Canberra Rules: To Allow, or Disallow?

Richard Griffiths
Capital Monitor

Some law librarians may be aware that there could be problems associated with the *Occupational Superannuation Standards Regulations (Amendment)*, which were gazetted on 30 June 1993, thinly disguised as Statutory Rules No 189. In short, they could be "disallowed" when Parliament sits again from 17 August. What is this "disallowance" business, and how does it relate to the court systems?

I addressed disallowance briefly in the article "Canberra Rules (Well, Statutory Rules, Really)", published in the June 1991 *ALLG Newsletter*. Since then, we have had a wonderful example of the process, so awful in its complexity, so appalling in its execution, that it was considered worth explaining it in detail to the Senate on, appropriately enough, 1 April 1992. As we may have another of these sagas soon, let us refresh our memories of the salient points.

Even if you feel that statutory rules do not turn you on, bear with the intricacies of the following Hansard extract so that you, too, can experience a delicious sense of *schadenfreude* as Senator Giles describes the frantic thrashing around of the Department of Administrative Services. Enjoy the limpid prose as some of the finest legal brains in the Parliament attempt to describe the almost indescribable confusion that surrounded the attempts to make regulations to control political advertising in December 1991 and January 1992.

> **[Wednesday, 1 April 1992 Senate pp.1539-1542]**
>
> **Standing Committee on Regulations and Ordinances**
>
> **Political Broadcasts Regulations**
>
> **Senator GILES** (Western Australia) - by leave - Honourable senators will recall that the Political Broadcasts and Political Disclosures Act 1991, which for convenience I will refer to as the Political Broadcasts Act, was passed by the Senate after considerable debate. That debate appropriately concentrated on the policy aspects of its provisions. However, the actual implementation of those provisions would not have been possible without regulations filling out the details of its general framework. These regulations were made under the parent Broadcasting Act 1942, which I will call the Act, as amended by the Political Broadcasts Act.
>
> As part of its mandate from the Senate, the Standing Committee on Regulations and Ordinances examined nine separate sets of regulations made under the Act to ensure that they complied with its principles of parliamentary propriety and personal liberties. The Committee found that the only principle which may have been

breached was that which requires delegated legislation to be in accordance with its parent Act.

The Committee considers that it is not certain that some, or all, of these regulations have a valid effect. However, this is a matter upon which opinions may differ and which may only be determined conclusively by a court. In such cases of uncertain validity, the Committee does not express an opinion one way or the other. This is a point which was made by Senator Patterson recently during the condolence motion for Senator Ian Wood. Nevertheless, in this case the Committee decided that it may be useful to set out the issues of legislative scrutiny raised by the regulations. The nine separate sets of regulations dealt with broadcasts in Tasmania, the Australian Capital Territory and New South Wales. However, they conveniently fall into three groups of three. I seek leave to incorporate in Hansard a table setting out details of these groups.

Leave granted.

The table reads as follows -

First Group

Political Broadcasts (Tasmania) Regulations
Statutory Rules 1991 No 482
Made, gazetted and tabled on 19 December 1991

Political Broadcasts (Australian Capital Territory) Regulations
Statutory Rules 1991 No 483
Made, gazetted and tabled on 19 December 1991

Political Broadcasts (New South Wales) Regulations
Statutory Rules 1991 No 489
Made on 23 December 1991, gazetted on 3 January 1992 and tabled on 25 February 1992

Second Group

Political Broadcasts (Australian Capital Territory) Regulations
Statutory Rules 1992 No 1

Political Broadcasts (Tasmania) Regulations
Statutory Rules 1992 No 2

Political Broadcasts (New South Wales) Regulations
Statutory Rules 1992 No 3

All of the second group were made and gazetted on 3 January 1992 and table on 27 February 1992

Third Group

Political Broadcasts (Australian Capital Territory) Regulations (Amendment) Statutory Rules 1992 No 4

Political Broadcasts (Tasmania) Regulations (Amendment) Statutory Rules 1992 No 5

Political Broadcasts (New South Wales) Regulations (Amendment) Statutory Rules 1992 No 6

All of the third group were made and gazetted on 10 January 1992 and tabled on 27 February 1992.

Senator GILES - Regulations in the first group all prescribe the free time to be allocated in respect of elections in those two States and the Australian Capital Territory and the method of allocation of this free time. Those in the second group repeal the first group and remake similar provisions to those made by the first group. The third group amends the first group of regulations.

At this point it should be emphasised that actions have been instituted in the High Court seeking declarations that part IIID of the Broadcasting Act, inserted by the Political Broadcasts Act, is invalid. If these actions are successful and that part is declared invalid, then all of these regulations, which are dependent upon provisions in that part, will also fail.

I will now deal with the first group of three sets of regulations. There are two possible problems with this legislation. First, two of the group of three, those dealing with elections in Tasmania and the Australian Capital Territory, contained a regulation providing for their commencement on 1 January 1992. This may have created a difficulty because the first proclamation of Part 2 of the Political Broadcasts Act, which inserted Part IIID containing the amendments upon which the regulations were to operate, was not gazetted until 2 January 1992. The third of this group of three regulations, dealing with elections in New South Wales, was not affected in this way as they commenced on their date of gazettal, 3 January 1992, which was the date of the second proclamation of part 2 of the Political Broadcasts Act.

The second problem with this first group of regulations is that all three sets of regulations in the group refer to section numbers which, in fact, do not exist in the amendments effected by the Political Broadcasts Act. Thus, they appear to have nothing upon which to operate.

I now pass on to the second group, also of three sets of regulations, dealing with elections in the Australian Capital Territory, Tasmania and New South Wales. This second group was made on 3 January 1992, which was the date of the second proclamation of the Political Broadcasts Act, so there is not the same problem

with commencement as exists for the first group. However, there are other difficulties.

First, two of the three sets of regulations, dealing with the Australian Capital Territory and Tasmania, were made at a time when there was a motion pending in the Senate for disallowance of the equivalent regulations in the first group, which had been tabled in both Houses. In this context, section 48B of the Acts Interpretation Act 1901 provides, in effect, that if a regulation is made while a regulation the same in substance - and I emphasise 'the same in substance' - is subject to a disallowance motion, then the second regulation 'has no effect'.

It is a possible argument that some of the individual regulations in the two sets of affected regulations are the same in substance as those in the earlier group. Here, it is not necessary for the whole set to be the same in substance as the earlier set, but each regulation can be compared with an earlier one. In the second group there were differences in many of the regulations in that correct sections of the Act were included, compared with the incorrect references in the previous group. This could raise the question whether these later regulations were the same in substance as the earlier. This is a matter of legal and factual interpretation to be decided by the courts and, if the later regulations were held to be the same in substance, they would have no effect. On the other hand, if they were held not to be the same in substance, the second group of regulations would stand.

The third set of regulations in the first group, dealing with New South Wales, had not been tabled at the time the second group was made. Thus, they were not subject to a disallowance motion and so the corresponding set in the second group was not caught by section 48B. However, a similar fate could be argued for the third set in the second group or some of them, relying on section 48A of the Acts Interpretation Act, which provides that if regulations the same in substance are made during the tabling requirement period, they have no effect. It should be noted that if any of the regulations were held to be the same in substance, they would be void and not merely voidable, as is the case if regulations are made and not tabled within 15 sitting days.

There is another problem with the set of regulations dealing with New South Wales in the second group. Cross-references in regulations 8 and 9 refer to regulation 5, when a reference to regulation 6 was probably intended. Indeed, if the cross-references to regulation 5 are correct, then the corresponding cross-references in the other five sets of regulations in the first and second group would appear to be wrong

The next difficulty with the second group of regulations concerns a final provision repealing the equivalent set of regulations in the first group. It could be argued that even if the other individual regulations in the second group of regulations are of no effect because they are the same in substance as regulations in the first group, there are certainly no regulations in the first group the same in subtance as these three repealing regulations. If this argument is correct, these three repealing regulations would stand and would be effective to repeal the first group.

On the other hand, it could be argued that the repealing regulations were such an integral part of the whole set that, if the other regulations in the set fell as being the same in substance, these repealing regulations also fall. However, as noted earlier, neither section 48A nor section 48B refers to a set of regulations the same in substance, but refer to 'no regulation the same in substance'. Incidentally, the explanatory statements for the second group of regulations offer no assistance, as they provide an outline of every provision in each set apart from the repealing provision, which is not mentioned.

This question of repeal becomes important when the third group of regulations is considered, because they purport to amend the first group, which may or may not have been repealed by the repealing regulations in the second group. The third group of regulations was apparently made on the assumption that all the substantive provisions of the second group, including the repeal provisions, were invalid, and that the first group had therefore not been repealed.

This third group amended the first group to do two principal things, as well as to make some minor changes. First, they amended the two sets of regulations dealing with Tasmania and the Australian Capital Territory to repeal the individual provisions fixing their commencement date as 1 January 1992, with the aim of ensuring commencement after the second proclamation of part 2 of the Political Broadcasts Act. The explanatory statement advised that this amendment was intended to ensure that the amended sets of regulations came into effect, at the latest, on the gazettal of the third group on 10 January 1992.

Whether this has been the effect will be for a court to decide and will be a test, among other things, of the interpretation of section 4 of the Acts Interpretation Act, under which the first two sets in the first group were made. That section provides that regulations may be made under provisions of a parent Act which have not yet come into operation, although the regulations cannot come into operation before those provisions. Secondly, the third group amended the first group to remove the spurious section numbers and to insert the correct ones.

In summary, there are arguments both for and against the validity of the regulations made under the Political Broadcasts Act amendments. In all of these arguments the meaning of the phrase 'the same substance' is crucial. So, too, is the effect of the three repealing regulations. The result is that there are at least two ways in which a court decision could result in there being no effective regulations in force. Firstly, in the actions already commenced, the High Court of Australia could make declaration that part IIID of the Act, inserted by the Political Broadcasts Act, was invalid.

If that happened, then these regulations, all of which depend on provision in that part, will not be effective. Alternatively, a court could hold that most of the regulations in the second groups were the same in substance as those in the first group and thus have no effect, but that the repealing provisions were not the same in substance and thus operate to repeal the first group. The third group would then be ineffectual as they merely purport to amend the first group.

> On the other hand, a court could hold that there were effective regulations in force. Under this argument the individual regulations, including the repealing regulations, in the second group, would be held to be the same in substance as the relevant earlier regulations and thus of no effect. The first group would thus be held not to have been repealed. In addition, any possible defects in the first group concerning the date of commencement and the wrong section numbers would have been corrected by the third group.
>
> As mentioned earlier, the Committee does not express a view on the validity of these regulations. Instead, this survey of possible issues concerning validity is presented generally to assist honourable senators and as a case study of some technical aspects of delegated legislation.

There, that was worth reading, wasn't it? Think of the sense of despair of the public servants in the Department of Administrative Services, as they realised that they were sinking further into the quagmire. Think what the Minister, Senator Bolkus, must have said to his staff and his department when they approached him to place a third set of the regulations before the Governor-General! No wonder he went on leave before the meeting!

Think what the Governor-General must have said when he had to convene a meeting of the Federal Executive Council to make the second set of regulations between arriving at Yarralumla from Sydney, at about 7.20 am on 3 January 1992, and being at the airport in best bib-and-tucker to farewell President George Bush at 9.00 am! Now think what His Excellency might have said when, on 10 January, the third set of regulations was presented for signature! Sadly, Senator Giles did not choose to address those aspects.

Now, what general lessons should we learn?

The first is the point that the disallowance process has quite different objectives to a legal challenge. The courts can decide on the meaning and the effect of provisions in laws, including those in subordinate legislation like Statutory Rules. The Parliamentary disallowance process represents a political challenge.

The Senate Standing Committee on Regulations and Ordinances may decide that the delegated legislation offends parliamentary propriety or personal liberty. Individual Senators may also move disallowance, on almost any grounds they like. Neither attempts to assess the legal "validity" of the legislation. It is a simple matter of brute political force; if they can muster the numbers, they can knock it off.

Note that merely moving a motion of disallowance places delegated legislation in mortal peril. Unless that motion is withdrawn by the Senator (Members of the House of Representatives almost never get involved in matters of parliamentary scrutiny like this), it comes into effect 15 sitting days later unless the Government can muster the numbers to debate and to defeat the motion. Note that there are two motions subsumed in there, both of which the Government must win to be successful: it must be able to move successfully to bring the debate on, and it must then be able to defeat the motion.

The court processes and the disallowance processes can run in parallel. Obviously, if a court finds the delegated legislation invalid, there is no need for the Parliament to disallow it. It has never been valid.

The obverse, however, does not follow. If the Parliament disallows delegated legislation, the now-disallowed delegated legislation has been in effect for the period between its commencement (normally, its date of gazettal) and the date of its disallowance. There may still be a requirement to challenge the delegated legislation in court for the (relatively) short period for which it applied.

Enough of lessons. As you re-read the Hansard description of the hilarious misfortunes of the Political Advertising Regulations and think to yourself, "That can never happen again," just ask yourself what Senator Bolkus is Minister for now. Immigration and Ethnic Affairs, that's what. Think of the potential for confusion with all those Migration Regulations! Oh frabjous day!

Meanwhile, for a run-through on the disallowance processes, watch for an attempt being made to disallow the *Occupational Superannuation Standards Regulations (Amendment)* (Statutory Rules No 189 of 1993) in the Budget Sittings.
