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Clerk of the Senate

THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-SECOND REPORT

Undertakings by Ministers  
to Amend Regulations and Ordinances

Standing Order 36A

28 September 1978

MEMBERS OF THE COMMITTEE

Senator A.J. Missen (Chairman)  
Senator N.T. Bonner  
Senator the Hon. J.L. Cavanagh  
Senator G.J. Evans  
Senator G. Georges  
Senator D.J. Hamer, D.S.C.  
Senator A.W.R. Lewis

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

SIXTY-SECOND REPORT

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

UNDERTAKINGS BY MINISTERS  
TO AMEND REGULATIONS AND ORDINANCES

- 2 In its Fifty-eighth Report to the Senate the Committee expressed its concern at the inordinate delays in the carrying out of undertakings given by Ministers to amend regulations and ordinances. In that report the Committee stated that it would report to the Senate any cases where Ministers had not carried out such undertakings with reasonable promptness.
- 3 Since the presentation of its Fifty-eighth Report the Committee has reported to the Senate a considerable number of other cases in which Ministers have given undertakings to the Committee to amend regulations and ordinances as an alternative to having those regulations and ordinances disallowed by the Senate.
- 4 The Committee now reports to the Senate that all of the undertakings by Ministers previously reported have been carried out with the exception of those listed below. The Senate will note that some of these outstanding undertakings also appeared in the schedule to the Committee's Fifty-eighth Report.

- (i) A.C.T. Court of Petty Sessions Ordinance:  
prosecution procedures in relation to motor  
traffic offences where onus of proof reversed.

An undertaking to make amendments in relation to this ordinance was given by the then Attorney-General on 15 April 1975. The Attorney-General in the new government was asked to confirm this undertaking in February 1976. A substantive reply was not forthcoming until 4 October 1977. That reply indicated that the Attorney-General

was considering amendments to overcome the difficulty pointed out by the Committee, namely, that a person may be put to needless inconvenience in establishing a defence to a prosecution under certain clauses of the Motor Traffic Ordinance where the onus of proof is, in effect, reversed. A further letter, dated 23 May 1978, from the Attorney-General indicated that his Department was ready to make a submission to him by which the matter might finally be concluded. Another letter, dated 19 September 1978, indicated that it had been decided that the matter ought to be reconsidered by the Committee and that a draft letter to the Committee setting out alternatives was being prepared by the Departments of the Attorney-General and of the Capital Territory.

- (ii) Postal Service Regulations: provisions allowing opening of mail by officers.

On 5 November 1975 the then Minister for Post and Telecommunications gave an undertaking to amend these regulations so as to properly restrict the powers of officers to open mail and to safeguard the right of privacy of mail. That undertaking was confirmed by the Minister in the new government on 5 May 1976. In March 1977 the Committee agreed to a postponement of the promised amendments pending a consideration of the matter by the Law Reform Commission providing there was no undue delay. The Committee has since been advised that the Royal Commission on Drugs is also considering the matter of opening of mail and that the Minister wishes to await the outcome of that Commission. By letter dated 7 June 1978 the Minister assured the Committee that the matters raised by the Committee would be considered when amendments to the regulations were finally forthcoming.

- (iii) Regulations under the Customs Act: absence of rights of appeal against administrative acts.

On 16 March 1976 the then Minister for Business and Consumer Affairs undertook to refer to the Administrative Review Council a number of provisions in regulations under the Customs Act whereby Ministers and officials are given powers which amount to control of the business of individual importers and exporters with no right of appeal provided. The most recent letter from the present Minister, dated 12 September 1978, indicates that the Department of Business and Consumer Affairs has taken appropriate action to bring

the matter before the Council, but that the Council has not yet considered it. The Committee has now written to the Council and asked for an assurance that the matter will be dealt with expeditiously.

- (iv) A.C.T. Consumer Affairs Ordinance: power of officers to compel documents; self-incrimination of persons supplying information; immunity of officers from Court orders and legal proceedings.

An undertaking was given on 17 August 1977 to amend this ordinance so as to remove provisions which the Committee regarded as trespassing on individual rights and liberties. The most recent communication from the Department of the Capital Territory, dated 5 September 1978, indicates that the draft amendments are still in preparation.

- (v) A.C.T. Sale of Motor Vehicles Ordinance: powers of registrar to determine disputes.

The Committee considered certain provisions in this ordinance undesirable as conferring judicial power upon an executive officer. An undertaking to review those provisions and not to bring them into operation was given on 20 October 1977.

- (vi) Federal Court of Australia Regulations: power of registrars to remit fees.

An undertaking to amend these regulations so as to provide a right of appeal from the decisions of registrars was given by the Attorney-General on 10 May 1978. A letter from the Attorney-General, dated 19 September 1978, indicated that the matter was in the hands of the legislative draftsman.

- (vii) A.C.T. Physiotherapists Registration Ordinance: payment of witnesses.

The Committee regarded provisions in this ordinance relating to the payment of witnesses as unfairly discriminating against witnesses other than those called by the Health Commission. The Minister for Health undertook to amend the ordinance on 10 May 1978.

- 5 All of the regulations and ordinances referred to have provisions which are unsatisfactory in their effect on individual rights and liberties, and this has been recognised by the various Ministers in their various undertakings. A highly unsatisfactory situation arises when undertakings by Ministers are not carried out promptly and expeditiously, in

that provisions recognised to be defective are allowed to stand and the public effectively lack the protection which the disallowance procedure and the Committee are designed to give. Unless there is an improvement in the situation in the future the Committee will be less ready to accept undertakings which cannot be carried out before the time for disallowance has passed.

## STANDING ORDER 36A

- 6 Standing Order 36A, which is attached as appendix 1 to this Report, refers to the Committee all regulations and ordinances except those of the Northern Territory.
- 7 The Committee has not confined itself to considering regulations and ordinances properly so called. In practice it has considered all instruments which are subject to disallowance by either House of the Parliament and which are legislative in character. Until 1975 such instruments other than regulations and ordinances consisted mainly of rules of court and rules included in the statutory rules series. In 1975 two Acts were passed (Postal Services Act, Telecommunications Act) empowering the making of by-laws not included in the statutory rules series, and these were considered by the Committee, and amended as a result of action by the Committee. In 1977 by-laws under the Australian National Railways Act were made subject to disallowance, and again they were considered by the Committee and a ministerial undertaking to amend them was given as a result of action by the Committee. Since 1975 a number of other Acts have been passed empowering the making of by-laws and other instruments subject to disallowance. The Senate has, in effect, accepted the Committee's practice of considering instruments other than regulations and ordinances, by accepting reports from the Committee on such instruments, and so have Ministers, by giving to the Committee undertakings to amend such instruments.
- 8 Attached as appendix 2 to this report is a list which is believed to show all instruments subject to disallowance, and which also shows those instruments presently considered by the Committee.
- 9 Standing Order 66A (precedence to motions for disallowance) was recently amended so as to ensure that it covered all instruments subject to disallowance. The Committee considers that Standing Order 36A ought now to be updated so as to take account of the present practice of the Committee.

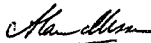
- 10 There are some instruments subject to disallowance which are clearly not legislative in nature and which the Committee would not want to scrutinize, such as notices of acquisition of land. The solution would therefore seem to be to have Standing Order 36A amended to leave out the words "All Regulations and Ordinances laid on the Table of the Senate, except those of the Northern Territory," and insert the words "All regulations ordinances and other instruments, made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate, and which are of a legislative character". The expression "of a legislative character" has some statutory basis, being used in the regulations under the Statutory Rules Publication Act. The proposed amendment also follows the wording of the new Standing Order 66A in so far as it is applicable. Under the proposed amended Standing Order, it would be for the Committee to determine which instruments are legislative in character, subject to any direction by the Senate on the matter.
- 11 The question arises with respect to the scrutiny of instruments not subject to disallowance. At present these are not subject to any scrutiny by the Regulations and Ordinances Committee or any other committee. The view has been taken that if Parliament has not seen fit to provide for disallowance of these instruments, it is not Parliament's wish that they be subject to particular scrutiny. Moreover, if the Committee did scrutinize such instruments it could only express an opinion about them; it could not use the procedure of disallowance to bring about changes in them. It is not feasible to compile a complete list of all instruments not subject to disallowance, as this would involve a close reading of all of the statutes. Most of the instruments in question are not required to be tabled in either House of the Parliament. The list attached hereto as appendix 3 for the information of the Senate must therefore be regarded as showing only a few examples. Apart from the power of the Minister under various Acts relating to Customs to fix rates of duty, the powers listed consist mainly of powers vested in Ministers to give orders or directions or make determinations with which statutory bodies, particular classes of persons and sometimes the general public are bound to comply. It is sometimes difficult to say whether the instruments made pursuant to these powers are legislative in character, as the distinction between a legislative instrument and an executive instrument is not always clear in the cases of these types of instruments. The Committee has noted that the Standing Committee on Constitutional and Legal Affairs is considering a reference relating to the Delegation of Parliamentary Authority and that this reference will involve it in considering the extent to which, if at all, certain classes of these instruments should be subject to disallowance, and whether the general practice in this area should be revised. Any further consideration of this matter by this Committee will await its receipt of the report of the Standing Committee on Constitutional and Legal Affairs.

- 12 Another matter which the Standing Committee on Constitutional and Legal Affairs should consider is the lack of uniformity in provisions in Acts for disallowance of instruments. It was pointed out by a member of this Committee that section 42 of the Aboriginal Land Rights (Northern Territory) Act, relating to the disallowance of a declaration contained in a proclamation for the grant of a mining interest, unlike the Acts Interpretation Act and other Acts providing for disallowance, contains no provision to the effect that the notice of motion for disallowance must be disposed of within fifteen sitting days. There is no apparent reason why such a provision has been omitted. The other Acts providing for disallowance of various instruments contain many variations in the conditions for disallowance. It is intended to draw this matter to the attention of the Constitutional and Legal Affairs Committee so that that Committee may consider it in compiling its report on the Delegation of Parliamentary Authority.
- 13 The Committee has noted that the Standing Committee on Constitutional and Legal Affairs is also considering a reference relating to the scrutiny of Bills. There are two areas in which this Committee has been involved and which ought to be considered by the Senate when the Report of the Constitutional and Legal Affairs Committee is available. In its Fifteenth Report the Committee asserted its right to examine the regulation-making clauses of Bills to see that those clauses do not confer a legislative power which ought to be exercised by Parliament. This was a matter which had been intended to be referred to the Committee in 1932, but which was omitted from its terms of reference, apparently due to a mere oversight. In the debate on the Fifteenth Report all Senators who spoke, other than Ministers, supported the Committee's view that it ought to examine the regulation-making clauses of Bills in the terms of that report, but there was no formal expression of the Senate's opinion. Since then the Committee has occasionally commented in its reports on regulation-making provisions in Bills or Acts, but the matter has not been formally resolved. At present the secretary to the Committee looks at the regulation-making clauses in Bills to see whether there is anything that ought to be drawn to the attention of the Committee. For the last few years the secretary has also been looking at Bills to see whether they empower the making of instruments which are legislative in character and which ought to be subject to disallowance. The Committee considers that these two tasks ought to be formally undertaken, but how best they can be undertaken is a matter which may await consideration of the report of



7.

the Constitutional and Legal Affairs Committee. It is proposed to draw these matters to the attention of that Committee so that it can consider them in compiling its report.



Alan Missen  
Chairman

28 September 1978

ATTACHMENT

Statistics concerning undertakings to amend regulations and ordinances given by Ministers since 1968, and a note on the figures.

YEAR	NOTICES OF MOTION FOR DISALLOWANCE GIVEN AS A RESULT OF DECISIONS BY C'TEE	NOTICES OF MOTION PROCEEDED WITH AND REGULATIONS OR ORDINANCES DISALLOWED ON RECOMMENDATION OF COMMITTEE	NOTICES OF MOTION WITHDRAWN WHEN UNDERTAKINGS GIVEN BY MINISTERS OR C'TEE SATISFIED WITH EXPLANATION	TOTAL NO. OF UNDERTAKINGS GIVEN	UNDERTAKINGS CARRIED OUT (TO 27/9/78)	UNDERTAKINGS NOT CARRIED OUT (TO 27/9/78)
1968	3	NONE	3	4	4	-
1969	1	NONE	1	3	3	-
1970	12	2	10	14	14	-
1971	5	1	4	10	10	-
1972	6	NONE	6	4	4	-
1973	3	NONE	3	7	7	-
1974	5	NONE	5	11	11	-
1975	6	NONE	6	8	6	2
1976	13	NONE	13	14	13	1
1977	4	NONE	4	6	4	2
1978	4	NONE	4	6	4	2

(TO 27/9/78)

NOTE

There is no relationship between notices of motion given and undertakings received. Ministers have often given undertakings without notices of motion being given and notices of motion have been given because the time for giving notice has expired before the Committee has concluded its inquiries into the regulations or ordinances concerned. When the Committee after correspondence with the responsible Minister, and sometimes after taking evidence, has concluded that particular regulations or ordinances are objectionable, it has either

- (a) recommended disallowance in reports to the Senate, or
- (b) informed the Minister of that view,

In all cases since 1968 where the Committee has decided to press its objection, whether by course (a) or course (b), the regulations or ordinances concerned have been the subject of undertakings to repeal or amend or have been disallowed.

## STANDING ORDER 36A

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

*Regulations and Ordinances Committee.  
Adopted  
11 March 1932.  
Amended  
1 October 1937,  
and  
1 January 1966.*

**(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, 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.**

Senate Standing Committee on Regulations and Ordinances

INSTRUMENTS MADE UNDER ACTS OF THE PARLIAMENT AND SUBJECT  
TO DISALLOWANCE OR DISAPPROVAL BY EITHER HOUSE OF THE PARLIAMENT

<u>Instruments</u>	<u>Enactments</u>
*regulations <sup>1</sup>	various acts, subject to Acts Interpretation Act 2 SS48, 49
*ordinances of territories	Seat of Government (Administration) Act S12 Christmas Island Act S10 Cocos (Keeling) Islands Act S13 Norfolk Island Act S17 Australian Antarctic Territory Act S12 3 Coral Sea Islands Act S7 3 Heard Island and McDonald Islands Act S11 <sup>3</sup> Ashmore and Cartier Islands 4 Acceptance Act S6
*regulations of territories	Christmas Island Inter- pretation Ordinance S15 Cocos (Keeling) Islands Interpretation Ordinance S15 Norfolk Island Inter- pretation Ordinance S8
*rules of court <sup>1</sup>	Judiciary Act S87 Federal Court of Australia Act S59 A.C.T. Supreme Court Act S28 N.T. Supreme Court Act S55 Commonwealth Electoral Act S202
*rules (bankruptcy proceedings) <sup>1</sup>	Bankruptcy Act S315
*by-laws <sup>1</sup>	Australian Shipping Commission 3 Act S49 Australian National 3 Airlines Act S69
*by-laws	Postal Services Act S115 Telecommunications Act S111 Australian National 4 Railways Act S88

by-laws	Aboriginal Councils and Associations Act S30 4 Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management) Act S10 4
regulations (River Murray Commission, tolls, offences)	River Murray Waters Act S7 3
orders (Broadcasting Tribunal, conduct of Broadcasting)	Broadcasting and Television Act S17 3
orders (Minister for Post and Telecommunications, planning, technical services)	Broadcasting and Television Act S11D 4
orders (Minister for Business and Consumer Affairs, application of duties)	Customs Tariff S36
orders (Minister for Defence, restricted areas)	Defence (Special Undertakings) Act S15 3
orders (administrative procedures)	Environment Protection (Impact of Proposals) Act S7
orders (handling of explosives)	Explosives Act S16
orders (Attorney-General, evidence before foreign tribunals)	Foreign Proceedings (Prohibition of Certain Evidence) Act S6A 4
orders (administrative arrangements)	Acts Interpretation Act S19BA 4
orders (codes of practice, nuclear activities)	Environment Protection (Nuclear Codes) Act S10 4
orders (special situations, nuclear activities)	Environment Protection (Nuclear Codes) Act S14 4
orders made under regulations	Environment Protection (Nuclear Codes) Act S15 4

declarations (grants of mining interest)	Aboriginal Land Rights (Northern Territory) Act S42 4
determinations (remuneration of office holders)	Remuneration Tribunals Act SS7, 12D 4
determinations (Minister for Health, variation of table of services)	Health Insurance Act S4A 4
determinations (public service employment)	Public Service Arbitration Act S22
notices of acquisition of lands	Lands Acquisition Act S12
modifications or variations of the plan of lay-out of Canberra	Seat of Government (Administration) Act S12A
zoning plans, marine park	Great Barrier Reef Marine Park Act S33 3

## N O T E S

This list does not include matters subject to approval or affirmation by either House of the Parliament, under, for example, Australian Capital Territory Representation (House of Representatives) Act S17, Commonwealth Electoral Act S24, Parliament Act S5, States Grants (Petroleum Products) Act S4.

- \* Instruments presently (August 1978) examined by the Committee.
- 1 Instruments published as statutory rules pursuant to the Statutory Rules Publication Act.
- 2 Some Acts make special and unusual provisions relating to regulations, for example, Environment Protection (Nuclear Codes) Act S12, Health Insurance Act S4(6), National Health Act S55C, Representation Act S13.
- 3 These provisions have either not been used at all, or used very infrequently.
- 4 These are recent provisions, enacted after 1975.



15.  
APPENDIX 3

SOME INSTRUMENTS NOT SUBJECT TO DISALLOWANCE

by-laws and determinations (rates of duty)	Customs Act ss 272, 273
notices (imposition of special duties)	Customs Tariff (Dumping and Subsidies) Act s 7; Customs Tariff (Anti-Dumping) Act, passim
orders and directions (conduct of coal industry)	Coal Industry Act ss 14, 18
statutes	Australian National University Act ss 27, 27A
orders (crew accommodation)	Navigation Act s 138
rules (superannuation)	Commonwealth Banks Act s 110
orders (conduct of stevedoring industry)	Stevedoring Industry Act s 18
orders and directions (quarantine measures)	Quarantine Act s 28
determinations and exemptions (conduct of financial corporations)	Financial Corporations Act ss 13-18
orders and declarations (shipping conferences)	Trade Practices Act ss 123, 129
directions (wheat marketing)	Wheat Industry Stabilization Act s 18
directions (insurance contracts)	Export Finance and Insurance Corporation Act ss 30, 31
determinations (prices of pharmaceutical benefits)	National Health Act s 98C
directions (meat export)	Australian Meat and Livestock Corporation Act s 11

AT TABLING OF PAPERS

Senator Missen: I present the Sixty-second Report from the Standing Committee on Regulations and Ordinances, relating to undertakings by Ministers to amend Regulations and Ordinances and Standing Order 36A and I move: That the Report be printed.

(question to be put)

Senator Missen: I ask leave to move a motion to refer a matter to the Standing Orders Committee and to make a statement relating to the Report.

(when leave granted)

I move: That the amendment of Standing Order 36A proposed in the Sixty-second Report of the Standing Committee on Regulations and Ordinances be referred to the Standing Orders Committee.

(question to be put)

! (make statement) !

The Committee intends to ask the Senate to express an opinion on this matter of undertakings by Ministers not promptly carried out, and accordingly I ask leave to give a notice of motion.

(when leave granted)

I give notice that on the next day of sitting I shall move: That the Senate notes with concern the failure of some Ministers and Departments promptly to carry out undertakings given to the Standing Committee on Regulations and Ordinances to amend unsatisfactory legislation, as recorded in the Sixty-second Report of the Committee.