



**Regulation Review Committee
Parliament of New South Wales**

**Report on the
Lord Howe Island (Elections)
Regulation 1999**

**Report No 11/52
June 2000**

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Dr Liz. Kernohan MP
Mr Gerard Martin MP
Ms Marianne Saliba MP
Mr Russell Turner MP



**Mr Peter Nagle MP
Chairman**



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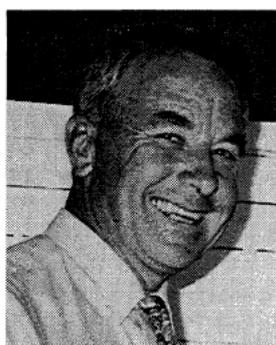
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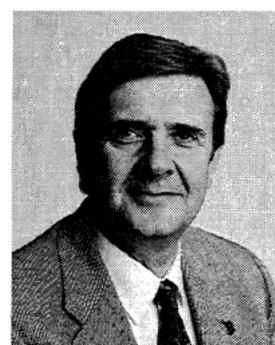
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Ms Susannah Dale, Assistant Committee Officer

Functions of Regulation Review Committee

The Regulation Review Committee was established under the *Regulation Review Act 1987*. A principal function of the Committee is to consider all regulations while they are subject to disallowance by Parliament. In examining a regulation the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

- (a) that the regulation trespasses unduly on personal rights and liberties;
- (b) that the regulation may have an adverse impact on the business community;
- (c) that the regulation may not have been within the general objects of the legislation under which it was made;
- (d) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
- (e) that the objective of the regulation could have been achieved by alternative and more effective means;
- (f) that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
- (g) that the form or intention of the regulation calls for elucidation; or that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the Guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

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

Chairman's Foreword

This report sets out the Committee's consideration of the *Lord Howe Island (Elections) Regulation 1999*. The object of this Regulation is to repeal and remake, with minor modifications, the *Lord Howe Island (Elections) Regulation 1994*. When the Committee considered the 1994 regulation it found that the RIS was defective, particularly with regard to the assessment of the method of voting. The Minister at that time undertook that any future regulatory impact statements would canvass this issue in more detail.

The new regulation is said to relate to matters of a machinery nature and as such does not require an RIS. The Committee found it difficult to believe that this major regulation which affects the voting rights of citizens could not require an RIS and public consultation, particularly in the light of the earlier Ministerial undertaking. The Committee asked the Minister why this regulation was only considered a machinery provision and also sought details of the schedule 1 assessment.

On 7 February 2000, the Minister advised that the Lord Howe Island Board sought advice from the Electoral Commissioner on the matter and that, as a consequence, a plebiscite would be held in conjunction with the Board elections in February to determine whether a change to the voting method was favoured by a majority of the electors. He said that dependant on the outcome of the plebiscite, the Board will bring forward recommendations for Government consideration, and should any substantive changes be proposed, an appropriate regulatory impact statement would be prepared. If so he said that a further regulation and RIS would be required.

The Committee sought further details of this plebiscite and was advised by the Lord Howe Island Board on 26 June 2000 that the first past the post system had been approved by a majority of electors. The Board advised that the Minister would be considering an appropriate change to the regulation.



Peter R. Nagle, MP
Chairman

LORD HOWE ISLAND (ELECTIONS) REGULATION 1999

Explanatory Note

The Explanatory note for this regulation states as follows :

The object of this Regulation is to repeal and remake, with minor modifications, the Lord Howe Island (Elections) Regulation 1994. The new Regulation deals with the following matters:

- (a) the calling of elections (Part 2),*
- (b) the appointment of the returning officer and other electoral officials (Part 3),*
- (c) the preparation of an electoral roll (Part 4),*
- (d) nominations of candidates for an election (Part 5),*
- (e) the preparation of ballot-papers (Part 6),*
- (f) postal voting (Part 7),*
- (g) pre-poll voting (Part 8),*
- (h) voting at a polling place on polling day (Part 9),*
- (i) the scrutiny of the votes (Part 10),*
- (j) other matters of a minor, consequential or ancillary nature (Parts 1 and 11 and Schedule 1).*

The Regulation is made under the Lord Howe Island Act 1953, including section 38 (the general regulation-making power) and section 9C (Elections).

The Regulation relates to matters of a machinery nature. The Regulation is made in connection with the staged repeal of subordinate legislation under the Subordinate Legislation Act 1989.

1994 Regulation

When the Committee considered the repealed regulation in 1994, it noted that in the regulatory impact statement for the regulation, three options were presented: to make the regulation; to do nothing; or to implement some of the provisions by administrative action.

The Committee considered these options were far too general to be of practical utility in considering the particular substantive provisions of the regulation.

The relevant enabling section (Section 9(c)) indicates that the substantive provisions of the regulation include the following matters: the enrolment of electors; the nomination of persons as candidates at an election; the time for holding elections; the appointment of electoral officers; the system of the election; and method of voting. Each of these matters present different alternatives. Accordingly different systems of election and methods of voting could usefully have been evaluated in the regulatory impact statement.

This limitation in formulating alternatives flowed through to the cost/benefit analysis in the regulatory impact statement where there had been no attempt to compare the relative costs and benefits of different means of holding elections.

The regulatory impact statement excluded assessment of different voting methods on the following basis:

There has been some preliminary discussion between the Lord Howe Island Board, the Island administration and the Electoral Commissioner in the past on implementing possible variations to the counting methods in the Board elections. The current method of counting is specified in the Regulation by reference to the Constitution Act 1902 and is 'proportional representation'. This is the current system used in Australia in all tiers of government - local, State and Commonwealth.

We understand, however, that there has been a view expressed by some Islanders that the current method is excessively complex and not well understood. Alternative methods of election counting include 'first past the post', and 'multi-preferential'.

However, in view of the fact that the present method has wide acceptance in Australia and that the Electoral Commissioner has indicated that he would not support a change without the authority of the Minister, consideration of such changes have not been included as 'alternatives' to the Regulation in this impact statement.

The Committee found that this lack of assessment of the substantive provisions was raised in the public submissions on the regulatory impact statement. The submission by Mr Fenton stated that the system of voting was chosen in the regulatory impact statement without any assessment. His view was that the proportional representation system is not appropriate for Lord Howe Island as it is different from the rest of Australia and is not divided into electorates or ridings.

Irrespective of the merits of Mr Fenton's arguments, the point of the regulatory impact statement was to assess those substantive matters that were enabled by the Act and a major matter was the method of voting. Simply to state that it is accepted by the Electoral Commissioner and is appropriate for Australia was not an adequate assessment. The comparative costs and benefits of the different systems should have been identified.

The Committee accordingly requested the Minister's advice as to what consideration was given to these specific issues and sought his assurance that future regulatory impact statements will avoid these problems.

The Minister responded on 9 February, 1996 and said that she agreed with the Committee's view that different systems of election and methods of voting could usefully have been evaluated in the regulatory impact statement.

She said that she understood that this was not done because it was assumed that it would not be appropriate for the Island to have systems different from the rest of Australia and that although clearly some Islanders consider that the proportional representation system is not appropriate for the island, it had worked well in the past.

The Minister assured the Committee that any future regulatory impact statements would canvass this issue in more detail.

As the Minister had undertaken to ensure that all alternatives were properly assessed in future, the Committee took no further action on the regulation at that time.

The 1999 Regulation

The new regulation is said to relate to matters of a machinery nature and as such does not require an RIS even though it is made in connection with the staged repeal of subordinate legislation under the *Subordinate Legislation Act 1989*. The regulation only requires an informal assessment to be carried out within the Department under schedule 1 of the *Subordinate Legislation Act 1989*.

While the new regulation only contains minor changes and does not alter the current method of voting, its total impact must nevertheless be assessed, not merely the incremental effects of the minor changes.

The Committee finds it difficult to see how this major regulation which affects the voting rights of citizens could be considered a machinery provision which did not require an RIS and public consultation, particularly in the light of the earlier Ministerial undertaking.

The Committee accordingly wrote to the Minister setting out this view and referring to its earlier submissions and the Ministerial undertaking.

It sought the Minister's advice on why this regulation was only considered a machinery provision and sought details of the assessment of the impact of the regulation under schedule 1 of the *Subordinate Legislation Act 1989* on the citizens of Lord Howe Island.

Minister's Response

The Minister advised on 7 February 2000 that the Lord Howe Island Board sought advice from the Electoral Commissioner on the matter and that as a consequence a plebiscite would be held in conjunction with the Board elections in February to determine whether a change to the voting method was favoured by a majority of the electors. The Minister said:

Dependant on the outcome of the plebiscite, the Board will bring forward recommendations for Government consideration. Should any substantive changes be proposed, an appropriate regulatory impact statement would be prepared.

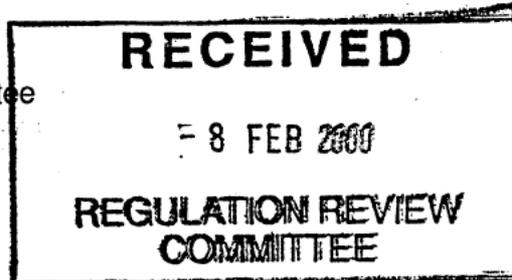
The Committee sought further details of this plebiscite and was advised by the Lord Howe Island Board on 26 June 2000 that the first past the post system had been approved by a majority of electors and that the Minister would be considering an appropriate change to the regulation.

Appendix

Letter from the Minister for the Environment,
the Hon Bob Debus MP, dated 7 February 2000

In reply please quote NP99/06954 & 99/08018

Mr Peter Nagle MP
Chairman
Regulation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000



07 FEB 2000

Dear Mr Nagle

I refer to your letters of 6 October and 20 December 1999 concerning the Lord Howe Island (Elections) Regulation 1999. Please accept my apologies for the delay in replying.

The Lord Howe Island (Elections) Regulation 1999 repealed and remade the Lord Howe Island (Election) Regulation 1994, with minor modifications in accordance with the *Subordinate Legislation Act 1989*. Parliamentary Counsel determined that the 1999 Regulation comprised or related to matters of a machinery nature.

Two clauses of the 1999 Regulation related to the method of counting votes. The regulation adopted the methods set out in the *Constitution Act*, which are used in all tiers of government in Australia.

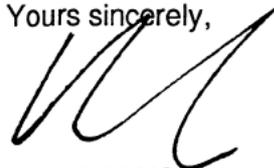
In addition, the draft regulation was forwarded to the State Electoral Office prior to the regulation being made. The NSW Electoral Commissioner advised that the proposed regulation was acceptable to his office.

I have been advised that the Lord Howe Island Board is aware that some members of the Island community believe that the method of vote counting for Board elections should be changed. The Board has sought advice from the Electoral Commissioner on possible alternate vote counting methods and has circulated this advice to the community for public input on the question of whether a change in the vote counting method is favoured by Island electors. Unfortunately, the level of community response has not been sufficient to provide the Board with a clear indication of the wishes of electors.

The Board now plans to hold a plebiscite in conjunction with the Board elections this month in order to ascertain whether change is favoured by the majority of electors and, if so, which possible alternative vote counting method is favoured. Such a plebiscite is considered to be the most effective means of obtaining the views of the majority of electors. Dependant on the outcome of the plebiscite, the Board will bring forward recommendations for Government consideration. Should any substantive changes be proposed, an appropriate regulatory impact statement would be prepared.

I trust this information is of assistance.

Yours sincerely,



BOB DEBUS