REGULATION REVIEW COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

REPORT DRAWING THE SPECIAL ATTENTION OF PARLIAMENT TO THE FACT THAT CERTAIN REQUIREMENTS OF THE SUBORDINATE LEGISLATION ACT 1989 APPEAR NOT TO HAVE BEEN COMPLIED WITH IN CONNECTION WITH THE MAKING OF THE LOCAL GOVERNMENT [APPROVALS] REGULATION 1993

Report No. 26
March 1994

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The Regulation Review Committee was established under the Regulation Review Act 1987. A principal function of it is to consider all regulations while they are subject to disallowance by Parliament.

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

[a] that the regulation trespasses unduly on personal rights and liberties;

[b] that the regulation may have an adverse impact on the business community;

[c] that the regulation may not have been within the general objects of the legislation under which it was made;

[d] that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;

[e] that the objective of the regulation could have been achieved by alternative and more effective means;

[f] that the regulation duplicates, overlaps or conflicts with any other regulation or Act;

[g] that the form or intention of the regulation calls for elucidation;

or,

[h] that any of the requirements of Sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with to the extent that they were applicable in relation to the regulation.

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

LOCAL GOVERNMENT [APPROVALS] REGULATION 1993: GAZETTE OF 1.7.1993 AT P. 3345

This is an important Regulation as it relates to the matters that local councils must take into consideration when making a decision in relation to an application for approval of activities. The activities subject to the regulation relate to erecting, demolishing and installing buildings and temporary structures, water supply, management of waste, engaging in trade on community land, public roads and other major activities that a local council is required to approve as part of its functions.

Section 89 of the Local Government Act 1993 says that in determining an application for approval of an activity, a council must not approve the application if the activity or the carrying out of the activity for which approval is sought would not comply with requirements of any relevant regulation.

The objects of the Regulation which are set out fully in Clause 3 are chiefly to supplement the uniform approvals system established by the Act; to allow certain activities, which would otherwise require approval, to be done without approval; to specify the matter to accompany applications and criteria to be taken into account when considering applications for approval.

Clause 52 states that subject to the specific provisions of the regulation all matters relating to the construction, maintenance, management and use of a building are to be governed by the provisions of the Building Code of Australia. The Australian Uniform Building Regulation Co-ordinating Council, which is a joint State and Commonwealth body, drafted the Building Code of Australia [BCA].

At this stage, the BCA has not been adopted in full by any of the states or territories, each of which has produced a range of variations to replace or add to the relevant BCA provisions.

In a few cases, a BCA provision is entirely deleted [with no substitution] and this fact is indicated by the notation "deleted". An example of a significant deletion in New South Wales occurs in Part G5 - Construction in Bushfire Prone Areas. That Part states:

. **Part G5 - Construction in Bushfire Prone Areas**
G5.1 Protection required

A Class 1, 2 or 3 building that is constructed in a designated bushfire prone area must be provided with protection to reduce the risk of ignition by embers in the event of a bushfire.

G5.2 Protection deemed-to-satisfy

A building complies with G5.1 if it is provided with protection in accordance with AS 3959.

SA Variation -
SA G5.2 Protection deemed-to-satisfy

A building complies with G5.1 if it is provided with protection in accordance with Minister's specification SA G5.101.

NSW Variation -
NSW Part G5 - Construction in Bushfire Prone Areas deleted -

The commentary on this Part in the standard text on the code "Building Regulation Australia" published by Butterworths, states:

"Bushfires are not uncommon in Australia, in every State. However, there are areas where such catastrophic fires have been experienced, and may well occur again, that the authorities have taken action to declare such areas "bushfire prone", making it mandatory to implement those actions considered necessary to preserve life and property.

This clause applies to all buildings of Classes 1, 2 and 3 making ignition of flammable materials by embers less likely. The Australian Standard quoted in this Clause, AS 3959, sets out those actions compliance with which should satisfy the local authority in relation to the owner's responsibility."

There has been recent criticism in the press of the decision in New South Wales to delete that part of the BCA which was designed to protect homes from bushfires.

In a newspaper article published in The Sydney Morning Herald on 19.01.1993, a copy of which appears in Appendix One of this report, a spokesman for the Minister is reported to have said that the National Code provisions were inflexible and not considered to cover all the issues that they needed to take

account of. This subject should have been examined in the regulatory impact statement required for the regulation under the Subordinate Legislation Act. However, the regulatory impact statement produced for the regulation specifically excluded the assessment of the code. The regulation came into force 1 July, 1993, so it covers building approvals after that date. The controls preceding this regulation were contained in Ordinance 70 under the Local Government Act 1919, which also adopted the Building Code of Australia with similar exceptions. The Committee previously questioned the lack of assessment of this Ordinance.

The RIS for the Regulation has been prepared in a similar fashion to The Local Government [Water, Sewerage and Drainage] Regulation 1993 which the committee dealt with in Report No. 25.

Only general options were identified and as with other standards, the BCA was specifically excluded from assessment. The cost/benefit assessment, like the other regulations, is confined to a purely narrative description of the options without any quantification of costs and benefits.

A consultation program was also required to be set out in the RIS. Only the major departments and major organisations were consulted in this case. The Australian Chamber of Manufactures, in its submission on the RIS, while applauding the streamlining of the approval process, expressed its concern that the RIS did not include appropriate economic analysis to assist in identifying the best option. It encouraged the Minister to reassess economic issues associated with the regulation. It was concerned at the lack of economic rigour in the RIS. The Chamber specifically advocated a cost/benefit analysis for the Act, regulation and standards.

This submission goes to the heart of the defect in the RIS. In its response, the department said the RIS was primarily concerned with assessing the costs and benefits of procedures required by the regulations, rather than the technical standards incorporated into, or called up, by the regulation, and that cost effectiveness was, in fact, a principle observed in developing the Building Code of Australia which has been adopted in the Approvals Regulation under Clause 52.

While cost effectiveness may have been observed in preparing the standard, my Committee is not aware of the issue on that ground by the Attorney-General of any exemption from the preparation of an RIS under Section 6 and Schedule 3 of the Subordinate Legislation Act.

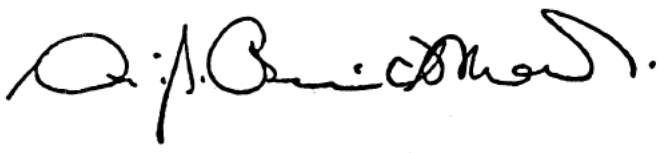
By not following the procedure laid down in the Subordinate Legislation Act the Minister has effectively re-introduced the old standards which could now legally go without mandatory assessment for up to 10 years - allowing for the 5 year sunset provisions plus potential postponement of repeal for an additional 5 years.

The Committee is of the opinion that the RIS fails to properly assess the costs and benefits of the Regulation and its alternatives. In particular, that the standard adopted in the Regulation, the Building Code of Australia with its state variations, has not been compared with other options in terms of their costs and benefits.

Recommendation:

The Committee recommends that a supplementary impact statement be carried out by the Department of Local Government and Co-operatives so as to properly assess the regulation and its alternatives. That RIS should fully assess the regulation, the standards it adopts, and relevant alternatives in terms of their quantified costs and benefits.

At the conclusion of the study, public consultation should be undertaken in accordance with Section 5 and Schedule 2 of the Subordinate Legislation Act as this has not yet been done properly in relation to this regulation and its alternatives.



Adrian Cruickshank
Chairman
Regulation Review Committee

APPENDIX 1

ARTICLE

THE SYDNEY MORNING HERALD

19.1.1994

Govt rebuked for ignoring fire code

By ELIZABETH JURMAN

Builders, architects and the State Opposition have attacked the Government for its decision 18 months ago to reject a national building code designed to protect homes from bushfires.

As the State mops up after the worst bushfires in 50 years, the Government is again considering whether the national standard should replace regulation by local councils.

According to the NSW appendix to the Building Code of Australia, all provisions covering construction in bushfire areas were deleted in NSW.

The Opposition Leader, Mr Carr, said yesterday that NSW was the only State which had refused to adopt the CSIRO-developed building standards for fire-prone areas.

"The South Australian Government made these standards law to protect its citizens living in fire-prone districts," he said.

The Masters Builders' Association and the Royal Australian Institute of Architects joined the criticism, respectively describing the decision to reject the code as inexplicable and shortsighted.

The Australian standard on home construction in bushfire areas includes:

- Using non-combustible materials or timber treated with fire retardant for construction;
- Using mesh screening to prevent embers flying into open windows; and
- Sealing the roof-wall junction to prevent embers entering the rafters.

At a loss . . . Mr Elder.

According to the standard: "Self help, by providing passive protection measures incorporating siting, layout, design and construction of buildings and landscaping, is the most reliable and effective way of reducing the impact and damage of bushfires.

"A building which will withstand all bushfires is not feasible, but in addition to the building requirements provided by this standard, if the guidelines provided by fire and planning authorities in all States are followed, this will create a property which will have an enhanced chance of surviving most bushfires."

Mr Kim Rockman, the co-ordinator of disaster planning for Architecentre, a division of the institute of architects, said there was no excuse for the Government's inaction.

"I think it was shortsighted, given that the work had been done [by the CSIRO].

"It would be clear that in country NSW and fire-prone areas that houses should be built according to the standard."

The executive director of the Master Builders' Association, Mr John Elder, said he was unable to explain the Government's failure to adopt the standard.

"We're at a loss to say why it was deleted," he said. "I think that there ought to be more consideration given to bushfire areas than obviously has been given as far as design is concerned."

Mr Carr called for an independent inquiry to examine the Government's refusal to adopt the national standards.

The Minister for Local Government, Mr West, was unavailable for comment. A spokesman for his department said the code was not adopted because it was "inflexible", and "not considered to cover all the issues that they needed to take account of".

But the Government was now re-examining the issue and looking at whether a uniform standard was required, he said.