Regulation Review Committee

Parliament of New South Wales

Report to Parliament by Chairman on overseas study tour:

Some aspects of International Regulatory Programs and Practice

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Report No 14/51
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Introduction

The Regulation Review Committee is undertaking, in co-operation with scrutiny committees of the Commonwealth and the other states and territories, an evaluation of cost benefit and sunset provisions and other relevant options for the effective scrutiny of regulations. The object of that appraisal, from the NSW viewpoint, is to subsequently report to Parliament on whether NSW regulatory controls in their current form provide the best means of monitoring the impact and growth of regulations. Part of that appraisal involves a consideration of the current regulatory initiatives going forward in other states and overseas in order to determine whether new or modified ways of monitoring regulations could usefully be incorporated into the existing NSW system. The Committee has a good knowledge of the position in other Australian states. This has been acquired over several years through the formal meetings which occur at regular intervals between state, Commonwealth and Territory regulation review committees and also as a result of the close contact that is maintained at officer level and at the level of Chairperson and Vice-Chairperson of those committees.

There is, however, a need for detailed appraisal of the relevant overseas laws and regulatory initiatives. This need is enhanced by the New South Wales Government's currently stated policy of adopting, where possible, new regulatory approaches that will allow it to depart from the standard regulatory model under which a regulation sets out specifically either what must be done or what must not be done and follows this with a penalty provision. The current model is seen as lacking flexibility by excluding valid alternative means of satisfying the regulation's objectives and as perpetuating large departments and enforcement agencies.

There is a growing recognition of the costs of regulation and governments, particularly in OECD countries, are questioning longstanding regulatory traditions. It is evident that attention is starting to turn away from solely examining the costs and benefits of individual regulations to the performance of the regulatory system as a whole.

A variety of new measures have been put in place in these countries, some for several years, and experience is building up as to their usefulness.

A delegation from the Committee, comprising myself as Chairman, Mr Adrian Cruickshank MP and the Director of the Committee, Mr Jim Jefferis, had an opportunity to discuss the operation of some of these initiatives at a senior management level during a visit to London, Paris and Washington over the period 29 September 1997 to 16 October 1997. This report details those discussions and some of the information which was gathered during the visit. I thank all the officials of the organisations mentioned in this report for the substantial assistance they gave us.

Doug Shedden, MP
Chairman

Meeting with officials of Better Regulation Unit of UK Cabinet Office

The delegation met with Mr George Kidd, BRU, Deputy Director with responsibilities for the Better Regulation Task Force, local business partnerships, citizen issues and deregulation orders; Mr David Dawson, BRU, Deputy Director with responsibility for small business issues, 'Access Business', Information Technology forms and surveys and regulatory appraisal; Mr Michael Herron, BRU, Deputy Director with responsibility for European Union and international regulatory reform, taxation issues and charities; and Mr Mark Addison, the newly appointed Director of the Better Regulation Unit.

(a) Better Regulation Task Force

The Better Regulation Task Force is an independent advisory body appointed by the Public Service Minister and Chancellor of the Duchy of Lancaster, Dr David Clark, and assisted and advised by the Better Regulation Unit of the Office of Public Service. Appointments are for two years (and the Chairman for three years) and are unpaid.

The Task Force's terms of reference are to advise the Government on action which improves the effectiveness and credibility of government regulation by ensuring that it is necessary, fair and affordable, and simple to understand and administer, taking particular account of the needs of small business and ordinary people.

Task Force membership:

Christopher Haskins, Chairman	Chairman of Northern Foods PLC
Teresa Graham, Deputy Chair	Baker Tilly
Stephen Alambritis	Federation of Small Businesses
Sarah Anderson	Mayday Staff Services Ltd
Allan Charlesworth	West Yorkshire Police
Hugh Field	BCB International
Ram Gidoomal	Winning Communications
Sir Simon Gourlay	Farmer
Pamela Meadows	Policy Studies Institute
Robert Purry	Grant Thornton
Dr Chai Patel	Chai Patel Associates, Continuing Care Conference
Helena Shovelton	National Association of Citizen's Advice Bureaux
Sue Slipman	Gas Consumers Council
Ed Sweeney	Banking Insurance and Finance Union

This task force was preceded by the Deregulation Task Force. The reason for the change in emphasis was explained by Dr David Clark, Chancellor of the Duchy of Lancaster, when he launched on 3 July 1997 the new policy initiative 'Better Regulation'.

Dr Clark said:

> *Some regulation is necessary for public and consumer protection, for example to ensure food safety, and to carry out the functions of government. 'Deregulation' implies that regulation is not needed. In fact good regulation can benefit us all - it is only bad regulation that is a burden. That is why the Government's new regulatory policy will concentrate on ensuring that regulations are necessary, fair to all parties, properly costed, practical to enforce and straightforward to comply with. Better regulation will mean greater consultation with business and ordinary people. I am appointing a new task force under the chairmanship of Chris Haskins to take this forward. Unlike its predecessor, the task force will not be dominated by a narrow range of interests. There will be more representation from small business and the ordinary citizen....*

The deregulation initiative of the previous government aimed at reducing regulatory burdens on business, charities and the voluntary sector. About a thousand regulations have been repealed which were imposing excessive burdens on the economy. Programmes have been introduced to cut government forms and surveys, to improve cooperation between enforcement officers and business, and to reduce regulatory requirements in the European Union.

Mr George Kidd told the delegation that the new task force would closely examine the principles of better regulation and the type of sanctions that work. He said the task force would be considering a shift to enforcement through local authorities which were often better placed to perform this role than departmental inspectors. He said the Better Regulation Unit was conscious that the quality of impact assessment needs to be raised.

On 10 November 1997, the Chairman of the Task Force, in a press release, said that four Task Force Working Groups had been set up to identify where existing regulatory arrangements or proposals for reform do not meet good regulation principles. The groups will offer solutions where appropriate. The Working Groups will examine the following areas:

Employment Law

The initial focus will be on how the EC Working Time Directive, Young Workers Directive and the National Minimum Wage will be implemented and enforced.

Consumer Law

This working group will consider points of process, for example the consistency of enforcement throughout the UK, and concerns about specific regulations, such as weights and measures and metrification.

Charities and the Voluntary Sector

The regulations governing access to government and EU funding will be considered. The working group will work in partnership with the voluntary sector and the government departments involved.

Social Services

The focus will be on care homes and domiciliary care for elderly people, and early years services for children. The working group will concentrate on registration and inspection regimes, including consistency of standards. Views will be taken from various groups to inform discussions with Ministers and others.

(b) Deregulation orders

The 1994 UK Contracting Out Act gives a minister of the crown power, by order, to remove or reduce statutory burdens on business providing this would not remove any necessary protection. On the face of it this has the potential to expeditiously modify the operation of a law in the interests of small business. However, a minister cannot make such an order unless a draft of it has been laid before and approved by a resolution of each House of Parliament. That draft has to contain details of the burden proposed to be removed, how any existing protections will be preserved, the benefits from the proposal, and details of representations received. The minister must consult with organisations representative of interests affected by the proposal. There is a sixty day period for parliamentary consideration of the draft order. These precautionary curbs on the power (which is really a Henry VIII provision) seem to have severely limited the number of orders made. To date there have only been thirty-six, whereas the DTI in its 1995 paper on competitiveness predicted an extensive use of the power: "Fifty-five candidates for use of this power have already been announced. Many further proposals are being developed." (DTI-Competitiveness Forging Ahead-Chapter 15). The procedures governing these orders really force Ministers to follow a path comparable to an amending bill. NSW could probably achieve the same result by using the Statute Law (Miscellaneous Provisions)Acts which are passed twice a year. Nevertheless it may be of benefit for the minister responsible for small business issues to investigate the scheme further.

(c) Regulatory appraisal

Mr David Dawson, a Deputy Director of the Better Regulation Unit, told the delegation that government officials had now acquired several years of experience in carrying out

regulatory appraisal which he described as a "fairly well-worn system".

He said the Better Regulation Unit favoured a reasonably simple appraisal system that could be followed by the non-specialist and one that did not result in documents that were too complicated for the public to follow. However he said this was subject to the size of the regulatory proposal —if big, then you would need a professional assessment. He said that each year there were approximately 150 new regulations imposing a cost on the public and a lot of minor ones. No minister can impose a cost on the economy unless the minister signs a statement that costs are justified.

Mr Dawson said that a full cost appraisal was undertaken for issues with a significant impact. The aim of the Unit is to spread a culture of serious costings where this is justified. He said benefits are difficult to calculate and that Departments do not have to put a value on such benefits if this is difficult. This situation occurs in the environmental area. The UK Cabinet Office provides central guidelines in cost-benefit analysis. Every department has someone responsible for better regulation.

(d) Information technology initiatives to assist small business

1. Direct Access government

On 6 November 1997, the Better Regulation Unit introduced an Internet site specifically designed to assist small businesses, charities and voluntary organisations to find out the relevant regulations and forms, particularly when setting up their enterprises. Direct Access Government can be found on the Internet at http://www.open.gov.uk/gdirect.

The Better Regulation Unit said that the Access Business Initiative aims to bring together regulatory advice and information across central and local government in a "business superstore".This type of initiative warrants further examination as to its usefulness in the New South Wales context.

2. One-Stop Shop at Bexley

The delegation visited the Bexley Council's One-Stop Shop premises in Kent to examine how effectively the program worked. Bexley was one of four boroughs selected to pilot new systems for supplying information about the developments of small business premises. The system that has been set up uses case-based reasoning software. A set of questions and answers diagnoses the inquiry. The One-Stop Shop:

- gives the applicant information on the decision process;
- gives information as to the council, departments and outside agencies that will be involved in that process;
- gives advice on whether Planning and Building Regulations consent is required;
- in the case of substantial projects, sets up a team of officers representing statutory consultees and relevant council departments throughout the project to ensure full co-ordination and co-operation;

- ensures the relevant officers dealing with the decision are accessible to the public;
- promotes and encourages pre-application discussions;
- acts as a focal point for information initiatives affecting development.

The essence of the scheme is to provide one point of contact from which all the necessary information about a development can be obtained. It cuts down on routine and repetitious questions being asked of professional officers.

The scheme is also intended to produce consistency and a way to ascertain, say for the Ombudsman, what information has been given out. The delegation was told that the most difficult task had been to structure the information for the purposes of the information technology manual. A lot of time was initially spent in developing flow charts to accurately show the planning steps and procedures before the computer software could be developed. The project has led to a significant reduction in the number of questions and issues that have to be referred by staff to a higher authority.

(e) EC Legislation

As more legislation is initiated in Brussels rather than Whitehall, the UK government must focus greater efforts on ensuring that new requirements do not impose unnecessary burdens on business. There are two aspects of this: proposed European legislation and its implementation in the UK. The UK government is pressing for more detailed assessments of the costs to, and real effects on, small businesses of proposed legislation and a more open consultation process prior to the agreement by the Commission of a draft directive.

2. *OECD Activity on Regulatory Reform*

Discussions with OECD officials on regulatory reform

The OECD's Public Management Service (PUMA), working under the direction of the Public Management Committee, offers managerial expertise and comparative analysis to support OECD countries in improving public sector efficiency, responsiveness, and effectiveness. In the area of regulation, PUMA provides comparative information, drawn from international exchanges and analysis of practical experiences, on emerging regulatory issues and new strategies of regulatory management and reform. OECD countries are investing considerable resources to upgrade the quality and efficiency of national regulatory systems, using methods such as regulatory impact analysis, codification and registration systems, public consultation, centralised oversight and quality control, review and updating of the stock of existing regulations. The PUMA work monitors and reports on strategies used in Member countries to organise, initiate, and promote regulatory reform, and, through comparative analysis, identifies best practices.

The delegation from the Regulation Review Committee had discussions with the following staff of the Public Management Service responsible for regulatory management and reform issues:

- Scott H Jacobs, Principal Administrator
- Rex Deighton-Smith, Administrator
- Cesar Cordova-Novion, Administrator

(a) Restructuring of activities of OECD Committees

These officials said that there would be a possible restructuring of the activities of Committees. They said the US and Japan, the main contributors to the budget, have asked for a 'deep restructuring' to re-form activities of the various OECD Committees so they examined issues horizontally, that is, in relation to a large number of countries in order to draw links about what is happening in those countries. A greater attempt will be made to bring all aspects of regulatory reform together. Mr Jacobs said that in the first half in 1998 the OECD will publish a discussion paper which will look at different regulatory systems and the most likely circumstances in which they will work.

(b) OECD Report on Regulatory Reform

Mr Deighton-Smith referred the delegation to the OECD Report on Regulatory Reform released in June 1997. This report was issued in response to a 1995 request by OECD Ministers for the OECD to examine the significance, direction and means of reform in regulatory regimes in Member countries.

Mr Deighton-Smith told the delegation that the report showed the type of benefits that could be expected from good regulatory reform programmes. The conclusions and recommendations in this report are the result of a two year examination by the OECD of the experiences of Member countries.

The recommendations in the report constitute an action plan for regulatory reform. In May 1997, OECD Ministers agreed to implement the report's recommendations in their countries and they have asked the OECD to conduct reviews of regulatory reform efforts beginning in 1998.

The seven policy recommendations on regulatory reform contained in the report are:

1. Adopt at the political level broad programmes of regulatory reform that establish clear objectives and framework for implementation.

2. Review regulations systematically to ensure they continue to meet their intended objectives efficiently and effectively.

3. Ensure that regulations and regulatory processes are transparent, non- discriminatory and efficiently applied.

4. Review, and strengthen where necessary, the scope, effectiveness and enforcement of competition policy.

5. Reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.

6. Eliminate unnecessary regulatory barriers to trade and investment by enhancing implementation of international agreements and strengthening international principles.

7. Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

The delegation was told that the OECD's various principles of regulatory reform support each other. For instance, if regulatory impact analysis is weak, other principles such as adequate consultation will supplement the assessment. We were told that each country needs to be constantly investigating other policy measures to promote reform.

We were advised that there was a reluctance to use other alternatives because their operation

might be relatively unknown. To improve this situation, OECD plans to publish case studies on what Members have actually done. This work will include "best practice in regulatory impact assessment" which will put together the experience derived from other countries. It will include a methodology for doing impact assessment and on estimating regulatory costs.

(c) The Roots of the Problem

The examination by the OECD of the regulatory regimes in Member countries has allowed it to gain an understanding of why OECD countries have found themselves in need of regulatory reform. The Regulatory Reform Report lists the following:

- The complexity of reform and uncertainty about its consequences has blocked progress. This is in part due to policy fragmentation in the structure of government. Governments have often lacked the co-ordination and planning capacities necessary to move forward with coherent packages of policies and reforms.

- Vested interests have often been able to install regulations that benefit them, and to block needed reform even when broad or longer-term benefits are vastly larger than concentrated costs. In some countries, a "regulatory culture" has emerged, as businesses have come to look to government protection for survival rather than to their own performance. Lack of transparency is a key problem here. Vested interests are strengthened by opaque decision processes and unaccountable administrative discretion.

- Incentives inside regulatory bureaucracies have not encouraged effective and accountable use of discretion. Incentives have too often favoured vocal rather than general interests, short-term over long-term views, pursuit of narrow mission goals at any cost, and use of detailed and traditional controls rather than flexible and innovative approaches. Most regulators are not equipped to assess the hidden costs of regulation nor to ensure that regulatory powers are used cost-effectively and coherently.

- Good regulation can become bad regulation over time. Governments give too little attention to reviewing, updating, and eliminating unnecessary or harmful regulation. Many regulations currently on the books date from periods earlier in this century when economic and social conditions were very different from what they are today. Governments must find means of responding more quickly to changing environments.

- Controlling regulatory and legislative inflation is essential. The volume and complexity of laws, rules, paperwork, and administrative formalities now reach an all-time high in OECD countries, overwhelming the ability of regulators in implementing the total load, the private sector in complying, and elected officials in monitoring action. Too often, legislators issue laws as symbolic public action, rather that as practical solutions to real problems.
- All these problems risk being exacerbated where different layers of government can impose duplicative, conflicting, or excessive regulations.

Discussions with the Conseil d'Etat

On 7 October 1997 members of the delegation had discussions with Mr Michael Gentot, President du Contentieux.

The Conseil d'Etat has a dual role. It acts as advisor to the government in the drafting of legislation and administrative orders. It also acts as a supreme administrative jurisdiction, capping the system of administrative courts and tribunals and the administrative courts of appeal. It can also, under certain circumstances, act as a court of first instance.

To deal with its considerable volume of work, the Conseil d'Etat is divided into six sections, which are (1) the Section du Contentieux, (2) the Section de l'Interieur, (3) the Section des Finances, (4) the Section des Travaux Publics, (5) the Section Sociale and (6) the Section du Rapport et des Etudes.

Matters referred to the Conseil d'Etat cover regulations with a nation-wide field of application, and fall into three main categories: cases where the administration is thought to have overstepped the limits of its jurisdiction, cases where government regulations are suspected of having a detrimental effect on citizens' basic rights and finally cases where a serious fault is thought to have been committed by the administration. Such cases will already have been heard by an Administrative Court of Appeal, the role of the Conseil d'Etat being that of a court of annulment in administrative matters. The judgements may involve the establishment of a principle, or, in cases of "plein contentieux", lead to compensation or redress. The Conseil d'Etat can act as a court of first instance for certain specified categories of high-ranking public servants in matters concerning their administrative status, and, in certain cases, can quash a decree.

Although the Conseil d'Etat is the supreme jurisdictional authority in administrative matters in France, and makes an important contribution to jurisprudence, it may be obliged to defer, in certain cases, to decisions of the Court of Justice of the European Communities.

Discussions with Cosiform - Commission on the Simplification of Formalities

On 7 October 1997 the delegation also met with:

- Mr Patrick de Miribel, Secretaire General, CERFA (Centre d'Enregistrement et de Revision des Formulaires Administratifs)
- Mr Jean Prada, Vice-President, COSIFORM (Commission pour la Simplification des Formalities)

- Mr Louis Breas, Secretaire General, COSIFORM
- Mr Christian Saout, Secretaire General Adjoint, COSIFORM

The principal task of the Commission is to simplify forms. It has 18 members: eight drawn from the administration and 10 representing citizens. Cosiform is consulted by ministries for advice. Every new form has to go through this small organisation to see if it is in line with the regulation it is supposed to support. Officers of Cosiform told the delegation that they try to look at things from the point of view of the customer. A main activity has been to regroup a number of forms into one form. Another business service by Cosiform has been to reduce the number of services a person has to get in touch with. The delegation was told that the French Government is currently considering increasing the powers of Cosiform to look into other administrative functions.

Cosiform doesn't appear to actually criticise regulations but to see if they are being enforced in a proper manner. A fiche d'impact is imposed in the case of draft bills and major regulations.

3. *Regulatory Practice in the United States*

Washington

Discussions with the Office of the Federal Register

On 9 October 1997, the delegation met with Mr Ray Mosley, Director of the Office of the Federal Register and his advisers to get an understanding of the Federal Register and its public usefulness in the context of agency regulations.

Mr Mosley outlined the following points:

- The Federal Register Act established a uniform system for handling agency regulations. It required regulations to be published in the Register.

- The Federal Register is the medium for notifying the public on official agency actions. Proposed and final rules are published in the Register and this process affords the public a chance to comment on the proposed rule. The agency may also announce hearings as

another means of gathering public input on proposed regulations.

- It is not unusual for a year or more to go by between the publication of proposed and final rules.

- The Federal Register also publishes supplementary information on proposed rules. This summarises the public comments and provides the department's response to those comments.

- Executive Order 12291 applies to rules whose expected annual costs exceed $100 million. In such a case the order requires the agency to prepare a Regulatory Impact Analysis. The Federal Register contains highlights of what the analysis shows.

- Paperwork Reduction Act - if the rule includes information collection requirements this has to be mentioned in the summary in the Register as such requirements are not effective until Paperwork Act clearance has been received.

- Regulatory Flexibility Analysis - if the proposed role could have a significant impact on small business entities then the agency must carry out a regulatory flexibility analysis to determine, for instance, whether some of those entities should be exempted from the operation of this rule. This all has to be detailed in the Federal Register.

It was clear from the points outlined by Mr Mosley and his colleagues that the Federal Register provided far more opportunities than the NSW Government Gazette for members of the public to understand and become involved in the development of regulations.

However, a 1996 survey carried out by the US Chamber of Commerce entitled "Federal Regulation and its Effect on Business" disclosed that only one in 10 business firms find out from the federal agency about a new rule. The Executive Summary of that survey said that the US regulatory process was inefficient in that over a third of firms find out about regulations after they become law, and in some cases, only after the regulation has been broken. The majority of the respondents to the 4,000 questionnaires said the comment period in Federal Register was inadequate. Seventy-one percent felt review by independent scientists, rather than comments in the Federal Register or internal agency review would be the best mechanism for reviewing the findings of a federal agency's risk assessment.

Discussions with the Office of Information and Regulatory Affairs

Mr John Morrall
Chief, Human Resources Branch
Office of Information and Regulatory Affairs

Mr Jeff Hill
Chief, Commerce and Land Branch
Office of Information and Regulatory Affairs

(a) Regulatory Budgeting

The US Government in recent years has been examining whether regulatory budgeting would provide a better way to control aggregate costs. This involves an earlier appraisal of regulatory proposals and giving departments a cost ceiling beyond which no further regulations can be made in that financial year.

(b) Executive Order No.12866 - Regulatory Planning and Review

This order of the President established the process by which the Office of Management and Budget (OMB) co-ordinates the review of agency proposed and final rules to ensure they are consistent with the President's regulatory principles. The last report by OMB on the operation of this order said that agencies had been asked to return to basics and to begin the rulemaking process by asking the key question of what it was trying to achieve. It said that correctly identifying the problem and tailoring the rule to fit was one of the cornerstones of sound regulation.

The report stressed the need for agencies to consider flexible alternatives to the command and control approach relied upon so heavily in the past. It divided alternative approaches into three categories: performance standards, market incentive approaches and information strategies.The report said that virtually all agencies are re-examining existing rules to develop better ways to solve problems. This process intensified following the instruction by the President to agencies in February 1995 to review page by page their regulations in order to eliminate those that were unduly burdensome, outdated or in need of revision. This effort resulted in 16000 pages of regulations being eliminated from the Code of Federal Regulations.

(c) Performance Based Regulations

A performance based approach means drafting a regulation that will specify the acceptable results or goals to be met and how they will be monitored or judged. The intention here is to produce some flexibility in how the objectives will be achieved and to increase the effective use of resources. This option of regulatory management is finding growing acceptance in the United States and also seems favoured by the New South Wales Government.[1] OMB's December 1996 report to the President on the third anniversary of Executive Order 12866 concluded that performance standards are generally preferred to a command and control design standard because they give regulated entities the flexibility to achieve the desired regulatory outcome in a more

[1] NSW Government Green Paper on Regulatory Innovation.

cost effective way. An added advantage, said the report, was that firms would continue to search for the least costly way to meet the regulatory objective and would not stop simply because a specified design standard had been met. Selecting performance standards allows these firms to choose their own unique solutions.

(d) Negotiated Rule making

In September 1993 President Clinton, in Executive Order 12866, directed each government agency to use consensual mechanisms for developing regulations, including negotiated rule making. The President directed agencies to select at least one proposed rule each year that could be made the subject of negotiated rule making. Mr John Morrall said that the negotiated rule-making process was very staff intensive and that it only worked where the competing interests wanted to reach a result through a co-operative approach. He said that negotiated rule-making was not suitable where there were major conflicts. The American experience shows that significant costs are attendant on the process and that agencies can only support a limited number of negotiated rule making projects per year. It would seem that disadvantaged groups may need financial assistance or assistance by way of expertise to allow them to successfully participate in negotiated rule making.

The objective of negotiated rule-making is to avoid costly litigation involving challenges to agency regulations. Experience suggests this objective has been successful. Mr David Pritzker, a Senior Attorney of the former Administrative Conference of the United States, reported that over a 12 year period only three lawsuits had been filed involving rules based on negotiated rule-making. Mr Morrall said there had been 70 negotiated rule making examples in five years which shows that the process is not making significant inroads on traditional regulation making procedures. The 1996 survey of business by the US Chamber of Commerce shows that a large majority of business would like to have input in the regulatory drafting process to make it more user-friendly. They would also like to participate in some form of government/business dialogue and believe such input would be much more beneficial than the current comment period after publication in the Federal Register.

An essential of negotiated rule making is that it provides an opportunity for persons and organisations that will be materially affected by a regulatory proposal to reach agreement on the principles and details of the regulation before these are drawn up or proposed by the department. Although there are useful consultation procedures in the New South Wales Subordinate Legislation Act relating to the making of regulations they do not come at the commencement of the process but after the department or agency has prepared its RIS and draft regulation. This results in parties being consulted on an already detailed proposal. For this reason the delegation feels that negotiated rule-making should be supported in every instance that it is practicable to do so.

(e) Regulatory Flexibility Act

The Regulatory Flexibility Act requires US agencies to give special consideration to the impact of regulations on small business. The Act specifies that a regulatory flexibility analysis must be prepared if a screening analysis indicates that a regulation will have a significant impact on a substantial number of small entities. Major goals of the act are: (i) to increase government awareness and understanding of the impact of their regulations on small business; (ii) to require agencies to communicate and explain their findings to the public; and (iii) to encourage agencies to use flexibility and to provide regulatory relief to small entities.[2]

The US Small Business Administration in its overview of the Regulatory Flexibility Act made the following points about its objectives and requirements:

- Under the RFA, each agency must analyse how its regulations affect the ability of small entities to invent, to produce and to compete. Agencies are supposed to balance the burdens imposed by regulations against their benefits and propose alternatives to those regulations that create economic disparities between different-sized entities.

- The RFA establishes a procedure for looking at the effects of rules on small entities. Regulated small entities are encouraged to participate in the development and consideration of alternate means of achieving regulatory objectives. Federal agencies must consider establishing different compliance or reporting requirements, timetables, or exemptions to take into account the resources available to small entities.

- Under the 1996 amendments, whenever a small business feels adversely affected or aggrieved by an agency rule-making because of the agency's failure to comply with the RFA, the small business may seek review of the agency's RFA compliance in court.

- The chief counsel for advocacy of the US Small Business Administration has been designated to monitor agency compliance with the RFA, and possesses authority to intervene as an *animus curiae* in court proceedings involving compliance with the RFA.

The 1996 annual report of the Chief Counsel for Advocacy on the implementation of the Regulatory Flexibility Act said that because of the judicial review provisions many federal agencies have expressed a new willingness to comply with the requirements of the RFA. Mr

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[2] A Guide to the Regulatory Flexibility Act, US Small Business Administration, May 1996.

Glover, Chief Counsel, said agencies appear to be making good-faith efforts to comply with the formulated RFA but that integration of regulatory flexibility analyses into agency decision-making process was far from complete. He said there was still a need for ongoing education and interaction with agencies in order to ensure full compliance. The Office of Advocacy will continue to work with federal agencies to provide the necessary information and guidance to advance their understanding of regulatory flexibility compliance.

The New South Wales Government in its 1997 Green Paper on Regulatory Flexibility has put significant stress on this option but it is still to be demonstrated whether it will improve regulatory efficiency or simply add a further procedure to the regulation-making chain.

(f) Paperwork Reduction Act 1995

The Paperwork Reduction Act (PRA) establishes policies and procedures for controlling paperwork burdens imposed by Federal agencies on the public. Goals of the PRA are to:

i) minimise the Federal paperwork burden on individuals, small businesses, and State and local governments;
ii) maximise the usefulness of information collected by the Federal government; and
iii) minimise the cost to the Federal government of collecting, maintaining, using, and distributing information.

Federal agencies are prohibited from enforcing paperwork requirements that are not approved by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). OIRA is required by the Act to set a five per cent reduction goal for each of the years 1998-2002.

OIRA make periodic reports to Congress to document the efforts being made towards achieving the purposes of the Act. These reports detail how much the Federal government anticipates spending on information resources, to what extent the information collection burden on citizens by the government has been reduced, and how the Federal government has improved access to government information.

The paperwork burden covered by the Act is the number of hours individuals, businesses, and State and local governments must spend preparing or maintaining Federally mandated forms, reports and records.

OMB's 1997 Report to Congress on the Paperwork Reduction Act estimates that for the fiscal year 1996 the estimated burden was 6.7 billion hours, marginally less than the 6.9 billion hours estimated for 1995. The Report illustrates the variety of collection requirements:

- legal obligations to report information to government to verify compliance with government requirements (eg. tax forms);

- reporting requirements for persons who wish to obtain benefits (Medicare);
- reporting requirements for statistical purposes (eg. decennial census);
- reporting information to third parties (eg. nutritional labelling of food products);
- record keeping (eg. meat inspection tests per pathogens)

The 1997 Report provides details of reductions achieved by government agencies during 1996 and a description of some of the plans agencies have for reducing or minimising burdens they impose on the public.

OIRA has the task of developing an annual Information Collection Budget. Under this budget OIRA, in consultation with each agency, sets annual reduction goals to reduce collection burdens on the public.

The 1997 Report to Congress says that since 1980 agencies have made progress in reducing the paperwork burden. Recently, as part of the Administration's regulatory and reform efforts, President Clinton directed Federal agencies to increase the use of electronic means of information collection and, where feasible, to decrease reporting by the public by one-half. The report says that as a result of this many initiatives have been taken. The magnitude of the savings that can be achieved are revealed in the examples given in the report, eg:

Department of Agriculture. - The Food and Consumer Service published a final rule that established a new system to help schools use nutrient-based menu planning for meals in the National School Lunch and School Breakfast Programs. The rule eliminated regulatory requirements for audit checks and the maintenance of records to prove the nonprofit status of schools. As a result, paperwork burden was reduced by almost 16 million hours.

Environmental Protection Agency. - The Office of Water efforts to reduce reporting focused on the National Pollutant Discharge Elimination system (NPDES) Monitoring Report. Guidance was developed to reduce existing monitoring and reporting requirements for facilities that consistently discharge higher quality water than required by their permits, or implement strong facility management plans. The burden associated with the NPDES Monitoring Report will be reduced by about 4.7 million hours once the program is fully implemented.

In discussions with OMB officials it was apparent that although the Paperwork Reduction Act was politically popular, the practicalities of reducing the federal paperwork burden was limited by the fact that the Treasury accounted for 80% of it. Large reduction would only be achieved if the US went to a flat tax. This comment is borne out in the testimony given by the United States General Accounting Office before the Senate Committee on Small Business.

In June 1997 the GAO said that the view of the Inland Revenue Service was that a 25 per cent reduction goal could only be achieved through a major simplification of the tax laws. That agency and the EPA and OSHA (Occupational Safety and Health Administration) each said that the statutory framework underlying their regulations and continued actions by Congress requiring

them to produce regulations were major impediments to eliminating paperwork burden. Mr Michael Brostek, an associate director of the GAO, in his testimony commented on the doubts surrounding paperwork burden assessments:

> *Before discussing the specifics of OMB and agencies' goal-setting efforts, it is appropriate to recognize that the basic data used to gauge paperwork burden have important limitations. Although the paperwork reduction concepts in the Paperwork Reduction Act 1995 are a useful framework for imposing discipline on the government's management of paperwork requirements affecting the public, users of paperwork burden-hour estimates should proceed with caution. Estimating the amount of time it will take or an individual to collect and provide information or how many individuals an information collection will affect is not a simple matter. Therefore, the degree to which agency burden-hour estimates reflect real burden and the factors that cause changes to the estimates are often unclear. For example, considerable uncertainty exists about the accuracy of IRS's paperwork burden-hour estimate - which has recently accounted for about 75 percent of the government's estimated total paperwork burden. IRS' estimates may be off by as much as billions of burden hours and to the extent that the estimates are off, the estimates used to gauge progress in meeting the goals of the Paperwork Reduction Act would also be significantly flawed. Nevertheless, these are the best indicators of paperwork burden available, and we believe that they can be useful as long as their limitations are borne in mind.*

(g) Report to Congress on the Costs and Benefits of Federal Regulations - September 30, 1997

On September 30 1996, Congress directed the Office of Management and Budget to submit to Congress a report that provides : -

- estimates of the total annual costs and benefits of Federal Regulatory programs, including quantitative and nonquantitive measures of regulatory costs and benefits;
- estimates of the costs and benefits (including quantitative and nonquantitive measures) of each rule that is likely to have a gross annual effect on the economy of $100,000,000 or more in increased costs;
- an assessment of the direct and indirect impacts of Federal rules on the private sector, State and local government, and the Federal Government; and
- recommendations from the Director and a description of significant public comments to reform or eliminate any Federal regulatory program or program element that is inefficient, ineffective, or is not a sound use of the Nation's resources.

The objective for seeking this report was to assemble information for the purpose of improving the quality of the debate and potential recommendations for regulatory reform.

The report acknowledges that there are "enormous data gaps" in the information available on

regulatory benefits and costs. It says reliable data is sparse on benefits. The report says this arises firstly, from the technical difficulties of valuing qualities not generally traded in the market place and, secondly, from the "cultural" or "philosophical" barriers to reducing values, equities and physical or emotional effects to dollars and cents.

"There are few agreed upon conventions for doing this, and agencies are understandably reluctant to spend scarce time and resources on what may be perceived as a not very informative exercise. This is compounded by the belief of some that it is morally or politically difficult or wrong to engage in such seemingly uncaring calculations. Some also fear a tyranny of numbers - that is, if it is quantified, the decision will necessarily be determined solely by the numbers. Their understandable response is not to quantify or monetize" (page 2 of report).

Although recognising these difficulties the report affirms the merit of explicitly quantifying and monetizing benefits and costs of individual regulations in order to enhance the consideration of alternative approaches to achieving regulatory goals.

However, it said that knowing the total costs and total benefits of all regulations provides little specific guidance for decisions on reforming regulatory programs. It placed stress on the need to standardise the methodologies applied by agencies. The report recommended that:

- Office of Information and Regulatory Affairs (OIRA) lead an effort among the agencies to raise the quality of agency analyses used in developing new regulations by promoting greater use of the Best Practice guidelines and offering technical outreach programs and training sessions on the guidelines.

- An interagency group subject a selected number of agency regulatory analyses to ex-post disinterested peer review in order to identify areas that need improvement and stimulate the development of better estimation techniques useful for reforming existing regulations.

- OIRA continue to develop a data base on benefits and costs of major rules by using consistent assumptions and better estimation techniques to refine agency estimates of incremental costs and benefits of regulatory programs and elements.

- OIRA continue to work on developing methodologies appropriate for evaluating whether existing regulatory programs or their elements should be reformed or eliminated using its Best Practices document as the starting point.

- OIRA work toward a system to track the net benefits provided by new regulations and reforms of existing regulations for use in determining the specific regulatory reforms or eliminations, if any, to recommend.

Discussions with Mr Wayne Brough, Senior Advisor for