REGULATION REVIEW COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

Report Upon:

REGULATIONS

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ISSUES COMMON TO REGULATIONS CONSIDERED

NEW DEVELOPMENTS

Report No. 15

REGULATION REVIEW COMMITTEE

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1. REPORT ON REGULATIONS

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

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

(a) that the regulation trespasses unduly on personal rights and liberties;

(b) that the regulation may have an adverse impact on the business community;

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

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

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

(f) that the regulation duplicates, overlaps or conflicts with any other regulation or Act;

(g) that the form or intention of the regulation calls for elucidation; or

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

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

(1) FIREARMS ACT 1989 - REGULATION (PROVIDING EXEMPTIONS IN RELATION TO GOVERNMENT AGENCIES)
GOVERNMENT GAZETTE 21 JUNE, 1991 AT P. 4822

The Firearms Act 1989 prohibits the possession or use of a firearm without a licence or permit. Section 56(2)(i) of the Act empowers the governor to make regulations exempting persons from specified requirements under the Act. Prior to this regulation, inspectors under the Stock Diseases Act 1923 were exempt from the obligation to obtain a licence or permit in relation to the possession and use of captive bolt pistols for the purpose of exercising or performing their functions under that Act.

The object of this Regulation was to extend the exemption to the possession and use of rifles for that purpose. The reason for doing this was because Inspectors were issued with rifles not captive bolt pistols. This exemption covers approximately 700 officers who have duties in relation to the destruction of diseased stock. Inquiries made by the Committee indicate that suitability checks on officers are left to the discretion of New South Wales Agriculture. Currently inspectors are given a local police check before they are employed but no examination is made of them from the point of view of their character or experience in the use, keeping and management of weapons. The sort of people employed for this work are experienced stockmen who are assumed to be proficient with weapons.

These circumstances do not disclose any justification for an exemption from the requirements to hold a permit or licence under the Firearms Act. Section 25 of the Firearms Act prohibits the issue of a licence to a person who is not a natural person; who has committed a prescribed offence; who is the subject of a recognisance; or who is subject to a firearms prohibition order. That section also states a licence must not be issued unless the Commissioner of Police is satisfied that the applicant is of good character and repute and can be trusted to have possession of firearms without danger to the public safety or to the peace.

The section also prohibits the issue of a licence if the Commissioner has reasonable cause to believe that the applicant may not personally exercise continuous and responsible control over the firearm because of (a) the applicant's way of living

or domestic circumstances; (b) any previous attempt by the applicant to commit suicide or cause a self inflicted injury; or (c) the applicant's intemperate habits or of being of unsound mind. The issue of permits are subject to similar restrictions (see regulation 16 which applies the provisions of section 25 of the Act to permits).

The Committee, after a detailed examination of these restrictions concluded they were in the public interest and did not impose any unnecessary compliance burdens on the inspectors or New South Wales Agriculture.

Inquiries made with the Central Licensing Branch of the New South Wales Police Department did not disclose any reason for the current exemptions other than the fact they followed the precedent of previous regulations.

The existence of a large number of persons possessing and using weapons without a licence or permit under the Firearms Act necessarily downgrades the effectiveness of the firearms register. Section 4 of the Act states that it binds the Crown. These exemptions, unless clearly necessary, weaken the intended ambit of the Act. In those cases where the need for an exemption can be substantiated the register should clearly show the persons who hold that exemption. This apparently is not the case at present.

On 13 August 1991 the Chairman, on behalf of the Regulation Review Committee, wrote to the Minister for Police and Emergency Services detailing its concerns with this regulation. In a subsequent letter of 22 August, 1991 the Committee also suggested that an examination be made of the basis for the existing exemption of other Government agencies from the licensing and permit requirements of the Firearms Act to determine if there was any compelling reason for them. The Minister, in a letter dated 9 September, 1991 replied as follows:

> *"I refer to your letters of the 13th and 22nd August 1991, concerning the exemptions provided under schedule 6 of the Regulations to the Firearms Act 1989.*
>
> *You will be pleased to know that the anomaly had previously been brought to my attention by the Police Service. On 26th February, I approved of the Commissioner writing to the Parliamentary Counsel with a view to framing*

legislation for a form of Government Firearms licence. Such a system will ensure that Government employees who are given access to firearms as a result of their employment, are subject to the same checks as are applied to the general public. I will keep you informed of progress on this matter although it will obviously be included in the general review of firearms legislation which is currently underway."

The Minister's objective could have been immediately achieved under the existing requirements of the Firearms Act as, in the absence of the gazetted exemptions, Government employees would be subject to the same licensing and permit requirements as the general public. It is unclear to the Committee why the Minister should have proceeded to gazette the regulation as it conflicted with the purpose of his instructions of 26 February 1991 to the Police Commissioner.

The matter was again examined by the Regulation Review Committee at its meeting on 19 September, 1991 at which it resolved to write to the Minister inviting him to participate in further discussions on the regulation scheduled to be held on 26 September, 1991.

In reply to that invitation the Minister on 25 September, 1991 wrote to the Committee advising it that he would be unable to attend the discussions because of a previous commitment. His letter went on to make the following two points:-

"Firstly, as I mentioned in my previous letter, the review of exemptions to Government employees provided under Schedule 6 is well in hand and will be addressed in revisions of the legislation which flow from the current review of gun laws. Consequently, the exemption under discussion has a very limited future.

Secondly, to disallow the amendment at this stage will I understand, complicate the operation of the inspectors to whom the current exemption applies. To remove the exemption at a time when they are unable to obtain a licence because of Government action will leave them liable to prosecution."

As a consequence of the Minister's concern on these two issues the Committee, in a letter dated 22 October, 1991 suggested as an interim measure that clause 1(1) of Schedule 6 to the Firearms Regulation 1990 be made subject to a sunset clause so that the regulation would expire on 1 February, 1992. The effect of this would be to

allow inspectors to have the benefit of their existing exemptions until that date. After that they would be required to obtain a licence or otherwise conform to any new changes to the law.

The Minister responded to the Committee's suggestion in a letter dated 5 November 1991 part of which reads:

> *"In your letter of 22 October you suggested an interim solution by making the regulation subject to a sunset clause to expire on 1 February 1992. I did not favour such a solution at that time as it was not clear the timetable which would be associated with the review of the Firearms legislation.*
>
> *On Wednesday 23 October, I attended a meeting of the Australian Police Ministers Council in Melbourne to reach a consensus on gun laws on a national basis. A large degree of agreement was reached and as part of proceedings it was resolved that a review of firearms legislation in all jurisdictions would be finalised by 1 July 1992. It is expected that this resolution will be endorsed by the Special Premier's Conference on 22 November.*
>
> *It is envisaged that the review of the NSW firearms legislation will commence shortly after the SPC and I am confident that the licensing embargo which currently exists will be resolved well before 1 July 1992.*
>
> *Now that a finite timetable for the review of the legislation has been established I agree that a sunset clause arrangement as proposed in your latest letter will best resolve the impasse which currently exists while ensuring the practical operations of the stock inspections can continue.*
>
> *If such a compromise is acceptable you may be assured that I will insist that those persons presently covered by the exemption under Schedule 6 will comply with the revised licensing requirements."*

The Committee advised the Minister that it was satisfied with this course.

(2) SECURITY (PROTECTION) INDUSTRY ACT 1985 - REGULATION (RELATING TO APPLICATIONS FOR LICENCES) GOVERNMENT GAZETTE 21 JUNE, 1991 AT P. 4828

The purpose of the regulation is to delete the current requirement under the Security (Protection) Industry Act 1985 for an applicant for a class 1 or class 3 licence

to produce a photograph with the application. These were previously used so that a security licence could be issued bearing the photo of the holder. These licences authorise the licensee to carry out the security activities specified in the licence. These include activities such as acting as a bodyguard, the patrol and protection of property and the installation and maintenance of security equipment.

The Regulation Review Committee understands that the decision to omit this requirement was bought about by delays occasioned in processing applications that were required to be accompanied by photos. A Report by the Business Deregulation Unit had also recommended the deletion of photo licences.

It is the Committee's view that photo licences are essential for the purpose of identifying the holder of the licence as the particular person authorised to patrol premises or undertake other work under the Security (Protection) Industry Act. The Committee has knowledge of several representations from the holders of current licences who believe that the change made by this regulation is not in the interests of the security industry and will in fact downgrade security licences.

During its examination of this regulation the Committee was advised that the Minister was currently reconsidering the appropriateness of the regulation and that he could well favour its repeal. On 8 November 1991 the Committee wrote to the Minister supporting the repeal of the regulation. In a letter dated 15 November 1991 the Minister agreed to take the action necessary to re-instate photo security licences.

(3) TRAFFIC ACT 1909 - REGULATION (PROHIBITING LENGTHY VEHICLES FROM USING CERTAIN ROADS)
GAZETTE 26 APRIL, 1991 AT P. 3191

The object of this regulation is to amend the Motor Traffic Regulation 1935 so as to prohibit the use of certain lengths of roads through the Galston Gorge by vehicles which exceed a specified length. The regulation was made following complaints by local residents and motorists generally, who sought restrictions on the access of lengthy vehicles so as to improve the general traffic flow and minimise the hazards created by drivers of theses vehicles who frequently ignored the advisory signs and consequently blocked the road.

The Committee noted that this regulation commenced on the date of its gazettal. In its Report issued in January 1990 the Committee stated its concern at the practice of bringing regulations into force on the date of gazettal. The Committee made the following recommendation:

> *"The Committee considers that the general practice in NSW of bringing regulations into force on the date of their gazettal requires reconsideration by the Ministers concerned, particularly in those cases where regulations impose duties or obligations on members of the public or where an offence could be committed for breach of them. In these cases the regulations, although gazetted, should be expressed to commence at a sufficiently later date to enable members of the public to inform themselves of the content and effect of it."*

In a letter of 9 May, 1990 the Attorney General advised the Committee that he had written to all other Ministers stating that he shared the Committee's concern and supported its recommendation.

He went on to say:

> *"I would also point out that there have been recent instances where gazettal has occurred after the proposed commencement date. In these circumstances by virtue of section 39 of the Interpretation Act 1987 the regulation is not operative until publication takes place. This results in the nominated commencement date being invalid and causes confusion.*
>
> *To overcome problems in this area I suggest that as a general rule the commencement date should be at least 14 days after publication. Appropriate allowance for lead in time should be made when the regulation is being drafted."*

Although the Attorney-General's guidelines have not been followed in the present case the Committee was advised in a letter dated 14 November 1991 by the Deputy Premier and Minister for Roads, that advisory signs, warning drivers of overlength vehicles of the hazards of trying to negotiate the winding road through Galston gorge, have been displayed on that length of road for many years. The Minister stated that adequate measures were taken to ensure members of the public were aware of the pending change. These measures included:-

- meetings between the RTA, the local council and concerned members of the public;
- suitable prior publicity by the Authority;
- a moratorium on enforcement for one week after the regulation was published.

The Committee recommended to the Minister that any similar regulations should be expressed to commence on a date at least 14 days after their gazettal. This would avoid the need to artificially postpone their enforcement until the public is familiar with their requirements.

In his letter the Minister agreed that as a general rule, the commencement date of a regulation should be at least 14 days after publication. He gave his assurance that, where possible, every endeavour would be made to comply with this course of action on any proposal which has a potential for impact upon the motoring public.

(4) POISONS ACT 1966 - PROCLAMATION: GOVERNMENT GAZETTE 7 DECEMBER, 1990 AT P. 10655

The Committee recently considered this proclamation which amends the Poisons list by omitting Schedules 1-7 and inserting new schedules. The present changes arise as a result of amendments made in 1987 to the Poisons Act which allow the governor to alter the list by "applying, adopting or incorporating with or without modification, a standard published by the National Health and Medical Research Council or any other published standard". It appears that this is the first list published under these new provisions.

This proclamation is subject to review under the Regulation Review Act because section 46 of the Poisons Act makes these proclamations subject to the tabling and disallowance provisions of sections 39, 40 and 41 of the Interpretation Act. Under section 3 the Regulation Review Act a regulation includes a proclamation that is subject to disallowance.

It seems that in the past the Government Printer published the total list of poisons and that amendments were made periodically to this list. This practice has

been discontinued, in favour of incorporating the list by reference, because of its magnitude. This means that all manufacturers, distributors and users of these poisons will need to read the list in the context of the National Standard which it incorporates. This is made difficult by the variety of inclusions and exclusions that are to be read into that text. In many cases it will compel the public to rely on secondary publications to explain the list.

The Committee understood that efforts were being made to streamline the format of the list and that this was being done by departmental staff. The Committee wrote to the Minister on 20th August 1991 recommending that he seek some assistance for that task from the Parliamentary Counsel, at least to establish a basic format for future proclamations. At present the Parliamentary Counsel drafts proclamations in three circumstances: (i) where the proclamation commences an Act; (ii) where the proclamation amends a schedule to an Act; and (iii) where there is an arrangement with a particular Department to do so because of the nature of the subject matter.

The Committee feels that the importance and complexity of the present matter and the penalties associated with it, justify an approach being made to the Parliamentary Counsel in that regard. It seems that the present format may already have occasioned some difficulties as it was necessary for the Department to republish on 7 June 1991 a proclamation that had been incorrectly gazetted on 17 May 1991.

In its letter of 20th August 1991 the Committee made reference to its earlier report to Parliament of November 1990 on the subject of regulations applying , adopting or incorporating codes or other publications. One of the recommendations of that Report was that a copy of the incorporated material should be laid before Parliament at the same time as the tabling of the regulation. The Committee also suggested to the Minister that he consider such a practice in future instances as it would assist members in the event of any debate or examination of the Poisons List.

On 4 October 1991 the Minister replied as follows:

"I refer to your letter concerning the Poisons List which is proclaimed under the provisions of the Poisons Act 1966.

The N.S.W. Department of Health has advised me that the new format of the Poisons List followed extensive consultation with the pharmaceutical industry and the medical and pharmacy professions. As a result of this consultation, most of the differences between the former Poisons List and the Standard for the Uniform Scheduling of Drugs and Poisons (S.U.S.D.P.) published by the National Health and Medical Research Council were eliminated, either by amendments being made to the List or the S.U.S.D.P.

As the number of differences is now so small ,and in the interests of national uniformity, it was decided to incorporate the list of substances in the S.U.S.D.P. by reference into the Poisons List. Thus, in effect the new formatted Poisons List has become a "list of differences" to the national recommendations. However, it is important to stress that this consultation is continuing with a view to eliminating even more differences and that where the differences are to remain they will have the concurrence of the industry.

It is acknowledged that with the new format of the Poisons List it is necessary to rely on a secondary publication. I have therefore accepted the recommendation of your Committee's report to Parliament of November 1990 and will in future table the relevant publications of the National Health and Medical Research Council each time the Poisons List is amended.

Finally, I have been advised that the new format of the Poisons List has not created any major difficulties. The need to republish on 7 June 1991 a proclamation that had been published on 17 May 1991 was due to the fact that the printer of the Government Gazette inadvertently published the pages of the document in an incorrect order. By doing so the Poisons List was incorrectly amended. Nevertheless, I will consider your Committee's suggestion to consult with Parliamentary Counsel on the new format of the Poisons List should I become aware of any major problems encountered by users of the List."

The Committee is grateful to the Minister for promptly acting on its recommendations.

(5) TRAFFIC ACT 1902 - REGULATION
(RELATING TO SEIZURE OF MOTOR VEHICLES)
GAZETTE 20 JULY, 1990 AT P. 6701

The object of the Regulation was to enable certain employees of the Council of the City of South Sydney to seize motor vehicles parked contrary to law in those parts of designated streets in Kings Cross indicated by signs to be "tow away areas" or by other words indicating that such motor vehicles are subject to seizure. Although the regulation was similar to existing regulation 58 of the Motor Traffic Regulations, no provision was made for restoration of the balance of moneys earned after disposal of seized vehicles. These vehicles could be "disposed of or destroyed" if not claimed within 3 months from seizure in accordance with the directions of the Town Clerk. However no provision was made for cases where disposal is by way of sale and there was a balance left after costs are deducted.

In the past the Committee had dealt with such provisions by requesting the relevant Minister to amend the regulation to provide that the balance of moneys after disposal by sale and deduction of costs should be available for claim by the owner for a period of 12 months.

Following that recommendation the Deputy Premier and Minister for Roads in his letter of 3 May 1991 advised as follows:

> *"I refer to your Committee's consideration of Motor Traffic Regulations 58A (your reference 1214 - 26 March 1991) and would agree that on initial examination there appears no justification for denying vehicle owners the balance of any moneys left after Council has met its own costs.*
>
> *In the circumstances I have asked the Roads and Traffic Authority to consult with both South Sydney Council and the Police Department with a view to amending Motor Traffic Regulations 58 and 58A along those lines contained in s. 13UB of the Maritime Services Act. A similar provision also exists under s. 64 of the State Roads Act.*
>
> *I would also mention that the provisions of Motor Traffic Regulation 58 have not been used by the Police since 1974 and consideration will also be given as to whether it needs to be retained.*

As this matter together with the question of adoption of standardised procedures for the disposal or destruction of vehicles are primarily matters for South Sydney Council and the Police Department, the Roads and Traffic Authority will also canvass those issues with them.

I thank you and your Committee for raising these issues and I will keep you informed of developments."

The Committee is satisfied with the action proposed by the Minister.

(6) FOOD ACT 1989 - REGULATION (RELATING TO THE SECURING OF EGGS FROM CONTAMINATION) GAZETTE 24 APRIL, 1991 AT P. 3175

The object of this regulation is to amend the Food Regulations 1937 so as to prohibit the sale of eggs having cracked shells unless the eggs are to be used in the production of pasteurised liquid eggs or pasteurised liquid egg products.

The Committee considered this regulation at its meeting on 19 September 1991 and resolved to seek advice from the Minister for Health and Community Services on the practical need for the regulation. Preliminary enquiries made by Committee officers with the Department of Health did not disclose any previous problems that would support the making of it.

On 23 October 1991 the Minister wrote to the Committee as follows:

"I refer to your letter concerning the gazettal on 26 April 1991 of an amendment to the Food Regulation 1937 to secure eggs from contamination.

The Regulation commenced on 1 May 1991. This is the same date as the commencement of the Egg Standards Regulation (Repeal) Regulation 1991, which appeared in Gazette No. 59 of 19 April 1991 at page 2949. That regulation repealed the Egg Standards Regulation 1989, clause 5 of which prescribed in effect that eggs sold to consumers or retailers should not be cracked.

No new standards were therefore prescribed, but rather the existing "standard" was transferred to the Food Regulation 1937. This was in line with the transfer of administrative responsibility for the standards relating to eggs for sale from the Department of Agriculture to the Department of Health.

I trust that this information is sufficient for the Committee."

The Committee feels that simply because the new regulation follows the terms of a previous regulation is not an adequate justification for its regazettal. The main function of the Subordinate Legislation Act was to encourage departments to test the need for all new regulations.

(7) MARITIME SERVICES ACT 1935 - REGULATION (RELATING TO THE TERMINATION OF OCCUPATION LICENCES) GOVERNMENT GAZETTE 14 DECEMBER, 1990 AT P. 10958

The object of this Regulation is to amend the Management of Waters and Waterside Lands Regulations - N.S.W. so as to declare that, in accordance with the rules of natural justice, an occupation licence may not be terminated under Regulation 45 unless the holder of the licence has been allowed at least 14 days within which to show cause to the Maritime Services Board why the licence should not be terminated.

This regulation implements an undertaking given by the Minister to the Committee on 28 August 1989 to alter the regulation to allow the holder of an occupation licence a period in which to show cause why the licence should not be cancelled for breach of the regulations.

(8) TRAFFIC ACT 1909 - REGULATION (RELATING TO THE USE OF SKATEBOARDS AND SIMILAR TOY VEHICLES ON PUBLIC STREETS) GOVERNMENT GAZETTE 26 APRIL 1991 P. 3198

The Explanatory Note with this regulation states its object is to amend the General Traffic Regulations 1916 so as to regulate the use of toy vehicles (including scooters, skateboards, roller skates and similar toys) by prohibiting their use on public streets.

It would seem to the Committee that children will be the main offenders under this regulation. Under it they will be liable to a penalty of $30.00. The Committee understands that the regulation will be administered by officers of the New South Wales Police Department. Preliminary inquiries concerning this regulation with

officers of the Roads and Traffic Authority indicate that the regulation will probably not be policed to the extent of issuing infringement notices but that the likely course on each occasion will be the issue of a caution by the Police Officer to the child concerned. This is understandable in view of the fact that the regulation will extend to children on scooters and tricycles.

The Committee's initial concern with this regulation lay in a number of areas. The first was its apparent impracticality. If there was no intention to enforce the regulation there seemed little point in making children liable to offences of this nature under the Traffic Act.

It also seemed that the regulation duplicated existing controls residing in local councils under the Local Government Act. The powers of councils under the Act already allow them to regulate such activities in most public places. It seemed that rather than further regulatory controls a better alternative may have been to carry out a detailed educational programme in schools on the matter.

A further issue of concern was that the General Traffic Regulations 1916 had not been reprinted since 1984 even though they have been amended on numerous occasions. This made it difficult for the public to properly inform themselves of the current law. This was an unsatisfactory position particularly as many of the regulations carry substantial penalties. The Committee sought the Minister's views on these matters.

In a letter dated 15 October 1991 the Minister replied as follows:

"I refer to your letter concerning the General Traffic Regulations 1916 in so far as they relate to the use of skateboards and similar toy vehicles on public streets.

The Government's decision to introduce controls over the use of skateboards and similar toy vehicles was made after the release of a report prepared by the Roads and Traffic Authority's Skateboard Advisory Committee. The Road Safety Advisory Council, which reviewed the report, endorsed the report's view that there was a strong case for banning the road use of skateboards in many areas, and for restricting their use on footpaths.

With respect to committee members' concern about the practicality of enforcing the regulation against children, it should be noted that the regulation applies to

adults as well as children. While it is recognised that younger children who offend will be dealt with by police by means of an oral caution, the issue of an infringement notice is an option available to police in the case of an adult or a child approaching adulthood. Furthermore, the existence of the regulation provides police with the basis to caution young offenders.

Although Ordinances Nos. 30 and 48 under the Local Government Act give councils power to control skateboards and roller-skates in public places and reserves, such control can only be exercised in places where councils have, by notice, prohibited skating. The erection of such notices on public streets which carry substantial volumes of traffic would be extensive and expensive and their proliferation could have an adverse effect on the visual environment.

You and committee members will, no doubt, be pleased to know that the General Traffic Regulations have been reprinted recently and copies are now available from the Government Information Service."

The Committee is satisfied with the information provided by the Minister in respect of its concerns.

(9) TRAFFIC ACT 1909 - REGULATION
GOVERNMENT GAZETTE 26 APRIL 1991 AT P. 3190

The object of this regulation is to amend the Motor Traffic Regulations 1935 so as to require motorists to stop and give way to toy vehicles being ridden across footcrossings and children's footcrossings.

In this regulation "toy vehicle" means a vehicle (other than a bicycle) ordinarily used by a child at play or by an adult for recreational or sporting purposes which is designed to be propelled by human power, and includes a scooter, skateboard, roller-skates and similar toys.

The Regulation Review committee sought the advice of the Joint Standing Committee upon Road Safety on whether this regulation was satisfactory from the point of view of safety. It referred the matter for this advice because it appeared from discussions at officer level with the Advisory and Legislative Section of the Roads and Traffic Authority that the Commissioner for Police had raised certain safety issues

relating to this regulation. These centred on the possibility that if children were allowed to ride rather than get off their toy vehicles and walk across footcrossings that accidents could occur.

On 30 October 1991 the Joint Standing Committee on Road Safety replied as follows:-

> *"I refer to your recent letter concerning the amendment to the Motor Traffic Regulations 1935 requiring motorists to stop and give way to toy vehicles being ridden across foot-crossings and children's foot-crossings.*
>
> *The STAYSAFE Committee recognises that this issue is problematic. We understand that the object of the regulation is to afford the riders of toy vehicles the same protection that pedestrians have on a foot-crossing. Besides skateboards and billycarts the legislation includes other toys such as roller skates and roller blades. The Committee understands that it is unlikely that children would remove roller skates/blades or refrain from riding a skateboard or billycart across a foot-crossing. From a practical view point the amendment was therefore necessary.*
>
> *However the Committee also recognise that skateboard riders, children using roller blades or other toy vehicles may suddenly swerve from the foot path onto a crossing, giving motorists too little time to avoid a collision.*
>
> *Although this latter situation may occur it is the opinion of the Committee that motorists approaching any foot crossing must be prepared to stop their vehicle and give way to a pedestrian. This requires that motorists must anticipate such hazards as children using toy vehicles to proceed a marked foot-crossing. It is the advice of the Committee therefore that this regulation remain in its current form."*

(10) WESTERN LANDS ACT 1901 - REGULATION (RELATING TO PAYMENT OF ARREARS) GOVERNMENT GAZETTE 20 APRIL, 1990 AT PAGE 3256

This regulation prescribes leases and licences as a class of holding in respect of which an incoming holder is liable to pay arrears of rent. Section 36D of the Western Lands Act 1901 requires the holder of that title to pay any amount due or unpaid in respect of that holding. This arrangement would be satisfactory in the case of leases as these are transferred to the incoming holder. However in the case of a licence

these are not transferable and a new licence is issued each time. Consequently there will never be arrears of rent owing on the new licence, only in respect of the land to which it relates.

The Legal Officer of the Lands Department conceded this was the case and that action was needed to correct the matter. He said the regulation should have only prescribed leases. He said that licences would be dealt with administratively, that is, a person would not get a licence unless he paid the arrears of rent. A common situation was where a person was given a lease of lands and then took out a licence to pump water from an adjoining river.

The Committee wrote to the Minister for Lands expressing the view that the regulation should be altered to limit its operation to leases.

In a letter dated 17 January 1991 the Minister advised that the regulation would be amended in accordance with the recommendation of the Committee. This was done on 21 June 1991.

(11) COMMERCIAL TRIBUNAL ACT 1984 - RULE
GOVERNMENT GAZETTE 27 APRIL, 1990 AT PAGE 3396

The Committee observed that no explanatory note was provided with this rule. The Committee suggested to the Tribunal the inclusion of Explanatory Notes in future cases. The Registrar of the Commercial Tribunal of New South Wales, advised on 6 March 1991, as follows:

> *"I refer to your letter to Mr Holt, the former Chairman of the Commercial Tribunal, concerning a Rule under the Commercial Tribunal Act, gazetted on 27th April, 1990. Your letter was referred to me for reply and I must apologise for the delay in responding.*
>
> *Thank you for drawing this matter to the Tribunal's attention. It is the Commercial Tribunal's standard practice to include explanatory notes with all Rules but unfortunately the procedure was not followed in this instance. I will of course ensure that such an oversight does not occur in future."*

(12) FISHERIES AND OYSTER FARMS ACT 1935 - REGULATION (RELATING TO SALE OF PACIFIC OYSTERS) GOVERNMENT GAZETTE OF 6TH NOVEMBER 1991 AT PAGE 10090

In a letter dated 12 April, 1991 the New South Wales Shellfish Association Limited drew the Committee's attention to a bag levy on the sale of Pacific Oysters out of the Port Stephens area and the possible consequences of that levy.

Section 20C of the Fisheries and Oyster Farms Act 1935 gives the Governor power, by Order published in the Gazette, to declare pacific oysters as noxious fish if they are in any waters or a specified class of waters. Pacific Oysters were declared noxious fish in Government Gazette No. 2 of 3 January, 1986.

One of the affects of that prohibition is that a person is guilty of an offence if he sells a pacific oyster to which an order under section 20C applies unless the oyster is sold with the consent of the Minister and in accordance with any terms and conditions imposed by the Minister.

On 21 December, 1990 the Minister by notification, under section 18 prohibited for a period of 5 years from 21 December 1990 the taking of any oyster from the waters of any leased area unless the person complied with the provisions set out in the schedules to that notification.

Schedules 1 and 2 outline a management plan to control the spread of pacific oysters and QX disease. These schedules do not refer to a levy on the sale of pacific oysters though certain inspection costs must be borne by the shipping oyster farmer.

Discussions at officer level between the Secretariat of the Regulation Review Committee and the Fisheries Division of the Department of Agriculture indicated that a regulation was being prepared that would have the effect of imposing a fee or levy. That fee or levy was to recoup costs of inspection associated with the containment of the Pacific Oyster which had been declared a noxious fish.

The Committee re-examined the matter when a regulation was subsequently made under the Fisheries and Oyster Farms Act 1935 on 6 November 1991 at page 10090 of the Gazette.

The object of this regulation was to require those lessees who sell Pacific oysters to pay annual contributions to the Minister based on the areas of their leases. Annual contributions paid by or recovered from those lessees were to be used for research into the purification of oysters and to provide a contribution towards the management of Pacific oysters in New South Wales waters. The requirement to pay such contributions only applied to lessees whose oyster leases are located within Port Stephens or its tributaries.

Section 59B of the Act enabled conditions requiring payment of annual contributions to be retrospectively included in leases by this regulation.

The Committee requested the Minister's advice on the reasons for imposing the contribution only on Port Stephens farmers. The Minister was also asked whether the costs and benefits of this contribution were assessed as required under schedule 1 of the Subordinate Legislation Act 1989. The Minister in his letter of 15 September 1992 responded as follows:

> *"Thank you for your letter of 10 July 1992 regarding the Regulation requiring Pacific oyster farmers to pay an annual contribution (based on lease area) to the management of Pacific oysters.*
> *The enclosed letter from Mr Geoff Diemar refers to the decision earlier taken by my colleague, the Hon Ian Armstrong, to introduce an $80 levy on each bag of Pacific oysters produced to pay for Pacific oyster management. When I became the Minister responsible for NSW Fisheries, I reversed that decision.*
> *In its place I implemented the Regulation you have referred to, which requires those oyster farmers in Port Stephens growing Pacific oysters to pay a contribution equivalent to $50 per hectare for the first year, $100 per hectare for the second year and $150 per hectare for the third year. This rate of contribution is far less than that originally proposed by Mr Ian Armstrong.*
> *The contribution was designed to recoup the costs of the Pacific oyster research undertaken by my Department and to partially recoup those ongoing management costs that have resulted from the decision to allow farmers in Port Stephens to sell Pacific oysters. This research defined the parameters under which purification, which is mandatory for all oysters sold in NSW, could be undertaken - without*

this research, no sales of Pacific oysters were possible. The additional management costs related to the need to stop the further spread of Pacific oysters and, in particular, to the costs of dedicating two Inspectors to implementing the provisions of the Pacific oyster and QX Management Plan.

I have recently reviewed this requirement. I am now of the view that it is unreasonable in these difficult times to require Pacific oyster farmers to pay this additional charge, which in effect stops them competing on a level playing field. I remain convinced, however, that those farmers who have benefited from the research funded by my Department should meet the costs of that research. I will shortly arrange further discussions with the NSW Shellfish Association to decide how these funds can most equitably be recouped. It may be that the annual contribution specified in the Regulation should remain in effect but only until these funds are recouped.

With regard to the requirements of Schedule 1 of the Subordinate Legislation Act 1989, which specifies guidelines for the preparation of Statutory Rules, I consider that these requirements were generally met. Circumstances in the industry have changed, however, and this has led to my reviewing the need for this Regulation, as I have outlined above.

Thank you for your interest in this matter."

(13) COMPENSATION COURT ACT 1984 - RULE
PUBLISHED IN GOVERNMENT GAZETTE 4 DECEMBER, 1990

In its eighth report to Parliament, the Regulation Review Committee referred to an earlier request to the Chief Judge of the Compensation Court of NSW to include explanatory notes in the publication of court rules. The Chief Judge replied that the Regulation Review Committee's comments in relation to the desirability of adding explanatory notes to published Rules would be drawn to the attention of the Rule Committee.

A concise reprint of the Compensation Court Rules was printed in the Gazette of 14.12.90 at p. 10883. There was no explanatory note with the rules. In a letter dated 18 March 1991 the Committee asked whether the Rule Committee had accepted the Committee's request for the inclusion of explanatory notes.

In his reply of 3 April, 1991 the Chief Judge of the Compensation Court said:

"I acknowledge your letter of 18 March, 1991.

I would advise that the Rule Committee, when promulgating the new Rules for the Compensation Court, gave consideration to the question of explanatory notes. After careful consideration the Committee concluded that explanatory notes were inappropriate in the circumstances.

The Committee was of the view that the Rules, coupled with the Practice Notes, were sufficiently clear without more. Further, it was considered that such explanatory notes could not add to, or take away from the provisions of the Rules, but could provoke unnecessary litigation if any ambiguity, or conflict, arose between the notes and the Rules themselves."

The Compensation Court Rule Committee's decision was inconsistent with the practice of the Rule Committees of the Supreme and District Courts which also issue practice notes but have nevertheless adopted explanatory notes with their rules. The basis for the Rule Committee's decision also appears to be incorrect in respect of the issue of ambiguity and conflict.

Section 35 of the Interpretation Act 1987 states that headings, marginal notes, foot notes and end notes do not form part of an Act or instrument, unless they are expressly referred to or are part of a form or table in the act or instrument. As such no "ambiguity" or "conflict" can arise between the notes and the Rules as the Rules stand alone .It is only where the circumstances in section 34 of the Interpretation Act arise i.e. where the rules themselves are ambiguous or obscure, or would result in an absurdity or require confirmation, that extrinsic material such as explanatory notes can be used in the construction of the rules.

The Committee also observed that the explanatory notes with the Supreme Court Rules state expressly that they do not form part of the rules. Although the Regulation Review Committee thinks such exclusions may be unnecessary in the light of the above provisions, they may offer greater clarity as to the role of the notes.

As the original proposal for explanatory notes arose out of discussions between the Regulation Review Committee and the Parliamentary Counsel's Office the Committee sought the view of that office on the circumstances in which explanatory notes may be used in construing statutory rules.

The Parliamentary Counsel in his letter of 13 June, 1991 advised as follows:

"My advice has been sought on the following matters:

(1) The circumstances in which explanatory notes may be used in construing statutory rules.

(2) Whether it is necessary or desirable for statutory rules, particularly those drafted in the Parliamentary Counsel's Office, to contain a statement expressly excluding explanatory notes from rules.

(3) Whether it would be desirable for section 34 of the Interpretation Act to be amended to specifically refer to explanatory notes to statutory rules.

I am reluctant to comment on the views or practices of any of the court Rule Committees, especially in view of the special circumstances that might exist for any of the courts of the State. The use of Practice Notes and the limited class of users may reduce the need for explanatory notes for certain rules of courts. Therefore you will understand that my advice on these matters is not intended to imply any criticism of any Rule Committee.

Use of explanatory notes in construing statutory rules

The potential for the use of explanatory notes in the construction of statutory rules (including of course rules of court) is to be found in section 34(1) and (3) of the Interpretation Act. Accordingly, explanatory notes may only be used to confirm the meaning of the text of a rule, or to determine the meaning of a rule in the event of ambiguity, obscurity, manifest absurdity or unreasonableness.

Section 34(2) contains some examples of material that may be considered for this purpose, and the subsection is expressed as not limiting the effect of section 34(1). It is clear therefore that the non-inclusion in subsection (2) of a specific reference to explanatory notes for statutory rules does not affect their use under subsection (1). Explanatory notes are but one of the kinds of material that would be available to assist in interpreting statutory rules. Their non-inclusion in subsection (2) was quite understandable in view of their adoption after the enactment of the Interpretation Act.

Section 35 is also of considerable assistance in this area. While section 35(2) contains a statement to the effect that an endnote does not form part of an Act or

instrument (ie including a rule of court), section 35(5) provides relevantly that the section does not limit the application of section 34 in relation to the use of any endnote in the interpretation of the provision to which the endnote relates.

The end result is that the Interpretation Act clearly contemplates that such notes are available for consideration in the interpretation of statutory rules in the limited circumstances described in section 34.

It does not appear that section 34(2)(a) would extend to explanatory notes for statutory rules, as was suggested in the letter.

I note in passing that Practice Notes might themselves fall within the classes of material to which section 34(1) would apply, particularly when the Practice Notes were contemporaneous with the rules in question.

Explanatory notes have been used for Bills for many years, and for statutory rules from a comparatively recent time. Their use has been beneficial to explain the legislation to which they relate, and (more recently) to provide a limited means of assisting in the interpretation of the legislation. I suspect that their use is now well established and understood, and that there will continue to be pressure for extension of their use to other public documents.

During discussions leading to the enactment of section 34 of the Interpretation Act 1987 of NSW and its counterpart in the Acts Interpretation Act of the Commonwealth, the possible problems associated with allowing Explanatory Notes to be used to assist in the interpretation of legislation were recognised and fully discussed. One of the issues discussed was the usefulness of introducing a "second level" of material that would accompany the "first level" legislation. There was general agreement that the proposed provisions would be useful. The result was that the provisions were carefully drafted with these issues in mind, and the provisions were adopted by the legislatures. The issues addressed explanatory notes for Bills, which were directly in contemplation, but the same principles clearly apply for explanatory notes for statutory rules. The provisions also require that regard be had to the need to avoid prolonging legal or other proceedings without compensating advantage: section 34(3)(b).

<u>Express statements that explanatory notes are not part of statutory rules</u>

The letter points out that the Supreme Court explanatory notes state expressly that

they do not form part of the rules.

It is clear that an explanatory note at the end of a statutory rule is an "endnote" within the meaning of section 35(2) of the Interpretation Act, and therefore that it does not form part of the rule concerned. The situation would not be as clear if the notes were included within the text, otherwise than as a "marginal note, footnote or endnote".

While it is not necessary to extend this practice of the Supreme Court Rules to other instruments, there is nothing wrong with the Supreme Court's decision to adopt it. It merely duplicates the effect of the Interpretation Act in this regard and is therefore unexceptionable. I would not be in favour of applying the practice to other forms of statutory rules.

Amendment of section 34

Now that the addition of explanatory notes to most if not all statutory rules has become standard practice in this State, it may be appropriate to amend section 34(2) of the Interpretation Act in due course to include an express reference to them. However, a court would not find their current omission puzzling, and would undoubtedly consider such an explanatory note as falling within the general words of section 34(1). I therefore do not think the Act needs to be amended for this purpose on an urgent basis. In considering such an amendment, I would like to consider whether explanatory notes for other instruments (eg proclamations) should be included as well. Furthermore, I would like to consult my interstate colleagues on the issue, so that whatever uniformity exists in this area is maintained as far as possible."

(14) MARITIME SERVICES ACT 1935 - REGULATION (RELATING TO THE CONTROL OF TOILET AND GALLEY WASTE FROM VESSELS) GOVERNMENT GAZETTE OF 25.10.91 AT P. 9050

The object of this regulation is to control the discharge of toilet and galley waste from vessels in the Sydney Harbour locality and on the Murray River. Certain commercial and recreational vessels must have from 1 January, 1992 a holding tank/galley waste container for such waste.

The Committee wrote to the Minister on 4 March 1992 seeking an amendment of Regulations 63E(2) and 63G(1) of the Regulation as these appeared to be in conflict with Section 16(1) of the Clean Waters Act. The Committee also questioned the policing and enforcability of the regulation.

The Minister responded on 16 March in the following terms:

"I refer to your letter dated 4 March 1992 regarding the Maritime Services Act 1935 - Regulation relating to the control of toilet and galley waste from vessels (Committee Reference: 1483).

The Transport Administration's primary concern in this matter is to ensure that Sydney Harbour is protected from environmental harm by the control of vessel waste discharges. This program implements a critical part of the Premier's objective to clean up Sydney Harbour and it is imperative that the regulation not be disallowed.

However, the issues raised in your letter are valid and, to resolve them, it is proposed that the Management of Waters and Waterside Lands Regulation - NSW 1980 be amended as follows:

by omitting Regulations 63D(6)(b) and 63F(5)(b) and by inserting instead the following

(b) the Board may exempt a vessel from compliance with those clauses in accordance with such conditions and on payment of such fees as may be specified in the exemption.

by omitting Regulations 63E(2)(b) and 63(G)(1)(b) and by inserting instead the following paragraph

(b) in accordance with a licence issued under the Pollution Control Act 1970.

I have asked the Department of Transport to review your Committee's suggestion that the issue of EPA licences and the enforcement of their conditions be delegated to the MSB, and I am advised that suitable arrangements can be made. Enforcement via on-the-spot fines for water pollution offences (tier 3 offences under the Environmental Offences and Penalties Act 1989) can be carried out by the MSB's boating service officers. The MSB considers that staffing with respect to survey and enforcement is sufficient.

It should be made clear that the MSB's proposed arrangements regarding the operation of vessels in which holding tanks are not fitted will apply only to a limited number of commercial vessels in Sydney Harbour, and following the first year of phasing-in, to an even smaller number.

I understand that a meeting has been arranged on 17 March 1992 between officers of the Regulation Review Committee and the relevant agencies to explore the above matters and any other proposals that will contribute to the speedy resolution of the problem. I would appreciate it if the Committee could take all steps necessary to ensure that adequate time is available to allow the amendments to be made."

After holding the discussion on 17.3.92 it was agreed that Regulations 63(D)(6)(b) and 63(F)(5)(b) should also be made expressly subject to Regulations 63(E)(2)(b) and 63G(1)(b). This would make it abundantly clear that the Board's exemption was subject to the requirement to obtain a licence under the Pollution Control Act 1970.

The Minister for Transport in his letter of 2 April 1992 advised as follows:

"Further to my letter dated 16 March 1992 regarding the Maritime Services Act 1935 - Regulation relating to the control of toilet and galley waste from vessels (Committee Reference: 1482), I am pleased to report progress in resolving the problem identified by the Regulation Review Committee.

A meeting has been held between officers of the Regulation Review Committee, the Department of Transport and the Maritime Services Board. I understand that the Committee Secretariat will now be recommending to the Committee that the Regulation <u>not</u> be disallowed provided:

(a) the attached amendments (Attachment A) are put in train.

(b) no prosecution action on the Regulation is taken until the proposed amendments are made.

I appreciate the work of the Regulation Review Committee in rectifying the matter and trust that this will ensure a satisfactory outcome."

"ATTACHMENT A

The following amendments to the Management of Waters and Waterside Lands Regulations are proposed:

by omitting Regulation 63D(6)(b) and by inserting instead the following paragraph:

(b) subject to Regulation 63E(2), the Board may exempt the vessel from compliance with this Regulation in accordance with such conditions and on payment of such fees as may be specified in the exemption.

by omitting Regulation 63F(5)(b) and by inserting instead the following paragraph:

(b) subject to Regulation 63G(1), the Board may exempt the vessel from compliance with this Regulation in accordance with such conditions and on payment of such fees as may be specified in the exemption.

by omitting Regulations 63E(2)(b) and 63G(1)(b) and by inserting instead the following paragraph:

(b) in accordance with a licence issued under Section 17(a) of the Pollution Control Act 1970."

The Committee expressed itself satisfied with these changes and requested the Minister to advise it when they were made.

2. ISSUES COMMON TO REGULATIONS CONSIDERED

(i) TABLING OF STATUTORY RULES

The Committee has had drawn to its attention a letter from the former Minister for the Environment and Leader of the House dated 19th March 1992 which recommended certain reforms for the tabling of statutory instruments. The Committee had been pursuing similar reforms for the tabling of statutory rules since its 4th Report of December 1988. In response to the Committee's earlier representations the Attorney-General advised that his Department would convene a meeting on the various preferences for reform with the Clerks of both Houses, Parliamentary Counsel and the Regulation Review Committee. The Committee noted that whilst the proposals outlined in the former Minister's letter of 19th March were similar to those proposed to be discussed there was no mention made of the Committee's involvement.

The Committee noted that the former Minister proposed that extracts from the Gazette containing regulations should be tabled in the House immediately after publication. This would also mean that the 15 sitting day period within which the Committee can consider regulations would commence immediately after publication. It would therefore be important for the Committee to be properly briefed on the effect and the impact of each statutory instrument immediately upon tabling. At present the Committee does not receive a copy of the Executive Council Minute and other material submitted to the Governor under Section 7 of the Subordinate Legislation Act. If the statutory rule is a principal statutory rule Departments have 28 days in which to send a copy of the regulatory impact statement for that rule and any public comments made on it. Departments frequently exceed this maximum time.

Accordingly the Committee is of the view that if the Minister's proposal goes ahead, sections 7 and 5 of the Subordinate Legislation Act should be amended to require the submission to the Committee of the relevant material on the day that the statutory instrument is published in the Gazette.

The Committee wrote to the Premier and Treasurer on 10th July 1992 formally requesting these amendments.

(ii) MINISTER'S CORRESPONDENCE AND UNDERTAKINGS

The Committee draws the following outstanding correspondence to the attention of Parliament:

Principal Statutory Rules published on 29 June 1990

In its 9th Report the Committee dealt in detail with the large number of principal statutory rules that had been published in the Gazette on 29 June 1990 apparently for the main purpose of evading the impact assessment provisions of the Subordinate Legislation Act 1989 which were due to commence on 1 July 1990. The principal statutory rules published in the gazette of 29 June include some of the most important subordinate legislation of this State. The list includes:

- Ambulance Services (Elected Staff Director) Regulation 1990.
- Ambulance Services (Staff) Regulation 1990.
- Animal Research Regulation 1990.
- Community Land Development Regulation 1990.
- Community Land Management Regulation 1990.
- Day Procedure Centres Regulation 1990.
- Dentists (Savings and Transitional) Regulation 1990.
- Friendly Societies General Regulation 1990.
- Health Administration (Quality Assurance Committees) Regulation 1990.
- Mental Health Regulation 1990.
- Nursing Homes Regulation 1990.
- Occupational Health and Safety (Confined Spaces) Regulation 1990.
- Occupational Health and Safety (Floors, Passageways and Stairs) Regulation 1990.
- Passenger Transport Regulation 1990.
- Podiatrists Regulation 1990.
- Psychologists Regulation 1990.
- Police Service Regulation 1990.
- Private Hospitals Regulation 1990.
- Public Authorities (Financial Arrangements) Investment Powers Regulation 1990.

- State Authorities Superannuation (Hunter District Water Board Employees' Provident Fund Transfer) Regulation 1990.
- Superannuation (Government Insurance Office Employees) Regulation 1990.
- Survey Practice Regulation 1990.
- Swimming Pools Regulation 1990.

These regulations have undergone no formal assessment under the provisions of the Subordinate Legislation Act.

The Premier responded by stating that the Government proposed to honour the spirit of the legislation and provide for the appropriate review of those principal statutory rules published on 29 June 1990.

In response to the Committee's letter of 29 November 1990 seeking further details of the proposed review, the Acting Director-General of the Cabinet Office advised that the Attorney General, was coordinating the Government's review of this matter.

Since that time no Regulatory Impact Statements have been received by the Committee in respect of the relevant regulations.

Correspondence has only been received on one regulation, the Survey Practice Regulation which indicates that a Regulatory Impact Statement is not necessary in that case.

The Committee is concerned that the Premier's undertaking has not yet been implemented. The Committee reminded the then Attorney General of this undertaking on 6 November 1991. He responded as follows:

> *"I refer to your letter of 6 November 1991, concerning principal statutory rules published in the Government Gazette of 29 June 1990.*
>
> *As the Premier is now the Minister responsible for the Subordinate Legislation Act 1989, your letter has been referred to him for consideration and reply direct to you."*

The Committee is not satisfied with the lack of a substantive response from the Government on this matter.

(iii) REGULATORY IMPACT STATEMENTS PRODUCED FOR NEW AND REPLACEMENT PRINCIPAL STATUTORY RULES

The first and second stage in the staged repeal of statutory rules occurred, on 1

September 1991 and 1 September 1992 respectively. This meant that all those regulations made prior to 1 September 1964 were repealed unless that repeal was postponed by the Governor. Information provided by the Parliamentary Counsel indicates that as at 1 July 1990, the date the Subordinate Legislation Act commenced, the total number of Statutory rules in New South Wales was 978 comprising 15,087 pages. As at 1 September 1992 the total is 820 comprising 12,111 pages. This represents a 15 per cent reduction in regulations and a 20 per cent reduction in pages since 1 July 1990

New and replacement regulations as from 1 July 1990 had to be made in accordance with the Regulatory Impact Statement process. The standard of these regulatory impact statements was not high. Many of the requirements of the Act were either glossed over or misunderstood. If any one thing characterised the statements it was a failure to identify alternative options to making statutory rules. In general there seems to be an attitude that the regulatory impact statement procedures are something tacked on at the end of the internal departmental decision making process, rather than a reformation of the decision making process itself.

Significant amendments have been made as a consequence of public comment on draft regulations and regulatory impact statements. In some cases however departments and even Ministers have disregarded significant concerns raised by the public and industry groups.

The following are some examples of the statements the Committee considered:

DENTISTS REGULATION 1991, GAZETTE OF 26TH JULY 1991 AT P 6046

This regulation replaced the old Dentists Regulation as a consequence of the passage of the new Dentists Act 1989. The Committee raised the following issues with the Minister:-

Statement of objectives of regulation and reasons for them

The Committee believed the objective as stated in the Impact Statement was clearly a departure from the Subordinate Legislation Act. The objective was stated as follows: "*to satisfy the provisions of the Dentists Act 1989 which was assented to on 25 October 1989*". Satisfying the provisions of the enabling Act is the function of any regulation. What is required is a statement of the particular objectives of the

statutory rule. The objective should have been more informatively stated for example as follows: *"to protect the health and safety of the public who seek dental health services"*

Identification of alternative options

As the Regulation was made up of 4 distinct parts, alternative options to achieve the objectives should have been proposed for each of those parts.

Assessment of costs and benefits

The impact of extending the scope of work by dental hygienists was not assessed. Separate cost-benefit analyses addressing different options for the separate parts of the Regulation should have been conducted.

Consultation Programme

The consultation programme should have included organisations such as the Australian Consumers Association.

The Committee believed that a further impact assessment should be carried out taking into account the above issues.

The Minister for Health and Community Services responded on 19th December 1991. The Minister conceded that the objectives could have been stated at the beginning of the Regulatory Impact Statement. He said however that the overall objective was made clear through the body of the statement and quoted passages from pages 1, 4 and 5 of the statement as representing the objective. The Committee considers that the statement of the objectives in a Regulatory Impact Statement is the most important part as all else flows from its proper formulation. The public and the Parliament should not have to reconstruct the objectives of a Statutory Rule by compiling parts from throughout the statement, as the Minister suggested.

The Minister considered that alternative options had been adequately evaluated in terms of their costs and benefits. The Committee's concern still remains, however, that separate consideration in terms of costs and benefits should be given to each substantive part of a statutory rule as well as the alternative options to those parts. Although the Minister has indicated that consumer groups were in fact consulted this was done indirectly through their members on the Dental Advisory Committee. The Regulatory Impact Statement did not make this clear in the proposed consultation program.

CROWN LANDS (GENERAL CEMETERY) BY-LAW 1991,
NECROPOLIS REGULATION 1991,
GAZETTE 30.8.91 AT PGS. 7373 AND 7454

The above by-law and regulation consolidate the sets of Cemetery by-laws under the Crown Lands Act 1989 and the Necropolis Act 1901. The Committee was concerned that the Regulatory Impact Statements accompanying these regulations had a number of major defects. As the Statements for the By-Law and Regulation were very similar they can be dealt with together.

Objectives and Options

The only two options considered were the introduction of the regulation and by-law or not proceeding with any action. The following statement was made on the other options available:

> "*Other options such as maintaining the status quo or taking administrative action do not wholly or substantially achieve the objectives above and have not been considered.*"

The Committee was of the view that the consideration of options had been a unnecessarily curtailed because the objectives had been confused with the options. By stating the objectives in terms of streamlining and making a common set of by-laws and regulations and repealing obsolete by-laws and regulations the only option must involve remaking the by-laws and regulations. Other administrative or legislative action is precluded.

Impact Assessment

No attempt was made to quantify direct or indirect costs of the by-laws and regulations. It was stated that changes to resource allocation, administration and compliance costs could not be adequately quantified but no attempt at quantification was made. It was further stated that the by-laws and regulations were mainly used by the Trust and only played a minor role in the control of cemeteries by Government. The main controls being contained in the Crown Lands Regulations and other acts and regulations and administrative guidelines administered by the Department. The Committee considered that if this was the case then one of the major options would have been further rationalising controls by incorporating the content of the by-laws and regulations within the major controls administered by the department.

Powers of Trust

The Committee was also concerned that the powers of the trusts as stated in the by-laws and regulations were broad and unfettered. The Committee previously made recommendations concerning the power of cemetery trusts to remove structures without giving notice to relevant persons. The Minister agreed to amend the previous by-laws and regulations to provide for appropriate notice and this was subsequently done. No requirement for that notice is now contained in the new by-laws and regulations. The relevant clause, clause 8, simply enables the reserve trust to make such provision as it considers necessary for the removal, replacement and maintenance of structures. Generally clause 8 is a form of sub-delegation of legislative power to the individual trusts and leaves very little of substance to be dealt with in the regulation concerning the powers of trusts. As many matters are left to the trust to determine, a major option would have been to incorporate these by-laws within the other major controls on Crown reserves.

COMMONS MANAGEMENT REGULATION

GAZETTE OF 30.8.91 AT P 7306

The Regulatory Impact Statement for the Commons Management Regulation was prepared in a very similar fashion to those for the General Cemetery and Necropolis By-laws and Regulations. The regulatory impact statement accordingly shared a number of defects with those by-laws and regulations.

Objectives

The objectives of the regulation were not properly defined. They appeared to be a direct quote from the explanatory note to the regulation which stated what the regulation did, not what its objectives were.

Options

Because the objectives were improperly formulated, the consideration of alternative options was curtailed. The only alternatives are making the regulation as drafted or not. Other options could have included making the regulation in a different form, prescribing certain matters to be dealt with administratively or incorporating by reference material from other acts or instruments.

Impact Assessment

The Impact Assessment was dealt with in a similar fashion to the earlier

regulations. NO attempt was made to quantify direct or indirect costs of the regulation. It was again stated that changes to resource allocation administration and compliance costs could not be adequately quantified. Again no attempt at quantification was made.

The only statement in dollar terms in the regulatory impact statement was on pages 4 and 5 which set out the fees in Schedule 2 to the regulation and the reasons for them. The following statement was then made:

> *"These fees are commensurate with fees for travelling stock under the Rural Lands Protection Regulations."*

This statement was wrong. In its response to the regulatory impact statement, the Rural Lands Protection Board pointed out that their fees were in fact much lower than those in the regulation.

The Committee considered that if such inaccuracies could occur in a simple comparison of two sets of fees, then how much greater may be the inaccuracy of the unquantified assumptions as to the costs and benefits of the options for making the regulation in the regulatory impact statement.

HUNTER CATCHMENT MANAGEMENT TRUST REGULATION 1991 (GAZETTE OF 22.11.91 AT P 9738)

The Committee was pleased to note by contrast with the gross deficiencies in the Statements on the cemetery and commons management by-laws and regulations that in the case of the Hunter Catchment Management Trust Regulation, a reasonable attempt has been made to comply with the Subordinate Legislation Act.

Objectives

Although the objectives were defined in terms of complying with various sections of the Act, this was not seen as limiting the range of options.

Options

The options were well prepared. Eight options were presented. Four options presented alternatives to making a regulation but importantly the other four options considered different ways in which the regulation could be made.

Impact Assessment

In the Impact Assessment, a reasonable attempt were made to determine the costs and benefits of the options which were summarised in Table 1 to the statement.

Consultation

In the consultation programme, some difficulty was experienced by Councils in responding to the Department in the 21 day period allowed, which is the minimum under the Act.

Aside from the fact that the objective of this regulation could have been more generally stated and that a greater period for consultation could have been allowed, the Committee considered this statement a satisfactory compliance with the Subordinate Legislation Act. The Committee resolved to draw the Minister's attention to the marked divergence in approach between this and the preceding statements. The Committee suggested that in future cases, regulatory impact statements should be prepared along the lines of that for the Hunter Catchment Management Trust Regulation. The Committee also provided the Minister with an example of another regulatory impact statement that the Committee found satisfactory to aid in the preparation of statements in the future. This was the regulatory impact statement in respect of the Tow Truck Regulation 1990.

The Minister for Conservation and Land Management responded on 26 May 1992 as follows:

"I refer to your letter (reference 1394/5 and 1468/9) regarding the Commons Management Regulation 1991 and the Hunter Catchment Management Trust Regulation 1991.

In my letter of 2nd April 1992 regarding the Crown Lands (General Cemetery) By-law 1991 and Necropolis Regulation 1991, I advised that your Committee's comments on the preparation of Regulatory Impact Statements had been brought to the attention of the appropriate officers.

Your Committee's more recent comments and favourable examples of impact statements have also been drawn to the attention of these officers as a guide for future preparation of impact statements."

STAMP DUTIES ACT 1920 - REGULATION
(STAMP DUTIES REGULATION 1991)
(GAZETTE OF 30.8.91 AT P 7401)

The object of the Regulation was to repeal and remake, without any major modifications, certain of the provisions of the Stamp Duties Regulations 1934.

The Committee noted that many of the provisions of the old regulation had been continued on the basis that they will be reviewed at some time in the future. It was the Committee's view that this was not in accordance with the spirit of the Subordinate Legislation Act 1989.

All possible reviews of these provisions should have preceded the making of the Regulatory Impact Statement. In a number of instances the review of the provisions was said to await the review of sections in the Stamp Duties Act 1920. The Committee considered this unacceptable as Departments knew of the requirements of the Subordinate Legislation Act since August 1989 when the Act was passed and it was known that this particular regulation would be in the first category of review and would expire on 1 September 1991 unless remade.

The Committee believed there would accordingly be no grounds for postponing a review of the substantive provisions of the regulations to a more convenient time in accordance with the Department's own legislative programme.

The Committee informed the Minister that provision already exists in the Subordinate Legislation Act (section 11) for the Governor to make an order postponing repeal in specific cases, by up to a maximum of two years. As most of the substantive provisions of the Regulation were either due for repeal, for transfer to the Act or for major review, it clearly would have been the most appropriate course to seek a section 11 order from the Governor. Instead a new principal Statutory Rule was made consuming considerable resources in preparation and consultation only to be the subject of further major review within a short period.

It appeared that of the 11 clauses of the regulation only clauses 4 and 10 were likely to be retained unaltered.

Therefore the Committee noted that further major amendments to the regulation would be necessary but that these would not themselves be the subject of a Regulatory Impact Statement. A further regulatory impact statement would only be

required when the regulation came up for review in 5 years time in 1996, instead of 1992, or 1993 at the latest, if the proper course of seeking an order under section 11 had been followed.

The Committee accordingly sought a timetable for the review of the relevant clauses. Furthermore, when these provisions were ultimately reviewed, the Committee asked that a regulatory impact statement be prepared on any substantive amendments that are made to the regulation as a consequence of that review.

The Assistant Treasurer of New South Wales in his letter of 13 December 1991 said as follows:

> *"I refer to your letter to the Premier and Treasurer in which you advise that your Committee considers the Review of the Regulations to the Stamp Duties Act was not executed in accordance with the spirit of the Subordinate Legislation Act 1989,*
>
> *It is not accepted that a number of the retained Regulations which will be reviewed in the future should have been made the subject of an order by the Governor postponing their repeal. The matters to which these Regulations relate are the subject of long term negotiations or are connected to the phased abolition of stamp duty on ASX transactions, which is in turn dependent on the abolition of a similar duty in the United Kingdom. At this stage the dates for further review of these Regulations are not known.*
>
> *The review of the Regulations was carried out with the assistance and advice of the Business Deregulation Unit and Parliamentary Counsel. I draw your attention to the reduction in the number of Regulations from 81 to 11, excluding repeal and transitional provisions.*
>
> *Consequently it is considered that the review of the Regulations to the Stamp Duties Act was executed in an appropriate and cost effective manner. Furthermore, the review was conducted in accordance with appropriate and relevant advice and within the spirit of the Subordinate Legislation Act 1989."*

In his statement that the number of regulations had been reduced from 81 to 11 the Minister says that he did not count the transitional provisions. However these provisions continued in force a further 11 regulations pending their proposed repeal in 1992.

The Minister has not given a definite timetable for review of the provisions nor has he given any undertaking to prepare an regulatory impact statement when they are ultimately reviewed. Indefinite deferral of review would set a dangerous precedent.

The Committee found when it was developing proposals for the staged review in 1988 that when similar proposals had been adopted in Queensland, Departments frequently sought an exemption from the provisions of the Queensland legislation on the basis that the Act under which the regulations were made was subject to review. This was considered by the authorities in Queensland to be an excuse as very often Acts are under constant review by Departments and substantive change to regulations might be postponed indefinitely.

It must be remembered that under the Subordinate Legislation Act regulations only have a 5 year life span. In that context deferral for up to 2 years is more than reasonable. Based on what the Minister has said there is no guarantee even at the end of the 5 year life of this regulation that all the provisions will be the subject of a substantive review. They may linger on into another 5 year life without any consideration of their appropriateness in terms of the Subordinate Legislation Act. This is certainly at odds with the principles of the Act.

The Committee in is report of July 1989 which gave rise to the Subordinate Legislation Act referred to earlier comments by the then Leader of the Opposition, the Hon. N Greiner, MP on the need for Ministers to demonstrate that regulations are necessary:-

> "*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 to those who wish to rid themselves of the regulation.*"

FISHERIES AND OYSTER FARMS (SOLITARY ISLANDS MARINE RESERVE) REGULATION 1991

(GAZETTE REFERENCE 26.4.91 AT P. 3193-3207)

The objective of this regulation was to make provision for the management and protection of the Solitary Islands Marine Reserve.

No regulatory impact statement was prepared before this regulation was made which is a major departure from the Subordinate Legislation Act.

A regulatory impact statement was prepared in October and received by the Committee on 11 December 1991, one month after the last date on which disallowance could be moved.

Estimates of costs and benefits of the alternative options to meet objectives were not presented in the regulatory impact statement.

The Consultation Programme was described as follows in the regulatory impact statement.

"*4. Consultation Process*

An extensive public and industry consultation programme has been undertaken prior to the preparation of this regulation. A Draft Management Strategy was prepared in 1989 based on extensive research of the resources and the industries involved. This Draft Strategy was widely advertised in local papers and television over a two month period (July - August 1989) and circulated to all interested Government and user groups.

Submissions were called for and 374 submissions were received, of which over 95% were supportive of the overall proposal. All recommendations were examined by a Consultative Committee and there was unanimous agreement of the final recommendations which were forwarded to the Minister for his approval and implementation in this regulation. The Consultative Committee had an independent Chairman appointed and the following representatives:-

- *commercial fisherman*
- *recreational fishermen*
- *dive operators*
- *local conservation body*
- *independent marine scientist*

. *Coffs Harbour City Council*

. *Ulmarra Shire Council*

A management advisory committee with a similar membership will be established to implement the management strategy and to monitor the effectiveness of the regulation. A review process will be undertaken in 1995-6.

The Regulatory Impact Statement will be forwarded to interested organisations for comment."

Only the Department of State Development responded to the regulatory impact statement and it was unclear as to which organisations were provided with a copy of the regulatory impact statement.

The Committee is of the view that such prior consultation on a general proposal cannot act as a substitute for detailed consultation on a draft regulation and regulatory impact statement prepared under the Act. The Committee informed the Minister of this major departure from the Act and requested further consultation on the published regulation.

3. NEW DEVELOPMENTS

Consultation with departments on drafting regulations

On 23rd July 1992 Committee members met with an officer of the Environment Protection Authority to discuss proposed regulations. The meeting arose out of the offer made in Parliament by the former Minister for the Environment on 27th March 1992 following the tabling of the Regulation Review Committee's Report No. 14. The officer briefed the Committee on forthcoming regulations proposed by the Authority and new procedures for the review of legislation by the Authority. The Committee considered that the officers presence was indicative of a new co-operative approach on the part of Ministers to the preparation of legislation in compliance with the Subordinate Legislation Act 1989.

Uniform approach to the review of subordinate legislation in Australia

The Committee has noted that moves are underway in a number of other States and the Commonwealth towards the preparation of legislation along the lines of the Subordinate Legislation Act of New South Wales. In March 1992 the Administrative Review Council of the Commonwealth released a report on the making of rules by Commonwealth agencies. If adopted by the Federal Attorney-General the proposals in that report would bring about the review of all instruments of a "legislative character". These instruments would include many of the quasi legislative instruments which have escaped review in the past. The Regulation Review Committee of New South Wales was consulted by the Administrative Review Council during the course of the preparation of these proposals. The Committee has made representations on proposals of a similar nature in Queensland, Tasmania and Western Australia and on the proposed review of the Victorian Subordinate Legislation Act. Suggestions have been made for the introduction of a Uniform Subordinate Legislation Act throughout the Commonwealth following on from proposals to introduce a Uniform Interpretation Act. The Committee considers these proposals have merit in the light of the need to pursue micro-economic reform in the area of business regulation. In a report sponsored by 19 business and employer groups entitled "Liberating Enterprise to improve competitiveness" of September 1992 it was noted that New South Wales was commented on favourably for having cut red tape and repealed many regulations under the staged repeal process. The main thrust

of the paper was to call on all Australian States and the Commonwealth to convene a Special Premiers Conference to discuss adoption of uniform procedures for regulatory assessment. The Committee agrees with this recommendation.

Impact Statements for Legislation

The Committee has been provided with a memorandum from the former Premier, memorandum No. 92-10 of 13th May 1992 concerning review clauses in legislation. The Committee was pleased to note that it is now government policy to include review clauses in all principal legislation so that the legislation is reviewed at the end of 5 years.

The memorandum was silent on whether the Report to Parliament on the outcome of each review would be made to a particular committee or whether the report would merely be tabled in the house. The Committee was concerned that there was no mention in this memorandum of any assessment of Bills presented to Parliament. It appears that it will only be after a principal act has been in force for 5 years that the review will take place. There will be no assessment of amending Bills.

The Committee noted that in the Government's Memorandum of Understanding with the Independent Members provision is made for the introduction of statements on the financial, social or environmental impact of Bills and that this reform was due to be implemented in accordance with that agreement by July of this year. In March of 1991 the Committee tabled its 11th Report which contained detailed recommendations for the introduction of such impact statements on Bills as well as for the staged review of Acts. The Committee recommended that the process be monitored by a Scrutiny of Bills Committee.

The Committee sought the advice of the Premier and Treasurer by letter dated 10th July 1992 on whether the model for legislative review recommended by it in its 11th Report would be adopted in the proposed reforms.

The Premier in his response of 1 October 1992 said as follows:

"I write in reply to your letter of 10 July 1992 concerning impact statements for legislation. In this letter, you indicated that the Regulation Review Committee was seeking advice on whether the model recommended in its Report No. 11 of March 1991 for the introduction of impact statements for legislation and related matters would be adopted. The delay in replying is regretted.

As was noted in your letter, the memorandum of Understanding with the Independent Members of the Legislative Assembly referred to the establishment of "a system of statements or legislation on its financial, social or environmental impact". The development of suitable proposals to implement this undertaking has taken longer than envisaged in the Memorandum of Understanding but it is expected that preliminary proposals will soon be available for discussion with the Independents. It is therefore not possible to give at this stage a definitive account of how the new procedures will operate. Nevertheless, in the development of proposals in this area, the comments put forward in the Regulation Review Committee's Report have been kept in mind.

It can also be suggested that the overall excellent quality of the legislation enacted since 1988 might serve to allay some of the concerns expressed in the Committee's Report about current procedures relating to principal legislation."

The paper "Liberating enterprise to improve competitiveness" of September 1992 saw the lack of proper scrutiny of Acts as a major weakness of the present system in New South Wales. It said:

"State Governments have initiated a number of valuable regulatory reforms. New South Wales and Victoria appear to have the most advanced procedures for the examination of existing legislation and the vetting of new regulatory proposals. The main weakness of these State initiatives is that they only apply to subordinate legislation and not to Acts of Parliament. In New South Wales the ***Subordinate Legislation Act (1989)*** *set in place a systematic review of all existing regulations through a program of staged repeal as well as automatic sunsetting of all new regulation. Forty eight per cent of regulations passed before 1941 were repealed and the remaining regulations of that period are being reviewed. All regulations passed between 1941 and 1964 face automatic repeal on 1 September 1992. All new regulations, under the Subordinate Legislation Act, are subjected to clearly defined processes of assessment (eg financial impact statements), public consultation and scrutiny."*

A.J. Cruickshank,

Chairman,

Regulation Review Committee.