Regulation Review Committee
Parliament of New South Wales

Report on the Mining (General) Amendment Regulation 2002 and the Petroleum (Onshore) Amendment Regulation 2002

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Functions of Regulation Review Committee

The Regulation Review Committee was established under the *Regulation Review Act 1987*. A principal function of the Committee 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:

1. that the regulation trespasses unduly on personal rights and liberties;

2. that the regulation may have an adverse impact on the business community;

3. that the regulation may not have been within the general objects of the legislation under which it was made;

4. 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;

5. that the objective of the regulation could have been achieved by alternative and more effective means;

6. that the regulation duplicates, overlaps or conflicts with any other regulation or Act;

7. that the form or intention of the regulation calls for elucidation; or 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 ought to be disallowed.

Chairman's Foreword

The Committee has chosen to report on its consideration of the Mining (General) Amendment Regulation 2002 and the Petroleum (Onshore) Amendment Regulation 2002 as it considered that its concerns in relation to their drafting should be placed on the public record.

The Committee found that the Mining (General) Amendment Regulation, if read literally, would prohibit activities essential to fossicking. This was clearly not the Government's intention as the Department of Mineral Resources guide to fossicking advocated activities which could expose a fossicker to a $5,500 penalty. The Committee also questions the use of the expression "excavate water" which has been copied from Commonwealth legislation. The Minister has indicated that the these provisions will be reconsidered during the remaking of the Mining General Regulation this year.

The Petroleum (Onshore) Amendment Regulation required that petroleum title holders to conform with Australian Petroleum Production and Exploration Association's Code of Environmental Practice. That Code included a disclaimer that it had not been approved by Government and was not of legal force. While it is arguable that such a disclaimer would not prevail over the Regulation, it could reasonably create confusion in the mind of the reader. This provides an example of how particular care needs to be taken when adopting external material into a regulation by reference.

Mr Gerard Martin MP
Chairman

One of the objects of this regulation is to vary the quantity of minerals that may lawfully be taken in the course of fossicking and to require fossickers to replace material that has been disturbed in the course of fossicking.

On examining the Mining (General) Amendment Regulation 2002, the Committee identified a number a number of ground for comment on the regulation which it raised with the Minister in a letter dated 15 March 2002 (Appendix 1). The Minister replied in a letter dated 29 April 2002 (Appendix 2). While the Committee did not consider that the issues raised warranted a recommendation for disallowance, it thought that the issues raised and the Minister's response should be placed on the public record.

Obligation to replace soil rock or other material

The Committee noted that one of the changes made to Clause 10 of the principal regulation is to make it an offence, in the course of fossicking, to "fail to replace any soil, rock or other material that has been disturbed in the course of fossicking for minerals." The Fossicker's Guide indicates that a regular practice is to carry material down to a stream to wash it so as to remove the soil or rock and then inspect the residue for gold or gemstones. It would seem impractical and unreasonable to expect a fossicker to recover worked soil and rock, possibly in suspension, from water and replace it in its original site. The penalty for breach of this requirement is $5500 (50 penalty units). The Committee thought this excessive for the nature of the activity which is purely recreational with the accent on family participation. In contrast, Schedule 1 of the same amending regulation sets a lesser penalty of $2500 for leaving an unsafe excavation in the course of activities under an exploration licence, which would involve major works.

The Minister informed the Committee that the scale of the penalty was chosen to reflect the significant environmental damage that could be caused by the use of power- operated equipment, such as suction dredges or excavators and that there was no intention that the maximum penalty would be applied to minor breaches, such as the removal of larger quantities of minerals than are allowed, or a minor failure to replace disturbed material.

Prohibition on excavating land

Clause10 also prohibits a fossicker from excavating land, water or bushrock in the course of fossicking for minerals. "Excavate" is not defined in the mining

legislation. The Macquarie dictionary defines it as to dig or scoop out earth etc; to make a hole by removing material. The McGraw-Hill Dictionary of Scientific and Technical terms has a similar definition. The prohibition on excavating any land therefore would prevent activities that are central to fossicking and which would necessarily take place whenever fossicking occurred.

The Minister said that a number of concerns relate to the drafting of clause 10 and that the form of words then used was chosen by the Parliamentary Counsel to mirror the provisions of section 24LA(1)(b)(iv) of the Commonwealth's Native Title Act 1993, which addresses low impact future acts. Further, that conformity with that section was an important element in establishing an ongoing means by which NSW fossickers could continue to enjoy their activities.

Protection of bushrock

The protection given to bushrock from fossicking is in conformity with the listing by the Scientific Committee under the Threatened Species Conservation Act of the removal of bushrock as a key threatening process. The Scientific Committee's Determination says bushrock removal is the removal of natural surface deposits of rock from rock outcrops or from areas of native vegetation. The rocks may be loose rocks on rock surfaces or on the soil surface. Clause10 prohibits a fossicker from damaging or removing such rock.

The Committee noted that the Fossicker's Guide, issued by the Department, in regard to fossicking for gemstones, advises fossickers to "lever large boulders from the ground using a pick and crowbar and then break these up." This could contravene the regulation and expose the fossicker to a $5500 penalty.

The Minister indicated that it is unlikely that the minerals that fossickers might seek to recover in significant quantities (ie where the 25 kg limit applies), such as quartz crystal, agate, or chalcedony, would also be considered to be "bushrock".

Plain English drafting

The Committee also thought that the requirement in clause 10 not to "excavate....waters" in the course of fossicking departs from Government policy on plain English drafting. What was possibly intended are restrictions on pumping or diverting water.

The provisions of clause 10 therefore put many fossickers in jeopardy of prosecution. While it is possible the provisions would be read down by a court to apply "as far as practicable", the difficulty would be that a fossicker would only find out if this defence was available when he or she went to court.

As noted above, the Minister advised that many of the terms used in clause 10 were taken from section 24LA(1)(b)(iv) of the Commonwealth's Native Title Act 1993. The advice of the Parliamentary Counsel to the Department of Mineral Resources during the development of the amending regulation was that, notwithstanding potential confusion over the concept of excavating or clearing "waters", the exact form of the Commonwealth provisions should continue to be used.

Review of the Regulation

The Minister informed the Committee that the present framing of clause 10 would be reconsidered during the review of the Mining (General) Regulation 1997 under the Subordinate Legislation Act. The Minister's office has advised that this review had been postponed from 1 September 2002 in order to enable a thorough review of the all the provisions of the legislation in the forthcoming year.

Petroleum (Onshore) Amendment Regulation 2002

One of the objects of this regulation is to amend the Petroleum (Onshore) Regulation 1997 to make it clear that all exploration or other activity carried out under the authority of a petroleum title is to be carried out in conformity with the Code of Environmental Practice - Onshore published by the Australian Petroleum Production and Exploration Association Limited in 1996, as amended from time to time.

On examination, the Committee was found that the Code to which the regulation referred included a notice stating that the Code did not have legal force or effect. The Committee considered that this could give rise to questions regarding the legal force of the Code as adopted by the Regulation and that in any case it was inappropriate to include such apparently contradictory statements within the ambit of a regulation.

The Committee believed that this contradiction between the Regulation and the Code could conceivably cause a court to have difficulty with the Code's application. In Wright v TIL Services Pty Ltd (1956) 56 SR (NSW) 413 Walsh J said (at 421-2)*: Whether the instrument with which a court is concerned is a statutory regulation, or is an instrument of a different kind, such as a written contract or a will, in my opinion no uncertainty arises from the circumstance that it has incorporated in it, by reference, some other document, if that which is incorporated is clearly identified, and contains no ambiguity in its own terms.* There is clearly a conflict between the words in the "Important Legal Notice" in the Code and clause 23 of the Regulation. Given the high standards of certainty courts require for material incorporated into regulations by reference, the Committee considered that it would be prudent to remove this contradiction.

The Committee raised this matter with the Minister in correspondence dated 15 March 2002 and 28 June 2002, to which the Minister replied on 12 April 2002 and 13 August 2002 respectively (see Appendices 3 to 6). While the Minister considered that the disclaimer in the Code did not create any problems with the ability to enforce the Regulation, he agreed to include a clarifying amendment when the Regulation was replaced under the staged repeal program on 30 August 2002.

The Committee considers that this matter highlights the need for close examination of material to be incorporated into regulations by reference.

Appendix 1: Letter dated 15 March 2002 from the Chairman to the Minister for Mineral Resources

Regulation Review Committee

PARLIAMENT OF NEW SOUTH WALES

The Hon Edward Obeid MLC, OAM
Minister for Fisheries
Level 34, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2060

15 MAR 2002

Our Ref: CP3402

Dear Minister Eddie

Mining (General) Amendment Regulation 2002

My Committee recently examined this regulation. It would be grateful if you would arrange for your Department to clarify the following issues.

Obligation to replace soil rock or other material
The Committee noted that one of the changes made to Regulation 10 is to make it an offence, in the course of fossicking, to "fail to replace any soil, rock or other material that has been disturbed in the course of fossicking for minerals." The Fossicker's Guide indicates that a regular practice is to carry material down to a stream to wash it so as to remove the soil or rock and then inspect the residue for gold or gemstones. It would seem impractical and unreasonable to expect a fossicker to recover worked soil and rock, possibly in suspension, from water and replace it in its original site. The penalty for breach of this requirement is $5500 (50 penalty units). This seems excessive for the nature of the activity which is purely recreational with the accent on family participation. In contrast, Schedule 1 of the same amending regulation sets a lesser penalty of $2500 for leaving an unsafe excavation in the course of activities under an exploration licence, which would involve major works.

Prohibition on excavating land
Regulation 10 also prohibits a fossicker from excavating land, water or bushrock in the course of fossicking for minerals. "Excavate" is not defined in the mining legislation. The Macquarie dictionary defines it as to dig or scoop out earth etc; to make a hole by removing material. The McGraw-Hill Dictionary of Scientific and Technical terms has a similar definition. The prohibition on excavating any land seems to prevent activities that are central to fossicking and which would necessarily take place whenever fossicking occurred.

Protection of bushrock
The protection given to bushrock from fossicking is in conformity with the listing by the Scientific Committee under the Threatened Species Conservation Act of the removal of bushrock as a key threatening process. The Scientific Committee's Determination says

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bushrock removal is the removal of natural surface deposits of rock from rock outcrops or from areas of native vegetation. The rocks may be loose rocks on rock surfaces or on the soil surface. Regulation 10 prohibits a fossicker from damaging or removing such rock.
My Committee notes that the Fossicker's Guide, issued by your Department, in regard to fossicking for gemstones, advises fossickers to "lever large boulders from the ground using a pick and crowbar and then break these up." This would contravene the regulation and expose the fossicker to a $5500 penalty.

Plain english drafting
The requirement in regulation 10 not to "excavate....waters" in the course of fossicking seems to depart from Government policy on plain english drafting. What is possibly intended are restrictions on pumping or diverting water.

In summary, the provisions of regulation 10 seem to put many fossickers in jeopardy of prosecution. It is possible the provisions would be read down so as to apply "as far as practicable" but the difficulty would be that a fossicker would only find out if this defence was available when he or she went to court.

My Committee is of the view that this situation justifies an immediate examination by the Department of Mineral Resources of Regulation 10 and of the accompanying Fossickers Guide in relation to these issues.

Yours sincerely

Gerard Martin

Mr Gerard Martin MP
Chairman

Appendix 2: Letter dated 29 April 2002 from the Minister for Mineral Resources

New South Wales

The Hon. Edward Obeid, OAM MLC
Minister for Mineral Resources
Minister for Fisheries

MMIN020126
M01/0061.3

RECEIVED
- 2 MAY 2002
REGULATION REVIEW COMMITTEE

29 APR 2002

Mr Gerard Martin MP
Chairman
Regulation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Martin

I refer to your letter of 15 March 2002 concerning clause 10 of the *Mining (General) Amendment Regulation 2002* (the amending regulation).

A number of your concerns relate to the drafting of clause 10, for example, with respect to the prohibition of "excavation" and the relationship of that term to "waters". The present form of clause 10(1)(c)(i) was included in the *Mining (General) Regulation 1997* in May 2000. The form of words then used was chosen by the Parliamentary Counsel to mirror the provisions of section 24LA(1)(b)(iv) of the Commonwealth's *Native Title Act 1993*, which addresses low impact future acts. Conformity with that section was an important element in establishing an ongoing means by which NSW fossickers could continue to enjoy their activities.

The advice of the Parliamentary Counsel to the Department of Mineral Resources during the development of the amending regulation was that, notwithstanding potential confusion over the concept of excavating or clearing "waters", the exact form of the Commonwealth provisions should continue to be used.

Given that requirement, and the nature of fossicking, other provisions of the regulation were drafted to give guidance to both fossickers and regulators as to what activities were permitted in the course of fossicking. Consequently, clause 10 permits the use of hand-held implements and the removal of certain quantities of material, and requires the replacement of disturbed material. I am advised that adherence to these requirements may therefore be seen as the standard by which the prohibition on excavation should be measured.

In respect of the prohibition of the removal of bushrock, which similarly dates from May 2000, the regulation seeks to establish a distinction between "minerals" and "bushrock". In doing so, I am advised that protection is given to fossickers where the material they have removed is a prescribed mineral. Further, it is unlikely that the minerals that fossickers might seek to recover in significant quantities (ie where the 25 kg limit applies), such as quartz crystal, agate, or chalcedony, would also be considered to be "bushrock".

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I should also point out that the Department of Mineral Resources consulted with the Gem and Lapidary Council of NSW over the proposed form of the amendments. The Council indicated its "overwhelming support". It was particularly pleased at the changes in the limits of minerals which can be recovered and removed.

Your other concern relates to the revised size of the maximum penalty within clause 10(1), which is 50 penalty units or $5,500. I am advised that the scale of the penalty was chosen to reflect the significant environmental damage that could be caused by illegal fossicking. In particular, substantial damage can be done by the use of power-operated equipment, such as suction dredges or excavators. The ability for a court to apply a significant penalty in such cases is in accordance with community expectations of sustainable land management. There is no intention that the maximum penalty would be applied to minor breaches of other aspects of clause 10(1), such as the removal of larger quantities of minerals than are allowed, or a minor failure to replace disturbed material.

The *Mining (General) Regulation 1997* is due to be remade this year under the provisions of the Staged Repeal Program. I will undertake to ensure that the present framing of clause 10 will be reconsidered during that process. However, given the constraints imposed by the Commonwealth's *Native Title Act 1993*, and the requirement to protect "bushrock" while permitting fossicking for "minerals", there are limited opportunities for change. I would also expect that the present level of maximum penalty would remain necessary in some circumstances.

I thank you for your interest in this matter and your close attention to the provisions of the regulation. I recognise that the purposes of your committee are to clarify and protect the interests of fossickers. Both my Department and I are committed to the same purpose.

If you require further information on these matters, please contact Sam Maresh, Policy Adviser, in my office on 9228 3777.

Yours sincerely

Eddie Obeid
Minister for Mineral Resources
Minister for Fisheries

Appendix 3: Letter dated 15 March 2002 from the Chairman to the Minister for Mineral Resources

Regulation Review Committee

PARLIAMENT OF NEW SOUTH WALES

Hon Edward Obeid, M.L.C. O.A.M.
Minister for Mineral Resources
Level 34, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2060

15 MAR 2002

Committee Paper 3401

Dear Minister Eddie

Petroleum (Onshore) Amendment Regulation 2002

My Committee recently considered the above regulation one of the objects of which is to amend the Petroleum (Onshore) Regulation 1997 to make it clear that the provisions of Clauses 23 and 24 of the regulation, concerning environmental and safety practices, constitute conditions of a petroleum title.

Clause 23 provides that all exploration or other activity carried out under the authority of a petroleum title is to be carried out in conformity with the *Code of Environmental Practice - Onshore* published by the Australian Petroleum Production and Exploration Association Limited in 1996, as amended from time to time.

The Code of Environmental Practice - Onshore is prefaced by the following:"IMPORTANT LEGAL NOTICE The APPEA Guidelines are intended to provide general guidance as to those operating practices which are considered to represent good industry practices in the petroleum industry. However, APPEA does not accept any responsibility or liability for any person's use of or reliance on the Guidelines, or for any consequences of such use or reliance.The Guidelines have been developed solely from input provided by members of APPEA. The Guidelines have not been reviewed or approved by Government bodies or regulators, and do not have legal force or effect. Therefore, compliance with the Guidelines will not necessarily mean compliance with legal obligations. Each person accessing the Guidelines must acquaint itself with its own legal obligations, and must, on a case-by-case basis, form its own judgement as to the conduct required in order to satisfy those legal obligations. The conduct required will depend on the individual circumstances. It can not be assumed that compliance with the Guidelines will in any way be sufficient. Legal obligations and standards change over time. While APPEA intends to review and update the Guidelines from time to time, APPEA's capacity to do so is limited. Accordingly, APPEA does not represent that the Guidelines are up-to-date."

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The Code deals with several important issues, among them procedures for dealing with terrestrial and marine oil spills. The Code is nevertheless advisory in nature only, it is subjective and self regulatory and is not represented as being up to date. Furthermore it is stated that the Guidelines have not been reviewed or approved by Government bodies or regulators, and do not have legal force or effect. This statement conflicts with the fact that the guidelines have been incorporated as a condition of Petroleum Titles, the contravention of which can lead to cancellation of the title and a penalty.

Arguably if the code were breached and cancellation action or prosecution ensued, the title holder could argue that the government had sanctioned the fact that the code had no legal force or effect. This calls into question the effectiveness of this amendment.

The Committee has considered the adoption of codes by regulations in several reports to Parliament. It recognises that there is a need for codes as an alternative to regulations in certain cases provided that safety is not compromised and that the code is properly assessed in terms of its costs and benefits before it is adopted in New South Wales.

The present regulation indicates that there is a need for greater attention to the content of codes when they are assessed for adoption in regulations. Perhaps close scrutiny of the contents of the applied provisions by the Parliamentary Counsel is required. Statements in the code that conflict with the objects of the regulation such as the statement that the guidelines have not been reviewed or approved by Government bodies or regulators and do not have legal force or effect, will have to be negated in the regulation.

My Committee recommends that the regulation be amended to negate the conflicting clauses and seeks your advice as to whether any assessment was made of the code as compared with other regulatory options under schedule I of the Subordinate Legislation Act 1989 before it was adopted.

Yours sincerely

Gerard Martin

Mr Gerard Martin MP
CHAIRMAN

Appendix 4: Letter dated 12 April 2002 from the Minister for Mineral Resources

New South Wales

The Hon. Edward Obeid, OAM MLC
Minister for Mineral Resources
Minister for Fisheries

MMIN020127
M01/0061.3

RECEIVED
15 APR 2002
REGULATION REVIEW COMMITTEE

12 APR 2002

Mr Gerard Martin MP
Chairman
Regulation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Martin

I refer to your letter of 15 March 2002 concerning the Petroleum (Onshore) Amendment Regulation 2002 (the amending regulation). I note that your particular concerns relate to the content of clause 23 and the relationship of this clause with the Code of Environmental Practice published by the Australian Petroleum Production and Exploration Association (APPEA).

The Petroleum (Onshore) Regulation (the regulation) has required adherence to APPEA's Code of Environmental Practice since it was first gazetted in August 1992. The preparation of the regulation, including the relevant clause, was subject to a Regulatory Impact Statement in July 1992, and again when the regulation was remade in 1997. I am advised that APPEA and/or various petroleum exploration companies active in NSW were consulted on both occasions, and did not raise concerns over the form of the regulation, including the relevant clause, at either time.

The Petroleum (Onshore) Amendment Regulation 2002 did not vary this essential requirement of adherence to the Code. However, one of the major purposes of the amending regulation was to revise the penalty provisions of the regulation. It was considered that for the regulation to contain various requirements, such as adherence to the Code, without including a penalty for breach of those requirements was inappropriate. Consequently, clause 23 was amended to make adherence to the Code a condition of every petroleum title. As you rightly point out, this brought adherence to the Code of Environmental Practice under the penalty provisions of the *Petroleum (Onshore) Act 1991*, including fines, suspension of operations, or cancellation of the title. APPEA was consulted over the proposal to make adherence to the Code subject to a penalty and again raised no concerns. Other parties consulted also did not raise any concerns.

Regarding the legal disclaimer contained within APPEA's Code, I am advised that this does not present a problem in the enforceability of the regulation, including clause 23. The legal disclaimer is for the benefit of APPEA, not those parties that are bound to adherence of the Code by means of the regulation.

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I am advised that the disclaimer does not (nor can it) make the provisions of the regulation of no effect. Rather the nature of the disclaimer is to indicate that legal requirements apply to petroleum titleholders in various Australian jurisdictions, and that simple adherence to the Code may not be sufficient to fulfil those requirements. That position remains the case in NSW, where, in addition to the longstanding legal requirement under the regulation pertaining to the Code itself (rather than the disclaimer associated with it), legal requirements also arise from other conditions of petroleum titles, other provisions of the regulation and the *Petroleum (Onshore) Act 1991*, and indeed the provisions of other State legislation.

I thank you for your interest in this matter and your close attention to the provisions of the regulation.

If you require further information on these matters, please contact Sam Maresh, Policy Adviser, in my office on 9228 3777.

Yours sincerely

Eddie Obeid
Minister for Mineral Resources
Minister for Fisheries

Appendix 5: Letter dated 28 June 2002 from the Chairman to the Minister for Mineral Resources

Regulation Review Committee

PARLIAMENT OF NEW SOUTH WALES

Hon Edward Obeid, MLC OAM
Minister for Mineral Resources
Level 34, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2060

28 JUN 2002

Committee Paper 3401a

Dear Minister

Petroleum (Onshore) Amendment Regulation 2002

I refer to your letter of 12 April 2002. My Committee notes your advice that the intention of the "Important Legal Notice" on the Code is for the benefit of APPEA and is to indicate that the Code does not cover the range of legal requirements applying to titleholders. While that appears to be the intention, it is not made explicit in either the Code or the Regulation. Also, the words of the Notice go beyond disclaiming liability of APPEA by stating that "The Guidelines have not been reviewed or approved by Government bodies or regulators, and do not have legal force or effect." This statement clearly contradicts clause 23 of the Regulations which requires conformity with the Code.

While as a matter of construction the Regulation should prevail over the Code on inconsistent points, this contradiction could arguably create uncertainty in the mind of the reader regarding the application of the Code. Given the high value the courts have placed on certainty when incorporating material in regulations by reference (discussed below), this contradiction between the Regulation and the Code could conceivably cause a court to have difficulty with the Code's application.

In "Delegated Legislation" 2nd Edition 1999 published by Butterworths, Professor Pearce states:

> *"The earlier decisions required the legislation to be complete. Later cases, probably because of a tacit recognition of the problems associated with a full spelling-out of the obligations in a form that merely repeated another document, permit legislation by reference. These later decisions do not satisfactorily distinguish the approach adopted in the earlier cases, particularly those of the High Court and of the New South Wales Full Court in the two wartime cases of Arnold v Hunt and McIver v Allen. If regard were paid only to the question of precedent, it seems doubtful whether the attitude taken in the recent cases could be sustained. However, from the point of view of the better statement of the law, there is much to commend the view expressed in the later cases, provided always that the instrument which is incorporated by reference is readily available. This is an element that is troubling in the broad approach seemingly*

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taken in the Dainford Ltd v Smith. It should not be sufficient to be able to identify the incorporated document when it comes into existence. Incorporation should only be permitted of an existing document." (page 277)

Professor Pearce also cites a case which establishes that a regulation which incorporates material by reference must state the extent of the obligation with sufficient certainty:

"In Wright v TIL Services Pty Ltd (1956) 56 SR (NSW) 413, a view consistent with that in Holland v Halpin and rejecting the other authorities was taken by a majority of the New South Wales Full Court. Regulations made under the Inflammable Liquid Act 1915 (NSW) specified requirements for buildings in which nitrocellulose products were being manufactured, and included a requirement that electrical devices should 'comply with the relevant rules of the Standards Association of Australia relating to electrical equipment in hazardous locations'. It was not disputed that the rules of the Standards Association were identifiable, and were not uncertain in the sense discussed in Chapter 22. It was argued, following McDevitt v McArthur, that the regulations were invalid because they did not themselves contain the requirements that had to be complied with. This argument was rejected by Walsh J, with whom Herron J agreed on this issue: Owen J, the third member of the court, did not allude to this point. Walsh J said (at 421-2):

> *The general proposition that in no circumstances can a regulation incorporate by reference something not set forth in it is, in my opinion, unsound. It is true that a regulation should indicate with sufficient certainty to those upon whom it imposes a penalty for a breach of it, what is the extent of the obligation. Where a regulation contains a reference to some other document the question whether or not the requirement just stated is fulfilled must depend upon a consideration of the particular regulation and of the nature and contents of the incorporated document. If there is uncertainty as to what is the document to which reference is made, no doubt the regulation would be held invalid. Again, if such document is not readily accessible it may be, in some cases, that the regulation would be held to be bad, the true ground for doing so being that it is unreasonable rather than that it is uncertain. Subject to the considerations mentioned, I can see no reason for holding that any uncertainty is created by the mere fact that the incorporated document is not set out in terms in the regulation itself. Whether the instrument with which a court is concerned is a statutory regulation, or is an instrument of a different kind, such as a written contract or a will, in my opinion no uncertainty arises from the circumstance that it has incorporated in it, by reference, some other document, if that which is incorporated is clearly identified, and contains no ambiguity in its own terms.*

His Honour stated that if this reasoning ran contrary to that in McDevitt v McArthur, he was not prepared to agree with the reasoning in that case. His Honour also distinguished McIver v Allen and Arnold v Hunt as being cases which were 'concerned with different problems from those which arise in these cases'. This last statement must be treated with some reservation, as the courts in both cases clearly took into account the fact that there was a failure to set out all the requirements in the regulations. (Page 275)

There is clearly a conflict between the words in the "Important Legal Notice" in the Code and clause 23 of the Regulation. While there are good arguments for disregarding the statement in the Code that it has no legal effect, the contradiction may give rise to arguments that the Codes' application is uncertain. Given the high standards of certainty courts require for material incorporated into regulations by reference, the Committee considers that it would be prudent to remove this contradiction.

The Committee is also of the view that as a matter of drafting policy, regulations should not contain contradictory statements, regardless of whether one can be construed to prevail over the other.

My Committee accordingly considers that the regulation or the code should be amended to remove the apparent contradiction.

Officers of my secretariat would be pleased to discuss this matter further with the appropriate officer(s) of your administration. In this regard your officer(s) should contact Mr Russell Keith, Committee Manager (Tel. 9230 3050).

Yours sincerely

Gerard Martin MP
Chairman

Appendix 6: Letter dated 13 August 2002 from the Minister for Mineral Resources

New South Wales

The Hon. Edward Obeid, OAM MLC
Minister for Mineral Resources
Minister for Fisheries

MMIN020374
M01/0081.3

Mr Gerard Martin MP
Chairman
Regulation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

RECEIVED
15 AUG 2002
REGULATION REVIEW COMMITTEE

13 AUG 2002

Dear Mr Martin

I refer to your letter of 28 June 2002 concerning clause 23 of the Petroleum (Onshore) Regulation 1997 and the relationship of this clause with the Code of Environmental Practice.

The advice given to me remains very much of the view that the legal disclaimer contained within APPEA's Code does not affect the enforceability of clause 23. The legal disclaimer is for the benefit of APPEA, not those parties that are bound to adherence of the Code by means of the regulation. I note that your Committee has now accepted that "there are good arguments for disregarding the statement in the Code that it has no legal effect".

However, I accept your view that the content of the legal disclaimer may give rise to uncertainty within the petroleum industry, notwithstanding the legal position. It is clear that this issue of uncertainty cannot be fully settled except by amendment to either the Regulation or the disclaimer. Given that the Regulation is currently in the process of replacement under the Staged Repeal Program, I have decided to include a simple clarifying amendment within the relevant clause. The Parliamentary Counsel's Office has agreed to this proposal. An appropriate amendment has now been included within the draft Petroleum (Onshore) Regulation 2002 and accompanying Regulatory Impact Statement.

The proposed Regulation and accompanying Regulatory Impact Statement are currently on public exhibition. Copies may be obtained from the website of the Department of Mineral Resources at www.minerals.nsw.gov.au/whatsnew/.

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I thank you for your interest in this matter and your close attention to the provisions of the regulation. If you require further information on these matters, please contact Sam Maresh, Policy Adviser, in my office on 9228 3777.

Yours sincerely

Eddie Obeid
Minister for Mineral Resources
Minister for Fisheries