REGULATION REVIEW COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

REPORT UPON REGULATORY DEVELOPMENTS

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Regulation Review Committee

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MR D BEATTIE, RESEARCH OFFICER
MS S WANT, B.SOCSC, ASSISTANT COMMITTEE OFFICER

Functions of Regulation Review Committee

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.

A further function of the Committee is to report from time to time to both Houses of Parliament on the staged repeal of regulations.

Chairman's Foreword

This report contains the Committee's response to the New South Wales Government Green Paper on Regulatory Innovation.

It also contains comments on the Legislative Instruments Bill of the Commonwealth Government.

Doug Shedden MP
Chairman
Regulation Review Committee

NSW Government Green Paper on Regulatory Innovation

This paper was released by the Government on 31 May, 1996 for information and comment. It identifies a range of ways in which the objectives of regulations can be met so as to give business a chance to develop innovative ways to satisfy requirements. These strategies include:

a. Performance-based regulation;
b. Negotiated rule-making;
c. Class exemptions - small business;
d. Regulatory flexibility; and
e. Third party certification.

The purpose of the paper is to encourage community debate on regulatory areas where these proposed innovations can be applied.

The Regulation Review Committee formed the following view on these strategies and informed The Cabinet Office accordingly:

Performance based regulation

The Regulation Review Committee supports the concept of increasing the effectiveness of regulations by promoting flexibility provided safety is not compromised. A performance based approach means drafting a regulation that will specify the acceptable results or goals to be met and how they will be monitored or judged. The intention here is to produce some flexibility in how the objectives will be achieved and to increase the effective use of resources.

Literature and overseas experience suggest that it will be necessary to integrate the new standards into the existing regulatory process. It will not be a "stand alone" approach to regulation. A flexible regulatory approach will need to combine risk based criteria, performance based experience and prescription. For example, prescription will still be required when justified by high risk or poor past performance. A case by case approach will be necessary. It would be desirable to select the areas where clear and definite performance standards can be laid down as overseas practice shows that a large degree of subjectivity is involved in assessing compliance.

It would seem to the Regulation Review Committee that the current five year sunset provisions for regulations under the Subordinate Legislation Act would provide a means of gradually reviewing all major regulations that might benefit from incorporation of performance based standards. When these regulations are revised

it may be necessary to consider in particular cases whether the new performance based standard should be introduced as an alternative that does not supersede the existing prescriptive standard. A further approach would be to examine whether the current prescriptions might form the basis of a performance based guide. Codes relating to animals in New South Wales are often used in this way. For example, the regulation might state that adherence to the code represents satisfactory compliance with the regulation. These approaches would have the benefit of allowing small business the option of making a change.

It may be necessary to accompany some of the changes by inclusion of provisions in law reform (miscellaneous provisions) bills although the existing ambit of regulation making powers would already authorise performance standards in many cases.

At present regulations are reviewed every five years, although a large number are amended during that period as well. The guidelines for the preparation of statutory rules set out in the Subordinate Legislation Act could be reviewed so as to highlight the need to address the needs of business.

Incorporation of performance based standards alongside existing prescriptive standards would provide a "safe harbour" in some cases.

Negotiated rule making

An essential of negotiated rule making is that it provides an opportunity for persons and organisations that will be materially affected by a regulatory proposal to reach agreement on the principles and details of the regulation before these are drawn up or proposed by the department.

Although there are useful consultation procedures in the Subordinate Legislation Act relating to the making of regulations they do not come at the commencement of the process but after the department or agency has prepared its RIS and draft regulation. This results in parties being consulted on an already detailed proposal. Public comments, therefore, concentrate on the details of that proposal. This has the result that departments become somewhat inflexible in their responses to public submissions containing alternatives that would result in setting aside or substantially modifying the draft regulation.

The existing regulatory procedures in the Subordinate Legislation Act are based on relevant government departments having responsibility for their own regulatory proposals. This traditional approach is a recognition that in a large number of cases the initiative by default falls nearly solely to the department to develop the initial draft regulation and proposal. It is the Committee's experience that often industry and members of the public are not willing to devote time and expertise to the drawing up of a proposal to meet an essential regulatory need.

However, the point to recognise in the current situation is that the negotiation/consultation that takes place under the Subordinate Legislation Act cannot be equated to that envisaged under negotiated rule making. Certainly, in some instances, departments do involve relevant interest groups in their discussions at the earliest stages but these in the Committee's view would be a minority.

A further point is that procedures under the Subordinate Legislation Act do not usually involve negotiation taking place between the parties simultaneously but rather take the form of different parties addressing in writing an existing departmental proposal. This is in contrast to negotiated rule making where parties mutually inform each other as to their own practical concern.

The Regulation Review Committee can see no objection to the use of negotiated rule making in any case where adequate representation of interests can be achieved within a reasonable compass and provided that the parties have sufficient funds to support the procedure.

In the United States negotiated rule making has occurred in approximately 100 cases ranging from rules on coal refuse disposal to regulations for increased safety for railroad track workers. In each of these cases the use of the process has not meant that other essential regulation making procedures such as public notice have been dispensed with. Even where the process has failed to produce an agreed regulatory proposal it nevertheless had the benefit of advising each party of the other's concerns and interests.

In September 1993 President Clinton, in Executive Order 12866, directed each government agency to use consensual mechanisms for developing regulations, including negotiated rule making. It directed agencies to select at least one proposed rule each year that could be made the subject of negotiated rule making. This limited number was not necessarily indicative of the lack of attractiveness of the process but of its cost. The American experience shows that significant costs are attendant on the process and that agencies can only support a limited number of negotiated rule making projects per year. It would seem that disadvantaged groups may need financial assistance or assistance by way of expertise to allow them to successfully participate in negotiated rule making. Under the Federal Advisory Committee Act of the United States restricted funding may be available in some cases, for example where a member's representation on a negotiating committee is critical to ensure the success of the rule making effort. The Negotiating Rule Making Act also authorises reimbursement for expenses incurred by a needy committee member in the procurement of whatever technical assistance that member needs for full participation in the committee's activities.

Useful reference on the issue of identifying appropriate parties to a negotiation can be made to the Negotiated Rule Making Handbook of the United States Department of

Labor prepared by the Administrative Law Council. It is the policy of the Department of Labor to conduct negotiated rule making proceedings with particular attention to ensuring full and adequate representation of those interests that may be significantly affected by the proposed rule. That handbook advocates that in seeking information from the public to help ascertain what interests are likely to be significantly affected, considerations about minimising the size and scope of the negotiated rule making committee should not be an excuse against inclusiveness. Rather, efforts must be made to achieve a balance in this regard.

The handbook further indicates that adequate representation means that those who are willing to come to the table must actually be in a position to represent the views of those whom they purport to represent.

In addition adequate representation means selecting organisations or individuals as representatives who have the ability to ensure that required information and decisions are provided within the time frames established by the committee process.

The United States experience shows that negotiated rule making is unlikely to be successful where the number of distinct interests represented on the committee goes beyond 25. Efforts also have to be made to ascertain whether interests can be grouped so to enable one person or organisation to represent a number of interests.

"Class exemptions" - small business

The Regulation Review Committee considers that the best approach for selecting examples would be on a case by case basis. Regulation making powers in New South Wales Acts are generally so wide that they would appear to permit exemptions without the need for significant legislative changes. Section 42 of the Interpretation Act authorises the making of statutory rules that apply generally or are limited in their application by reference to specified exemptions or factors and may apply differently according to different factors of a specified kind. Many specific regulation making powers in Acts are even more detailed than this and allow regulations to be made applying to particular cases or classes of cases. A search made through New South Wales regulations would identify examples. It is usual, for instance, for some coal mine owners to be exempt by regulation from contributing to the Mines Rescue Fund and Mines Subsidence Compensation Act because they have not been in operation for the relevant period. It would seem to the Committee that existing regulation making powers provide potential to exempt both individual small businesses as well as classes of business. It has probably been the situation that to date insufficient accent may have been placed on the need to identify appropriate cases for exemption.

In the Green Paper it is said that the United States legislation does not provide any incentive for regulators to seek opportunities to exempt small business from regulations. This conclusion is contrary to the numerous examples of modifications to

regulatory proposals brought about as a result of the regulatory flexibility assessments carried out under the United States Act. The Committee does not believe that an appeals process would be justified at this stage.

A central object of competition neutrality is to ensure the equal applicability of regulations to both private sector businesses and to government business enterprises. Provisions in regulations for flexibility and exemptions do not of themselves conflict with this principle as long as equal considerations apply to both sectors. It would be necessary to ensure procedural fairness in the operation of such provisions. Paragraph 3(7) of the Agreement contemplates some differential operation and 3(8) provides for a complaints mechanism

Regulatory flexibility

The definition of major rule in section 621 of the United States Act includes rules which impose an increased annual cost of $50 million or more. However, the definition also covers designation of a rule that is likely to result in a substantial increase in costs or prices for individual industries or geographic regions. It also extends to designation of a rule as a major rule where it has significant adverse effects on competition, employment, investment, innovation, health, safety or the environment, or where it causes disproportionate costs to a class of persons.

The definition is therefore reasonably inclusive since it can apply to both large and small business as well as to significant adverse effects on health, safety and the environment.

One point to examine if the United States approach is followed is whether the provisions should apply only in those cases where a regulatory impact statement is required for a principal statutory rule under the Subordinate Legislation Act. If the scheme was not so limited then government authorities might find themselves obliged to prepare impact statements/regulatory flexibility analyses in connection with proposed alternative compliance arrangements when they would not otherwise have done so. This would defeat action taken by the government to reduce the cases when an RIS must be prepared by a government authority (see paragraph 6 of Schedule 3 of the Subordinate Legislation Act).

The Regulation Review Committee in its 23rd report to Parliament of November 1993 recommended that a training scheme, including the preparation of a practical training manual and follow-up workshops, be developed to ensure an improvement in the quality of regulatory impact statements prepared by government departments. It said that funds should be provided for this purpose so that quotations could be called from accredited organisations to develop an overall training strategy, including a manual and a course of training.

Although the then Premier expressed support for this proposal it was not acted upon. The consequence is that many impact statements inadequately assess regulatory proposals. If the government proceeds to introduce provisions for regulatory flexibility analysis these will be equally incomplete. This issue should be addressed by positive action as it will continue to undermine whatever further government regulatory initiatives are developed. The matter was discussed with Mr Roger Wilkins, the Director-General of The Cabinet office, at a meeting of the Regulation Review Committee on 20 June 1996. He undertook to examine the problem.

Each regulatory flexibility agreement should certainly be developed in association with adequate public consultation. In this connection an effort should be made to make the Government Gazette more user friendly having particular regard to the practice adopted by the United States in relation to the Federal Register. This issue was also examined by the Committee in its 23rd report.

Third party certification

A principal area where certification could apply would be where proof is required that a product meets the requirements of Australian and international product standards. The 1994 GATT Multicultural Trade negotiations (The Uruguay Round) oblige all Australian states to look beyond a domestic oriented regulatory regime to one taking account of internal standards and assessment systems. The Agreement applies to all products including industrial and agricultural products.

Under this Agreement where technical regulations are required and relevant international standards exist, members are to use them as the basis for their regulations.

Implementation of this Agreement will provide a growing area for the use of organisations equipped to provide certification.

It may be necessary to have some scheme of accreditation for those bodies authorised to certify compliance. Under United States legislation accreditation of Nationally Recognised Testing laboratories is issued for a 5 year period. In the United Kingdom there is some scope for 'self certification'. Organisations are permitted to "self certify" that they meet safety regulations. If it is found, for instance, that particular equipment does not comply, the directors of the Company are personally liable.

Commonwealth Legislative Instruments Bill 1996

On 26 June 1996 the Federal Attorney-General, the Hon Darryl Williams, introduced the Legislative Instruments Bill into the House of Representatives. This bill sets out drafting standards and procedures for making, publication and scrutiny of delegated legislation. The former Federal Government introduced a bill in 1994 with similar aims. Its chief purpose is to implement the Government's response to the recommendations of the Administrative Review Council's Report No. 35 on rule-making by Commonwealth agencies.

Even though the bill deals only with Commonwealth regulations, these can have a great importance for the States as they are often adopted as the basis for uniform legislation which applies Australia-wide. It is therefore important for State parliamentary committees to be aware of the required standards for assessment and scrutiny of Commonwealth regulations.

1994 BILL

The New South Wales Regulation Review Committee and the Victorian Scrutiny of Acts and Regulations Committee both made submissions on the 1994 bill. The main thrust of these submissions was that the bill was defective because of the absence of a staged repeal program for regulations. The Administrative Review Council of the Commonwealth had been of the view that the staged repeal program was essential.

Mr Adrian Cruickshank MP, former Chairman of the Regulation Review Committee, gave evidence to the House of Representatives Standing Committee on Legal and Constitutional Affairs pointing to the absence of the staged repeal program and the fact that the bill contained no guidelines as to the content of the required cost benefit analysis and that there was no requirement for quantification of that analysis.

In its report of 9 February 1995 the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that sunsetting should be introduced.

The Committee commented on evidence given by Mr Cruikshank, and evidence given by the Business Council of Australia with respect to the position in the United Kingdom and the European Union where detailed assessment of the impact on business are required before proposals can be presented to the Parliament of Westminster and the European Council.

The New South Wales Regulation Review Committee also made additional submissions with respect to the definition of legislative instrument under the bill and the extent of exemptions in the legislation. It considered these exemptions so general and imprecise in their definition that arguably all rules could be exempt.

1996 BILL

The reforms contained in the 1996 bill are referred to in the Minister's second reading speech. Mr Williams said:

"The amount of scrutiny the 1994 bill received in indicative of the importance of this legislation in reforming the procedures for making, publication and scrutiny of delegated legislation and in redefining the relationship between parliament and the executive. The Legislative Instruments Bill 1995 draws on earlier work but is significantly strengthened by the introduction of sunsetting and a more structured consultation regime to represent the best achievable package of reforms. It represents a significant shift in control over delegated legislation back towards the parliament and increases government accountability through improved access and consultation mechanisms.

The bill will apply the same regime to all delegated 'legislative instruments ' instead of the varying requirements that may presently apply. This will provide greater certainty about the regime applicable to legislative instruments. The bill 's coverage is determined by a definition of a legislative instrument, essentially based on the legislative character of instruments. There are very limited exemptions from the bill, and I do not expect these exemptions to be readily expanded.'

The bill introduced a mandatory consultation procedure for instruments directly affecting business or having a substantial indirect effect on business. Consultation will ensure the consideration of all relevant issues before delegated legislation is made.

The consultation process will generally require public notification of a proposal to make a legislative instrument affecting business and the development of a legislative instrument proposal which analyses the need for the regulation, the costs and benefits of ir and alternative ways of achieving the objectives of the proposal. This will allow public input into the proposal and should ensure that any defects in the proposal are identified and can be addressed before the instrument is made. The extension of consultation beyond the business context will be considered in the review of the legislation in light of the experience gained in this more targeted approach.

The bill will prevent outdated and unnecessary legislative instruments remaining in force. This will reduce the number of outdated and unnecessary legislative instruments on the statute books, helping to lessen the regulatory burden on small business. To achieve this, the bill will contain a comprehensive sunsetting regime - introducing

five-year sunsetting of new legislative instruments. Existing instruments will be sunsetted five years from the cut-off date for their backcapture onto the register.

This automatic repeal after five years will force agencies to regularly review the delegated legislation they administer. The bill will introduce the most comprehensive reforms to delegated legislation in Australia."

The assertion that the bill will introduce the most comprehensive reforms to delegated legislation in Australia is questionable given that similar procedures were introduced in Victoria and New South Wales in the 1980's and have since been adopted by several other States.

In line with the 1994 bill, the present bill establishes a Federal register of legislative instruments on which instruments would have to be recorded in order to be enforceable. This is not as much of a problem in New South Wales where the whole text of each regulation is published in the New South Wales Government Gazette. However, in the Committee's 23rd Report of November 1993 it recommended that the user friendly approach adopted in the Federal register of the United States be adopted in the Government Gazette of New South Wales.

The impact of regulations on the whole community will not be assessed under the bill as it concentrates its focus on assessment and consultation with respect to regulations that affect business. The bill is nevertheless a significant advance over its 1994 predecessor.

The Committee wrote to the Federal Attorney-General as follows:

"The Hon Daryl Williams, AM, QC, MP
Attorney General
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Mr Williams

Legislative Instruments Bill 1996

You will be aware that the Regulation Review Committee of New South Wales made a submission and gave evidence on the Legislative Instruments Bill introduced in the previous Federal Parliament.

My Committee was pleased to note that some significant improvements have been made in the new Bill, in line with our earlier submissions and evidence, particularly with respect to the details of the cost benefit assessment required under Section 21 and

sunsetting under Part 6.

While these provisions are generally in line with those adopted in New South Wales, my Committee notes that the principal emphasis of the Bill is to assess the impact on business.

A further difference is that the legislative instrument proposal is only reviewed by the regulation review body of the government and is not subject, as it is in New South Wales and other States, to independent parliamentary scrutiny under Part 5 of the Bill.

Regulatory impact statements in New South Wales, the equivalent of the legislative instrument proposal, are required to be referred to the Committee within fourteen days of the publication of the relevant statutory rule. The Committee considers it essential to review these instruments as, among other things, they assist it in determining whether the regulation trespasses unduly on personal rights and liberties. You may therefore consider it appropriate to include an equivalent provision in the Bill.

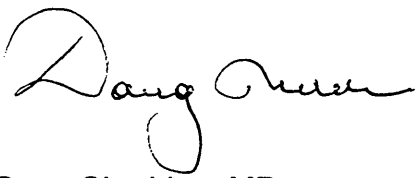
As the object of the Bill is to reduce red tape affecting business, particularly small business, you may wish to consider a further initiative.

Much of the red tape burdening small business originates from principal legislation. Many acts remain on the books for decades without being tested as to their relevance to the community or their current impact on business. Even when they are amended there is no wholesale review, but instead, a tacking on of provisions which may achieve a limited purpose but without general improvement.

For these reasons and to complete the legislative picture, I believe it is essential to introduce sunsetting for acts coupled with legislative instrument proposals for new bills and for bills arising from the repealed acts.

Only in this way will the total regulatory framework be subject to national assessment.

Yours sincerely



Doug Shedden, MP
Chairman
Regulation Review Committee