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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Seventy-sixth Report

Report upon a Certain Ordinance of the Australian Capital Territory Disallowed by Effluxion of Time

December 1985

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

Senator B.C. Cooney (Chairman)

Senator A.W.R. Lewis (Deputy Chairman)

Senator the Hon. Sir John Carrick

Senator J. Coates

Senator P.J. Giles

Senator A.E. Vanstone

PRINCIPLES OF THE COMMITTEE

(Adopted 1932; Amended 1979)

The Committee scrutinizes delegated legislation to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for Parliamentary enactment.

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SEVENTY SIXTH REPORT

The Senate Standing Committee on Regulations and Ordinances has the honour to present its Seventy Sixth Report to the Senate.

New South Wales Acts Application Ordinance 1985.

INTRODUCTION

2. When the Senate rose on Thursday 28 November 1985 the New South Wales Acts Application Ordinance 1985, (being Australian Capital Territory Ordinance No. 25 of 1985) was deemed to have been disallowed by virtue of sub-section 12(5) of the Seat of Government (Administration) Act 1910. This was the first occasion on which such a disallowance has occurred in the Senate. Since the notice of motion for disallowance of the Ordinance had been given on 11 October 1985 by the Chairman of the Committee acting under its Principles, it is incumbent on the Committee to explain to the Senate the background to its scrutiny of this instrument.

PURPOSE OF THE ORDINANCE

3. On 21 June 1985 the New South Wales Acts Application Ordinance 1985 (the Ordinance) was made by the Governor-General on the advice of the Attorney-General. The Ordinance arose out of, and was to a large extent based upon, recommendations from the Australian Capital Territory Law Reform Commission's Report on the Review of New South Wales Acts in Force in the Australian Capital Territory (A.G.P.S. 1974)). The purposes of the Ordinance were twofold. It was designed to revise, clarify and make available in definitive form certain old N.S.W. Acts that were to remain in force in the A.C.T. It was also designed to provide that, apart from a relatively small and clearly identified corpus of N.S.W. Acts, all other N.S.W. Acts in force in the A.C.T. were to cease to be in force. These Acts, numbering well in excess of 100, were not identified in the Ordinance in any way and included Acts which

the A.C.T. Law Reform Commission Report had recommended should be retained in force.

RETAINED NEW SOUTH WALES ACTS

4. The Committee examined those N.S.W. Acts which were set out in their revised, clarified and definitive form in schedules to the Ordinance. In subsequent correspondence with the Attorney-General about these Acts the Committee raised several issues of concern to it under its Principles. These included the question of a large number of offences which appeared to impose strict liability on a defendant and were alongside other provisions which appeared to require the usual proof of mens rea. The Committee also expressed concern under its Principles about the conferral of a statutory right on any person without warrant to arrest certain offenders under one Act and about deeming and reversal of onus of proof provisions in another Act. The Committee accepted the Attorney-General's explanations that the Ordinance had not been designed as a vehicle for substantive law reform other than by way of repeal of old laws. Thus, the kinds of issues raised by the Committee had not been specifically addressed in preparing this Ordinance but they would be so addressed bearing in mind the Committee's concerns when each of the remaining old N.S.W. Acts still in force was examined with a view to repeal and replacement by modern laws. The Attorney-General indicated that this process of substantive law reform and modernisation was well in hand in relevant Departments responsible for different N.S.W. Acts, including the Department of Territories and the Department of Employment and Industrial Relations. In accepting the Attorney-General's explanations the Committee maintained its concern that the provisions to which it had objected should not remain in the statute book for any longer than was necessary to allow for the completion of the substantive law reform program. The Committee urged the Attorney-General and his ministerial colleagues to pursue the relevant substantive reforms and thus allay the Committee's particular concerns.

REPEALED NEW SOUTH WALES ACTS

5. Several weeks later the Committee also sought to examine the large body of N.S.W. Acts which under the terms of section 3 of the Ordinance ceased to apply in the A.C.T. The termination of these Acts, without there being any incorporated schedule listing them, was achieved by a drafting formula in section 3 of the Ordinance. In correspondence with the Attorney-General in relation to these Acts the Committee expressed its concern about the absence of a schedule listing, as far as possible, the names of N.S.W. Acts the application of which had ceased under the terms of the Ordinance. The Committee recognised and accepted from the Attorney-General's earlier

correspondence that the terms of the Seat of Government Acceptance Act 1909 left room for doubt and ambiguity as to which N.S.W. Acts were "applicable" in the A.C.T. subsequent to 1 January 1911. Thus, from the outset of its raising this aspect of the Ordinance the Committee did not insist on a totally accurate and comprehensive schedule. The Committee's concern under its Principles was that in the absence of a reasonably complete list of statutes incorporated in a schedule to the Ordinance, it would be impossible for it to conclude that no rights, liberties, privileges, benefits or entitlements of whatever kind were being extinguished unnecessarily by the Ordinance.

6. However, the Committee rejected the idea that an informal list of repealed Acts would meet the full scope of its concerns because this would not enable the Committee or the Parliament to exercise any supervision over Executive decisions to effect an extensive repeal of laws by means of delegated legislation. When the Chairman on behalf of the Committee wrote to the Attorney-General on 15 October 1985, 4 days after giving the Senate notice of motion of disallowance, he sought to make it very clear that such an outcome would be a serious limitation on the powers of the Parliament and therefore an important principle was at stake for the Committee.

A.C.T. LAW SOCIETY

7. The President of the A.C.T. Law Society wrote to the Chairman of the Committee on behalf of the Society expressing its concern about the notice of motion of disallowance given by the Committee with respect to the Ordinance. The Society was uncertain as to the connection between the listing in a schedule of repealed N.S.W. Acts and the question of the possible loss of rights since legally any rights accrued under any of the repealed laws would remain unaffected by the repeals. In his reply to the Society on behalf of the Committee, the Chairman sought to correct this apparent misunderstanding of the Committee's concern about the Ordinance by pointing out that a list per se would not enable the Parliament to exercise any supervision over Executive decisions to repeal laws by means of delegated legislation. The Chairman again explained on behalf of the Committee that this would be a serious limitation on the powers of the Parliament and therefore an important principle was at stake for the Committee in its scrutiny of the Ordinance.

ATTORNEY-GENERAL'S REPLY

(i) Identification of Repealed Laws

8. In his reply the Attorney-General explained that because of uncertainties about identifying all of the Acts inherited by the A.C.T. a catch-all termination provision would have been necessary in order to avoid a substantial area of

uncertainty about what was the law in force in the A.C.T. The Attorney-General indicated that a schedule list and such a catch-all provision would have brought about that requisite degree of certainty. However, in rejecting the Committee's request for a schedule he indicated that even employing such a combination, the Committee would nevertheless have remained uncertain as to what precisely was repealed. It must be clearly stated, as can be observed from paragraph 5 above, that the Committee had accepted that a scheduled list could not be totally comprehensive, and in recognition of this it had never insisted that such a list should be infallible in order to meet the Committee's concerns. In any event, the Attorney-General in explaining the research and consultation carried out to assess the consequences of extensive repeals, stated that there was only an extremely remote possibility that any useful N.S.W. Act in force in the A.C.T. had in fact been overlooked.

ATTORNEY-GENERAL'S REPLY

(ii) Revival of Repealed Laws

9. The Attorney-General's letter went on to indicate that in any event disallowance of the Ordinance by the Senate in accordance with the Committee's motion of disallowance would not have the effect of reviving any of the terminated N.S.W. Acts. Likewise disallowance by the Senate of section 3 of the Ordinance in accordance with a notice of motion of disallowance given by Senator Vigor would not revive terminated N.S.W. Acts. It should be noted at this juncture that, as with its scrutiny of any instrument of delegated legislation which may infringe its Principles, the Committee was seeking, not disallowance of the Ordinance, but an undertaking from the Attorney-General that would meet the Committee's concerns. It is apposite here to recall the observation of Professor D.C. Pearce in his standard work on Australian delegated legislation:

> "Because of (the) awareness (within the bureaucracy) of the power of the Committee it is unusual for regulations to be made that offend the Committee's principles for review. Where regulations are made that do offend these principles, it is usually only necessary for the Committee to point this out and the department will act immediately to amend the regulations to remove the offensive provisions. The department is left with little choice as it knows that if it refuses to act, the regulations are virtually certain to be disallowed".
>
> (Pearce: Delegated Legislation in Australia and New Zealand Butterworths, 1977, at paragraph 94)

10. In his further letter the Attorney-General explained that the Seat of Government Acceptance Act 1909 had originally continued in force applicable N.S.W. Acts until "other provision" was made. The Ordinance repealing the bulk of those Acts was such "other provision". Therefore, the repealed Acts were not in law repealed by the Ordinance and they could not be revived by its disallowance. In any event, the Attorney-General advised that by virtue of the consequences of amendments made by the Statute Law (Miscellaneous Amendments) (No. 1) Act 1982 to section 12 of the Seat of Government (Administration) Act 1910 provisions dealing with revival of an Ordinance which had been repealed by a disallowed repealing Ordinance did not apply to N.S.W. Acts which had been repealed by a disallowed repealing Ordinance. The Attorney-General stated that

> "Until the question of disallowance of the Application Ordinance was raised by the Committee, it had not been appreciated what the effect was of those amendments in such a case as the present."

Prior to the 1982 Statute Law Act amendments, which were ostensibly made to widen disallowance and revival powers, the repealed N.S.W. Acts would have revived as they would clearly have fallen within the scope of sub-section 12(6) of the Administration Act as it had then stood. The Attorney-General, acknowledging that Parliament hardly intended such an outcome, proposed to suggest to the Minister for Territories that the Administration Act should be amended as a matter of high priority to provide for revival of a N.S.W. Act terminated by a subsequently disallowed Ordinance. He also indicated in relation to any repealed N.S.W. Act within his portfolio that he would give prompt consideration to the making of an Ordinance re-enacting such an Act if the Committee or a Senator considered that such an Act should not have been terminated. Also, in relation to any such law within the responsibility of any of his ministerial colleagues he would suggest that he or she take similar action and give prompt consideration to the making of a re-enacting Ordinance.

11. The Committee's legal adviser advised on the question of revival of repealed laws. This advice stated in short that the law in relation to possible revival of repealed N.S.W. Acts on disallowance of an Ordinance which repealed them was not clear or conclusive on either side of the question and could only be settled by a court decision or appropriate legislative action. He stated:

> "In my view there are acceptable arguments on both sides. On balance I still would prefer to argue for non-revival, but I would

expect to get a very rough time from a Court especially in relation to the Parliamentary intention material."

DECLATORY SCHEDULE VERSUS DISALLOWABLE SCHEDULE

12. The Committee held an in camera hearing of evidence from officials of the Attorney-General's Department on 26 November 1985, at which were canvassed two possible ways of resolving the impasse. An amending Ordinance containing a declaratory list of repealed N.S.W. Acts to the extent to which they were known, could be prepared on the basis of those Acts referred to in the 1974 ACT Law Reform Commission Report. It was made clear that such a list would be declaratory only. It could not have the effect of reviving or re-enacting repealed Acts and no effective disallowance motion could be moved in respect of it.

13. Alternatively, if the objective were to allow for the possibility of effective disallowance and thus preserve effective parliamentary scrutiny of the unmaking, as of the making, of particular laws, then a more sophisticated scheme was needed. Such a scheme would have involved the following steps:

(a) The Attorney-General could make an Ordinance which re-enacted the repealed N.S.W. Acts using a formula of words.

(b) In that Ordinance he could list in a schedule all, or at least the great bulk, of the repealed Acts.

(c) In another schedule he could use a form of words to deal with an Act which could not easily be identified by name, but without prejudice to those that could be.

(d) He could make this Ordinance retrospective to the date of the first Ordinance under consideration by the Committee.

(e) In a second and virtually simultaneous Ordinance he could repeal the first Ordinance while retrospectively saving in the normal way, any rights or benefits that might have accrued to individuals during the period of retrospectivity.

(f) At this point a de novo situation would have been created which would overcome legal uncertainties about revival of repealed N.S.W. Acts. Effective disallowance of the repeal of an individual N.S.W. Act would then have been possible if a House of the Parliament so moved.

14. At this point there was a view that an amending Ordinance containing a declaratory list would meet the Committee's concerns.

15. Following the hearing, and on the final day for the disposal of the Committee's motion of disallowance, the Attorney-General in a further letter again proposed to meet the Committee's concerns by incorporating a declaratory schedule of repealed N.S.W. Acts into the Ordinance. He noted however, that it would not be possible to provide such a declaratory list if the Senate moved Senator Vigor's motion for disallowance of section 3 of the Ordinance. This was because the declaratory list would have to be incorporated by reference to an amended section 3 and disallowance would erase that section from the Ordinance.

COMMITTEE'S FINAL DELIBERATIONS

16. On the final day, Thursday 28 November 1985, the Committee met twice and reviewed the issues which had arisen from its scrutiny of the Ordinance.

(i) There was a complex and unresolved question whether disallowance of the Ordinance would in fact result in revival of all or any of the repealed N.S.W. laws. The Committee had received conflicting advice which tended however to favour non-revival though not without significant qualifications. These were based on an assessment of Parliament's intention in enacting the 1982 Statute Law Act amendments and the effect which a clearly expressed parliamentary intention to expand and not diminish disallowance and revival powers could have on the statutory interpretation of the relevant legislation.

(ii) There were two competing proposals aimed to meet the Committee's concerns. On the one hand the declaratoy schedule was a very simple solution but it would not in fact enable disallowance of any particular repeal. It would thus not have allowed effective parliamentary scrutiny of delegated legislation. On the other hand, the making of two new Ordinances which re-enacted and then immediately repealed a scheduled list of repealed N.S.W. Acts was a very complex solution. However, it would be effective and it would establish a valuable precedent should the proposed repeal of Imperial Acts which may currently apply in the A.C.T. be attempted by an Ordinance before the Seat of Government (Administration) Act 1910 is amended to restore it to its pre-1982 effectiveness on the issue of disallowance.

(iii) Although the alternative proposal would have allowed disallowance and would thus have restored to Parliament the capacity for effective supervision and scrutiny of this particular instrument of delegated legislation, the Committee had to give careful consideration to the fundamental question whether it fell within its Principles to press for

such an extremely complex, detailed and to some extent, uncertain legislative solution for disallowance of repealed N.S.W. Acts. The Committee was aware that one of the amending Ordinances would have had to be made retrospective to the date of the making of the Principal Ordinance. This could have given rise to legal difficulties because of uncertainty as to the identity of all applicable N.S.W. Acts.

CONCLUSIONS

17. There emerged a question as to how far the form of the Ordinance infringed the Committee's Principles. However, this much was clear. The Ordinance, in the form in which it had been made, gave no opportunity to any individual Senator to move to disallow the repeal of any particular N.S.W. Acts. Any Senator who wished to so move could only invite the Senate to disallow the whole Ordinance, or the vital section of it, in the knowledge that disallowance might either:

- revive all the obsolete Acts and not merely one possibly useful Act; or more likely
- be merely a parliamentary gesture, made ineffective by the drafting in 1982.

18. Given the legal advice about the ineffectiveness of disallowance, effective parliamentary scrutiny of this Ordinance may at no stage have been possible because of the form in which it was made.

19. These issues were debated by the Committee and raised with the Attorney-General both in writing and in meetings with the Chairman of the Committee. The Attorney-General was not persuaded.

20. The Ordinance was deemed to have been disallowed under sub-section 12(5) of the Seat of Government (Administration) Act.

RECOMMENDATIONS

21. Arising out of its scrutiny of the New South Wales Acts Application Ordinance 1985 the Committee makes the following recommendations to the Senate. These recommendations are made on the principle that for a Senator not to be in a position to move to disallow the repeal of any particular N.S.W. Acts as they applied in the A.C.T. would be a restriction of the rights of a Senator and a limitation on the powers of the Senate.

(a) Any instrument of delegated legislation, including an A.C.T. Ordinance, which is designed to repeal, cancel or terminate any other instrument or law should where possible identify by name that which

is to be repealed, cancelled or terminated. (The word repeal is used hereafter to include any cessation of law.)

(b) Section 12 of the Seat of Government (Administration) Act 1910 should be amended as a matter of urgency to allow for the revival of any instrument or law which was repealed by a subsequently disallowed instrument of delegated legislation. The reality of revival would thereby restore to the Parliament the full and proper powers of disallowance which it intended to possess but which it may inadvertently have failed to bestow upon itself by virtue of the amendments made to the Act by the Statute Law (Miscellaneous Amendments) (No. 1) Act 1982.

(c) The Acts Interpretation Act 1901 should likewise be amended.

(d) Any proposed law reform Ordinance designed to repeal Imperial Acts in force in the A.C.T. in pursuance of recommendations in the A.C.T. Law Reform Commission Report on Imperial Acts (Parliamentary Paper No. 63 of 1973) should

EITHER:

(i) not be made until the recommendations in paragraph (b) above have been implemented to restore proper parliamentary control over delegated legislation;

OR

(ii) be made in such a form as to allow effective disallowance of any particular repeal which a House of the Parliament, resolves should be disallowed. Effective disallowance means that repealed laws should revive on disallowance of the repealing law.

(e) For the avoidance of doubt, the Committee again affirms the views expressed by previous Committees that Principle (a) of its terms of reference enables the Committee to scrutinize delegated legislation to ensure that it is subject to effective disallowance. Until the Senate directs otherwise, the Committee assumes it is Parliament's intention when delegating law-making powers that the exercise of such powers be subject to the control and supervision of Parliament by the mechanism of disallowance (including, by implication, necessary revival of any instrument or law repealed by a disallowed instrument). The Committee draws this mandate from the terms of Principle (a) which requires the Committee to scrutinize delegated legislation to

ensure that it is “in accordance with the Statute”. The Committee recommends that this interpretation be confirmed by the Senate. (An explanation of the history and use of Principle (a) appears in Appendix 1.)

Barney Cooney

Chairman

Senate Standing Committee

on Regulations and Ordinances

December 1985

APPENDIX I

COMMITTEE'S PRINCIPLE (a)

1. The Report of the Select Committee of the Senate appointed to consider, report and make recommendations upon the advisability or otherwise of establishing a Standing Committee of the Senate upon Regulations and Ordinances reported on 31 March 1930. It recommended the establishment of a Regulations and Ordinances Committee required to scrutinize regulations to ascertain inter alia

   "(a) that they are in accordance with the Statute."

   (Recommendation 1 (d) (1).)

2. On 11 March 1932 the Senate adopted the Report of the Standing Orders Committee and established the Regulations and Ordinances Committee under what is now Senate Standing Order 36A.

3. The Committee was appointed on 17 March 1932. The Committee's Principles including Principle (a) were adopted by the Senate on 3 November 1938 when it adopted the Committee's 4th Report.

4. Principle (a) has therefore remained unchanged since the inception of the Committee.

5. The Committee has acted on the basis that questions concerning the tabling and disallowance of delegated legislation or of instruments to be made under delegated legislation, fall within the scope of the Committee's Principle (a).

6. This has been the subject of express and implied reference and interpretation by the Committee in its Reports on a number of occasions. It has been a traditional concern of the Committee that delegated legislation and instruments under such legislation be subject to effective parliamentary scrutiny. The Committee has drawn its mandate for this role from the scope of Principle (a).

7. The explanation for this is that in an enabling Act, which empowers the making of delegated legislation, the Committee assumes that it was Parliament's intention to preserve proper control over that

delegated legislation. Delegated legislation which is not fully subject to such control is therefore viewed as not being in accordance with the statute.

8. There are in the Committee's Reports a number of examples of this approach.

(i) In the 4th Report, June 1938, (that which led to the principles enunciated by the Select Committee Report being adopted by the Senate), Principle (a) was referred to, at paragraph 9, in the context of the legality of regulations and their not being ultra vires the enabling Act. At paragraphs 11-13 the Committee also appeared to express its interest in questions of tabling and disallowance when reference was made to the absence of a power to disallow a proclamation prohibiting the import of goods.

(ii) In the 7th Report, October 1949, the Committee reported, at paragraph 10, on the "rather glaring lack of uniformity as between one Territory and another" in regard to the existing provisions for tabling and disallowance of ordinances and regulations made for the Territories. The Committee made recommendations about the tabling and disallowance of such delegated legislation.

(iii) In the 8th Report, June 1952, referring to Customs Regulations, the Committee noted, at paragraph 30, that while previous Customs policy had been implemented by regulations, the new customs policy "was implemented by ministerial determination made under a regulation." The Report noted that a regulation "is subject to Parliamentary review, and it may be disallowed by either House, but there is no such Parliamentary control over a ministerial determination". Previously, at paragraph 25, the Report had stated "… this is a point the Committee wishes to stress, (emphasis added) a ministerial determination is not subject to Parliamentary review in that it may not be disallowed by either House as may a proposed law or regulation".

(iv) In its 27th Report, September 1969, in examining Defence Regulations the Committee was concerned that they were not authorised by the regulation-making power of the relevant Defence Statutes. The Committee stated, at paragraph 6, its recognition "that in expressing an opinion that the regulations

may not be in accordance with the Statute under which they purport to have been made, it is entering a field where legal opinions may vary." Nevertheless the Committee did go on to express such a legal opinion.

(v) In its 39th Report, March 1972, at paragraph 8, the Committee reported on the scope of Principle (a). Referring to the legal issues which arose in the 27th Report the Committee expressed the view that it might not be a proper interpretation of its role and indeed could be dangerous if the Committee delivered legal opinions on the question of whether Regulations were ultra vires an enabling Act.

The Committee noted that it "has always interpreted (principle (a)) …. as expressing something wider than legal validity" (emphasis added). Notwithstanding the legality of the regulation it could still be regarded as "an unusual or unexpected use of the powers conferred by the Statute". The Committee pointed out that a court may subsequently declare invalid a regulation to which the Committee found no objection "because it does not appear to have exceeded what the Parliament envisaged (emphasis added) in granting the regulation-making power contained in the Statute."

(vi) In its 43rd Report, October 1972, the Committee, at paragraph 3 and in the Appendix, discussed, inter alia, principle (a) (see in particular page 15). The Committee stated that Principle (a) was not restricted to the narrow concept of legal authorisation but also connoted issues related to whether the delegated legislation represented an "unusual or unexpected use of the powers conferred by the Statute."

(vii) In the 64th Report, in March 1979, the Committee revised its Principles (c) and (d) but did not amend Principles (a) and (b).

(viii) In its 66th Report, in June 1979, the Committee considered the question whether the disallowance of an instrument of delegated legislation which repeals another instrument, has the effect of reviving that which the first instrument repealed. The Committee described this as "a matter which intimately concerns the effectiveness of the Committee in scrutinising delegated legislation". The Committee therefore recommended in effect that powers of disallowance be

widened by enabling revival of laws repealed by the disallowed instrument. This matter was taken up by the then Attorney-General who, in a statement to the Senate on 26 May 1981, promised to so amend the relevant legislation.

(ix) In its 68th Report, November 1979, the Committee recommended that for the effective parliamentary control of all delegated legislation there should be uniform tabling and disallowance provisions. The Report makes clear the Committee's concern for parliamentary control of delegated legislation (paragraphs 4-7). This matter was taken up by the then Attorney-General who, in a statement to the Senate on 26 May 1981, promised to standardise disallowance provisions.

(x) In its 71st Report, March 1982, the Committee indicated, at paragraph 32, that it had considered States (Tax Sharing and Health Grants) Regulations in the context of whether they "accorded with the intention of the legislation under which they were made".

(xi) In its most recent consideration of the ministerial exemption power in the Credit Ordinance 1985 and the making, by ministerial determination, of the donor declaration form in the Blood Donation (Acquired Immune Deficiency Syndrome) (Amendment) Ordinance 1985 the Committee has been acting under Principle (a) on the basis that proposals in instruments of delegated legislation may not be in accordance with the Statute in the sense that Parliament may not have wished delegated law-making powers to be so exercised that the absence of effective tabling and disallowance provisions could hamper effective parliamentary scrutiny.

9. These examples appear to indicate that the Committee has interpreted and used Principle (a) in a creative way to ensure that the Committee maintains a continuing and positive role in preserving effective parliamentary scrutiny of delegated legislation.

10. Indeed, the fact that since 1932 Principle (a) has not been altered, is evidence not merely of the rarity of its infringement in regulations and ordinances. Rather it is a demonstration of the resilient longevity of what that Principle is seen to embody in parliamentary terms. It has been taken by successive Committees to encapsulate the idea of coincidence or consistency between the use of a delegated law-making power and the parliament's aspirations as to its use. Principle (a) thus

lends itself to creative application in the interests of preserving and maintaining effective parliamentary control. The maintenance of effective parliamentary control is seen to be in accordance with what the Committee and ultimately the Senate assumed must have been the "parliamentary" intention when a particular law-making power was delegated. That assumed intention is that delegation of law-making in all its aspects, including the repeal of laws, should be amenable to effective parliamentary control in order to be in accordance with the Statute.

11. Parliament makes, and thereby controls, the parent Act which delegates law-making powers. It retains that control by reserving a power to disallow a law made under those powers. If a law made under those delegated powers is subject to control within the Committee's terms of reference, it would be incongruous if a law repealed under those delegated powers were not also subject to control within the same principles. Parliament has as great an interest in the unmaking as in the making, of law under its authority.

12. It is always possible and sometimes necessary to revise and amend terms of reference which embody Principles. When the Senate accepts a Report of the Committee embodying new Principles, these become the new criteria under which the Committee operates.

13. However, once the text of a fundamental Principle has been embodied in an operative term of reference, which through active consideration and application has taken on an historic and traditional meaning, scope and validity, then perhaps one should hesitate before attempting to codify its contents. The jurisprudential contest between the common law technique and the code technique as avenues to the source of perfected law, is resolved in the Australian legal system by a judicious amalgam of both approaches. The Committee's Principles represent a miniature codification of the Committee's remit. The Principles have lent themselves to creative interpretive processes akin to those of the common law technique. Senators, over the past 50 years, have interpreted and applied the basic principles to meet the successively new demands which delegated legislation places on the ideals of parliamentary democracy and civil liberty.

14. Seen in this light the Principles are not static and unchangeable. They are dynamic and have been extended by courageous and imaginative application to meet the problems inherent in the necessary delegation of law-making powers to the Executive and the bureaucracy.

15. The Committee enjoys a unique authority within the Senate as a Committee whose recommendations to date have never been rejected by the Chamber. That support could be lessened or even jeopardized if the Committee were to react to a particular question of principle by arguing that such a question did not fall within the scope of "the Committee's Principles" and thus could not be the subject of a Committee recommendation. The Committee has never considered that it could not positively act on an issue of principle with which it was confronted in delegated legislation because "the Committee's Principles" were found to be inadequate. The Committee has always made its Principles meet the issues of principle arising before it.

16. When Principles (c) and (d) were amended on 29 March 1979 no reference was made in the Senate to Principles (a) or (b). Principle (c) was revised expressly to take account of the large corpus of New Administrative Law which represented a tremendous innovation and had highly significant implications for the review of discretionary decisions. There was therefore a pressing need for this amendment.

17. Principle (d) was amended to reflect the modern trend, in a complex and sophisticated society with limited Parliamentary time, for more and more matters of substance to be of necessity dealt with by delegation. There was therefore a pressing need for this amendment also to ensure that Principle (d) truly reflected the Committee's practice of accepting the trend towards increasingly more substantive instruments. However, the Committee always scrutinizes the substance of a delegated instrument to determine if it is of such significance as to warrant enactment by a Bill and of course the Committee still applies its other principles to the contents of any substantive instrument.