

DEPARTMENT OF THE SENATE

PAPER No.

DATE

FILED IN FILED 24 OCT 1978

J. R. Ujers

Clerk of the Senate

STATE

ORDINANCES

*TABLET THIS
2/1/78*

THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-THIRD REPORT

Historic Shipwrecks Regulations

Superannuation (Allocation of Previous Fund) Regulations

Superannuation (Additional Pension) Regulations

19 October 1978

| |
|--------------------------|
| DEPARTMENT OF THE SENATE |
| PAPER No. 2140 |
| DATE 24 OCT 1978 |
| PRESENTED |
| <i>J. R. Ugen</i> |
| Clerk of the Senate |

THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-THIRD REPORT

Historic Shipwrecks Regulations
Superannuation (Allocation of Previous Fund) Regulations
Superannuation (Additional Pension) Regulations

19 October 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-THIRD REPORT

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

HISTORIC SHIPWRECKS REGULATIONS

- 2 The Historic Shipwrecks Act 1976 provides that areas may be declared protected zones for the purpose of protecting historic shipwrecks. The Act empowers the making of regulations to prohibit certain activities in protected zones, as follows:

"14.(1) The regulations may make provision -

- (a) for and in relation to prohibiting or restricting -
- (i) the bringing into a protected zone of equipment constructed or adapted for the purpose of diving, salvage or recovery operations, or of any explosives, instruments or tools the use of which would be likely to damage or interfere with a historic shipwreck or a historic relic situated within that protected zone;
 - (ii) the use within a protected zone of any such equipment, explosives, instruments or tools;
 - (iii) causing a ship carrying any such equipment, explosives, instruments or tools to enter, or remain within, a protected zone;
 - (iv) trawling, or diving or other underwater activity, within a protected zone; or
 - (v) the mooring or use of ships within a protected zone; and

(b) prescribing penalties, not exceeding a fine of \$1,000 or imprisonment for 1 year, or both, for any contravention of a provision of any regulations made for the purposes of paragraph (a).

(2) The provision that may be made by regulations made for the purposes of this section for or in relation to restricting the doing of an act includes a provision prohibiting the doing of that act except in accordance with a permit.

(3) Regulations made for the purposes of paragraph (1)(a) may be of general application or may make different provision in relation to different protected zones.

(4) In this section, "ship" includes a hovercraft and any similar craft."

3 The regulations made under the Act, contained in Statutory Rules 1978 No. 93, simply state that the activities listed in the Act are prohibited:

"4. For the purposes of section 14 of the Act, a person shall not do any of the following acts:

(a) bring into a protected zone equipment constructed or adapted for the purpose of diving, salvage or recovery operations, or any explosives, instruments or tools the use of which would be likely to damage or interfere with a historic shipwreck or a historic relic situated within that protected zone;

(b) use within a protected zone any such equipment, explosives, instruments or tools;

(c) cause a ship carrying any such equipment, explosives, instruments or tools to enter, or remain within, a protected zone;

(d) trawl, or dive or engage in any other underwater activity, within a protected zone;

(e) moor or use ships within a protected zone,

except in accordance with a permit granted under sub-section 15(1) of the Act.

Penalty: \$1,000 or imprisonment for 1 year, or both."

- 4 The Committee considers that this regulation trespasses unduly on personal rights and liberties by not providing the defence of reasonable excuse or some other similar safeguard. A person may enter a protected zone (and it is to be noted that there is no provision for marking the zones in any way), bearing the materials referred to in the regulation, unknowingly, or by accident, due to stress of weather or other cause, or for the purpose of assisting vessels or persons in difficulties in the protected zone. In these and similar circumstances a person charged with entering a protected zone contrary to the regulation ought to be able to escape that charge.
- 5 Section 16 of the Act does provide certain defences to prosecutions for offences against the Act or the regulations, as follows:

"16. It is a defence to a prosecution of a person for an offence against section 13, for an offence against a regulation made for the purposes of section 14, or for an offence against sub-section 15(5), if the act that constituted the offence was done for the purpose of -

- (a) saving human life;
- (b) securing the safety of a ship (including a hovercraft or any similar craft) where the ship was endangered by stress of weather or by navigational hazards; or
- (c) dealing with an emergency involving a serious threat to the environment."

This provision in the Act does not, however, cover all the cases which would be covered by the defence of reasonable excuse. It does not, for example, deal with the cases of a person entering a protected zone unknowingly, or by accident, or to assist another vessel or person in circumstances not covered by paragraph (b) of the section. It has also been put to the Committee that there would be available a common law defence that the offence was committed as a result of an honest and reasonable belief in a set of facts which, if they existed, would make the defendant's act innocent. As has been pointed out by the Committee's legal adviser, however, this common law defence does not cover situations where a person enters a protected zone for some reasonable purpose which is also not covered by section 16 of the Act. The Committee has therefore concluded that the

regulation ought to contain the defence of reasonable excuse or some other similar safeguard, without which there is a danger of persons being unjustly convicted under the regulation. It must be remembered that the purpose of the regulation is to prevent unauthorised tampering with historic shipwrecks, and not to prohibit the activities referred to in the Act as such.

- 6 In correspondence with the Committee the Minister for Home Affairs has expressed the view, as advised, that

"there is legal doubt whether a regulation that purported to extend the statutory grounds of defence against a prosecution beyond those specified in Section 16 of the Historic Shipwrecks Act would be consistent with the provisions of the Act and accordingly beyond the regulation-making power.

Because of this doubt, I am advised that the provision of additional statutory defences of the kinds referred to in your letter should desirably be made only after an amendment to the Act."

The Minister relies on the opinion of the Attorney-General's Department (supplied to the Committee) in support of this view, but it should be observed that the Attorney-General's Department conceded that there were "two possible views", maintaining that if the Committee's view was adopted, "the arguments that may be advanced in favour of the alternative view would be of sufficient weight to cast doubt on any regulation that prescribed additional grounds" such as proposed by the Committee.

The Committee is not persuaded by the views expressed by the Minister and the Attorney-General's Department as to the possible invalidity of a further amendment of the kind proposed by the Committee. The Committee further considers that the regulation, as presently drafted, should not be permitted to operate as it may unduly trespass on the personal rights and liberties of citizens.

- 7 For the reasons stated above, the Committee recommends that regulation 4 of the regulations be disallowed. Whether the defect of that regulation may be corrected by amending it, or whether this may be accomplished by an amendment of the Act, is a matter which the Minister must determine.

SUPERANNUATION (ALLOCATION OF PREVIOUS FUND)
REGULATIONS

- 8 The Superannuation Act 1976 empowers the Treasurer to make decisions concerning the allocation of contributor assets in the old superannuation fund which existed prior to the enactment of the 1976 Act. The Act provides that in making determinations concerning the allocation of contributor assets, the Treasurer shall have regard to such matters as are prescribed, and shall take into account all matters relevant to ensure that the amounts to be allocated will be allocated among the persons concerned on a fair and reasonable basis.
- 9 The regulations, as contained in Statutory Rules 1978 No. 156, prescribe that in making his determinations the Minister (the Act is now administered by the Minister for Finance) shall have regard to the relevant recommendations made to the Treasurer by the committee of five persons appointed to consider the matter, being recommendations by the majority of that committee as contained in a report presented to the Parliament on 20 October 1976. The majority of the committee of five persons recommended that there should be distributed among contributors to the old fund a surplus ascertained on the basis of an investigation by the Australian Government Actuary into the profits and losses resulting from the actual performance of the fund in the four years ending 30 June 1976 as compared with the assumed performance of the fund adopted by the Actuary in the tenth quinquennial investigation of the fund as at 30 June 1972. There had already been a distribution of the surplus of the fund based upon that tenth quinquennial investigation. A minority of the committee recommended that the course of action which had also been recommended by the Australian Government Actuary should be adopted, namely, that all contributors to the old fund should receive a refund of their contributions in excess of 5% of salary (this being the rate of contributions under the new scheme).
- 10 The Committee has received a number of submissions complaining that the regulations are unfair to long standing contributors to the old fund. It has been put to the Committee that these contributors often suffered financial hardship in keeping up their contributions to the old fund, and had been led to a reasonable expectation that they would receive a refund of their contributions in excess of 5% of salary. In particular, it has been put to the Committee that there are two grounds for the Committee to take action against the regulations.

First, the regulations are contrary to the Act in that they take away the Minister's discretion to determine the matters which the Act empowers him to determine. The Committee was supplied with the opinion of senior counsel advising on behalf of the objectors, which concluded that the regulations are invalid on this ground. The Committee, supported by the view of its legal adviser, is not persuaded that there is substance in this argument. The objectors are entitled to take legal proceedings to challenge the regulations, but the Committee is not persuaded that the regulations are not in accordance with the statute as required by the Committee's criteria.

Secondly, it is suggested that the regulations are contrary to the Act in that they do not allow the Minister to carry out his statutory obligation to allocate amounts on a fair and reasonable basis. Given the nature and complexity of the issues involved, the Committee does not consider that it can or should make its own judgment on whether the regulations provide a fair and reasonable basis for allocating the old fund. The Committee notes that the question of the allocation has already been the subject of exhaustive inquiry and active discussion between interested parties, and that, as was indicated above, the regulations represent the considered view of the majority of the committees of five persons which advised the government upon the question. In relation to this point the Committee adopts the following assessment of its legal adviser:

"Conceivably, there could be a situation in which the recommendations prescribed by the regulations may be such that the Treasurer could not properly have regard to such recommendations and also make determinations on a fair and reasonable basis, with the result that the regulations may be ultra vires. Having said that, there is not in my view, sufficient reason for thinking that such are the circumstances here."

- 11 It may well be that the courts will be called upon to adjudicate on all the matters raised in the previous paragraph. The Committee does not consider that it is its duty to do so.

SUPERANNUATION (ADDITIONAL PENSION) REGULATIONS

- 12 In its Twenty-fifth Report, which was confirmed by the Fifty-sixth Report, the Committee laid down certain principles which it would adopt in dealing with retrospective regulations. In particular, the Committee gave the following undertaking:

"Regulations involving retrospectivity in payment of moneys, if extending beyond two years, will be the subject of report to the Senate and unless quite exceptional circumstances are established to the Committee's satisfaction, will be the subject of a recommendation for disallowance."

- 13 The Superannuation (Additional Pension) Regulations, as contained in Statutory Rules 1978 No. 141, are retrospective for a period of more than two years, and in accordance with its undertaking to the Senate the Committee now reports the circumstances.
- 14 The explanation of the retrospectivity provided by the Minister for Finance is attached hereto as an appendix. The Senate will note that the retrospectivity arose from a defect which was detected in the Superannuation Act 1976 and which was corrected by the Superannuation Acts Amendment Act 1978. The regulations were made as a result of the 1978 amendment of the Act. It is also to be noted that the Superannuation Act contains in section 168, as amended, an explicit authorisation for regulations to be made retrospective to 1 July 1976 which was the date of the beginning of the new superannuation scheme. The Committee considers that the explanation provided does establish exceptional circumstances and the Committee does not therefore recommend that the regulations be disallowed.
- 15 The Minister for Finance has advised the Committee that there are further regulations to be made, relating to matters of great complexity, which must also be made retrospective to 1 July 1976, and the Minister has undertaken to provide a full explanation of these regulations when they are forthcoming.



Alan Missen
Chairman

STATUTORY RULES 1978 NO 141
AMENDMENTS TO THE SUPERANNUATION (ADDITIONAL PENSION) REGULATIONS

Statutory Rules 1978 No 141 amended the Superannuation (Additional Pension) Regulations (Statutory Rules 1976 No 158).

The amending regulations were made in accordance with the general regulation-making power contained in section 168 of the Superannuation Act 1976 and the specific power contained in section 61 of the Act.

The Superannuation Act 1976 introduced, from 1 July 1976, a new superannuation scheme for Commonwealth government employees. Section 59 of the Act provides for the payment, in certain circumstances, of a standard Government-financed early retirement pension and an additional contributor-financed early retirement pension to a person who retires before attaining age 60. The rate of the additional early retirement pension is established in accordance with section 61 of the Act.

At the time the Act came into operation, section 61 provided for the annual rate of the additional contributor-financed early retirement pension to be calculated by multiplying the amount of the person's accumulated contributions by the factor that would have applied had he been age 60 at retirement but reduced by 4% for each year, or part of a year, by which his age at retirement was less than 60 years. Also, the rate of the pension was subject to a maximum of 20% of the person's rate of salary at retirement reduced by 4% for each year, or part of a year, by which his age at retirement was less than 60 years.

It was subsequently considered that the 4% rate of reduction was unfair to contributors bearing in mind that the intention was that the additional contributor-financed pension be a pension that could be purchased on an actuarial basis by the amount of the person's accumulated contributions. Section 61 of the Act was therefore amended by section 31 of the Superannuation Acts Amendment Act 1978 (Act No 17 of 1978) which received Royal Assent on 24 April 1978.

The effect of the amendments was to provide for the rate of the additional contributor-financed early retirement pension to be calculated by multiplying the amount of the person's accumulated contributions by a factor prescribed in the regulations according to his age at retirement. Another effect was to provide for the maximum rate of the contributor-financed pension to be a prescribed percentage, according to age at retirement, of the person's rate of salary at retirement. Section 31 of the Superannuation Acts Amendment Act 1978 was made to operate from and including 1 July 1976 so that the amendments would apply to, or in respect of, contributors who had retired or died after 30 June 1976.

Statutory Rules 1978 No 141 amended the Superannuation (Additional Pension) Regulations to prescribe the factors and percentages to be used in determining rates of additional contributor-financed early retirement pension. To avoid disadvantage to, or in respect of, contributors who had retired or died on or after 1 July 1976 it was necessary for the amendments to the regulations to operate from that date. The amending regulations could not be made until the specific power was included in section 61 on 24 April 1978 but were made as soon as was practicable after that date.

Department of Finance
October 1978