REGULATION REVIEW COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

REPORT UPON REGULATIONS

- Annual Reports (Departments) Act 1985 - Regulation
- Bread Act 1969 - Regulation
- Construction Safety Act 1912 - Regulation
- Conveyancing Act 1919 - Regulation
- Electricity Act 1945 - Regulation
- Museum of Applied Arts and Sciences Act 1945 - Regulation
- Fire Brigades Act 1989 - Regulation
- Prevention of Cruelty to Animals (Animal Boarding Establishments and Pet Shops) Regulations 1954
- Prevention of Cruelty to Animals (Kennels) Regulations 1954
- Prevention of Cruelty to Animals (Livery Stables) Regulations 1953
- Prevention of Cruelty to Animals (Riding Schools) Regulations
- Public Sector Management Act 1988 - Regulation
- Swimming Pools Act 1992 - Regulation
- Water Act 1912 - Regulation
- Water Supplies Authorities Act 1987 - Regulations

Report No. 24
March 1994

REGULATION REVIEW COMMITTEE

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CHAIRMAN'S FOREWORD

The regulations the subject of this report fall into three broad categories:-

1. Those cases where the regulatory impact statement for the regulation does not comply with the Subordinate Legislation Act and the Committee considers that further action is required by the Minister. In this category can be included:

- the Water (Part 6) Regulation 1992
- the Fire Brigades (General) Regulation 1992
- the Swimming Pools Regulation (No. 2) 1992
- the Conveyancing (General) Regulation 1992;

2. Those cases where the RIS fails to comply with the Act but the Minister has made a satisfactory response. This group includes:

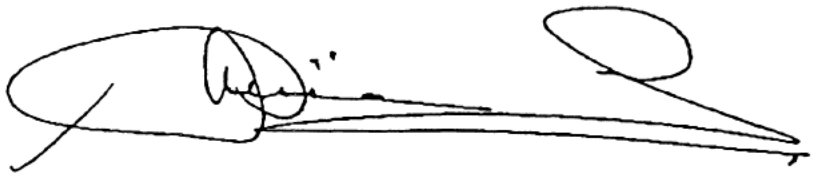
- the Water Supply Authorities (Broken Hill) (Catchment Areas), Water, Sewerage and Trade Waste) and (General) Regulations 1992
- the Museum of Applied Arts and Sciences Regulation 1992
- the Bread Regulation 1992;

3. Those regulations which do not require assessment by way of a formal regulatory impact statement, usually because they are only amendments and not principal statutory rules. In this group fall:

- the Annual Reports (Departments) Regulation relating to Codes of Conduct
- the Construction Safety Regulation
- the Public Sector Management Act Regulation relating to health assessments before appointment
- the Electricity Act Regulation relating to minimum safe working distances.

The assessment under Schedule 1 of the Subordinate Legislation Act required for the regulations in the 3rd group is not as extensive as that required under the regulatory impact statement procedures in Schedule 2 of the Act applying to the principal statutory rules mentioned in groups 1 and 2.

In the Committee's 23rd Report to Parliament on future directions for regulatory review it recommended the restriction of formal impact assessment by way of a regulatory impact statement to only the most significant regulations. A number of the regulations in this present report would fall into that category. However Schedule 1 of the Subordinate Legislation Act will still apply to all other regulations.



Chairman
Regulation Review Committee

requirement for unnecessary detail which does not fit the main purpose of the annual report.

As an alternative, this Department proposes that CEOs be requested to lodge copies of amended codes of conduct with the Parliamentary Library when amended, and list them in each organisation's annual Freedom of Information (FOI) Statement of Affairs. FOI Statement of Affairs are included in each annual report, as well as a special supplement to the Government Gazette.

It would be appreciated if the Committee could advise this Department of whether this approach is supported, so that Treasury can be advised how to proceed with the proposed amendment."

The Committee responded by saying that if there is a need to publish the code of conduct in the Annual Report at the first instance it would seem to be appropriate to include amendments to those codes in future Annual Reports. Amendments would not be "unnecessary detail" as referred to by the Premier's Department. Including amendments to codes in the organisation's Freedom of Information Statement of Affairs would not be adequate as these statements usually only include a broad description of each agency's functions and merely list by name each of the policy documents of the agency. The amendments would need to be published in full to have the desired effect. In any event it is doubtful whether publication in the Government Gazette and lodgment in the Parliamentary Library would have the desired degree of publicity for the Code of Conduct. In conclusion if it is appropriate to include the Code of Conduct at the first instance in the Annual Report it should be appropriate to include amendments in subsequent reports.

In his reply of 16.12.1992 the Director of the Premiers Department agreed unequivocally to make the amendments to the regulation as requested by the Committee.

IMPACT ASSESSMENT: The impact assessment in the RIS does not comply with Schedule 2 of the Subordinate Legislation Act in that there is no statement of the costs of the proposed regulation. Instead there is a statement of the details of each clause of the regulation prefaced by the comment that the only changes from the old regulation are the deletion of obsolete requirements. These details are followed by an unquantified statement of the benefits. There is, for example, no attempt to justify retention of the fees which are at the same level as in the old regulation.

ALTERNATIVE OPTIONS: In contrast to the preferred option of making the regulation the costs and benefits of the option to repeal the regulation have been quantified. These are as follows:

> *"Costs of Option 1)(Allow the Regulation to be automatically repealed on 1 September 1992)*
> ** Remove Government revenue obtained from the administration of the issue of Operative Bakers Certificates. (approx. $3000 per annum)*
> **Remove Government revenue obtained from the issue of Bread Manufacturers' Licences. (approx. $18000 per annum)*
> **Remove cost of Government administration of certificate/licences. (approx. $7000 per annum)*
> **Deregulation of the industry without alternative methods of maintaining standards and safeguards, protecting the industry and public.*
> *Benefits of Option 1)(Allow the Regulation to be automatically repealed on 1 September 1992)*
> **Immediate savings to industry and individuals (approx $21000 per annum)*
> **Immediate savings of Government administration of certificate/licences. (approx. $7000 per annum)*
> **would accelerate the deregulation process without further industry consultation."*

From the way these figures are presented the quantified costs of $28,000 appear to equal the benefits. However the removal of the costs of administration of $7000 is not in fact a cost but a benefit. The quantified benefits as corrected are therefore $28,000 and the costs $21,000.

- repeal of the regulation provides the greatest net benefit and least net cost to the community.

- Government policy of cost recovery is not being complied with in the regulation.

- deregulation of the industry is under discussion and repeal of this regulation, on a view presented in the RIS, would be a benefit in accelerating the deregulation process without the need for further industry consultation.

- Only the immediate benefits of repeal have been quantified.

- The industry is strongly supportive of repeal.

MEETING: The Minister agreed to the Committee's request for officers of the Department to attend the meeting of the Committee of 4th March 1993. A representative of the Retail Traders Association was also present.

The Chairman indicated that the main concern with the regulation was that the quantified costs and benefits as set out in the Regulatory Impact Statement (RIS) showed that its repeal should have been the preferred option. The costs and benefits also showed that government policy of cost recovery was not being complied with in the regulation. The RIS said that repeal was under discussion with industry. The Retail Traders Association was strongly in favour of repeal in its submission on the RIS.

The representatives of the Department were asked to indicate why they did not seek a postponement of repeal under s.11 of the Subordinate Legislation Act if repeal of the Act and regulation were actively under discussion with industry. They indicated that the advice of the Parliamentary Counsel was that postponement would only be granted in exceptional circumstances and that the current repeal discussions did not justify this. However they agreed that the RIS for the regulation should perhaps have included Parliamentary Counsel's advice. The Officers indicated that the Department intends to proceed to get consensus with the industry on repeal of the Act and regulation. The intention is that this would take place in the 1993 budget session. The officers believed it was not possible to repeal the regulation immediately as this would prohibit

Whilst I support the position of my predecessor, the issue of deregulation is still the subject of negotiations with the industry which should be expeditiously completed.

When the Bread Manufacture (Licensing) Regulation came up for automatic repeal, I was not in a position to repeal the regulation for the reasons set out above.

Consideration was given to postponing the repeal of the Regulation under Section 11 of the Subordinate Legislation Act. However, advice proffered by the office of the Parliamentary Counsel disclosed that such postponement would only be granted in exceptional circumstances. Consequently, the repeal of the Regulation could not be postponed.

In the event, the Bread Manufacture (Licensing) Regulation was repealed and the Bread Regulation 1992 was gazetted. This new regulation updated the repealed regulation. This ensured that the provisions of Part 3 of the Bread Act 1969 did not continue to operate in a vacuum. The repeal of the Regulation without the repeal of relevant provisions of Part 3 of the Bread Act would not have effected deregulation and could have posed special difficulties concerning applications for and renewals of Bread Manufacturers' Licences and Operative Bakers' Certificates.

Under these circumstances there were special practical and legal reasons why the Bread Regulation 1992 was gazetted pending finalisation of regulations with the industry.

I note that, at the abovementioned meeting of the Regulation Review Committee, the issue was raised as to whether a fee for a Bread Manufacturers' Licence and an Operative Bakers' Certificate should have been prescribed in the Bread Regulation 1992.

This issue has also been canvassed with the Crown Solicitor, who advises as follows:

" While I am of the view that the absence of a regulation prescribing a fee for an application for the relevant licence or certificate would likely be construed by a court to mean that no

accompanied by the fee. The Minister indicated that amendment of the Act and regulation could occur in the Budget session subject to discussion with the industry. These amendments were not made.

Finally the Minister agrees with the Committee's view that on the basis of the RIS the preferred option was repeal.

The Committee believes that this is a reasonably satisfactory response from the Minister which supports the action previously taken by the Committee.

increased from $40 to $400. This increase in fees was in line with a pricing structure aimed at full cost recovery for the Lift Section of the WorkCover Authority, and was approved by the former Minister in January 1991.

A copy of relevant papers on these earlier amendments including a Ministerial submission and fee schedule (Attachment 'C') is also attached for your information.

I would also point out that in addition to the information on costing contained in the attachments, the $900 was reasonable and an accurate reflection of the costs involved."

The Minister provided a comprehensive response. The Schedule I assessment in the attachment is satisfactory although costs and benefits were not set out in the assessment itself, but based on earlier costings.

The attachment reads as follows:

"

ATTACHMENT A

SUBORDINATE LEGISLATION ACT 1989 -
SCHEDULE 1 REQUIREMENTS

- ***The objectives sought to be achieved by the Regulation and the reasons for them***

  The proposed Regulation aims to amend the Construction Safety Regulations 1950 to provide for a new fee of $900 for the erection of a personnel and materials hoist. (These hoists fall within the definition of a "lift" in the Construction Safety Act 1912 because of amendments made by the Statute Law (Miscellaneous Provisions) Act (No. 2) 1991). This fee represents the following objectives

  - *it reflects the level of full cost recovery for the service*

  - *it (along with amendments made in 1991) places the Lift Inspection Service on a commercial "footing"*

resulting in accidents and loss of life on construction sites

* *Lack of safety could mean greater costs in rehabilitation and loss of income*

* *Nil - except for a small, immediate saving by industry which could easily be lost if unsafe hoists are installed and accidents occur*

Costs and benefits of no change

Costs * *Service cannot be provided due to financial constraints*

* *Costs to industry will grow re liquidated damages*

Benefits * *Nil*

Consultation

Consultation has taken place between the Authority and lift companies and industries concerned and all considered the imposition of such a fee as reasonable."

These figures are based on a full cost recovery model and include provision for on-cost items such as leave, superannuation and overheads, and comply with the Government's policy of cost recovery.

In addition, the Director advises that the figure of $2.6 million referred to in the RIS does not represent an increase in revenue due to the regulation, as stated in your letter. Rather, it represents an estimate of total revenue from functions of the Land Titles Office associated with the old system land. As indicated in the RIS, the Land titles Office operates on a commercial basis and would still have to set commercial fees for it services even if the fees were not contained in the regulation.

I trust that this information answers your concerns."

This information on costs should have been included in the RIS. Showing total revenue in the RIS was misleading as only an undisclosed fraction of it is attributable as a benefit in the RIS.

The Committee would draw the attention of each Minister to the need to accurately identify costs and benefits of the particular regulatory proposal.

regulation before the RIS is prepared. In such cases an RIS is required within 4 months after the regulation is published.

OBJECTIVE: The objective is stated quite simply on page one of the RIS as follows:

> *"The objective of the proposed Regulation is to ensure, as far as is reasonably practicable, that all work on electrical apparatus owned by the electricity supply authorities, and work on high voltage electrical apparatus owned by bodies other than an electricity supply authority, is carried out safely."*

The objective is succeeded by a detailed explanation of the reasons for the regulation at item 4.

OPTIONS:

The options to achieve the objectives are set out at item 5:

> *"The following options are considered as possible means to achieve the objective as stated in Part 3.*
>
> *Option 1: Maintaining the Status Quo*
>
> *This is the "do nothing" option i.e. retaining the existing Overhead Line (Workers) Regulations 1964, and leaving other aspects of work practices to be unregulated.*
>
> *Option 2: Self-regulation*
>
> *This would mean repealing the existing Overhead Line (Workers') Regulations 1964, leaving the industry and high voltage customers to self-regulate. The success of this option depends on the willingness and keenness of the industry and high voltage customers to self-regulate i.e. to carry out all work on electrical apparatus safely."*

Option 1 is incorrect. Retaining the existing regulation is not the "do nothing" option as the existing regulation would be automatically repealed by the

Similarly, the "cost of accidents" should be offset by the benefit of saving lives.

SENSITIVITY AND SCENARIO ANALYSIS: The sensitivity and scenario analyses are described as follows:

> *"8. <u>Sensitivity and Scenario Analyses</u>*
>
> *The above calculations are based upon a number of assumptions which may not be valid all the time. At a glance of the values assigned, it is evident that the number of lives saved will be the most important parameter when attempting to assess the financial savings. Sensitivity analysis is a means of testing the effect with change in one parameter whilst all other parameters remain unaltered. Scenario analysis is the methodology where more than one parameter can be varied at the same time. Four sensitivity analyses and one scenario analysis have been conducted."*

Option 4 (introducing the proposed legislation) is shown to be the most cost effective, and therefore preferred option primarily on the assumption of a reduction of 2 fatalities and a 20% reduction in non-fatal accidents. This option would require an initial expenditure of $1.575 million and a recurring expenditure of $810,000 every year. Option 3 - co-regulation by industry and Government, however, only requires an expenditure of $1,000,000 million on safety campaigns and running of safety courses etc.

It is assumed that Option 3 would result in saving of 1 fatality and 10% reduction in non-fatal accidents.

If this option was also to result in reduction of 2 fatalities and 20% reduction in non-fatal accidents, it might turn out to be more cost effective than option 4.

Therefore the assumption of a reduction in fatalities and in non-fatal accidents is most crucial to deciding which is the preferred option and could tilt the balance in favour of any of the options, as is clearly borne out by the sensitivity analysis carried out in the RIS. However, no attempt is made to justify these assumed reductions.

"EXPLANATORY NOTE

The Electricity (Workers' Safety) Regulation 1992 replaced an existing Regulation that was repealed on 1 September in accordance with the program for the staged repeal of regulations under the Subordinate Legislation Act 1989. In accordance with a certificate granted under section 6(1)(b) of that Act, the new Regulation was published before the public consultation procedures under that Act had been completed.

The object of this Regulation is to amend the Electricity (Workers' Safety) Regulation 1992 ("the new Regulation") to incorporate changes arising from comments received from the public consultation procedures. They include provisions for the following purposes:

(a) to extend the new Regulation to work on low voltage electrical apparatus, or on or near low voltage exposed conductors, owned or leased by an electricity supply authority for supply of electricity for the provision of a service to the public;

(b) to enable certain certificates issued by the Electricity Commission and the energy Corporation to be treated as acceptable qualifications for certain types of electrical work covered by the new Regulation;

(c) to place the responsibility for guarding a dangerous situation in the work place on the employee who discovers it rather than on the employer and the employee;

(d) to enable employers to develop their own procedures for issuing access permits for work on high voltage exposed conductors;

(e) to vary the minimum safe working distances for work on high voltage overhead lines;

(f) to make provisions with respect to other minor matters."

These are a good illustration of the success of the Subordinate Legislation Act in holding up regulations for public scrutiny.

DESCRIPTION: ELECTRICITY ACT 1945 - REGULATION (Relating to minimum safe working distances for working on live high voltage overhead lines) Gazette of 12-3-93 at p. 1005

OBJECT: The object of this Regulation is to further amend the Electricity (Workers' Safety) Regulation 1992 to increase the minimum safe working distance which is required to be observed when working on live high voltage overhead lines of up to 33 000 volts.

This new regulation now makes further amendments to the principal regulation to increase the minimum safe distances for overhead high voltage line work. This taken in conjunction with the earlier amendments would appear to indicate that the principal regulation was not properly thought out before it was "fast tracked" under the Premier's exemption certificate without an RIS. Even though no RIS was required at the time, an assessment under Schedule 1 was still required to be carried out.

This is yet further evidence of the benefit of assessing regulations thoroughly before they are made.

Whether workers were put in danger by the original regulation is not clear but it is apparent that the safety margin was not thought out properly in the first place, or fully assessed, otherwise this present amendment would not have been necessary.

The Committee wrote to the Minister for Energy in relation to this new amendment requesting details of its assessment under schedule 1 of the Subordinate Legislation Act. The Minister for Energy and Minister for Local Government and Co-operatives responded on 24 August 1993 as follows:

> *"I refer to your letter dated 20 July 1993 regarding the minimum safe working distances for working on live high voltage overhead lines.*
>
> *The Office of Energy has advised that the Electricity (Workers' Safety) Regulation was drafted after two years of consultation with the industry through a series of technical panels. The Regulation represents a significant reform of industry safety legislation and is non-prescriptive as*

far as possible. Safety outcomes are stipulated leaving the industry to determine the means of achieving them.

To this end the Electricity Council of NSW appointed the Industry Safety Standards Committee (ISSC) to provide a series of guides to help the industry to comply with the new Regulation. The ISSC is now the main source of technical advice to the Office of Energy on the Regulation.

The clause in the Regulation which covers live high voltage overhead line work stipulates that the techniques used must be approved in writing by the employer. All live high voltage overhead line techniques approved to date in New South Wales have a minimum safe working distance of 500 mm for voltages up to 33 000 volts.

The Regulation was gazetted on 1 September 1992 and following the public consultation process under the Subordinate Legislation Act comments were received that these distances should be reduced to:

300 mm for voltages up to 22 OOOV and 400 mm for voltages 22 000 to 33 OOOV

This was debated by the ISSC and endorsed based on the fact that use of these safe working distances would need to be incorporated into an employer approved technique. The amendments were gazetted on 16 October 1993.

Following this, the matter of safe working distances was again referred to the ISSC on 15 December 1992 following further industry comment. The ISSC resolved to advise the Office of Energy that the lower safe working distances were developed for operating work only on equipment designed for the purpose and using an insulated operating stick or approved earthing equipment. As such, these distances could be used by employers under the provisions of clause 27(3) - minimum safe working distances for non live line work which requires a particular written instruction from the employer. The ISSC indicated that the issue would be covered in the relevant ISSC guides. Consequently they recommended a return in the regelation to the 500 mm distance for voltages up to 33 000 volts.

On the 16 December 1992 the Office of Energy issued a circular letter to the industry indicating that the Regulation would be changed as soon as possible but reminding employers that they were still required to ensure employees comply with the provisions of the Regulation particularly as they relate to their employees following techniques approved in writing by the employer.

This further amendment was gazetted on 12 March 1993.

The Office of Energy considers that workers have not been put in danger as a result of these amendments because they are obligated to follow written procedures approved by their employers. The lower safe working distances are now incorporated in the relevant ISSC Guide (copy attached). This arrangement is consistent with the Regulation and its intent.

The introduction of the Electricity (Workers' Safety) Regulation 1992 and its related reforms have had a significant positive effect on safety in the electricity industry whilst allowing the industry the freedom to develop procedures to achieve safe outcomes which best suit their own circumstances.

I trust that this has clarified the situation. However, should you wish to discuss this or any other aspect relating to the electricity distribution safety legislation you could contact Mr Maurice Overy, Manager, Electricity Distribution Engineering, Office of Energy on telephone (02) 9018662."

The Minister hasn't answered the Committee's request for details of the Schedule 1 assessment but instead has given details of the various meetings and decisions made by the ISSC as they vacillated between the lower and higher safe working distances on the basis of their consultation with industry.

While consultation is desirable, the purpose of Schedule 1 is to first establish the respective costs and benefits of the regulatory proposal and its alternatives to determine which is in the best interest of the community. That assessment can then be used as a focus for consultation.

It would appear that this was not done in the present case but instead the regulation and the subsequent amendments were led by competing representations to the ISSC at the different times mentioned in the Minister's letter.

Had a proper assessment been carried out these amendments might have been avoided.

Apart from the deficiencies in the initial assessment this matter shows the effectiveness of the consultation requirements under the Subordinate Legislation Act in bringing about amendments to regulatory proposals. Had that consultation been part of the Schedule 1 assessment of the proposal for the principal regulation these additional amendments would have been unnecessary and the costs involved would have been saved. This points to the desirability of the Committee's proposal for a strengthened Schedule 1 assessment.

DESCRIPTION: FIRE BRIGADES ACT 1989 - REGULATION (Fire Brigades (General) Regulation 1992) Gazette of 28-8-92 p. 6143

OBJECT: The object of this regulation is to repeal and replace certain regulations under the Fire Brigades Act 1989 in connection with the staged repeal of subordinate legislation under the Subordinate Legislation Act 1989.

The Regulatory Impact Statement for the regulation sets out the options for achieving the objectives of the regulation as follows:

> "*Options to Achieve Objective*
>
> *(1) By-Laws as updated be adopted as Regulations specifying the provisions referred to in Section 74 of the Fire Brigades Act, 1989.*
>
> *(2) By-Laws as updated be included as an amendment to the Fire Brigades Act, 1989.*
>
> *(3) Administrative practice be adopted to cover conditions of employment, service and discipline of members.*
>
> *(4) By-Laws as updated be incorporated as award conditions for firefighters under the Fire Brigade Employees (State) Award and the Volunteer Fire Brigade Employees (State) Award.*"

The mandatory "*do nothing*" option which must be considered under schedule 1(2)(c) of the Subordinate Legislation Act has not been considered.

The Impact Assessment in the RIS is defective. There is no quantification of the costs and benefits of the options as required under schedule 2(1)(d) and (c) of the Subordinate Legislation Act.

Even on the basis of this defective assessment options 3 or 4 would appear to be the most realistic options and not the option of making the regulation. It is obvious that certain of the clauses could be dealt with administratively and do not require a regulation, eg. clause 6 concerning Bravery Awards, clause 7 concerning ranks of firefighters and clause 27 concerning uniforms. Other

provisions such as Division 3 of part 2 concerning watch-room duties would be appropriate for inclusion in the relevant award or contract of employment.

Aside from this, the analysis does not account for the power under clause 5 for the Chief Officer to make instructions with respect to the "efficiency discipline and good conduct" of fire fighters, and the fact that existing orders are continued in force under the present regulation.

These existing orders should have been identified under option (3).

Despite option (3) being dismissed in the RIS it is in fact implemented in part by means of sub delegation through clause 5 of the regulation in the form of these orders.

Submissions from the New South Wales Fire Brigade Employees Union as part of the consultation process stated that the regulation and the relevant awards overlapped and conflicted in a number of important respects. Although there is a reference to subsequent discussions in an attempt to resolve these issues there is no indication that they have been satisfactorily resolved. The Committee sought the Minister's advice on whether this issue was satisfactorily resolved with the unions.

It was also unclear whether the mandatory notices required under section 5 of the Subordinate Legislation Act were published. The statement of the intended consultation programme in the Regulatory Impact Statement indicates that only the New South Wales Fire Brigades Staff and Unions were consulted.

MINISTER'S RESPONSE: The Minister for Justice and Minister for Emergency Services in his letter 18th May said:

> *"On receipt of the letter (your reference 1646) I referred the matter to Mr Rath, Director General of the NSW Fire Brigades, and I now have the benefit of his advice.*
>
> *Mr Rath informs me that the decision to replace the Brigades' long-standing By-laws with a regulation was based on the operational need to have continued in force, with appropriate support, the personnel code under which the Brigades have long been administered.*

In reply to the comment that there is no reference to the "do nothing" option which must be considered under the Subordinate Legislation Act, Mr Rath has acknowledged to me that the "do nothing" option was not formally considered in the Regulatory Impact Statement. He has indicated, however, that the option was considered, particularly when the Brigades received advice from Parliamentary Counsel of the options available in the light of the scheduled repeal of the By-laws. The Parliamentary Counsel advised that the available options included the repeal of the By-laws without making a replacement instrument, and that this option was appropriate for an instrument that had ceased to be of practical utility. In the situation that the By-laws have been for many years, and continue to be, of practical utility, the Brigades decided on the second option, which was to remake the instrument.

The Director General has also acknowledged that the costs and benefits of the options were not quantified. He has advised me that the decision as to what type of instrument (legislation, regulation, award or administrative orders) should embody the remade By-laws was seen as a outcome of a consideration of administrative implications and was not seen as having quantifiable cost effects, and that a full consideration of the advantages and disadvantages of each type of instrument was set out in the RIS.

The Director General has informed me that he was surprised that the Committee formed the view that the replacement of the By-laws by either administrative order or their incorporation into the Award presented more realistic options that the making of a regulation. The Brigades have carefully considered the Committee's comments, but are of the view that the effective management of the personnel of a disciplined service is better supported by having a code of the relatively unchanged provisions with the force of a regulation, supplemented as they are the Chief Officer's orders which express procedural guidelines and detail the implementation of the basic provisions. Their effect is to extend and not to replace the Regulation provisions.

The Committee's support for the incorporation of the By-law provisions into the Award was, I understand, also of surprise to the Brigades. The Chief Officer is not required to enter into third party consultation in

administering the provisions of the By-laws as a Regulation. However, were the provisions (many of which do not fall within the industrial area) to be incorporated into the Award, it would be necessary for the Brigades to pursue any maters arising from the provisions with the Union and the Industrial Relations Commission. The Director General cannot accept that the necessary involvement of other parties in personnel matters included in the provisions represents a more efficient method of administering this emergency service than the direct use of a code of Regulations.

In response to your Committee's request for advice as to whether the submissions put forward by the Union were satisfactorily resolved, Mr Rath has indicated that the discussion process confirmed his Department's view that the regulation neither conflicted with nor significantly overlapped the Award. He has informed me that the Union has not raised the issue subsequent to the lengthy discussions held with officers of the Department.

On the question of the publication of mandatory notices, Mr Rath has provided me with copies of those which the Brigades published, and I attach them for the Committee's information.

In line with the consultation requirements I understand that the Brigades wrote to all four groups with a direct interest in Brigades staffing matters, namely the Insurance Council of Australia, whose members contribute 73.7% of the Brigades' recurrent costs, the Local Government and Shires Associations, whose members contribute 12.3% of the recurrent costs of fire services in Fire Districts in their respective areas, the NSW Fire Brigade Employees" union, and the NSW Fire Brigades Volunteers Federation. I am advised that only the latter two organisations responded to the request for comment.

I thank you for bringing the Committee's views to my attention. I have asked the Director General that his Department give them ongoing consideration, so that a full examination of the alternative options to remaking the regulation can be undertaken in adequate time to allow the adoption of an alternative method, if a favourable one is identified before the next scheduled repeal of the regulation."

COMMENT: The Minister's letter advises that the requirements of the Act were not complied with in preparing the RIS, ie. the do nothing option was not considered and the costs and benefits of the options were not quantified. He indicates that the real decisions with respect to the regulation were made informally and on an administrative basis by NSW Fire Brigades. This approach is of course completely contrary to the purpose of the RIS requirements which was to make implicit decisions explicit.

It would appear from his other comments that the Brigades misunderstand the whole purpose of the Subordinate Legislation Act. They express their surprise that the Regulation Review Committee favours certain options. Far from favouring particular options, the Committee's letter said that on the basis of the assessment in the RIS itself, certain options were clearly preferable. It is for the Brigades themselves to establish that making the regulation is indeed preferable and the onus is on them to rebut the option of taking no action. This had not been done.

DESCRIPTION: MUSEUM OF APPLIED ARTS AND SCIENCES ACT 1945 - REGULATION (Museum of Applied Arts and Sciences Regulation 1992) Gazette of 21-9-92 at p. 5967

OBJECT: The object of this regulation was to replace the regulations under the Museum of Applied Arts and Sciences Act 1945 in connection with their staged repeal under the Subordinate Legislation Act 1989. The Regulatory Impact Statement for the regulation was found to have the following defects:

OBJECTIVES: The objectives are stated in much the same way as the Explanatory Note for the regulation. This is a statement of what the regulation deals with rather than what is sought to be achieved and the reasons for them as required under section 5 and schedule 2(1)(a) of the Subordinate Legislation Act.

OPTIONS: No alternative options are identified in the RIS, nor is the mandatory "do nothing" option. The impending staged repeal of the regulation is used as justification for this.

This is a major departure from schedule 2 the Act which requires in clause 1(b) an identification of the alternative options by which the objectives can be achieved. The RIS deals with the options as follows:

> *"b) Alternative options to achieve objects: The matters that the proposed Regulation deals with can only be dealt with at this time by making a new regulation, as the present regulation will be repealed on 1 September 1992. In the future it may be possible to have matters dealt with by the Regulation in an Act of Parliament."*

The whole purpose of the staged repeal process was to compel consideration and assessment of alternatives before the repeal date. The statement in the RIS is therefore a repudiation of this purpose.

Under section 11 of the Subordinate Legislation Act repeal can be postponed by the Governor for a maximum of two years in appropriate cases. The Minister's Department could have applied for this postponement instead of preparing this defective RIS. However as the listing of this regulation for staged repeal has been current since the Subordinate Legislation Act was passed in 1989 it is

difficult to see how a proper RIS could not have been completed within those three years without the need for postponement.

IMPACT ASSESSMENT: Contrary to Schedule 2(1)(c) and 2(2) of the Subordinate Legislation Act there is no quantification of the costs and benefits of the regulation or its alternatives. Instead unquantified statements are made.

CONSULTATION: Given the museum's ability to promote its activities more direct public consultation should have been conducted. No persons outside the administration were directly consulted. The public were only invited to comment by newspaper advertisement and no submissions were received.

In the light of these major defects in the RIS the Committee requests the Minister to prepare a proper RIS taking into account the above comments and seek more direct public consultation through the Museum.

The Secretary of the Ministry for the Arts on 8th February 1993 advised as follows:

> *"The Minister for the Arts has asked me to thank you for your letter of 23 December 1992 regarding the Museum of Applied Arts and Sciences Act 1945 - Regulation.*
>
> *Mr Collins has noted the comments of the committee and has requested that the museum prepare a new Regulatory Impact Statement.*
>
> *Mr Collins will write to you once the museum has fully examined the impact of the Regulation and sought wider public consultation."*

The Minister for the Arts on 19 November 1993 advised as follows:

> *"I am writing to you in relation to the Regulation made under the Museum of Applied Arts and Sciences Act 1945.*
>
> *As requested by the committee, the museum has prepared a new regulatory impact statement (copy attached). It concluded that Clause 19 of the Regulation relating to the banking of money should be deleted as*

there are equally effective financial controls available to the Museum by way of the Public Authorities (Financial Arrangements) Act 1987.

As I intend to take a submission to the Cabinet to revise the Museum of Applied Arts and Sciences Act I will not seek a direct amendment of the Regulation at this stage.

The Museum notified a broad range of individuals and organisations of the availability of the Regulation and the RIS, and the opportunity to comment. However, no submissions were received.

I look forward to your favourable consideration of this matter and trust that the museum has met all requirements of the Subordinate Legislation Act 1989."

This action shows the benefits of proper assessment of regulatory proposals as a duplicatory provision was identified and the remaining provisions substantiated.

ESTABLISHMENTS AND PET SHOPS) REGULATIONS 1954
PREVENTION OF CRUELTY TO ANIMALS (KENNELS) REGULATIONS 1954
PREVENTION OF CRUELTY TO ANIMALS (LIVERY STABLES) REGULATIONS 1953
PREVENTION OF CRUELTY TO ANIMALS (RIDING SCHOOLS) REGULATIONS 1953

These regulations were repealed by the Prevention of Cruelty to Animals (Repeals) Regulation 1990 but were revived on the disallowance of that regulation by the Legislative Council on 10th April 1991.

Each of these regulations, which have been the subject of previous examination by the Committee, has as its objective the proper care of animals in the particular trade establishment. They provide a licensing scheme under which it must be demonstrated through a report of a Health Inspector under the Local Government Act, that the premises are suitable for the establishment of an animal boarding establishment or animal kennels, livery stables or riding schools as the case may be. The Minister has a discretion to refuse to issue a licence if the applicant has previously been guilty of an offence under the Cruelty to Animals Act 1979. Inspectors have the right to enter most premises. The licence can be made subject to various conditions.

In April 1991 the merits of these regulations were the subject of detailed debate in both Houses, each of which in fact passed a motion of disallowance of the Prevention of Cruelty to Animals (Repeals) Regulation 1990.

However notwithstanding the action taken by Parliament it remains the policy of NSW Agriculture not to enforce these regulations. Volume 1 of the Public Discussion paper dated November 1992 prepared by the Ministerial Review Team of the Department of Agriculture and Rural Affairs in relation to the Prevention of Cruelty to Animals Act 1979 and Regulations makes the following statements in relation to this group of regulations:

"Currently there are four sets of animal trades licensing Regulations in the legislation. These Regulations cover livery stables, riding schools, animal boarding establishments and dog kennels. There has been no comprehensive review of these regulations for many years. They have been in existence since 1954 and are recognised as outdated and ineffective. They are primarily regulatory licensing provisions and do little to promote animal welfare standards. As a result and in accordance with the government's program of deregulation of industry, there was an attempt to repeal these Regulations in November 1990, with the intent to introduce voluntary guidelines for self-regulation of these trades.

This repeal was disallowed by Parliament in April 1991 as a result of widespread community objection to complete deregulation, at least in part due to the fact that the participation of proprietors of companion animal trades as members of industry organisations is not widespread and compliance with voluntary guidelines would be difficult for the trade organisations themselves to encourage or monitor. During the repeal process, animal welfare organisations promoted retention of the Regulations based on the premise that regulation was necessary and justified to maintain animal welfare standards and ensure the humane treatment of animals on licensed premises.

The Regulations are currently administered by the N.S.W. Animal Welfare Branch and local councils. However, the licensing provisions have not been enforced since April 1991 and no change to this situation is proposed until this review of the legislation is completed. The automatic repeal of the Regulations under the Subordinate Legislation Act, scheduled for September 1992, has been postponed until September 1993. (Under the Subordinate Legislation Act, Regulations are automatically repealed every five years unless there is submission of the Regulatory Impact Statement to justify their retention.)"

The statement that the regulations are not being enforced is of grave concern to the Committee as the Parliament, in disallowing the repeal of the regulations, conclusively decided that they were to be enforced. Departure from this intent is contrary to the will of Parliament. The further statement of the Review Team that "no change is proposed until the review is completed" exacerbates the situation as any implementation of the conclusions of the Review Team will

require major legislative changes which will clearly take a substantial period to put in place.

The NSW Department of Agriculture has confirmed the statements of the Ministerial Review Team. In fact no new licences have been issued since the disallowance of the repeal regulation. As these were annual licences there are currently no Animal Trade Licences in place in New South Wales even though the Ministerial Review Team at paragraph 3.310.2 of its report concluded that the regulation of animal trades was justified and necessary.

It would seem to the Committee that the deliberate non-enforcement of this whole body of regulations has no legal authority to justify it and as such would be a matter for examination by the Auditor General under section 52(1) of the Public Finance and Audit Act. That section requires the Auditor General to bring to the attention of the Legislative Assembly cases where Acts or regulations have not been carried out provided they have a bearing on the financial position disclosed in the particular public account. This would appear to be such a case as the non-enforcement of the regulations would produce savings on administrative costs at the same time as a loss of licence fees.

The failure to enforce the regulations could seriously compromise any proceedings that might be taken under the Cruelty to Animals Act against persons carrying on animal trades. The stance taken by NSW Agriculture must also undermine Parliament's most important safeguard on the abuse of delegated legislation, that is, its power of disallowance. It is also contrary to the Order made by the Premier and published in the gazette of 25 June 1993 at page 3131 postponing the repeal of these regulations under the automatic sunset provisions of the Subordinate Legislation Act.

The current non-enforcement of the existing licensing regulations by NSW Agriculture would seem unsupported either on legal grounds or in the context of the conclusions reached by the Ministerial Review Team. On 1st March 1993 the Committee sought advice from the Minister on the action he proposed to take on these matters.

On 10th May 1993 the Minister wrote to the Committee as follows:

"I have carefully considered your letter of 1 March, 1993 regarding the enforcement of certain regulations subordinate to the Prevention of Cruelty to Animals Act 1979 commonly known as the Animal Trades Regulations.

As noted in your letter, the current Regulations are widely regarded as outdated and ineffective.

My interpretation of the Parliament's rejection of the Government's repeal motion in April 1990, was that the Parliament believed that enforcement of these Regulations should not be continued in their present form, and that the Regulations should be remade. Accordingly, I have initiated a review of the Prevention of Cruelty to Animals Act and Regulations which, as you know, is now in progress.

Rather than re-instate the enforcement of these outdated Regulations, which had not been enforced for some time prior to the transfer of responsibility for this legislation from my colleague, Mr Gerry Peacocke, Minister for Local Government and Minister for Co-operatives to myself, I instructed officers of my Department not to recommence the enforcement of these Regulations pending the report of my Ministerial Review Team. As you correctly state, licences have not been issued for some time, since the rejection of the repeal motion.

It is my intention to take no action to re-instate the enforcement of these statutory instruments until the current review of the legislation has been completed. When I have received the final report of my review team later this year I will consider what action is appropriate in the light of their final recommendation.

Should your committee require any further details on this issue please do not hesitate to contact me again."

The Committee sees no reason to depart from its conclusion that the current Ministerial policy and departmental practice on this matter is contrary to the specific decision of Parliament.

DESCRIPTION: PUBLIC SECTOR MANAGEMENT ACT 1988 - REGULATION (Relating to health assessments before appointment) Gazette of 6-11-93 at p. 1019

OBJECT: The object of this Regulation is to introduce a more flexible system of pre-placement health assessments for persons before appointment to positions as officers under the Public Sector Management Act 1988. This replaces the existing system of medical examinations by the Government Medical Officer prior to the confirmation of an appointment.

The intention of the regulation does not appear to have been carried out. Under the scheme of the regulation a person may not be appointed to an officer's position until his or her fitness has been confirmed by a health assessment. The regulation allows the Department Head to determine the form that the health assessment should take but 3 acceptable forms of assessment are set out in the regulation. The first deals with a declaration by the officer as to any specific health matters that might make him or her unfit for the position. The second is a health assessment of particular aspects of the person's health. The third is "a medical examination by a health assessment provider approved by the Department Head". Most cases would clearly fall into this third category and it is here that the regulation appears defective.

The medical examination is to be carried out by a "health assessment provider" which is defined in the regulation to mean a person who holds a professional qualification recognised by a health professional board referred to in Schedule a to the Health Administration Act 1982.

The following are the Boards listed in that schedule:

SCHEDULE 2a - HEALTH PROFESSIONAL BOARDS

(Secs. 13A, 14)

* *Chiropodists Registration Board established under the Chiropodists Registration Act 1962*

* *Chiropractors Registration Board established under the Chiropractic Act 1978*

* *Dental Technicians Registration Board established under the Dental Technicians Registration Act 1975*

* *Nurses Registration Board established under the Nurses Registration Act 1953*

* *Optical Dispensers Licensing Board established under the Optical dispensers Act 1963*

* *Board of Optometrical Registration established under the Optometrists Act 1930*

* *Physiotherapists Registration Board established under the Physiotherapists Registration Act 1945*

* *Podiatrists Registration Board established under the Podiatrists Act 1989*

* *Psychologists Registration Board established under the Psychologists Act 1989.*"

None of these Boards are relevant for the purpose of recognising the qualifications of a person to carry out a medical examination. The only relevant board for that purpose is the New South Wales Medical Board which does not appear in the schedule.

Although the various boards would no doubt "recognise" the qualifications of a medical practitioner this regulation was clearly directed towards the recognition of a qualification that is relevant to the Board's own area of expertise. In any event the recognition of a medical practitioner to carry out an assessment should not be dependent, for example, on recognition of his or her qualifications by the Nurses Registration Board or the Chiropractors Registration Board.

The gap in the regulation means an officer has to fall back on the general discretion given by the regulation to the Department Head to approve other forms of health assessment. It was clearly not intended by the regulation to throw the main onus back on the Departmental Head to approve other forms of medical assessment particularly as it must be questionable whether any

Departmental Head outside the Health Department would have any relevant qualifications to do so.

The Committee wrote to the Premier on 11th March 1993 recommending that he alter the definition of "health assessment provider" in sub clause (3) so as to read:

> *"(3) In this clause "health assessment provider: means a person who holds a professional qualification recognised by a health professional board referred to in Schedule 2A to the Health Administration Act 1982 or who is a registered medical practitioner."*

On 12th March 1993 a new regulation was published. The Explanatory Note stated the objective as follows:

> *"Clause 7 of the Public Sector Management (General) Regulation 1988 introduced a system of pre-placement health assessments for persons before appointment to positions as officers in the Public Service. The form of pre-placement health assessments is determined by each Department Head having regard to the duties and functions required for the officer's position. Clause 7 (2) gives examples of the types of assessment including requiring an officer to undergo an examination by a health assessment provider. Clause 7 (3) currently defines "health assessment provider" to mean a person who holds a professional qualification recognised by a health professional board referred to in Schedule 2A to the Health Administration Act 1982. That Schedule does not contain an exhaustive list of health professional boards.*
> *The object of this Regulation is to make it clear that all appropriately qualified health care professionals may be used to provide assessments and that medical examinations are to be conducted by medical practitioners."*

The Committee considers that this satisfies its request for clarification of the regulation.

DESCRIPTION: SWIMMING POOLS ACT 1992 - REGULATION (Swimming Pools Regulation (No. 2) 1992) Gazette of 23-10-92 at p. 7780

OBJECTIVES: This regulation prescribes matters that are necessary or convenient to the operation of the Swimming Pools Act 1992.

PREVIOUS ACTION: This regulation replaced the now repealed Swimming Pools Regulation 1990. When the Committee considered that earlier regulation one of the things the Committee questioned was the omission of an amendment to the standard for design construction and maintenance of fences under the regulation. That standard, AS1926, was adopted as in force on 4th August 1986 but in fact the Committee discovered a significant amendment had been made on 2nd March 1987 but not adopted in the regulation. The Committee raised its concerns with the then Minister for Local Government and Planning in its letter of 22nd November 1990. In his response of 11th February 1991 the Minister conceded that the amendment had been omitted in error but said that the standard was then being reviewed and that he would await the outcome of the review to determine whether it would be appropriate to adopt the 1987 amendment. The outcome of this review is not referred to in the Regulatory Impact Statement (RIS) for the new 1992 regulation. The Committee considered this would have been a critical matter for assessment in the RIS particularly as the new regulation chiefly concerns the adoption of such standards.

Another of the matters the Minister agreed to pursue was the need for a cautionary note in the standard to indicate its departure from the NSW Legislation. He said he would approach the Standards Association for this purpose.

The level of fees was also questioned by the Committee. The Minister in his reply stated that he believed the then $100 fee for an application for a certificate of compliance would approximate the cost of its provision. However in the new regulation these application fees are now $50.

Finally the Minister agreed to implement the Committee's recommendation for a description of the powers of inspectors to be included in their form of identification certificate under the regulation. This was in fact implemented in the new regulation.

REGULATORY IMPACT STATEMENT: The options are set out at item 4.1 of the RIS for the new regulation as follows:

> *"4.1 Definition of the Major Alternatives to the Proposed Regulation*
>
> *The major alternatives to the proposed Regulation are summarised as follows:*
>
> * *Do Nothing;*
>
> * *Re-instate the 1990 Legislative Regime (making isolation fencing for existing pools mandatory);*
>
> * *Make Pool Covers mandatory in place of isolation fencing for new pools;*
>
> * *Make Automatic Pool Alarms mandatory in place of isolation fencing for new pools;*
>
> * *Institute an on-going Publicity/Education Campaign in place of the proposed Regulation."*

Unfortunately these alternative options are alternatives to the requirements of the Act not alternatives to the regulation.

The Explanatory Note to the regulation states that its purpose is to assist in restricting pool access by young children by providing for standards of design of fences, doors, windows, walls etc.

However in the RIS there is no consideration of the merits of the standards that have been adopted in the regulation or of any alternative standards or modifications to them that could be applied or may already be adopted in other states and nations. This of course is the very review that the then Minister said he would undertake in respect of standards prescribed in the 1990 regulation.

The problem can be seen clearly by looking at two of the principal sections, sections 7 and 8, of the Act which enable the making of these regulations.

"General requirements for outdoor swimming pools

7. (1) The owner of the premises on which a swimming pool is situated must ensure that the swimming pool is at all times surrounded by a child-resistant barrier:

(a) that separates the swimming pool from any residential building situated on the premises and from any place (whether public or private) adjoining the premises; and

(b) that is designed, constructed, installed and maintained in accordance with the standards prescribed by the regulations.

Maximum penalty: 10 penalty units.

Exemption for all existing swimming pools and exemption for new swimming pools on very small properties.

8. (1) This section applies to existing swimming pools and also applies to new swimming pools that are situated, or proposed to be constructed or installed, on premises having an area of less than 230 square metres.

(2) The child-resistant barrier surrounding the swimming pool is not required to separate the swimming pool from any residential building situated on the premises so long as the means of access to the swimming pool from the building are at all times restricted in accordance with the standards prescribed by the regulations.

(3) The diagrams in part 2 of Schedule 1 illustrate the provisions of this section."

These and the other enabling sections clearly show that the RIS should concern itself with analysis of the relevant standards of design, construction, installation, and maintenance of child resistant barriers (fences) and means of restriction of access from buildings (doors, windows, walls). Instead the RIS mainly concerns itself with alternatives to the requirements of these sections of the Act, particularly in the following alternative options:

Reinstate the 1990 legislation (making isolation fencing for existing pools mandatory);

Make pool covers mandatory in place of isolation fencing for new pools;

Make automatic pool alarms mandatory in place of isolation fencing for new pools.

Clearly these are not feasible as the Act has already decided these matters. These options are in direct conflict with the enabling sections and any regulation or administrative action which purported to implement them would be ultra vires.

Of the two remaining options, only the mandatory "Do nothing option" is relevant. However in the RIS it is expressed in terms of having no Act as well as no regulation.

The final option, instituting a publicity campaign in place of the regulation, would also be an alternative to the regulation but in the way in which it is analysed in the RIS it is presented as an alternative to the total legislative scheme including the Swimming Pools Act 1992.

In the Impact Assessment section, the RIS goes into considerable detail in analysing the respective options. A scenario analysis and a break even analysis have been prepared.

This assessment would of course be useful in analysing the 1992 Act or the Bill when it was before Parliament, but as mentioned in respect of the options, the alternatives analysed are not appropriate in considering the regulation. What should have been analysed in this section is the respective costs and benefits of the alternative standards to those chosen in the draft regulation.

The Committee considered that the RIS was quite meritorious in the detailed way in which it has been prepared. However it omitted consideration of relevant alternatives to the regulation and instead concentrated on alternatives to the principal Act. As those matters were already decided by Parliament in passing the Act they did not admit further consideration in the RIS. The alternatives that should have been considered chiefly are alternative standards

to those prescribed in the regulation. This is also a matter that the former Minister indicated he would consider in reviewing the standard under the original 1990 regulation.

The Committee in its letter of 11th March 1993 informed the Minister that a new RIS should be prepared assessing the alternative options to making the regulation, particularly alternative standards, in line with the former Minister's undertaking.

MINISTER'S RESPONSE: The Minister for Local Government and Minister for Co-operatives on 27th April 1993 replied as follows:

> *"I refer to your letter of 11 March 1993 (reference: 1582) about the Swimming Pools Regulation (No. 2) 1992, and the R.I.S. completed concerning the Regulation.*
>
> *You will have noted that the former Minister in his letter of 11 February 1991 indicated that it should not be taken for granted that future amendments, updates, rewrites or reviews of 'AS1926' will, or should, become part of the prescribed standard. The former Minister also said that there may be good reason not to change 'AS1926' as in force on 4 August 1986, and that the approach adopted did not flaw the Regulation. It should be highlighted that the review of 'AS1826' by Standards Australia only reached an interim stage of completion on 12 March 1993, long after the conclusion of the Regulation (No. 2) process. Standards Australia has indicated to Local Government office that its review committee process has produced partial consensus on the 'AS1926' review and as a consequence it was agreed on 12 March 1993 that this part of 'AS1926' be published as an interim standard with an expiry date of June 1995 - during this period comment will be sought from the public following which a decision will be made as to whether it will be amended, withdrawn or made a full standard. In the meantime it can only be regarded as a draft standard. This situation, after long and detailed committee work, is an indication of the divergence of opinion and difficulty experienced by Standards Australia in completing its review and the uncertainty of the outcome in updating the standards. New different viewpoints have emerged and become prominent and have had to be accommodated in the review. This situation makes it clear that the action*

of prescribing specifically in the Regulation for the application of 'AS1926' as in force on 4 August 1986 was the prudent course to follow. Such action ensures that existing pool barriers will never be automatically and retrospectively made non-complying because a standard changes to meet new community demands without the Government having the opportunity to properly assess the effect of that changed standard.

The matter of a cautionary note in the revised standard was raised during the review, however, the final document will reflect the composite view of the review committee.

The development of Regulation (No.2) was a long and detailed process and many views and demands had to be considered. It is true that the previous application fee of $100 for a certificate of compliance was reduced to $50 in Regulation (No. 2). This is the outcome of a process that determined, on this point, that an improved fee structure should be afforded pool owners if they seek or are required to obtain a certificate of compliance.

In regard to the warning notice signs required to be displayed in the immediate vicinity of swimming pools, there were some initial problems associated with some councils not ordering sufficient quantities for their pool owners. The providers and manufacturers of the signs also under estimated initial demand. This resulted in short supply for a short period, however, with goodwill and co-operation on all sides this situation was overcome. I am unaware of any supply problems now.

You have indicated that the former Minister undertook to review the standards prescribed in the 1990 Regulation. I think it is fair to say that the former Minister indicated that Standards Australia, an independent authority, was going to effect a review - I believe that he clearly reserved his position, and rightly so, for the reasons already stated.

It appears that the essence of your concern with the R.I.S. is that the alternatives to the proposed Regulation are considered to be alternatives to the requirements of the Act and are not alternatives to the proposed Regulation. I should say that, after wide distribution of the R.I.S. and examination of comment thereon, no other suggestion was made that the

alternatives were not appropriate. I believe that the R.I.S. is a valuable document and that the alternatives identified and examined were proper, relevant and legitimate. To have examined this unique regulatory document otherwise would have been inane and counter productive, that is, to examine degrees (increasing and decreasing with the suggestion of infinite alternatives) of variation from the proposed regulation could hardly be an acceptable or helpful examination - that process had already been undertaken in determination of the proposed Regulation.

You have acknowledged the relevance of the examination of the 'Do nothing' option, which is, I think, perhaps the only really significant alternative; and the general merits of the R.I.S.

I can say that Regulation (No. 2) is now a well established working code which has been well publicised to councils, pool owners and the community. The level of inquiry, whilst understandably high initially, has trickled away to occasional inquiry.

Standards Australia is still to publish its review of 'AS1926' and associated pool safety standards, part of which will only be an interim standard.

I have established the Pool Fencing Advisory Committee as authorised by the new legislation. The Committee has commenced its work and will report to me in due course in accordance with its charter as set out in the legislation.

The hard work has been done, the on-going review process established and commenced.

I believe that any action to prepare a new R.I.S. would be counter-productive by opening up a divisive topic for renewed and rehashed argument. The issues have been more than adequately dealt with and I do not believe a new R.I.S. is necessary."

COMMENT: The Committee in its letter didn't ask for an examination of infinite alternatives but an examination of alternative standards consistent with the objectives of the regulation and in line with the former Minister's undertaking.

A simple examination of the explanatory note would show the Minister that the substantive provisions of the regulation are wholly concerned with standards:

> *"The object of this Regulation is to prescribe matters that are necessary or convenient to the operation of the Swimming Pools Act 1992. The Regulation makes provision for:*
>
> *(a) standards of design and construction for fences for outdoor swimming pools (clauses 4 and 6); and*
>
> *(b) standards of restricting access to outdoor swimming pools in cases where fencing is not required (clause 5); and*
>
> *(c) standards of restricting access to indoor swimming pools (clause 7); and*
>
> *(d) standards for warning notices to be displayed in connection with swimming pools (clause 8); and*
>
> *(e) standards of design and construction for certain walls that are used in place of fencing (clause 9); and*
>
> *(f) standards of restricting access to spa pools (clause 10); and*
>
> *(g) applications for exemptions under section 22 of the Act (clause 12); and*
>
> *(i) certificates of compliance under section 24 of the Act (clause 13); and*
>
> *(j) the form of certificates of identification under section 27 of the Act (clause 14); and*
>
> *(k) the constitution and procedure of the Pool Fencing Advisory Committee (clause 15); and*
>
> *(l) penalty notices under section 35 of the Act (clause 16); and*

(m) the repeal of the Swimming Pools Regulation 1992 (clause 17)."

Instead of an assessment of these standards and a comparison with alternative ones the RIS contained an assessment of the following options:

* *Do Nothing;*

* *Re-instate the 1990 Legislative Regime (making isolation fencing for existing pools mandatory);*

* *Make Pool Covers mandatory in place of isolation fencing for new pools;*

* *Make Automatic Pool Alarms mandatory in place of isolation fencing for new pools;*

* *Institute an on-going Publicity/Education Campaign in place of the proposed Regulation.*

The Minister has now told the Committee that the principal standard is still being reviewed by Australian Standards. As that review is conducted by a private body there will be no guarantee that there will be an assessment to determine whether the resultant standard is of greater net benefit to the community than other possible standards. On the Minister's advice even that limited review will not be completed until 1995. This means that two major regulations have been made within 6 years but no proper assessment of them will have been carried out under the Subordinate Legislation Act.

The Minister's final comment that "*any action to prepare a new R.I.S. would be counter-productive by opening up a divisive topic for renewed and rehashed argument*" is misleading. It was the Minister who "re hashed" the arguments on the topic in considering alternatives to the Act that had been well canvassed in the public and Parliamentary debate.

The subject of the relevant standards and alternatives to them has never been the subject of any debate in making the legislation and certainly not in preparing the RIS.

The Minister has seriously misrepresented the facts raised by the Committee. The Minister has failed to comply with the Subordinate Legislation Act, despite his views to the contrary, in that the RIS for the regulation assesses alternatives to the Act and not the Regulation itself.

DESCRIPTION: WATER ACT 1912 - REGULATION (Water (Part 6) Regulation 1992) Gazette of 28-8-92 at p. 6317

OBJECT: The object of this regulation was to repeal the Water (Part 6) Regulations and to remake them in connection with the staged repeal of subordinate legislation under Part 3 of the Subordinate Legislation Act 1989.

The Committee found the Regulatory Impact Statement for the regulation defective and wrote to the Minister on 11th March 1993 as follows:

> *"Four separate Regulatory Impact Statements (RISs) have been prepared for this regulation, one for each of the main irrigation districts. Why this was done has not been explained in the RISs or in the covering letter accompanying them.*
>
> *An examination of the RISs shows that they only vary in minor respects to take account of differences in the nature of each district. The Murray Murrumbidgee and Jemalong/Wyldes Plains RISs are virtually identical, as they concern irrigation districts while the Gumly RIS alone relates to a domestic and stock water supply district.*
>
> *The objectives for the Murrumbidgee regulation which are much the same as the other two are stated in terms of continuing the existing regulatory regime, which has the effect of anticipating the results of the RIS before any assessment has been made.*
>
> *The RIS states that the three alternative options to the regulation are carrying on or modifying the existing regulations or not having any regulations.*
>
> *There is no quantification of costs and benefits of the regulation in the RIS and the alternatives have been assessed in the following statement:*
>
> "No increase in costs to the DWR or landholders is involved. The relative costs of the alternative options (modifying or eliminating the regulations) have not been assessed owing to the difficulty in doing this."

This statement abrogates the whole purpose of the RIS which is to determine whether the regulation or other options are of the greatest net benefit or least net cost to the community.

- *The consultation programme was described as follows in the covering letter accompanying the RIS:*

"Advance copies of the draft regulations and relevant RIS were forwarded to:

(a) the relevant Management Boards;
(b) the Ricegrowers' Association'
(c) Gumly Progress Association.

None of the actual submissions on the RIS were however forwarded to the Committee with the RIS, which is a departure from section 5 of the Subordinate Legislation Act.

On 14th January 1993 the Committee received a further letter together with the comments on the regulation which were 2½ months overdue.

As these RISs were defective in major aspects the Committee requested that a new RIS be prepared on the regulation after 12 months of its operation taking into account the above matters.

MINISTER'S RESPONSE: The Minister for Natural Resources responded as follows on 1st April 1993:

"*I refer to your letter of 11 March 1993 commenting on the* Water (Part 6) Regulation 1992 *(your ref. 1655A).*

As you are aware, the Irrigation Areas and Districts now controlled by the Department of Water Resources are soon to come under irrigator control, following which the regulation will be repealed. This was not stated in the RIS because it could have sidetracked debate onto that issue.

The majority of the clauses are identical to the provision of the Irrigation Areas (Water Supply) Regulation, 1991, *which were approved by your*

committee. Some form the basis of the department's day-to-day operations, others have a high environmental significance (for instance the ability to prevent rice growing on leaky soils and to require tile drainage installation) and public significance (for instance the ability to prevent damage to shire roads through on-farm water wastage).

The balance have a high 'public safety' component, in particular prohibition of swimming in channels.

I find it curious that the committee has to date commented on the department's regulation without making any prior enquiries (either through its members or its secretariat) of the department as to the practical application of the various regulations or the merits of statements in its RIS. The potential value of prior discussion was brought out in the case of the Benerembah Environment Protection Trust's regulations, where the committee withdraw its objections when the practical position was illustrated to it.

In the case of the regulation under discussion, extensive enquiries were carried out (particularly in the Murrumbidgee Region where it has significant practical application) and the draft was tested against the existing Irrigation Areas regulations.

As you are aware from your recent private enquiries, the Murrumbidgee Irrigation Management Board fully supports the regulation, which it considered in practical and cost-effectiveness terms prior to commencement of the public consultation process.

The statement in the RIS regarding difficulty in assessing the relative cost of the alternative options is illustrated by the rice growing example referred to above. The department has always had these rice growing controls, so it could only surmise as to what would happen in terms of waterlogging and salinisation under local conditions if they were removed or modified.

There is no hard data to work from. However, the industry supports the controls. Potentially, the MIA could reach the extreme situation

experienced in the heavily salinised Barr Creek locality in Victoria if all controls were waived.

Returning to my original comment, having regard to the fact that the Districts will pass out of the department's hands in the near future, I ask that the committee's request for a further RIS be waived.

The Minister did not explain the reasons for making 4 separate RISs for the one regulation. Nor did he explain the defective objectives in the RIS or the lack of quantification. He simply says "there is no hard data to work from". The object of the RIS is to make the Department obtain the hard data. Merely because the industry supports the existing controls does not mean that some other option might not, if properly assessed, be found to have greater benefit to both industry and government and less net cost. The industry will never know this if the Department is not able to prepare a proper statement.

The tenor of the Minister's letter is that if an RIS is found to be defective, the onus is on the Regulation Review Committee to resolve any difficulties in negotiation with the departmental staff.

The whole object of the Subordinate Legislation Act is for the RIS to state, for the benefit of the public, Industry and Parliament alike, the costs and benefits of the regulation and its alternatives. If the RIS does not do this but leaves the impact to be a matter of negotiation with industry and, as the Minister suggests, the Parliament, the Act would effectively be set aside.

This is quite a different order of matter to that the Committee raised in the case of the Benerembah regulation. In that case the Committee was concerned with clause 17 of the regulation which enabled drainage to be cut off by the relevant authority without notice to the landowner. After much correspondence and discussion with departmental officers the Committee was satisfied in the practical application of the clause that notice might be dispensed with in emergency cases.

This practical state of affairs arising out of one clause of a regulation did not involve a RIS. In the present case however the RIS is defective in a number of major respects and the RIS is the document that seeks to justify making the whole regulation. The Chairman stated the Committee's position with regard to

MINISTER'S RESPONSE: The Minister responded as follows on 26th March 1993:

> *"I refer to your letter of 26 February 1993 (ref:1656/7/8) concerning regulations made under the Water Supply Authorities Act 1987 on behalf of the Broken Hill Water Board and note the issues raised by your committee.*
>
> *You further raised the question concerning an alleged conflict between clause 5 of the Water Supply Authorities Broken Hill (Catchment Areas) Regulation 1992 and Section 44 of the Water Supply Authorities Act 1987. I advise that this matter is presently the subject of discussions between officers of this department and the Parliamentary Counsel's Office. An answer should be forthcoming before the end of this month."*

The Minister provided further advice as follows on 28th April 1993:

> *"I refer to your letter of 26 February (your ref: 1656/7/8) and my reply dated 26 March 1993 concerning regulations made under the Water Supply Authorities Act 1987 on behalf of the Broken Hill Water Board.*
>
> *In particular, I refer to your concerns with Clause 5 of the Water Supply Authorities (Broken Hill - Catchment Areas) Regulation 1992 and Section 44 of the Water Supply Authorities Act 1987.*
>
> *Following consultation with the Parliamentary Counsel, there does appear to be some overlap between these two provision and it is proposed to amend Section 44 to reflect the intention of Clause 5 by way of Statute Law Revision.*
>
> *Yours sincerely, Ian Causley, MP, Minister for Natural Resources."*

The Committee considered this was a satisfactory response.

such defects in preparing RISs in his foreword to the Committee's 17th Report to Parliament:

> *"The Subordinate Legislation Act requires no greater detail to be provided in the RIS than the Department should itself require, in order to assess the effectiveness of its own administration. The RIS process was in part based on the Treasury guidelines for appraisal of assets by Departments. The sad fact of the matter is that at present, Departments are not discharging the onus of proof that the former Premier indicated should be placed upon them. When addressing the Regulation Review Bill 1987, which constituted my Committee and led to the Subordinate Legislation Act, the then leader of the Opposition, the Hon. Nick Greiner, MP said:*
>
> > "The onus should shift to those who wish to perpetuate the existence of a particular regulation, those who argue that a particular form of government intervention is either necessary or desirable. The onus should shift to the regulators to ascertain why a particular regulation should exist rather than those who wish to rid themselves of the regulation."
>
> *In far too many cases the departments have shifted this onus to the community or Parliament itself to disprove the need for the regulation."*

This present regulation and RIS is clearly a case where the Minister is seeking to reverse this onus of proof.

Finally the Minister states that the majority of clauses in the regulation are identical to the provision of the Irrigation Areas (Water Supply) Regulation 1991 which were "approved" by our Committee. The Committee of course cannot approve regulations but reviews them under its guidelines in the Regulation Review Act.

In any event, far from approving that regulation the Committee's letter of 12th November 1991 stated as follows:

> *"The Subordinate Legislation Act 1989 requires that costs and benefits should be quantified wherever possible and the anticipated impacts on each alternative presented for comparison. As the impact statements do*

not list or attempt to quantify costs and benefits and only address costs in relation to the preferred option, any subsequent RIS prepared by the Department should contain appropriate costings."

DESCRIPTION: WATER SUPPLY AUTHORITIES ACT 1987 - REGULATIONS, Water Supply Authorities Broken Hill:- (Catchment Areas), (Water, Sewerage and Trade Waste) and (General) Regulations 1992 Gazette of 28-8-92 at pp. 6321, 6203 and 6315

The Committee sought clarification of clause 5 of this regulation. That clause provided:

*"**5.** A person must not, otherwise than in accordance with an approval granted by the Board, remove, disturb, damage or deface any structure that is in a catchment area and is owned or controlled by the Board.*

Maximum penalty: $10,000 in the case of a corporation and $1,000 in any other case."

The Committee considered that this clause overlapped and conflicted with section 44 of the Act which provides:

*"**Damage to works***

44. A person shall not wilfully or negligently interfere with, destroy or damage a work or structure that belongs to, or is under the control and management of, an Authority.

Penalty: $20,000 in the case of a corporation or $10,000 in any other case."

The Committee said the clause conflicts with the section in that it enables the board to approve "*damage or disturbance*" of structures it owns or controls while section 44 prohibits all wilful "*damage*" or "*interference*" with structures belonging to it or under its control. This clause is arguably ultra vires as it is both in conflict with section 44 and is not specifically enabled by the general regulation making power in section 66.

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