

REGULATION REVIEW COMMITTEE
PARLIAMENT OF NEW SOUTH WALES

**FURTHER REPORT ON NON-COMPLIANCE WITH THE PROVISIONS
OF THE SUBORDINATE LEGISLATION ACT IN CONNECTION WITH
THE LOCAL GOVERNMENT (APPROVALS) REGULATION 1993**

Report No. 27
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The Regulation Review Committee was established under the Regulation Review Act 1987. A principal function of it is to consider all regulations while they are subject to disallowance by Parliament.

In examining a regulation, the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

- [a] that the regulation trespasses unduly on personal rights and liberties;
 - [b] that the regulation may have an adverse impact on the business community;
 - [c] that the regulation may not have been within the general objects of the legislation under which it was made;
 - [d] that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
 - [e] that the objective of the regulation could have been achieved by alternative and more effective means;
 - [f] that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
 - [g] that the form or intention of the regulation calls for elucidation;
- or,
- [h] that any of the requirements of Sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with to the extent that they were applicable in relation to the regulation.

The Committee may, as a consequence of its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

FURTHER REPORT ON NON-COMPLIANCE WITH THE PROVISIONS OF THE SUBORDINATE LEGISLATION ACT IN CONNECTION WITH THE LOCAL GOVERNMENT (APPROVALS) REGULATION 1993 :

The Committee tabled Report No.26 to Parliament on the Local Government (Approvals) Regulation 1993 in the Legislative Assembly on Tuesday, 8th March 1994. That report was debated on 10th March 1994. The Committee recommended in its report that a further Regulatory Impact Statement (RIS) be carried out on this regulation so as to properly assess the provisions of the regulation and the standard that it adopted, the Building Code of Australia.

Comments of Minister for Local Government during debate on report:

The Minister, the Hon. G. West, said that Section 9 of the Regulation Review Act specifically provided that the functions of the Committee do not include an examination of, inquiry into or a report on a matter of government policy. He said that the Committee had been misdirected in examining and reporting on the Building Code of Australia, because the Government had in 1989 made a specific policy decision to adopt this Code as the technical basis of building regulations in New South Wales.

An examination of the full text of Section 9(3) shows that it does in fact enable the Committee to examine, inquire into or report on government policy in connection with a regulation to ascertain if that policy has been implemented. That section reads:

"The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2)(b) by a Minister of the Crown."

Deletion of Part G-5 of the Building Code: The specific matter referred to in the 26th Report, the deletion of Part G-5 of the Building Code of Australia which related to construction in bushfire prone areas, was made after Cabinet's decision of 21st March 1989 to adopt the code. Part G5 was not in fact inserted into the Code until 29th June 1992 when it was contained in Amendment No.3 to the Code. That amendment applied Part G5 to every State except NSW. This amendment commenced in New South Wales on 1st October 1992 and was effected by way of an amendment to Ordinance 70. The omission of this part of the Code may itself be a departure from Cabinet's earlier decision. The Minister has not clarified this in the RIS. In his speech he said the government did not adopt the standard for one very good reason - the Building Regulation Advisory Council recommended against it for technical

reasons. It is not clear whether this decision was endorsed by Cabinet as part of its policy. An examination in the RIS of the costs and benefits of this decision to exclude the operation of this substantive provision should have been carried out by the Minister so as to comply with the duty placed on him by Section 5 and Schedule 2 of the Subordinate Legislation Act.

Cabinet's decision of 22nd March 1994 (referred to subsequently in this report) to develop a minimum standard for construction of buildings in bush fire prone areas makes it clear that the matter was not adequately assessed in the past.

It is not Government Policy to disregard the provisions of the Subordinate Legislation Act: The existence of a government policy in regard to a particular matter such as the adoption of a standard does not exempt the Minister from complying with the assessment requirements of the Subordinate Legislation Act. In this instance that obligation represents both a statutory duty and also a more subsequent expression of government policy.

The Subordinate Legislation Act determines whether or not an adopted code requires assessment: The Subordinate Legislation Act specifically deals with the assessment of adopted codes. In practical terms it says that an RIS is not required where an assessment of the costs and benefits of the adopted Australian or international standard has already been made. That situation must be evidenced by a certificate of the Minister prepared on the advice of the Attorney-General or Parliamentary Counsel. No evidence was presented that a certificate had been issued by the Minister on this ground. A statutory function of the Committee is to report on departures from the Subordinate Legislation Act. It has done so in this case.

Action subsequent to Committee's report: In the debate on the report on 10th March 1994, the Chairman referred to the government's response to the report. The Chairman said:

"The committee notes that as a consequence of this report the Deputy Premier, Minister for Public Works and Minister for Ports has announced that legislation dealing with fire hazard reduction and fire management and control will be introduced into Parliament this session. This will centralise the responsibility for bushfire control within the Bushfire Council. I assume that a concomitant of this proposal will be full assessment and public consultation on any construction standard for bushfire-prone areas."

On 22nd March 1994 Cabinet announced that it had approved measures recommended by the Cabinet Committee on Bush Fire Management and Control

in its Interim Report. One of those recommendations was the development of minimum standards for construction of buildings in bushfire-prone areas. The Interim Report deals with this matter at pages 26 and 27 as follows:

"6.209 Building codes

Many submissions received by the Committee - especially from town planners, architects, and similar professional people - called for changes in building codes.

The Australian Standards Association has developed Australian Standard 3959:1991 "Construction of Buildings in Bushfire-Prone Areas" (AS 3959:1991). In its submission, the CSIRO explained that this standard was the outcome of the CSIRO's extensive survey of building damage in the 1983 Ash Wednesday fires in Victoria. The CSIRO is now gathering further information in the aftermath of the recent fires in Como/Jannali, Lane Cove and Cabbage Point. The CSIRO considers that AS 3959:1991 should be implemented in all designated bush fire prone areas

The NSW Building Regulations Advisory Council, which advises the Minister for Local Government and Co-operatives, gave careful consideration to whether AS 3959:1991 should be adopted in this State. The Council ultimately recommended against adopting AS 3959:1991, principally because AS 3959:1991 was an incomplete document. In particular, AS 3959:1991 did not address steps to be taken to reduce the impact of radiant heat or direct flame contact.

The CSIRO's submission confirmed the Building Regulations Advisory Council's view in that the CSIRO recommended, among other things, that Standards Australia should be requested to produce a further standard to provide a minimum level of protection against radiant heat and flame.

Recommendation 18. That the Department of Local Government liaise with Standards Australia to develop a comprehensive version of AS 3959:1991 "Construction of Buildings in Bush Fire Prone Areas". When a comprehensive standard has been developed, the Minister for Local Government and Co-operatives should give consideration to that standard becoming the minimum standard in New South Wales.

It should be noted that, while AS 3959:1991 is not at present in force in New South Wales, the standard does provide some guidance to local Councils and builders on how to reduce the risk of ignition by embers in the event of a bush fire."

The Minister in his speech on the report also referred to the reasons for not adopting AS 3959:1991:

"The Regulation Review Committee made comment on the fact that New South Wales had not adopted the Australian standard regarding the construction of buildings in bushfire-prone areas. The Government did not adopt that standard for one very good reason: the Building Regulation Advisory Council recommended against it. Who is on that council? The Building Owners and Managers Association, the Australian Institute of Building, the New South Wales Fire Brigades, the Sydney City Council, the Local Government and Shires Associations, the Public Works Department, the Master Builders Association, the Royal Australian Institution of Architects, the Department of Local Government, the Department of

Housing, the Department of Health, the Australian Institute of Building Surveyors, and the Institution of Engineers of Australia.

As late as 16 November last year the Department of Bushfire Services wrote to the Building Regulation Advisory Council stating that further research was requested before the standards fully addressed the hazards associated with construction in bushfire-prone areas. The best brains available could not recommend that we adopt the standard. However, the Regulation Review Committee takes upon itself to question these people and their recommendations. Not only does it question their decision; it criticises me and my department for not doing a regulatory impact statement on a standard which the Government was not going to adopt. That standard is totally unacceptable for technical reasons. So here we have experts telling us one thing and a group of politicians telling us another, playing bureaucratic games for the sake of attempting to have the rest of us believe that they are important."

It would seem from the Interim Report that the CSIRO in its submission recommended two things - the first was that AS 3959:1991 (Construction of Buildings in Bushfire-Prone Areas) should be implemented in NSW and other states and secondly, that an additional standard be produced by Standards Australia to provide a minimum level of protection against radiant heat and flame. This contradicts the statement on p.26 of the Interim Report that the CSIRO's submission confirmed the Building Regulations Advisory Council's view that the code for Bushfire-prone Areas should not be adopted in NSW. The RIS, the Minister and the Interim Report all fail to explain why action was never taken, until now, to put in train work on a further code to provide a minimum level of protection against radiant heat and flame.

Inquiries made by the Committee at officer level with Standards Australia indicate that the Standard AS 3959:1991 was prepared on the basis that bushfire-prone areas would be designated in each state. This has been done in other states such as Victoria. Standards Australia advised that it was not adopted by NSW as part of the Building Code of Australia because it was considered that the planning system in NSW did not provide for the definition of bushfire-prone areas. This is left to local councils under advisory guidelines prepared by the Department of Planning and by the Department of Bushfire Services when individual subdivision approvals are considered. Why these could not be designated in local or regional plans or State Environmental Planning Policies has not been explained.

The Committee has been advised that the standard as originally drafted did incorporate provision for radiant heat and flame but agreement could not be reached by the Standards Australia Committee on the need to impose these additional requirements. The provisions in that draft dealing with radiant heat and flame in fact were adopted in a handbook to accompany AS 3959:1991. Standards Australia advised that this was chiefly because the Timber Industry

representatives opposed requirements which would have effectively meant that in bushfire-prone areas untreated timber construction would have been prohibited. This appears to be borne out from the commentary on the Standard which shows that its economic impact was a major concern. It states:

- " The attack of bushfires on buildings can be described in terms of three components -
- a) burning debris;
 - b) heat radiation; and
 - c) flame.

Research has shown the burning debris is the major means of ignition.

Comment received both during and subsequent to public review showed concern about the viability of methods for the assessment of the hazard and the establishment of hazard levels intended to encompass the three components noted above. Consequently this Standard only addresses the provision of minimal protection by increasing the performance of buildings subjected to burning debris.

The economic impact of additional protection measures in bushfire-prone areas is a matter of concern. The measures to reduce the effect of burning debris required by this Standard will provide increased protection at very little additional cost."

The commentary goes on to say that the additional measures required to improve the performance of buildings threatened with radiation and flame tend to be more expensive than those taken against exposure by burning debris. It also recognises they tend to be more site specific.

The preface to the handbook states:

"This Handbook was prepared jointly by Standards Australia and CSIRO to complement the requirements set out in AS 3959, Construction in bushfire-prone areas. Much of the content was derived from a Standards Australia draft for Public Review DR 89171, Building in Bushfire-prone Areas, Part 2: Guide to development and construction, prepared by Standards Australia Committee BD/64, Construction in bushfire-prone areas.

The development of DR 89171 was not continued because the Committee was unable to agree on an empirical method for the assessment of the level of hazard that a building was likely to be subjected to. Consequently, the contents of this Handbook cannot be considered as representing the views of all of the members of Committee BD/64, and accordingly the Handbook has not been published under the auspices of Committee BD/64."

It is difficult to understand why AS 3959:1991 could not have been adopted as a minimum standard for construction in bushfire-prone areas even if these were designated at the local level and other matters such as radiant heat and flame were not covered by the Standard. After all, the Cabinet Committee's Interim Report states that the code is presently used as a guide by Local Councils and builders for that purpose and the commentary on the Standard states that research has shown that burning debris is the major means of ignition. The

adoption of the standard would have gone a long way towards establishing minimum protection as far back as 1992.

These matters should have been taken into account in the RIS because they were central issues in the assessment of the costs and benefits of a substantive provision of the Principal Statutory Rule.

The implementation of Cabinet's decision of 22nd March 1994 should lead to the revision of the Local Government (Approvals) Regulation so as to impose a minimum standard for the construction of buildings in bush fire prone areas.

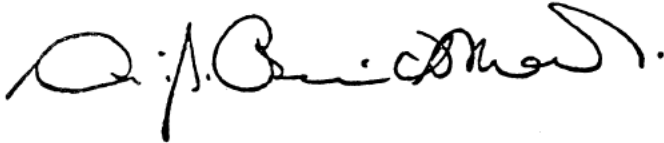
In 1989 when the Committee first brought forward proposals for the Subordinate Legislation Act it realised that to be effective these provisions should place the burden of compliance on the Minister and his Department for adequate assessment of the substantive content of regulations. The Government recognised and supported this. It stated that if a Minister failed to comply with the Subordinate Legislation Act the sanctions should be against the Minister not the regulation. The reason for this approach was to avoid the inflexible system operating at that time in Victoria where the validity of regulations had been challenged for non-compliance with the State's Subordinate Legislation Act. Codes adopted in regulations must be treated as integral matters for assessment for the purpose of parliamentary scrutiny. [In 1990 the Victorian Food Standards Regulation was found to be void for failure to table the codes incorporated by it].

In 1993 the Public Management Service of the Organisation for Economic Co-operation and Development carried out an examination of regulatory management and reform in OECD countries. It found that the determinant of success most frequently cited by officials responsible for regulatory reform was the degree of specific and sustained political support.

Recommendation:

The Committee is of the opinion that the Minister should now demonstrate such support in the present case by assessing the adequacy of the regulation for the purpose of implementing a minimum standard for the construction of buildings in bush fire prone areas. For this purpose the Committee recommends that a supplementary impact statement be carried out by the Department of Local Government and Co-operatives so as to properly assess the regulation and its alternatives. That RIS should fully assess the regulation, the standards it adopts, and relevant alternatives in terms of their quantified costs and benefits. At the conclusion of the study, public consultation should be undertaken in

accordance with Section 5 and Schedule 2 of the Subordinate Legislation Act as this has not yet been done properly in relation to this regulation and its alternatives.



Adrian Cruickshank
Chairman
Regulation Review Committee