defined by the Ordinance as follows:

'unleased land' means unleased land that—

- (a) belongs to the Commonwealth;
- (b) is within the City Area; and
- (c) is not within an area for the time being declared by the Minister, by notice published in the *Gazette*, to be, for the purposes of this Ordinance, a camping area.

57. It appeared to the Committee that whether a person is guilty of any or all of the offenses constituted by the Ordinance depends upon the existence or non-existence of a Gazette notice authorized by the Minister and declaring the land concerned to be a camping area. In other words, a person might be guilty of an offence because a notice declaring unleased land to be a camping area had been revoked. This situation, however, could arise by whatever method camping areas were declared, and persons might be ignorant of such declarations concerning camping areas even if they were contained in substantive legislation. The Committee considers that the requirement that notices concerning camping areas be published in the Gazette provided sufficient safeguard for the citizen.

58. The Ordinance also confers upon the Minister, or a person authorized by the Minister, a discretionary power to issue permits allowing persons conducting circuses, carnivals, etc. to camp on unleased land. The Committee does not consider this discretionary power to be objectionable.

General Remarks

59. The Committee considers that the principles which it has expressed with regard to the above regulations and ordinances are apt for general application and worth restating. In particular, the rights of individuals, and the question as to whether they are guilty of an offence, ought not to depend upon the existence or non-existence of a certificate issued at the discretion of an authority, and administrative decisions which could greatly affect the rights and liberties of individuals ought not to be put beyond legal challenge. The Committee expresses the hope that these principles, which give expression to the general principles which the Committee has followed since its establishment, will be taken into account by the authorities responsible for making delegated legislation.

IAN WOOD
Chairman

Senate Committee Room,
26 October 1972.

A P P E N D I X

(see paragraph 3)

THE OPERATION OF THE SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES

Establishment of the Committee

In 1932, following a report by a Select Committee recommending a standing committee system for the Senate, the Senate adopted Standing Order 36A which provided for the setting up of the Standing Committee on Regulations and Ordinances. Standing Order 36A is now in the following terms:

36A.—(1.) A Standing Committee, to be called the Standing Committee on Regulations and Ordinances, shall be appointed at the commencement of each Parliament.

(2.) The Committee shall consist of seven Senators chosen in the following manner:—

(a) The Leader of the Government in the Senate shall, within four sitting days after the commencement of each Parliament, nominate, in writing, addressed to the President, four Senators to be members of the Committee.

(b) The Leader of the Opposition in the Senate shall, within four sitting days after the commencement of each Parliament, nominate, in writing, addressed to the President, three Senators to be members of the Committee.

(c) Any vacancy arising in the Committee shall be filled after the Leader of the Government or the Leader of the Opposition, as the case may be, has nominated, in writing, addressed to the President, some Senator to fill the vacancy.

(3.) The Committee shall have power to send for persons, papers and records, and to sit during Recess; and the quorum of such Committee shall be four unless otherwise ordered by the Senate.

(4.) All Regulations and Ordinances laid on the Table of the Senate, except those of the Northern Territory and of the Territory of Papua and New Guinea, shall stand referred to such Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Senate on motion after notice.

Statutory Provisions relating to Parliamentary Control of Delegated Legislation

Certain Commonwealth statutes, including the Acts Interpretation Act, set out uniform provisions with regard to disallowance by either House of Parliament of delegated legislation.

The Acts Interpretation Act provides in Section 48 and 49 for Parliamentary control of regulations made under Commonwealth Acts, and its relevant provisions are as follows:

- (i) Regulations must be laid before each House of the Parliament within 15 sitting days of that House after the making of the regulations, and if any regulations are not so laid before each House, they shall be void and of no effect;
- (ii) Either House may pass a motion disallowing a regulation. Notice of such a motion must be given within 15 sitting days after tabling of the regulations and, if the motion is agreed to, such regulations shall thereupon cease to have effect;
- (iii) When notice of a motion to disallow a regulation has been given, within 15 sitting days thereafter the House in which the notice of motion has been given must dispose of it by passing or rejecting it or allowing its withdrawal - otherwise the regulation shall be deemed to have been disallowed.

Similar provisions for the disallowance of regulations and ordinances of various Commonwealth Territories are set out in the Acts providing for the administration of those Territories.

Accordingly, the Senate, through a combination of the powers conferred on the Houses of Parliament by the Acts and the work carried out by its Standing Committee on Regulations and Ordinances, has an effective control over delegated legislation.

Principles of the Committee

The Standing Order setting up the Committee does not lay down any principles for the guidance of the Committee in the scrutiny it gives to regulations and ordinances. During the formative years of its operation, the Committee made two important decisions:

- (a) that it would not be concerned with the policy contained in regulations and ordinances; and
- (b) that in its scrutiny of regulations and ordinances it would be guided by the principles suggested in the Report of the 1929 Select Committee on the Standing Committee System, namely, that regulations and ordinances should be scrutinized to ensure that:
 - (i) they are in accordance with the Statute;
 - (ii) they do not trespass unduly on personal rights and liberties;
 - (iii) they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions; and
 - (iv) they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

Procedure of the Committee

All regulations and ordinances referred to the Committee, together with the departmental explanatory memoranda, are forwarded to the Committee's independent legal adviser for his comments. The Committee then examines the regulations and ordinances together with the departmental explanation and the legal adviser's report.

Where regulations or ordinances contain provisions which appear to infringe upon the principles which the Committee upholds, the responsible Minister may be invited to send a written explanation as to the necessity for the provisions, or, in some cases, to send witnesses to give evidence and answer questions regarding the provisions.

After considering all the evidence and written explanations available to it the Committee must decide whether it wishes to pursue the matter further; if it is of the opinion that the offending provisions ought to be changed, it may decide to take the matter up with the responsible Minister; alternatively, the Committee may wish to report the facts to the Senate and, if it is considered appropriate, recommend disallowance.

The Committee regards a report recommending the disallowance by the Senate of certain delegated legislation as a serious matter. Only where important questions of principle are involved should the case be placed before the Senate for consideration.

A report recommending the disallowance of a regulation or ordinance places the matter in the hands of the Senate for its determination.

The Committee's Application of its Principles

In reporting to the Senate on regulations and ordinances, the Committee, in the main, has associated its objections with one or more of the guiding principles set out earlier in this paper. This paper will now elaborate, very briefly, on these principles and indicate the types of provisions which the Committee has found objectionable.

Principle (i) is not restricted to the narrow concept that regulations are in accordance with a Statute provided they are legally authorised under the regulation-making power contained in the Statute. 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 by the British House of Commons committee. Similarly, the Committee may not regard as objectionable a regulation which a court subsequently determines to be invalid, because the regulation may not be an unexpected or unusual use of the powers of the Statute (see the 39th Report of the Committee).

The Senate Committee has seldom reported an opinion that a particular regulation is not in accordance with the Statute, but a recent example of this was reported upon the 27th Report of the Committee. In Paragraph 5 of that Report the Committee noted that whether a regulation is within the regulation-making power in the Statute must always be a matter for a court to finally decide; and indicated that where doubt exists the wider concept mentioned above can be applied by reference to Principle (iv).

A provision to which the Committee has in recent years objected under its Principle (ii) is the reversal of the onus of proof, whereby a defendant in a particular case must prove his innocence, instead of the prosecution having to prove his guilt. Such a provision is usually resorted to only in peculiar circumstances, but the Committee regards reversal of the onus of proof as prima facie objectionable. A recent example of such a provision may be found in paragraphs 32 to 35 of the Committee's 26th Report.

Under Principles (ii) and (iii), which are closely related, the Committee has always objected to delegated legislation which unduly makes the rights and liberties of the citizen dependent upon action which an executive body may or may not take, at its discretion. Where officials are empowered to make administrative decisions which could abridge individual rights and liberties, two fundamental safeguards ought to be observed:

- (a) the empowering legislation should set out some objective criteria governing the administrative decisions in question; and
- (b) an individual aggrieved by a particular decision ought to have the right to appeal to a court or other judicial body against the decision. In some cases the inclusion of objective criteria will automatically confer a right of appeal to a court.

What is meant by objective criteria can best be explained by an example. The following is a hypothetical but familiar provision in a group of regulations:

The responsible officer may, in his discretion, suspend or revoke a licence granted under this section.

Under such a provision, a person licensed to carry on some activity may have his licence, and perhaps his source of livelihood taken away from him with no reasons given and no right of appeal. A preferable provision would contain objective criteria, thus:

The responsible officer may, where such-and-such circumstances apply, suspend or revoke, etc.

This type of provision opens the way for an appeal to a judicial body by an aggrieved person because such a person can contend that the circumstances set out in the regulations, and alleged by the officer to apply in the particular case, do not in fact apply.

The inclusion in this type of regulation of a phrase like 'where in his opinion such-and-such circumstances apply' is generally objectionable because it reintroduces the unchallengeable discretion in another form.

Examples of excessive discretionary powers in delegated legislation were the subjects of the 29th, 30th, 32nd, 35th, and 38th Reports of the Committee. In each of these cases, and in most other recent cases dealt with by the Committee, the offending regulation did not actually trespass unduly upon individual rights and liberties, but conferred upon officials a power which was a potential source of interference with individual rights and liberties, so that it was regarded by the Committee as unduly making rights and liberties dependent upon administrative decisions. This shows the close relationship between Principles (ii) and (iii).

On rare occasions regulations may place the rights and liberties of individuals in jeopardy by giving too great a discretion to a judicial body rather than an executive official. An example of this is to be found in the Committee's 34th Report.

Under its Principle (iv), the Committee has for many years objected to delegated legislation which authorises payments with long periods of retrospectivity, on the grounds that this denies to the Parliament the right to approve or disapprove of expenditure before it is made. This is clearly an elaboration of Principle (iv), which is concerned with ensuring that substantive legislation is placed before the Parliament. In its 25th Report the Committee set out clearly and in detail the principles which ought to be kept in mind by Departments making payments of any kind by regulation. A recent example of an unacceptable retrospective financial regulation may be found in the Committee's 31st Report.

Similarly, the introduction of important innovations of policy by regulation is objectionable under Principle (iv). Examples of this were dealt with in the Committee's 27th and 36th Reports.

The above sets out examples of the types of provisions to which the Committee has objected in the past, and which therefore ought to be avoided in the drafting of delegated legislation. It is not possible, however, to give a complete account of all types of provisions to which the Committee will object in the future, because circumstances change. Moreover, it is not the function of the Committee to lay down and elaborate drafting principles, but to look at regulations as they come forward and test them against the four Principles which the Committee has adopted.

The Committee believes that its existence and the vigilance of its members in their examination of regulations and ordinances over the years has had a salutary effect upon the formulation of delegated legislation.