
REGULATION REVIEW COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

REPORT UPON REGULATIONS UNDER THE FIREARMS ACT 1989:

REGULATION (EXEMPTING TASMANIAN SHOOTERS FROM THE
REQUIREMENT TO HOLD CERTAIN LICENCES);

THE FIREARMS AMENDMENT (PROHIBITION OF SALES)
REGULATION 1996

REPORT 8/51
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REGULATION REVIEW COMMITTEE

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FUNCTIONS OF REGULATION REVIEW COMMITTEE

The Regulation Review Committee was established under the Regulation Review Act 1987. A principal function of 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.

A further function of the Committee is to report from time to time to both Houses of Parliament on the staged repeal of regulations.

CHAIRMAN'S FOREWORD

The Committee's action on these two regulations demonstrates its vigilance in raising fundamental issues concerning the validity of regulations.

The first regulation concerns the recognition of Tasmanian shooters' licences in New South Wales. The second regulation was made as an interim measure, to prohibit sales of certain automatic firearms pending the passage of uniform firearms legislation.

While the Committee recognises that both regulations are due for repeal, the Committee believes that the issues they raise must be reported as they concern the enforceability and the validity of the respective regulations.

In relation to The Firearms Amendment (Prohibition of Sales) Regulation 1996 the Committee considers that a reasonable case had been made out to the Minister that the relationship between prohibitions in the regulation and some of the provisions of the Act are unclear and possibly in conflict. The Committee has an obligation under the Regulation Review Act to ensure that regulations are made in accordance with the principal Act notwithstanding that they may be of an interim nature.

Doug Shedden MP
Chairman
Regulation Review Committee

DESCRIPTION Firearms Act 1989 - Regulation (Exempting Tasmanian shooters from requirement to hold certain licences)

GOVERNMENT GAZETTE 1 March, 1996 at page 836

MINISTER for Police

OBJECT The committee first considered this regulation in May 1996. The explanatory note states that its object is to exempt a person who is a resident of Tasmania from the requirement to hold a shooter's licence - class 1 or shooter's licence - class 2 if the person holds a current equivalent Tasmanian licence.

The committee was concerned that there was no direct equivalence between the New South Wales and Tasmanian licences.

Clause 93 of the Regulation states: "A person who is a resident of the State of Queensland, Victoria, Tasmania, South Australia or Western Australia or the Australian Capital Territory or the Northern Territory is exempt from any requirement made by the Act to be the holder of a current shooter's licence, class 1 or class 2, if the person is the holder of a current licence or instrument conferring equivalent authority issued under the law in force in that State or Territory."

The NSW Licences

Shooter's licences class 1 and class 2 are set out in the table to section 21 of the Act.

Under the heading 'Shooter's licence class 1' in the table, the firearms to which the licence applies are air rifles, rifles, shot guns and rifle shot gun combinations but excluding self-loading, centre-fire rifles and self-loading shotguns or prohibited weapons.

Under the heading 'Shooter's licence class 2' the firearms to which the licence applies are listed as self-loading, centre-fire rifles (other than those designed for military purposes) which are fitted with an integral or detachable magazine capable of holding no more than 5 rounds; or self-loading shotguns fitted with a similar

magazine (but not firearms that are prohibited weapons).

A Class 1 licence authorises the holder and any other person under the personal supervision of the holder at an approved, moveable shooting range to possess and use, for any lawful purpose, the firearms to which it applies on the condition that no one under the age of 18 years can possess or use a firearm.

A shooter's licence class 2 authorises the holder to possess and use, for any lawful purpose, firearms to which the licence applies on the condition that no person under the age of 18 years possess or use the firearm.

The Tasmanian Licences

There was no direct equivalence between these New South Wales licences and those operating under the Guns Act 1991 of Tasmania. Under section 8 of the Tasmanian Act the following types of licences and permits were listed:

- gun dealers licence
- gun licence
- security agents gun licence
- security guard's licence
- pistol permit
- fully automatic gun permit
- prohibited gun permit
- temporary gun permit

Under section 10 of the Act a gun licence authorised the person specified in the licence to use, keep and possess a gun other than a pistol, a fully automatic gun or a prohibited gun. Under section 4 of the Act, prohibited guns are self-loading, centre-fire rifles other than fully automatic guns and such other guns of any class, design, style or model which the Minister declares by order to be a prohibited gun.

'Gun' was defined under section 3 of the Act as a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes the components of such a weapon, such a weapon that is obstructed from firing and an imitation gun.

Lack of equivalent Authority

The Tasmanian definition of 'gun' did not correspond

with the definition of firearm in the Firearms Act of NSW. For one thing, in NSW there is a separate Prohibited Weapons Act and Regulation which would cover some of the things defined as 'gun' under the Tasmanian Act.

In the case of the NSW Act the definition of 'Firearm' means a gun or other weapon that wholly or partially uses an explosive to propel a projectile while in the case of the Tasmanian Act the shot, bullet or missile can be discharged by any means.

Leaving aside these problems of definition there is also lack of correspondence between the licences as mentioned above.

The Class 2 Shooter's licence of NSW is closest in 'equivalent authority' to the prohibited gun permit of Tasmania. However, prohibited guns are defined as self-loading centre-fire rifles other than fully automatic guns while Class 2 Shooter's licences in NSW apply to self-loading centre-fire rifles other than those that are designed or adapted for military purposes and the magazine of which can hold no more than 5 rounds of ammunition. It also embraces shotguns of similar description. The holder of a prohibited gun permit therefore, from Tasmania, in possession of a gun with a magazine in excess of 5 rounds capacity could not be said to hold a licence or instrument conferring 'equivalent authority' to a Class 2 Shooter's licence in NSW and would be in breach of the Act.

It was difficult to understand how, in a practical sense, the NSW Police Force or any shooter would be able to ensure the equivalence of the authority in respect of Tasmanian licences and instruments under the legislation as it now stands without a table setting out the comparative provisions. In respect of a Class 1 Shooter's licence, the nearest equivalent in Tasmania is a gun licence under section 10 which authorises a person to use, keep and possess a gun other than a pistol, a fully automatic gun or a prohibited gun.

It should be noted that there is a further lack of

equivalence in the fact that the relevant provisions in Tasmania are in the Act itself. Section 19 of the Guns Act exempts visitors holding licences from the

requirements of the Act but only for the duration for their stay in Tasmania or 45 days after the person entered the State, whichever first happens. This again would appear to be a major difference between the two provisions.

Exemptions

The general regulation making power in section 56 of the NSW Firearms Act contains a very broad exemption provision. Section 56 (2)(i) states that the Governor may make regulations not inconsistent with this Act with respect to exempting persons from specified requirements of this Act or the regulation. This provision is so broad that it could enable exemptions to be made to any of the major provisions of the Act.

A number of significant exemptions already exist in the regulations. Under clause 38 interstate transactions between dealers holding 'corresponding licences' are exempt from the requirements of section 7 with respect to the firearms that the holder is authorised to possess. In that case 'corresponding licence' is defined as an instrument that in the opinion of the Commissioner is the equivalent for firearm dealer's licence in a place outside New South Wales. It will be noted that this approach is inconsistent with the approach taken in the present regulation which essentially leaves it up to the licence holder to determine whether their instrument confers 'equivalent authority' to those in NSW. This provides yet another powerful reason why the present exemption requires amendment but it also calls into question the efficacy of the general exemption power under the Act itself as there are now so many exemptions that its provisions are not being dealt with consistently.

Clearly this alternative as well as alternative systems in other states were required to be considered in the assessment of this regulation under section 4 and schedule 1 of the Subordinate legislation Act before it was made.

Guns Act 1991 of Tasmania

The Committee was informed that the reason Tasmania was not included in the original regulation in 1990 was that it didn't have any gun licences as such at that date. These were only introduced with the Guns Act of 1991 of Tasmania.

The Committee was advised that the regulation was also made because the NSW Shooters Association is holding more events in the run-up to the year 2000 Olympic Games and the regulation was requested by the Tasmanian Field and Game Association. Prior to this regulation about 20 or 30 licences were applied for each year by Tasmanian shooters seeking to use their weapons in NSW.

The inconsistencies between the licences in Tasmania and NSW appear similar to inconsistencies between licences in NSW and those of the States of Queensland, Victoria and Western Australia. The inconsistencies would make it difficult, if not impossible, for the ordinary shooter or the Police to determine whether they had 'equivalent authority' under their licence.

In Tasmania there is no similar exemption under the regulation but instead the provision is made in the Act itself, section 19, which permits a person to keep and use a gun which is authorised by licence in another State, to the full extent of that licence. In other words the individual shooter doesn't need to determine what the licensing requirements of Tasmania are, instead they merely rely on the full force of their own licence. The important limitation in section 19 of the Tasmanian Act is that the licence ceases to be valid when the person leaves the State or 45 days after the person enters the State, whichever first happens. This may be a preferable approach as the person is deemed to be the holder of a licence in Tasmania even though using a gun in accordance with their original licence. This is much closer to the mutual recognition of licences than the NSW position.

In NSW if anyone wanted to challenge a Tasmanian shooter and can show that their licence or instrument didn't confer equivalent authority, the shooter would be guilty of a crime under the NSW Firearms Act. A similar situation also exists with respect to target pistols and has done so for quite some time. The Committee understands that there have been cases where NSW shooters have gone to Western Australia believing that their NSW licence was fully recognised in that State and have been convicted of offences because their licence did not permit them to carry a particular type of weapon. For the reason that they were convicted of an offence

elsewhere in Australia, they were on their return considered not fit and proper persons to hold a licence in NSW and their licences were cancelled. This is certainly an untenable situation.

The Committee believed it would be of assistance if a comparative table could be drawn up indicating those licences in Tasmania or other states which confer equivalent authority to the New South Wales licences.

The Committee wrote to the Minister for Police on 3rd May 1996 seeking his assistance in making available appropriate officers to discuss issues arising under the regulation . The chief issues to be discussed were:-

- (1) the assessment of this regulation under schedule 1 and section 4 of the Subordinate Legislation Act;
- (2) that the respective licences and permits under the Tasmanian and NSW law vary significantly as to their requirements and that it would be difficult or impossible for the holder of a licence (or the New South Wales Police) to determine in a particular case whether they had 'equivalent authority';
- (3) that the exemption in clause 93 is inconsistent with the mode of exemption in other provisions of the regulation itself and specifically clause 38 which concerns interstate transactions between dealers. This enables the Commissioner to determine whether a licence is equivalent, unlike the present case where it is left to the individual licence or authority holder to determine.

MINISTER'S RESPONSE

The Minister for Police on 15 May 1996 acknowledged receipt of the Committee's letter.

DISCUSSIONS WITH POLICY ADVISER

A Ms Lynn Ashpole, Policy Adviser to the Minister for Police was designated to brief the Committee on this and the succeeding regulation, relating to the Firearms Amendment (Prohibition of Sales) Regulation 1996. She attended the Committees meeting on 16 May 1996.

Ms Ashpole was asked by the Committee whether any of the decisions of the Police Commissioner's Conference held on Friday, 10 May 1996, would materially alter the

law on firearms in NSW. She said that the changes will address many of the issues raised by the Committee.

She advised the Committee that she expected that the decisions made at the Conference would lead to standard licence categories with standard conditions. In effect, the mutual recognition of each other's licences although it was proposed that the licences will be exactly the same. She said that it was possible that "mutual recognition" will be limited to certain pursuits such as sports shooting. She said that there was hope that the changes to the Act would be made in as little as two weeks time although it was up to all the States and Territories to agree.

She said that members of interstate clubs coming into NSW usually got advice from the NSW Firearms Registry and that there didn't seem to be any practical problems in working out the question of equivalent rights. She conceded it was more difficult for individuals and that it came down to the question of how reliable the advice was from the Registry. She said that the Police Department did not issue any guidelines explaining the rights of licence holders in other States. She agreed that it would be useful if the Department did draw up guidelines to identify the equivalent rights in NSW of gun licence holders in other States.

FURTHER CORRESPONDENCE

Following the meeting the Committee wrote to the Minister thanking him for making available, Ms Ashpole, to discuss the regulation.

The Committee also said:

"One matter that emerged in discussions on this regulation was the need for guidelines explaining the equivalent rights available for exercise in New South Wales by the holders of the various licences in other states and territories. These should include identification of the equivalent rights applicable to the different types of firearms. Even though it is proposed that new uniform legislation on licensing will be introduced shortly, my Committee considers it essential that these guidelines be stated in plain English to enable licence holders, the community and Members of Parliament to understand fully the existing position throughout Australia. Not only will this assist licence holders in the short term, it will

improve debate on the legislation as it proceeds through each of the legislatures."

**MINISTER'S
SECOND
RESPONSE**

In his response, which was received by the Committee on 23 May 1996, the Minister said:

"Thank you for the Committee's letter of 16 May 1996 regarding the regulation exempting Tasmanian shooters from certain licensing requirements. I have instructed the Police Service to compile the suggested guidelines and will send you a copy when it is complete.

Yours faithfully

*PAUL WHELAN, LLB, MP
MINISTER FOR POLICE"*

The Committee has not yet received a copy of the guidelines.

**FIREARMS ACT
1996**

Although the Firearms Act 1996 was passed by Parliament only certain parts have been proclaimed to commence. By proclamation dated 23 August 1996 the Act was proclaimed to commence on 23 August 1996 except for the following provisions:

- (a) Parts 2-5, 7 and 8,
- (b) sections 50, 51, 53, 54, 56, 57, 58, 59, 60, 62, 63, 65, 68, 69, 70, 71, 78, 89, 90,
- (c) Schedule 2,
- (d) Part 2 of Schedule 3.

Parts 2 to 5, which haven't commenced, deal with the substantive matters of licences and permits including the temporary recognition of interstate licences for shooting competition purposes and interstate residents moving to this state.

Section 89, which repeals the Firearms Act 1989 and Firearms Regulation 1990 has not commenced. This means that the original provisions which concerned the Committee are still in force.

The Committee wrote to the Minister on 18 October 1996 seeking his advice on when the provisions which gave rise to the Committee's original concerns with respect to interstate licence and permit holders will be repealed and

replaced under the new Firearms Act 1996.

On 8 November 1996 the Minister advised the Committee that the remaining parts of the Firearms Act 1996 are expected to be proclaimed to commence early in the new year.

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| DESCRIPTION | Firearms Amendment (Prohibition of Sales) Regulation 1996 |
| GOVERNMENT GAZETTE | 14 May, 1996 at page 2255 |
| MINISTER | for Police |
| OBJECTIVES | <p>The explanatory note to this regulation states that its object is to provide that shooter licences (class 1 or 2), and firearm dealers' licences, are subject to the condition that the holder of any such licence must not sell or give possession of any of the following types of firearms to another person (unless the firearm is being surrendered to the police):</p> <ul style="list-style-type: none"> • self-loading centre-fire rifles fitted with an integral or a detachable magazine, • self-loading rimfire rifles, • self-loading shotguns fitted with an integral or a detachable magazine. • pump action shotguns. <p>The breach of any such condition by a licensed shooter or firearm dealer constitutes an offence under the Firearms Act 1989.</p> <p>This Regulation was made under Section 21 (3) of the Firearms Act 1989 which states that the types of licences for firearms, the authority they confer and their conditions, are set out in the table to that section. Section 21 (2) and (3) state as follows:</p> <p>(2) A licence that authorises its holder to have possession of a firearm at a specified place or for a specified purpose also authorises its holder to have possession of the firearm while:</p> <ul style="list-style-type: none"> a) taking it to the holder of a firearms dealer licence for the purpose of having it altered, maintained, tested or repaired and subsequently recovering it from that holder; and b) taking it to a member of the Police Force |

for the purpose of having it inspected and subsequently recovering it from such a member; and

- c) taking it to such a holder or member for the purpose of surrendering it.
- (3) A licence is also subject to any conditions prescribed by the regulations for licences of its type.

The three licences to which the Regulation applies are the shooter's class 1, shooter's class 2 and firearms dealers' licences.

The Regulation arguably conflicts with Section 7 of the Act. That section concerns duties of buyers and sellers of firearms, it provides:

- (1) A person shall not buy or take possession of a firearm from another person, unless:
 - (a) the other person is authorised to possess the firearm by a licence or to sell or otherwise give possession of the firearm by a permit; and
 - (b) except where the other person is the holder of a dealer's licence, the person buying or taking possession of the firearm has sighted the licence or permit.
- (2) A person shall not sell or give possession of a firearm to another person unless:
 - (a) the other person is authorised to possess the firearm by a licence or to buy or take possession of the firearm by a permit; and
 - (b) except where the other person is the holder of a dealer's licence, the person selling or giving possession of the firearm has sighted the licence or permit.

Maximum penalty on summary conviction--50 penalty units or imprisonment for 2 years, or both."

It could be argued that the conditions of the licence were intended to be exclusive of matters already regulated by the Act itself and as such the regulation was ultra vires

the Act.

On 16 May, 1996 the Committee wrote as follows to the Minister:

"This Regulation was considered by the Committee on 16 May, 1996. The Committee would be grateful if you could provide to it details of the assessment of the regulation carried out by your administration in terms of Schedule 1 of the Subordinate Legislation Act 1989. That schedule requires an identification of the objectives of the regulation, a consideration of other options and an evaluation of the costs and benefits of the regulatory proposal as compared with those other options.

One major concern of the Committee is that Section 7 (2) of the Firearms Act 1989 already regulates the right of firearm dealers and licence holders to dispose of firearms and it could be argued that the regulation is in conflict with it and therefore invalid.

A further concern is that section 21 under which the regulation is made, itself provides, in sub section(2) for the giving and recovery of possession of firearms for their repair. I would be grateful for your urgent advice."

**MINISTER'S
RESPONSE**

A response from the Minister was received on 23 May 1996. It stated as follows:

"I refer to your letter of 16 May 1996 concerning the Firearms Amendment (Prohibition of Sales) Regulation 1996 ("the regulation").

You have requested details of the assessment of the regulation carried out under section 4 of the Subordinate Legislation Act 1989 following the guidelines provided under schedule 1 of that Act.

I note that section 4 of the Subordinate Legislation Act provides that "as far as reasonably practicable" the guidelines in Schedule 1 are to be complied with. I advise that a detailed assessment under the schedule 1 guidelines was not reasonably practicable in that case. The regulation was required to be made urgently to prevent panic buying and stockpiling of the firearms that are to be banned under the resolutions of the Australian Police Ministers' Council made at its special meeting on

gun control held on 10 May 1996.

This regulation is an interim measure which will operate until the listed firearms are banned from possession and use in NSW. A new Firearms Act is to be introduced into Parliament as soon as possible in these sittings.

I note your comments on subsection 7(2) of the Firearms Act 1989. However, section 7(2) does not give a seller authority to sell. Rather, that provision placed restrictions on the sale. That is, sales may only be made to persons who are licensed to possess, or have a permit to possess, the firearm they wish to purchase. The regulation places further restrictions on the sale of firearms. Accordingly, I am of the view that the regulation is not in conflict with subsection 7(2) of the Firearms Act.

I also note your comments regarding section 21 of the Firearms Act but am of the opinion that the regulation does not conflict with that section. The regulation is intended to restrict sales and gifts of the firearms listed. It is not intended to prevent the repair or maintenance of firearms by dealers and their subsequent recovery by the owners.

Subsection 21(2) specifically authorises those actions listed in paragraphs (a) to (c) including taking firearms to a dealer for alteration, maintenance, testing or repair and recovering firearms from the dealer. If any inconsistency did arise between the general words in the regulation and the specific authority of the Firearms Act, then the Firearms Act would clearly prevail.

I also note your comments in regard to the use of the term "give possession" in the regulation but do not agree that the use of this term will cause confusion.

Finally, in regard to arrangements to deal with hardship, I advise that the firearms that are the subject of this regulation will have to be surrendered when their possession and use is banned by new legislation. A buy back scheme is being established to compensate owners, including firearms dealers, who surrender these firearms.

I trust my comments answer the Committee's concerns

regarding the regulation.”

**COMMITTEE
ACTION**

On 4 June 1996 the Committee sent a further letter to the Minister in the following terms:

“Thank you for your letter relating to this regulation. You indicate that a detailed assessment of the impact of it under Schedule 1 of the Subordinate Legislation Act was not reasonably practicable because of its urgency. This is understandable, however, the hurried preparation of the regulation, including the lack of assessment of its impact has left unclear the relationship between the new regulatory controls and some provisions of the Firearms Act mentioned in the Committee’s letter of 16 May, 1996. Your reply to an extent confirms this when you say the Act will prevail over such inconsistencies.

This lack of clarity would not be of great importance if there was some certainty that the proposed legislation would be introduced at an early date. This is not the case, as its introduction will depend on consensus having been reached with other Australian States. This could take some weeks, even months. In the circumstances my Committee recommends to you that confirmatory advice be obtained from the crown Solicitor as to the validity of this regulation so as to ensure that the significant social objects of the regulation can be implemented free from legal doubt. I would be grateful if you would advise my Committee of the action you propose to take.”

**MINISTER’S
FURTHER
RESPONSE**

On 23 July 1996 the Hon. Craig Knowles MP, Acting Minister for Police advised as follows:

“Thank you for your letter of 4 June 1996 to the Minister for Police, the Hon Paul Whelan, LLB, MP concerning the Firearms Amendment s(Prohibition of Sales) Regulation 1996 (“the Regulation”). As Acting Police Minister I am replying on behalf of Mr Whelan and I apologise for the delay in responding to your letter.

I note your concerns in relation to the Regulation. I also note that, since your letter, the Firearms Bill 1996 has been passed by the Parliament.

Regardless of this, however, I am not willing to seek Crown Solicitor’s advice on the validity of the Regulation.

The Parliamentary Counsel, Mr Dennis Murphy, gave his opinion that the Regulation could be legally made and I do not intend to challenge his opinion."

**COMMITTEES
FURTHER ACTION**

On 18 October 1996 the Committee wrote again to the Minister as follows:

"I refer to the letter of the Acting Minister for Police dated 23rd July 1996 in relation to the above Regulation. The Minister advises that the Parliamentary Counsel gave his opinion that the Regulation could be made and that he is not willing to seek the Crown Solicitor's advice on the validity of the Regulation. My Committee is concerned that the Parliamentary Counsel is placed in a difficult position in this case because having given his initial certificate on the legality of the Regulation he is now being asked to review that decision and possibly to set it aside. It is my Committee's view that the better course in this case would have been to seek independent advice on the validity of the regulation. This was the position formerly when the roles of the Crown Solicitor and Parliamentary Counsel were clearly delineated with respect to legislation. It was the role of the Parliamentary Counsel to give advice on draft legislation but once the legislation had been passed, or made, the Crown Solicitor advised on its validity. I have written separately to the Attorney General on this issue.

The Minister states that since the Committee raised its original concerns, the Firearms Bill had been passed by Parliament. Although the Act was passed my Committee notes that only certain parts have been proclaimed to commence. A proclamation was made on 23 August 1996 commencing certain parts and sections and on 27 September, a further proclamation was made commencing section 78 of the Act with respect to the "buy back" scheme. A regulation was also made on that day to implement that scheme.

My Committee notes that parts 2 to 5 of the Act haven't commenced. These include matters such as the temporary recognition of interstate licenses for shooting competition purposes and interstate residents moving to this State. These two matters were the subject of earlier correspondence with you and in respect of which you agreed to issue guidelines as to the firearms permitted to be used by interstate licensees.

My Committee notes that with respect to the sale of firearms, section 50 concerning buying of firearms and section 51 concerning restrictions on sale and purchase of firearms have not commenced. Most importantly section 89 which repeals the Firearms Act 1989 and the Firearms Regulation 1990 have also not commenced. This means that the original provisions which gave rise to the Committee's concerns are still in force.

My Committee accordingly seeks your advice on when these provisions with respect to interstate licence and permit holders and the sale of firearms will be repealed and replaced under the new Firearms Act 1996."

On 8 November 1996 the Minister responded as follows:-

"I refer to your letter of 18 October 1996 concerning the Firearms Amendment (Prohibition of Sales) Regulation 1996.

I enclose, for the information of the Committee, a copy of a letter from the Parliamentary Counsel confirming his opinion that the Regulation was legally made.

I advise the Committee that the remaining parts of the Firearms Act 1996 are expected to be proclaimed to commence early in the new year. "

**PARLIAMENTARY
COUNSEL'S
ADVICE**

The copy of the letter from the Parliamentary Counsel referred to in the Minister's letter states as follows:-

"You have asked for advice concerning comments made by the Regulation Review Committee in connection with the Firearms Amendment (Prohibition of Sales) Regulation 1996, published in the Government Gazette on 14 May 1996.

I have been provided with copies of correspondence between the Regulation Review Committee and the Minister for Police. It appears from this correspondence that the Committee has a number of concerns.

The view was reached in the Parliamentary Counsel's Office that the regulation could legally be made, and that section 7 (2) of the Firearms Act 1989 does not limit conditions that could be imposed by regulation under section 21 (3) Section 7 (2) creates an offence for the sale

or giving of possession of a firearm in certain circumstances, and does not in my view create an exclusive regime in this respect.

Clause 27A (2) of the regulations was inserted to emphasise the surrender aspect of the scheme being implemented and would not interfere with the statutory rights conferred by section 21 (2). If there were any conflict, then obviously the Act would prevail. In this connection, section 31 of the Interpretation Act 1987 provides that an instrument is to be construed so as not exceed legislative power and is valid to the extent that it does not exceed legislative power. This would in my view secure the validity of the regulation in the context of an argument based on section 21 (2).

The Committee commented on the phrase "give possession" as not being in accordance with existing terminology in the relevant sections of the Act. However, attention might be drawn to the use of that phrase in the Act - see section 7, where the phrase is used in the expression "A person shall not sell or give possession", which is practically identical to the wording used in the regulation.

The Subordinate legislation Act 1989 assigns to the Attorney General or the Parliamentary Counsel the responsibility for giving advice on the legality of a proposed regulation or other statutory rule before it is submitted to the Governor for marking. In practice this advice is given exclusively by the Parliamentary Counsel.

The division of responsibility between the Parliamentary Counsel and the Crown Solicitor is that the Parliamentary Counsel is responsible for the preparation of and advice on legislation and that the Crown Solicitor is responsible for its interpretation, after its enactment or making. I am not aware that the question of the legality of a regulation has previously been dealt with by the Crown Solicitor after it has been made, and it is my understanding that the Parliamentary Counsel's view is sustained until displaced in appropriate judicial proceedings.

Finally, it is noted that the regulations could have been, and can be, amended at any time to deal with any practical problems identified with their implementation. "

The Parliamentary Counsel believes that section 31 of the Interpretation Act saves the regulation by virtue of the fact that it must be construed so as not to exceed the legislative power. Subsection 2 of section 31 states that if any provision would but for the section be construed as being in excess of the legislative power, it shall be a valid provision to the extent to which it is not in excess of that power.

This statutory severance provision, as it is termed, is interpreted by the Courts to permit severance of the invalid laws only if rejection of the invalid part would mean that the otherwise unobjectionable provisions would not operate differently upon the persons matters or things falling under it or would not, in some other way, produce a different result. This was the view taken by Dixon J. in *Bank of New South Wales v the Commonwealth* (1948) 76 CLR at 371.

In the present case it would not be possible to sever clause 27A as it is the only substantive clause in the Prohibition of Sales regulation and as such the whole regulation would be invalid.

With respect to the demarcation line between the services of the Parliamentary Counsel and Crown Solicitor, it would appear that there is a grey area in respect of advice on the interpretation of the legislation which may involve issues of validity. The committee wrote separately to the Attorney General on the issue of the need to obtain independent advice on such issues and is awaiting a response.

Finally, the Committee noted that the remaining provisions of the new Act will be introduced early in the new year which will resolve this outstanding issue of invalidity.

Doug Shedden MP
Chairman
Regulation Review Committee