



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

**Report on the Royal Botanic Gardens and Domain Trust
Regulation 2002**

Report No 24/52
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Regulation Review Committee

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Functions of Regulation Review Committee

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

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

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

Chairman's Foreword

In its review of the Royal Botanic Gardens and Domain Trust Regulation 2002, the Committee found that no justification had been given for the practice of charging fees for access to Mount Annan and Mount Tomah gardens while access to the gardens in Sydney was free. The Committee noted the concerns raised by Camden Active Seniors about the effect this would have on their activities and concluded that this situation appeared to be inequitable. The lack of justification for this situation may stem from the failure of the regulatory impact statement to clearly set the objectives of the regulation and to adequately identify alternatives. The Committee has therefore recommended that the concerns of the Camden Active Seniors be addressed and that the Minister review the fee policy for the Mount Annan and Mount Tomah gardens.



Gerard Martin MP
Chairman

Royal Botanic Gardens and Domain Trust Regulation 2002

Introduction

The Regulation Review Committee resolved to report to Parliament on this regulation because of the inconsistent approach to the charging of fees for access to the three gardens controlled by the Royal Botanic Gardens and Domain Trust. While access to the gardens in Sydney is free, those using the gardens at Mount Annan and Mount Tomah are charged an admission fee. The Committee is of the view that such differential treatment should only arise out of the rational consideration of publicly stated factors. The lack of any clear justification within the regulatory impact statement prepared for the regulation means that this disparity appears to be inequitable.

Background

The Explanatory Note for the Regulation sets out its purpose as follows:

The object of this Regulation is to replace the *Royal Botanic Gardens and Domain Trust Regulation 1997* which was repealed on 1 September 2002 under section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation deals with the following matters:

- (a) the use of the Trust lands generally (Part 2),
- (b) the use of the Royal Botanic Gardens, the Mount Annan Botanic Garden, the Mount Tomah Botanic Garden and the Mount Tomah Conservation Area (Part 3),
- (c) the use of the Domain (Part 4),
- (d) penalty notices ("on-the-spot" fines) (clause 23 in Part 5 and Schedule 1),
- (e) ancillary and formal matters (Part 1 and the remainder of Part 5).

This Regulation is made under the *Royal Botanic Gardens and Domain Trust Act 1980* and, in particular, under section 22 (the general regulation-making power).

The Treatment of Fees in the Regulation

Clause 6 of the regulation provides:

6 Fees and charges

- (1) The Trust may from time to time determine the fees and charges payable for the use of any reserved land or (subject to the *Road Transport (Safety and Traffic Management) Regulation 1999*) for the parking of vehicles on any part of the Trust lands.
- (2) Fees and charges may differ according to such factors as the Trust may determine.
- (3) The Trust may exempt any person from paying any fee or charge.

The Regulation therefore sub-delegates the power to set fees for the use of the gardens to the Trust and allows the Trust to set different fees according to such factors as the Trust determines.

Section 22 (2) (p) of the *Royal Botanic Gardens and Domain Trust Act 1980* provides that the Governor may make regulations with respect to:

- (p) the determination and payment of fees for:
 - (i) using or entering upon the Trust lands or improvements thereon, or any specified part of the Trust lands or improvements,
 - (ii) filming or photographing for cinema or television, or any similar commercial purpose, within the Trust lands,
 - (iii) using or purchasing any written material that is the property of the Trust,
 - (iv) parking, camping or residing on the Trust lands, and
 - (v) such other matters as the Trust may, from time to time, determine,

Further, subsection 22 (3) provides:

- (3) A provision of a regulation may:
 - (a) apply generally or be limited in its application by reference to specified exceptions or factors,
 - (b) apply differently according to different factors of a specified kind, or
 - (c) authorise any matter or thing to be from time to time determined, applied or regulated by a specified person or body,or may do any combination of those things.

The Act therefore allows the Regulations to give to the Trust the power to determine fees for the use of any specified part of the Trust lands and allows for a provision of the regulation to apply differently according to different factors of a specified kind.

In clause 6, the factors specified in the Regulation for the different application of the fees are “such factors as the Trust may determine”. It may be questioned whether, in allowing for different application of the powers under the Act, Parliament contemplated the delegation of a general discretion to the Trust as a “specified factor”. In any case, the Committee was concerned with the apparent inequity of the Trust providing free access to the gardens in Sydney for those using and visiting the CBD while the residents of Camden and Campbelltown had to pay up to \$4.40 each for the use of their local garden.

The Factors Justifying Different Fee Application

As noted above, the Regulation gives a discretion to the Trust to determine what factors should be considered when setting fees for use of the various gardens under the Trust’s control. The Committee is of the view that, in examining the alternative options for implementing the objectives of the Regulation, the regulatory impact statement should have set out the factors which the Trust had used to date for the different treatment in respect of fees between the gardens. This would allow a better consideration of whether the greater net community benefit would be obtained by providing this discretion to the Trust or by setting out the factors to be considered when determining fees, or the fees themselves, within the Regulation.

While the Sydney garden is free, the Fees for the sites at Mount Annan and Mount Tomah are as follows:

- Adult \$4.40 each,
- Family \$8.80 (2 adults, 2 children),
- Child aged 4–16 \$2.20, under 4 free,
- Concession (student, pensioner) \$2.20,
- Seniors Card Holder \$3.30.

During consultations on the regulatory impact statement, the Camden Active Seniors Program and Ms Betty Scott JP of Camden made submissions which said that it was inequitable that visitors to the Mount Annan and Mount Tomah sites had to pay entry fees while entry to the Sydney site was free. In her letter of 2 July 2002, Ms Scott said as follows:

These Gardens were established on public land and are a public asset. They do not pay rates to the Local Government bodies yet the ratepayers who live in these areas have to pay if they wish to use and enjoy the Gardens. The original fee at Mount Annan, \$5 per car was increased in 2000 to \$4.40 per person and I was told that this reflected inflationary increases over the previous 12 years. Surely the same financial problem affected the Royal Botanic Gardens but the Trust still allowed free entry.

The majority of operating costs are met from Consolidated Revenue. The people who use the Sydney facility are being subsidised by all taxpayers in NSW. Those who use Mount Annan are paying in three ways: Entry fees, State revenue and local Council rates foregone.

In its analysis of the submissions on the RIS, the Trust deals with Ms Scotts representations as follows:

The Sydney site and the Mt Annan and Mt Tomah sites have different histories which have led to the different approaches to charging. The Sydney site has long been established as a free entry site for everybody – including those residents in the Mt Annan and Mt Tomah areas. The revenue derived from parking fees not only contributes to the proper stewardship of the Sydney sites but also contributes to Mt Annan and Mt Tomah. As additional sites with relatively recent histories, the costs of operating Mt Annan and Mt Tomah Botanic Gardens cannot be covered without a contribution by users. The decision to provide sufficient revenue to cover the operating costs of these sites is not within the scope of the Regulation.

In addition, fees for entry to Mt Annan and Mt Tomah Botanic Gardens are applied equitably (other than distinctions to cover pensioners, children etc.) as is the free entry to the Sydney site. The provision of a free access botanic garden to specific regions is not within the scope of the Regulation.

Issue rates refers to manner in which Trust has determined fees and charges rather than objection to the power in the Regulation (and as envisaged in the Act) to impose fees and charges.

The Committee is of the view that the setting of fees by the Trust should be according to public and rational factors. It is further of the view that material in the regulatory impact statement and the comments made in response to submissions on the draft regulation do not reveal an adequate rationale for the differing imposition of fees. In the absence of such a rationale, the fee differential appears to be inequitable.

The Adequacy of the Regulatory Impact Statement (RIS)

The Committee also held the following concerns relating to the adequacy of the regulatory impact statement prepared for the draft regulation:

- **It does not give meaningful objectives for the Regulation** — The RIS states that the objectives of the regulation are to give full and proper effect to the Act. It then goes on to outline the objects of the Trust under the Act and set out the Regulation's enabling section. Reciting these sections of the Act gives an indication of what may be permissible within the Regulation but does not provide a coherent statement of what the Regulation is meant to achieve. Without such a statement, it is difficult to

assess what options, including non-regulatory options, could best achieve the desired objectives.

- **It does not identify reasonable options by which the objectives may be achieved** — The Subordinate Legislation Act 1989 requires “the identification of alternative options by which [the] objectives can be achieved (whether wholly or substantially)” (cl 1 (b) Schedule 2) in addition to “an assessment of the costs and benefits of each alternative option to the making of the statutory rule” (cl 1(d) Schedule 2). The Committee is therefore of the view that, in addition to an assessment of non-regulatory options, an RIS should canvass the reasonable options for achieving its substantive objectives. The RIS prepared for the Regulation reduces the options for achieving the objectives to a consideration of non-regulatory options and consequently fails to provide a justification for the substantive matters within the Regulation.

Conclusion

On the basis of the material published to justify the making of the Regulation, the Committee considers that the case for imposing fees in Mount Annan and Mount Tomah gardens while not imposing fees in Sydney has not been made out and that this inconsistent charging of fees appears to be inequitable.

Recommendation

That the Minister exempt seniors from fees for access to the Mount Annan and Mount Tomah gardens and review the fee policy for these gardens as soon as possible.