

TALLEY INDEX

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DEPARTMENT OF THE SENATE
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PRESENTED -
<i>J. L.</i>
Clerk of the Senate

THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

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November 1977

MEMBERS OF THE COMMITTEE

Senator I.A.C. Wood (Chairman)  
Senator the Hon. J.L. Cavanagh  
Senator S.J. Collard  
Senator G. Georges  
Senator A.J. Missen  
Senator S.M. Ryan  
Senator the Hon. R.C. Wright

Function of the Committee: Since 1932, when the Committee was first established, the principle has been followed that the function of the Committee is 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

### FIFTY-NINTH REPORT

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

- 2 The purpose of this report is to acquaint the Senate with the Committee's consideration of the following regulations and ordinances.

### OMBUDSMAN REGULATIONS

- 3 The Ombudsman Act passed by the Parliament in 1976 provides that Commonwealth statutory authorities in general are subject to the jurisdiction of the Ombudsman, but that they may be excluded from his jurisdiction by regulation. Companies owned by the Commonwealth are excluded from his jurisdiction unless specifically included by the regulations. The regulations, as contained in Statutory Rules, 1977, No. 104, have the effect of excluding from the Ombudsman's jurisdiction a number of statutory authorities and companies. The Regulations and Ordinances Committee considered that it was its duty to examine the reasons for their exclusion. The Committee considers that to restrict the area of operation of the Ombudsman is to restrict the rights of the citizen, and that Commonwealth authorities should not be excluded from the Ombudsman's jurisdiction except for the most cogent reasons.
- 4 The Committee is concerned that the regulations exclude from the Ombudsman's jurisdiction a number of commercial statutory authorities and companies, such as the various Commonwealth Banks, on the ground that they are in competition with private enterprise and their commercial operations should not be subject to review by the Ombudsman. The Committee considers that the administrative acts as distinct from the commercial operations of these bodies should be included in the Ombudsman's jurisdiction. The Committee does not object to the other bodies mentioned in the regulations being excluded. These consist of judicial and industrial tribunals, bodies established by international agreement, the Auditor-General, and the Australian Security and Intelligence Organisation.
- 5 The Prime Minister has given the Committee an assurance that the Administrative Review Council will review the Ombudsman's jurisdiction and that the report of the Council

will be made available to the Committee. The Committee has accepted this assurance, and also intends, when the report is available, to seek the opinion of the Ombudsman, and information on the number of cases he has been unable to investigate because of lack of jurisdiction under the regulations. On this basis the Committee is prepared to allow the regulations to stand.

#### A.C.T. CONSUMER AFFAIRS ORDINANCE

- 6 This ordinance, as contained in A.C.T. Ordinance No. 49 of 1976, contains amendments designed to strengthen the powers of the Director of Consumer Affairs to obtain information from suppliers of goods and services and to institute or defend proceedings on behalf of consumers. There are four provisions in the ordinance which the Committee considers unduly trespass upon individual rights and liberties.
- 7 Section 15C of the ordinance empowers an investigating officer to require information and documents from persons, and refusal or failure to comply with such a requirement is an offence, the only defences being incapacity to comply or the defence that the requirement is not reasonable for the purposes of the ordinance. The Committee considers that the offence ought to be refusal or failure to comply without reasonable excuse, so that a person who considers that the demands of the investigating officer are unreasonable, for example, because compliance would prevent the continuance of his business, could ask a court to excuse him from compliance with those demands. The Minister has agreed to put the defence of reasonable excuse into this provision, although it should be noted that provisions similar to the one now in the ordinance have been passed by the Parliament in various Acts.
- 8 Section 15C of the ordinance provides that a person is not excused from supplying information or documents on the ground that they might incriminate him, and that information or documents compelled under the ordinance may then be used against the person from whom they were required in certain proceedings under the ordinance and under a number of other ordinances. The Committee considers that this provision violates the long-established right of a person not to be compelled to be a witness against himself. The Minister has agreed to amend this provision so that information and documents compelled under the ordinance may not be used in any proceedings, except proceedings for refusing or failing to comply with a requirement or for supplying false information.

- 9 Section 15E of the ordinance provides that officers are not obliged to produce to a court information or documents obtained under the ordinance except in proceedings under the ordinance or certain other specified ordinances. The Committee is always wary of restricting the power of courts to obtain information and documents, and of conferring upon executive or statutory bodies a privilege from court orders. In this case the Committee considers that the provision in certain circumstances could hamper litigants, in proceedings unrelated to the ordinance or the other laws specified, when they desired to subpoena information or documents to assist their case, and could prevent courts from obtaining the truth in some kinds of proceedings. The Minister has agreed to replace this provision with one which would allow the person from whom information or documents were obtained to make a submission to a court against their production in proceedings, so that, in effect, it will be for the court to decide whether it ought to obtain the information or documents in question.
- 10 Section 13 of the ordinance repeals and remakes section 16 of the principal ordinance whereby officers are immune from all civil or criminal proceedings in respect of anything done in good faith under the ordinance. The Committee accepted this provision in the principal ordinance because it had the effect only of conferring privilege in defamation actions in respect of statements made by officers of the Consumer Affairs Bureau. The amending ordinance, however, by empowering officers to enter and search premises, under warrant, and to compel information and documents, gives new significance to section 16, which now confers an immunity from legal proceedings which the Committee considers could be dangerous. For example, an officer might negligently cause damage to property while acting in good faith in searching premises under the ordinance, and would be immune from action arising from such damage. The Minister has agreed to amend the ordinance so that the immunity conferred will be confined to defamation actions arising from statements made by officers.

#### A.C.T. LEGAL AID ORDINANCE

- 11 This ordinance, as contained in A.C.T. Ordinance No. 31 of 1977, contains a provision in section 34 which has the effect that where a legally assisted person fails in litigation, and has costs awarded against him by a court, the Legal Aid Commission may or may not pay those costs. This decision is subject to no appeal except to a review committee appointed by the Commission itself. The Committee considers that there is a risk of grave injustice being done under this provision. A person may, with the assistance of legal aid, initiate litigation which he would not otherwise have undertaken. The defendant in those proceedings may be

put to great expense in defending himself, and then, notwithstanding that the case fails, and the court orders that the plaintiff should pay the defendant's costs, the defendant may be unable to recover those costs because the Legal Aid Commission, and the review committee appointed by it, refuse to pay the costs regardless of the order of the court. The Committee is also disturbed to note that the review committees are to be the final avenue of appeal against decisions by the Commission, but that they are lacking in procedures under the ordinance, and the appellant is not given a right to be heard.

- 12 The Attorney-General, in response to the Committee's view that a court should have the power to decide whether costs awarded against a legally assisted person will be paid by the Legal Aid Commission, has pointed out that this would require an Act of Parliament, and could not be achieved in the present Parliament. The Attorney-General has undertaken to refer to the Administrative Review Council the operation of the ordinance, and to review the ordinance in the light of experience in its first twelve months of operation. The ordinance will also be amended so as to give an appellant the right to be heard by a review committee. The Committee is prepared to allow the ordinance to stand on the basis of these assurances, but the Committee would hope to examine the recommendations of the Administrative Review Council, and also to discover whether there are any cases of costs being awarded against legally assisted persons, and whether the Legal Aid Commission pays those costs in those cases.

#### A.C.T. SALE OF MOTOR VEHICLES ORDINANCE

- 13 This ordinance, as contained in A.C.T. Ordinance No. 29 of 1977, provides in section 27 that the Registrar of Motor Vehicle Dealers may adjudicate in disputes between sellers and buyers of motor vehicles and may make such orders as he considers just, and there are penalties for enforcing his orders. Although there is an appeal to the courts against decisions of the Registrar, and the Registrar may not deal with disputes which are before the courts, the Committee considers that these provisions are in principle objectionable, in that they confer on an administrative official the powers and responsibilities of a court. The provision of penalties to enforce the orders of the Registrar violates the principle that civil orders should be enforced in the first instance by civil and not criminal remedies. The other provision that the Committee considers objectionable is in section 55 and is to the effect that persons who bring witnesses in hearings before the Registrar are liable for the expenses of those witnesses, notwithstanding that the witnesses may be material to the proceedings.

- 14 The Minister for the Capital Territory has undertaken to review and amend these provisions, which will not be brought into effect until that review has occurred. The Committee will have the opportunity of examining the amendments when they are made. The Committee is willing to allow the ordinance to stand on the basis of this undertaking.

IAN WOOD  
Chairman

3 November 1977