Regulation Review Committee

Parliament of New South Wales

Report on Regulations

Report No. 15/51

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TABLE OF CONTENTS

Regulation Review Committee

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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:

(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 program for the staged repeal of regulations under the Subordinate Legislation Act 1989. Under this legislation all regulations currently in force in NSW are being reexamined, on cost benefit and cost effectiveness principles, starting on a chronological basis with the oldest of the regulations.

The staged repeal process involves the automatic repeal of existing regulations (except where exempt) made before 1 September 1990 in a staggered process commencing on 1 September 1991. Regulations made after 1 September 1990 are automatically repealed (unless their repeal is postponed) five years after they are made.

Introduction

This report outlines the Committee's consideration of several regulations which replace regulations repealed under the Staged Repeal Program in the Subordinate Legislation Act 1989. The Committee often refers to its earlier action on the repealed regulations to determined whether any significant improvements have been made in the regulations or their assessments.

The report also deals with new regulations which are necessary for the implementation of new legislative schemes introduced by Acts of Parliament. The Environmental Planning and Assessment Amendment Regulation 1998, for example, is important for the implementation of the integrated development scheme introduced by the Environmental Planning and Assessment Amendment Act 1997.

In that case the Committee was concerned that no regulatory impact statement (RIS) was prepared under Section 5 and Schedule 2 of the Subordinate Legislation Act 1989 for the regulation and that this did not accord with the spirit of the Environmental Planning and Assessment Act itself. The Committee has been given an undertaking that this will now be addressed in the review of the principal regulation which is due for staged repeal next year.

In 1997 The Committee sought advice from the Premier as to the means by which consistency between the enabling provisions in Acts is achieved so as to ensure that the instruments made under those provisions which deal with similar subject matter are subject to the same level of Parliamentary scrutiny. The Premier advised that this important issue of appropriate Parliamentary scrutiny of executive activity was best considered on a case by case basis when existing legislation is reviewed or new or amending legislation is under consideration.

The Committee has long held the view that there is a need for an objective hierarchy for the inclusion of matters in the respective forms of legislation and will continue to monitor this issue.

A major innovation referred to in the report is the tabling of regulatory impact statements in both houses of Parliament. The Committee recommended this to the Premier in order to give Parliamentarians a better understanding of major regulatory proposals which is essential for the scrutiny role of Parliament. This also puts Departments on notice that they must ensure a reasonable standard for RISs as their Ministers have to table these statements and will be seen to be accountable to Parliament for them.

Doug Shedden, MP
Chairman
10 September 1998

REGULATIONS

DESCRIPTION **District Court (Fees) Amendment (Levy on Writs of Execution) Regulation 1996**

GAZETTE **5 July, 1996, page 3831**

MINISTER **Attorney-General**

OBJECTIVES

This Regulation adopts by reference the fees prescribed under the Sheriff Act 1900 in respect of the levy on a writ of execution. The regulation states that the levy is as prescribed by the Scale of Fees under the Sheriff Act 1900.

Section 9 the Sheriff Act 1900 provides that the Governor may, from time to time, fix the scale of fees to be chargeable in the Sheriff's Office in respect of all matters pending at any time in the Supreme Court.

There is no requirement in that Act to publish the scale of fees or for it to be tabled and be subject to disallowance in Parliament. The levy that has been fixed is 3% of amounts collected by the Sheriff pursuant to writs of execution issued by the District Court. This is the same levy as the levy presently imposed on amounts collected pursuant to writs issued by the Supreme Court.

The difficulty with this method of fixing fees is that while the amount fixed might be considered reasonable, it can simply be amended at any future time under the provisions of the Sheriff Act without any form of review.

The only opportunity Parliament will have to review the Sheriff Act fee is indirectly through this District Court regulation.

The Sheriff Act 1900 therefore contains an anachronistic provision for the making of delegated legislation which should be either amended or repealed.

The Committee considered this a good illustration of how regulation review is dependant for its effectiveness on the regular scrutiny and modification of the enabling provisions in Acts.

The Committee wrote to the Attorney General on the specific regulation recommending amendment of Section 9 of the Sheriff Act to provide for publication and disallowance of statutory rules by adopting the relevant provisions of the Interpretation Act 1987.

Section 39 of that Act requires statutory rule to be published in the Gazette, section 40 requires notice of statutory rules to be tabled and section 41 provides for disallowance of statutory rules.

On 28 April 1997 the Attorney General advised that he would consider the Committees recommendation as part of the current review of court filing fees and advise the Committee of progress.

The Committee also wrote to the Parliamentary Counsel citing this case and seeking his advice on the general issue of the review of enabling provisions in Acts.

On 19 June 1997 the Parliamentary Counsel advised that his office acts on instructions in these matters and suggested the Committee raise them with the Premier. The Committee accordingly wrote to the Premier on 25 September 1997 citing the specific case and said that it considers that there is a need for the review of enabling provisions in Acts in order to ensure that there is consistency in the provisions with respect to the review by Parliament and its Committees of delegated legislation.

The Committee sought advice as to the means by which consistency between the enabling provisions in Acts is achieved so as to ensure that instruments dealing with similar subject matter are subject to the same level of Parliamentary scrutiny.

The Committee also sought advice as to whether the enabling provisions are reviewed in the Statute Law (Miscellaneous Provisions) Bills for this purpose.

On 5 November 1997 the Premier advised that the committees letter raises the important issue of appropriate Parliamentary scrutiny of executive activity generally. He said that because of the extraordinary diversity in subject matter in legislation it was not possible to make any general statement as to the sorts of matters that should be dealt with in Acts as opposed to instruments which are tabled in Parliament and those instruments made by officials without any tabling requirements.

The Premier said that achieving consistency between the enabling provisions in Acts was best considered on a case by case basis when existing legislation is reviewed or new or amending legislation is under consideration.

The Committee has long held the view that there is a need for an objective hierarchy for the inclusion of matters in the respective forms of legislation. This view was first reported to Parliament in the Committees 11th report of the 50th Parliament of March 1991. The Committee said that its view was supported by the Administrative Review Council of the Commonwealth in a discussion paper on Rule Making by Commonwealth Agencies and by the Victorian Legal and Constitutional Committee in its 16th report. The Committee will continue to monitor this issue.

DESCRIPTION **Education Reform Regulation 1996**

GAZETTE **30 August 1996 at page 5377**

MINISTER **Education and Training**

OBJECTIVES

The regulation replaces, with minor modifications, the Education Reform Regulation 1990.

The present regulation has been exempted from the requirement for a formal regulatory impact statement on the basis that it comprises machinery matters and does not impose any appreciable burden or cost. However, costs and benefits still had to be taken into account in the Department's internal appraisal under Schedule 1 of the Subordinate Legislation Act. The Committee asked the Minister for details of this assessment.

The Committee also asked whether the matters raised in a letter to the former Minister in 1991 on the RIS for the 1990 regulation had been considered before the present regulation was made. In that letter the Committee said that the RIS for the 1990 regulation was defective and it outlined the manner in which the regulation should have been properly assessed.

The Committee also said that the RIS should demonstrate why school authorities should not be afforded wider access to basic skills testing data as this might be of considerable advantage for the individual planning programs of that school by allowing it to either correct or reinforce current practices.

The Committee's letter said that the 1991 regulation permitted the formation by parents of more than one association at a particular government school subject to the consent of the Minister and that the RIS should clarify the policy on this issue as it is of concern to the Federation of Parents and Citizens Association.

Finally the Committee's letter said that the wider publication of the Rules of the Board of Studies should have been considered as it would be unusual for ordinary members of the public to read through the Government Gazette.

The Minister responded on 8 December 1997 and said that the Committee's comments with respect to basic skills testing had received careful consideration and that the annual school reporting requirements recently introduced would address any concerns.

Regarding the concern of the Parents and Citizens Association that the regulation would permit the formation by parents of more than one association, the Minister advised that this provision has not caused any difficulty and has accordingly been retained.

With respect to the publication of the Rules of the Board of Studies, the Minister advised that the rules are now required to be published in relevant bulletins and manuals and be available for inspection at Board's offices.

However on the most important issue of the cost benefit analysis of the new regulation, he advised that the costs and benefits of the various provisions were carefully considered. He did not, as requested, provided details relating to that examination under Schedule 1 of the Subordinate Legislation Act.

Evidence of this assessment is important as the regulation was exempt from the requirement for an RIS.

The Committee still has no details of the assessment of the 1996 regulation. On the basis of this lack of evidence presented to the Committee it is obliged to conclude that neither this regulation nor its predecessor was adequately appraised by the relevant administration prior to its publication.

DESCRIPTION **Industrial Relations (General) Regulation 1996**

GAZETTE **30 August 1996 at page 5445**

MINISTER **Industrial Relations**

OBJECTIVES

The object of this regulation was to make provisions which complement the new Industrial Relations Act 1996.The Committee noted that the new Act repealed the Industrial Relations Act 1991 and the Industrial Relations Regulation 1992.

The RIS for the 1996 regulation is similar in many respects to that for the 1992 regulation. The RIS for the 1992 regulation contained the following defects:

(i) lack of assessment of alternative options;
(ii) lack of quantification of costs and benefits;
(iii) lack of assessment of substantive matters.

The RIS for the 1996 regulation contains similar defects:

(i) There are no specific alternative options to the substantive provisions of the regulation. The three options stated in the RIS of making the regulation; doing nothing and addressing the matters through the Act are so general that they could apply to any regulation.

(ii) There is no quantification of the costs and benefits. The options are evaluated in narrative form only, even those matters such as fees which would easily lend themselves to quantification. Again, because the options are so broadly stated, this precludes any meaningful assessment of realistic alternatives.

(iii) As the options are so general that they could apply to any regulation, they accordingly don't comply with the requirement of section 5 and schedule 2 of the Subordinate Legislation Act that alternative options to the substantive provisions of the regulation be identified and assessed.

Although the consultation program was extensive, including the relevant Unions and Industrial Associations, there were surprisingly few responses, in fact only three. This lack of public interest could be due to the circumstance that the major debate took place on the Act and concern could have abated since the Act was passed. However the lack of responses could equally be due to the absence of relevant alternatives presented to the public for consideration in the RIS.

The alternatives presented in the RIS essentially come down to an all or nothing choice and faced with such an assessment, it is not surprising that the public would not wish to express a view. Had relevant alternative options to the substantive provisions of the regulation been identified and assessed the response may well have been greater.

When the Committee considered the 1992 regulation it discussed the regulation with the relevant officers and the then Minister subsequently undertook to review the regulation at the end of 18 months of operation. During that 18 month period the Department intended to monitor the cost of the regulation and believed that at the end

of 18 months it would be able to assess fully its costs and benefits.

The Committee accordingly requested the Minister to prepare a proper RIS for the regulation as neither the former nor the present regulation have been properly assessed.

On 17 November 1997 the Minister responded stating that the 1996 Act and regulation are vastly different from the 1991 Act and 1992 regulation. The Minister said that the two RISs differ also, as the former was a clause by clause analysis of the 1992 regulation while the present, he believes, is an analysis of the substantive provisions of the 1996 regulation.

He considered it unfair to refer to the former Minister's comments on the 1992 regulation and RIS as he is unable to judge the relevance of them.

He stated that the present RIS complies with the Act and submits that the requirements of the RIS process are subjective, apart from the mandatory machinery requirements of timing and content.

The Minister accepted the Committees view that the range of options is so broad that they could apply to any regulation but believes that this is consistent with numerous other regulations circulated by Ministers.

He stated that the matters covered by the 1996 regulation defy cost benefit quantification and that certain of them concern government policy, which is outside the Committees terms of reference. He also said that the Committee did not have any power to require the preparation of a new RIS.

The Committee believes that merely because this RIS is consistent with those prepared for other regulations circulated by Ministers doesn't mean that it complies with the Act.

In its twelfth Report the Committee considered all the RISs for the principal statutory rules in stages 11 and 12 of the Staged Repeal Program and said that the standard of compliance with the Subordinate Legislation Act was poor except in respect of the public consultation requirement.

The present regulation in fact comes within stage 11 of the program.

The requirements of the Subordinate Legislation Act are far from subjective, in fact its purpose was to require an objective assessment of the impact of the regulation.

The issue was recently addressed by the Crown Solicitor in advice on the Aboriginal Land Rights Regulation 1996 which is also referred to in the twelfth Report.

Among other things the Crown Solicitor said that an RIS must address the costs and benefits of the substantive provisions of the regulation.

Although the Crown Solicitor said that the Committee did not in that instance have power to impose a mandatory time frame when it requested a new RIS, because it hadn't exercised its power to recommend disallowance, he said that it could comment on the RIS in a report to Parliament.

On 30 April 1998 the Committee wrote to the Minister and said that in view of the complexity of the issues the committee would welcome the attendance of the relevant officers of the department to discuss the matter.

That practice is often followed by the committee to ascertain, through informal discussion, the basis of various problems and methods to correct them.

On 25 May the Minister wrote to the committee in the following terms:
"I refer to your letter dated 30 April 1998 concerning the making of the Industrial Relations (General) Regulation 1996 and its attendant regulatory impact statement.

On the basis of the strongly-held views which I detailed in my previous letter of 17 November 1997 to you, I was not prepared to accede to your Committee's request for the preparation of a further regulatory impact statement in this matter. For the same reasons, I advise that I am not willing to permit any officer of the Department of Industrial Relations to attend before your Committee to discuss issues resulting from your review of the regulatory process in this matter".

This refusal by the Minister to allow officers to discuss the matter with the Committee does not accord with the spirit of Subordinate Legislation Act. The Committee believes that it is of fundamental importance to have Ministerial support for the Act. It accordingly replied as follows:

"*I refer to your letter of 25 May 1998 concerning this regulation and its regulatory impact statement.*

While my Committee noted the views detailed in your earlier letter of 17 November 1997, it believes that the issues warrant face to face discussion in order to resolve the Committee's concerns. That practice is often followed by the Committee to ascertain, through informal discussion with the relevant officers, the basis of the various problems and methods to correct them.

The Committee does not wish to resort to the formal issue of a summons under the Parliamentary Evidence Act in order to compel their attendance as it is of fundamental importance to have active Ministerial support for the purpose of the Subordinate Legislation Act. Similarly the Committee does not at this stage wish to draw the matter to the attention of the Premier as the Minister responsible for the administration of the Subordinate Legislation Act.

Without going into the merits of the issues you raised in your earlier letter, I should point out that the requirements of the Subordinate Legislation Act are far from subjective, in fact its purpose is to require a full and objective assessment of the impact of the regulation.

The issue was recently addressed by the Crown Solicitor in advice on the Aboriginal Land Rights Regulation 1996 which is referred to in the Committee's twelfth Report to Parliament. The Crown Solicitor said that the Committee did not have power to impose a mandatory time frame when it requested a new RIS, because it hadn't exercised its power to recommend disallowance. However he said that in the absence of what it regarded as an appropriate response to its request for a full assessment, it could comment on the RIS in a report to Parliament.

I would accordingly ask you to reconsider the matter and make the relevant officers available for discussions in order to achieve a satisfactory outcome prior to the Committee reporting to Parliament".

DESCRIPTION **Institute of Sport (Sporting Development Advisory Committee) Amendment Regulation 1998**

GAZETTE **27 February 1998 at page 991**

MINISTER **Sport and Recreation**

OBJECTIVES

This regulation amends the Institute of Sport (Sporting Development Advisory Committee) Regulation 1995 in line with the Committees recommendations in its twelfth report.

The object of that Regulation was to make provision for the constitution and procedure of the Sporting Development Advisory Committee.
When the Committee considered the regulation, it noted that Clause 10 purported to disapply certain Acts to make a special provision for the Board members. It was identical in this respect to clause 8 of Schedule 1 to the Act which already disapplied those Acts.

While an Act can disapply other earlier Acts a regulation cannot do this unless it is itself enabled by the Act to do so. This is not so in the present case and therefore the Regulation would be invalid.

The Committee drew the invalidity in clause 10 to the Minister's attention and requested the further opinion of the Parliamentary Counsel or independent legal advice.

The Minister sought the opinion of the Parliamentary Counsel, who presented a case for the validity of the clause, but also conceded that arguments could reasonably be mounted against its validity and recommended its repeal.

DESCRIPTION **Environmental Planning and Assessment Amendment Regulation 1998**

GAZETTE **25 May 1998 at page 3703,**

MINISTER **Urban Affairs and Planning**

OBJECTIVES

The object of this Regulation is to amend the Environmental Planning and Assessment Regulation 1994.

The Minister in a letter to the Committee dated 26 May 1998 indicated that the regulation implements the environmental planning controls for which provision is made in the Environmental Planning and Assessment Amendment Act 1997.

He also provided a copy of the assessment of this regulation under Schedule 1 of the Subordinate Legislation Act 1989. Among other things, this schedule requires an identification of different options to achieve the objectives of the regulation and an assessment of their respective costs and benefits.

The Minister advised that the regulation was the only option that achieved with certainty all the objectives of the reforms in the Environmental Planning and Assessment Amendment Act 1997.

The Committee noted that the regulation comprises 180 pages which is larger than most principal statutory rules and yet it is only an amendment and as such does not require the preparation of a regulatory impact statement (RIS).

In view of the importance of the regulation the Committee sought a briefing from the Department and the organisations that had concerns about the regulation.

The briefing was held in Parliament House on 25 June 1998 and was attended by the Honourable Ian Cohen MLC who had earlier made a motion for the disallowance of this regulation in the Legislative Council and by representatives of the Department of Urban Affairs and Planning, the Environmental Liaison Office, the Nature Conservation Council, the Total Environmental Centre, the Warringah Shire Council and the Housing Industry Association.

In the Briefing the Committee referred to the issue of the validity of the regulation which had been raised in the lower house during the debate on the Statute Law (Miscellaneous Provisions) Bill 1998.

That issue concerned the fact that the amendment was published on 25 May 1998 and among other things inserted an entirely new part in the regulation, Part 7B which imposes obligations on persons concerning fire safety.

The explanatory note for the regulation says that its enabling power is section 157 of the Act. Section 157 is a general regulation making power. It states:
"The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, for or with respect to:

(a) any function conferred by this Act on any person,
(b) requiring information, particulars, returns and statistics to be furnished to the Secretary by councils and the time and mode of furnishing and the manner of verifying them, and
(c) the form, time, manner and mode of giving notices under this Act".

However, at the time the regulation was made there was no specific power to impose obligations on persons regarding fire safety. That was only being introduced after the regulation was made by Schedule 1.9(40) of the Statute Law (Miscellaneous Provisions) Bill 1998.

The Committee was therefore concerned whether there was sufficient regulation making power in the Act when the regulation was made on 25 May 1998.

The Ministers Officers indicated that they relied on the certificate of the Parliamentary Counsel as to the validity of the regulation.

During the briefing the Director of the Total Environment Centre argued that the assessment of the regulation under Schedule 1 of the Subordinate Legislation Act was inadequate for several reasons, principally because the department had failed to consult with the broader community. He said that formal public exhibition and advertisement were the only proven ways of reaching the wider audience.

However as this is an amending regulation, the procedures governing it are those in schedule 1 of the Subordinate Legislation Act. Among other things the schedule provides that implementation by means of a statutory rule should not normally be undertaken unless the anticipated benefits to the community from the proposed statutory rule outweigh the anticipated costs to the community, bearing in mind the impact of the proposal on the economy and on consumers, members of the public, relevant interest groups, and any sector of industry and commerce, that may be affected.

The regulation does not legally require a formal regulatory impact statement. However in view of the size and potential impact of the regulation the Committee considered that a relevant option that should have been considered in the Schedule 1 assessment was the repeal of the principal regulation and the preparation of a new regulation based on a full assessment in a regulatory impact statement.

The Officers representing the Department and Minister were asked why this option wasn't considered. They said that the staged repeal of the principal regulation was due next year and as such it was thought that the full assessment of the regulation could wait until then.

The Committee indicated that staged repeal could be postponed under the Act for up to 5 years and that theoretically it could escape assessment for 6 years.

Furthermore if the principal regulation had only one year left, it would be more logical to repeal it and fully assess its replacement rather than make such a large amendment without a full assessment. The Ministers officers undertook that no postponement would be sought and that the principal regulation would be assessed in an RIS before its due repeal date of 1 September 1999.

As the planning legislation itself is directed at the full assessment of the impact of proposals the Committee expressed its concern that this major piece of the planning legislation had been exempted from full assessment by making this amendment rather than a new principal statutory rule. The Committee was concerned whether this accords with the spirit of the Environmental Planning and Assessment Act under which the regulation was made.

In fact this amendment is so large that it dwarfs the principal statutory rule which the Committee considered in 1994 and in respect of which an RIS had been prepared.

The Committee however noted that the Minister had indicated that changes to the draft regulation had been made after direct consultation with the green groups, the New South Wales Aboriginal Land Council, the Department of Local Government, the Institution of Engineers and Allied Professions, the insurance industry and the Australian Bureau of Statistics. Fees had been the subject of a reference to the Independent Pricing and Regulatory Tribunal.

The Committee formed the view that this detailed consultation process adequately allowed the Minister and his department to sufficiently appreciate the costs and benefits of the proposal at least so far as its impact on major impact groups is concerned. There was less evidence of an overall weighing up of the costs and benefits.

After the briefing the Committee advised the Minister of its concerns with respect to the validity of the regulation. It also said that, notwithstanding the compliance with the Act in respect of the Schedule 1 assessment, it was of the view that it would have been in the spirit of the Subordinate Legislation Act for his administration to have prepared the formal regulatory impact statement setting out the costs and benefits of the regulation so that the public could clearly understand and appraise the whole proposal.

The Committee refrained from recommending that this now be done because the regulation is scheduled for review under the Subordinate Legislation Act by 1 September, 1999.

The Committee, however, sought confirmation from the Minister of the undertaking given by his officers that this review would proceed in accordance with the timetable of the Subordinate Legislation Act and that it would not be postponed.

In his letter of 30 June 1998 the Minister advised that when the regulation is remade next year those provisions intended for the making of new regulations, including the preparation of an RIS will be applied.

This seems to confirm the Committee's request albeit in fairly indirect language.

On the issue of validity the Minister advised that he relies on the Parliamentary Counsel's certificate as to legality of the regulation and doesn't think it necessary to seek independent legal advice on the issue. He went on to say that if the Committee thinks otherwise, it should raise the matter with the Attorney General.

The issue of validity is still of concern. At the Committee's briefing the officers of the department said that the specific regulation making powers were being introduced into the Act for the purpose of making additional regulations and Schedule 1.9(4) of the Statute Law (Miscellaneous Provisions) Bill 1998 was being introduced to require the development of certain plans regarding fire safety which are distinct from the present regulation.

Nevertheless, at the time the regulation was made, there was no specific power enabling it and if it is now necessary to introduce that power to impose other obligations this must necessarily imply that the original obligations in the regulation were beyond the powers in the enabling Act at that time.

DESCRIPTION **Fisheries Management (General) Amendment Regulation 1998**

GAZETTE **26 June 1998 at page 5094**

MINISTER **Fisheries**

OBJECTIVES

This regulation is cognate with the Fisheries Management Amendment Act 1997 and introduces certain exemptions with respect to the recreational freshwater fishing fee introduced by that Act.

The regulation also introduces an "on the spot" fine of $200 for failing to pay the fee or failing to be in possession of a receipt for it while taking fish and enables seizure of a boat or a motor vehicle used in such an offence.

The Committee noted that this is one of a number of important regulations that have recently been included in Special Supplements to the Government Gazette.

These Special Supplements are prepared during the week but in fact do not get published until they are printed and bound with the normal Gazette on the Friday of the particular week. The practice being followed is to prepare a loose leaf supplement which is retained in the printing office until the next regular Friday's Gazette.

This regulation was put in a Special Supplement dated Friday the 26 June 1998 and was said to commence on Wednesday of the week following, 1 July 1998. In fact it was not published until Friday 3 July 1998 when it was printed bound and made available to the public with the later Gazettes.

Even though there was considerable publicity on the commencement date and prior consultation with fishers on the fee, had those fishers wanted to get the actual regulation on the commencement day from the Government Information Service to see what the exemptions and fines were, they would not have been able to. It only became publicly available on the following Friday.

Another current example is the Environmental Planning and Assessment Amendment Regulation 1998 referred to previously which comprised 180 pages and was in a Special Supplement to the Government Gazette No. 85, dated 25 May 1998 at page 3703. This regulation was not made available to the public and the subscribers to the Gazette until it was bound with a number of other supplements and Gazette number 87 which was published on Friday 29 May 1998.

These matters raise the issue of the meaning of the word “published”. In his book on "Delegated Legislation" Professor Pearce referred to the decision of Wells J in Myer Queenstown Garden Plaza Pty Ltd v The City of Port Adelaide (1975) 11 SASR at pages 536 to 538.

The Judge held that the word "published" in the Interpretation Act of that state which, as ours does, requires regulations to be published in the Gazette, means "to make the regulation generally accessible or available to the public".

In that case the Gazette containing the regulations was printed on 9 June 1972 but was not available to the public until 13 June 1972. The Judge held that the later day was the day of publication and that this rebutted the presumption in the Evidence Act of that State that the production in court of the printed rule was conclusive as to its date of publication.

A similar presumption is made under section 153 of the New South Wales Evidence Act 1995 but this too can be rebutted by contrary evidence.

The Committee wrote to the Minister indicating that under Section 39 (2A) of the Interpretation Act the regulation would commence on the date it was published, Friday 3 July 1998 not 1 July 1998 as stated in the regulation itself and that this will lead to confusion and should be corrected by a subsequent publication

The Committee also wrote to the Premier asking him to address this matter by ensuring that in future regulations become publicly available when they are included in the Gazette.

GENERAL ISSUES

Tabling in Parliament of regulatory impact statements prepared under the Subordinate Legislation Act 1989

In its twelfth report the Committee referred to initiatives it had recommended in order to bring about an improvement in the standard of regulatory impact statements.

The report said that the Chairman had written to the Deputy Director-General of the Cabinet Office in September 1997 seeking the Premiers approval of the tabling of RISs in Parliament to give Parliamentarians a better background understanding of new regulations and to put Departments on notice of the need to ensure a reasonable standard for RISs. There are between forty and fifty RISs prepared every year in connection with principal statutory rules which are the main regulations, not the amendments. The Committee feels that Departments would be far more sensitive about allowing a poor quality RIS to go forward knowing the Minister had to personally table it and may be accountable for it. The RIS also naturally accompanies the regulation.

The Committee considered the proposal could be implemented by way of a Premier's Memorandum, without the need for any legislative change.

In a letter dated 2 June 1998 the Premier advised that he has implemented the proposal by way of Premier's Memorandum 98-15 dated 2 June 1998.

The Committee intends to monitor the implementation of this important innovation and will report as to its effectiveness and in particular whether each tabled RIS is widely accessible to Members of Parliament.

Postponement of the Staged Repeal of Regulations by the Statute Law (Miscellaneous Provisions) Act 1998

In its twelfth report the Committee referred to its correspondence with the Premier in which it requested the referral to it of any bills which affect the publication, validity or disallowance of statutory rules.

The Premier advised that he could see no difficulty with informal consultation with the committee prior to the introduction of bills which change procedures concerning regulations. The Premier said he would ask the officers in his administration to arrange for the informal consultation to take place where practicable.

The Statute Law (Miscellaneous Provisions) Bill 1998 was introduced in June and amended Part 3 of the Subordinate Legislation Act which provides for the staged repeal of statutory rules. The amendments postponed until 1 September 1999 the repeal of various regulations due for staged repeal on 1 September 1998 and for which the maximum number of postponements had already been granted.

Section 10, which sets out the dates on which statutory rules are repealed, was amended to provide that:

(a) the General Traffic Regulations 1916,
(b) the Motor Traffic Regulations 1935,
(c) the General Traffic (Pedestrian) Regulations 1937,

are repealed on 1 September 1999. These were previously postponed by the Statute Law (Miscellaneous Provisions) Bill 1996 and are dealt with later in this report.

The section was also amended to provide that the Dangerous Goods Regulation 1978 was repealed on 1 September 1999 and that the Clean Waters Regulations 1972 are repealed on 1 September 1999, unless, before that date, the regulations are taken to have been made under the Protection of the Environment Operations Act 1997, by operation of clause 11 of Schedule 5 to that Act.

All regulations under the Commercial Vessels Act 1979, the Marine Pilotage Licensing Act 1971, the Maritime Services Act 1935 and the Navigation Act 1901 that are in force on the date of assent to the Statute Law (Miscellaneous Provisions) Act 1998, and the Maritime (Short Description of Offences) Regulation 1987 are also repealed on 1 September 1999.

There was little or no consultation on these amendments. In the case of the amendment which postponed the repeal of the Clean Waters Regulation 1972, the committee received notification of the proposed postponement from the Premier two days before the notice of motion for the Statute Law (Miscellaneous Provisions) Bill 1998 was given.

Notification to the committee of the postponement of the Dangerous Goods Regulation 1978 was received from the Premier on 16 June 1998, which was 13 days after notice of motion for the bill had been given.

For a number of years the Parliamentary Counsel has published a document entitled "Status of Statutory Rules" which contains tables which list in chronological order all statutory rules in force as at 1 July 1990 and all statutory rules that have been made after that date. It is published 3 times a year and among other things the tables indicate each statutory rule's original gazettal date and the date of its projected repeal.

The Committee therefore finds it difficult to understand why it was not practicable for officers of the Premier's Department and relevant departmental officers to briefly explain the proposals particularly as the impending repeal of these regulations would have been known to those officers for several years.

In respect of the three Traffic regulations the situation is more complex.The Cabinet Office wrote to the committee in October 1996 and sought its preliminary view on a proposal that the repeal of the traffic regulations be further postponed.

The office also sought the committee's view on an alternative proposal that the rules be "put beyond the reach of the Subordinate Legislation Act" by including them in schedule 4 to the Subordinate Legislation Act. The postponement of the regulation for a sixth and seventh year was outside the scheme of the Subordinate Legislation Act and, therefore, had to be made by amending the Act.

The amendment was said to be justified because uniform national roads legislation was then being prepared by the National Road Transport Commission and was expected to be implemented by 1998.

The Committee said that it would not support an amendment to the Subordinate Legislation Act so as to put those particular regulations beyond the reach of the Act. The Committee considered such a proposal unacceptable as it departed from the spirit of the Act, it did not comply with the Premier's guidelines on postponements and it was inconsistent with the approach taken at the national level under the guidelines of the Council of Australian Governments.

While the committee did not object to a further postponement of the repeal of these regulations for one year by way of inclusion in the Statute Law Miscellaneous Provisions Bill, it said that it was important that the current process of developing uniform national road rules, including the process of consultation and timing, should be examined by the Parliamentary Staysafe Committee. It accordingly recommended to the Premier that he refer this matter to the The Committee wrote to the Minister indicating that under Section 39 (2A) of the Interpretation Act the regulation would commence on the date it was published, Friday 3 July 1998 not 1 July 1998 as stated in the regulation itself and that this will lead to confusion and should be corrected by a subsequent publication Staysafe Committee for examination.

In his reply of 28 July 1997 the Premier advised that the Minister for Roads would introduce new rules by 1 September 1998 and that this would obviate the need for the inquiry by the Staysafe Committee.

In a letter dated 13 May 1998, the Acting Premier advised that while most elements of the National Road Transport Commission reforms should be implemented by

August 1998, the road rules component encompassing driver, rider and pedestrian behaviour will not be finalised by that time.

The Acting Premier stated that no firm timetable has yet been agreed upon for the implementation of these changes, but completion by the end of 1999 may not be unrealistic. In the course of its consideration of the matter the committee sought the view of the Staysafe Committee.

On 20 May 1998 the Chairman of the Staysafe Committee wrote to the Regulation Review Committee and said that the Staysafe Committee has serious concerns with the process of developing the Australian Road Rules, and may consider it appropriate to examine this matter in detail at a later stage.

The objective of drawing up Australia-wide rules is laudable, but the Minister should provide comprehensive details in relation to the progress made and outline whether the rules will be finalised in the short term.

On 22 May the Committee sought these details from the Minister for Roads. The Minister stated in his reply of 17 June that the completion of the Australian Road Rules had been delayed by the National Road Transport Commission on a number of occasions, because of the Commission's lack of resources or priorities given to its other projects. He said the Commission has now acknowledged that completion of the Australian Road Rules to enable their implementation in New South Wales is unlikely until late 1999.

He said that the Roads and Traffic Authority is currently reviewing the impact of the delay in the development of the Australian Road Rules with a view to determining what course of action is appropriate, given the requirements to repeal regulations under the Subordinate Legislation Act prior to September 1999.

As a consequence of this advice, the Committee wrote to the Chairman of the Staysafe Committee on 18 June and asked whether the Committee would monitor the current Roads and Traffic Authority review. The Chairman of the Staysafe Committee has now agreed to this course. In his letter of 22 July 1998 he said: "I refer to your recent letter concerning the postponement of the staged repeal of major regulations made under the Traffic Act 1909 - General Traffic Regulations 1916, Motor Traffic Regulations 1935, General Traffic (Pedestrian) Regulations 1937.

I note that the Hon. Carl Scully MP, Minister for Roads, has indicated that the Roads and Traffic Authority is to review the effect of the delay in introducing the proposed Australian Road Rules, with particular regard to ascertaining the actions that New South Wales might make to resolve the predicament posed by the urgent need to repeal the cumbersome and outdated regulations made under the Traffic Act 1909 on the one hand, and the seemingly intractable problems associated with the development of the Australian Road Rules on the other hand.

The Staysafe Committee will continue to question the Roads and Traffic Authority regarding the Australian Road rules. The Committee will also, following your suggestion, examine the review process being undertaken by the Roads and Traffic

Authority regarding the effect of the delay in repealing the regulations under the Traffic Act 1909."