
REGULATION REVIEW COMMITTEE

Parliament of New South Wales

Report upon Regulations

Report 10/51
June 1997

CONTENTS

Regulation Review Committee	4
Functions of Regulation Review Committee	5
Chairman's Foreword	6
Compensation Court Act 1984 - Rule	7
Institute of Sport (Sporting Development Advisory Committee) Regulation 1995	9

REGULATION REVIEW COMMITTEE

MEMBERS:

Mr D Shedden, MP, (Chairman)
Ms J Hall, MP, (Vice-Chairman)
Ms D Beamer, MP
Mr A Cruickshank, MP
Mr B Harrison, MP
Dr E Kernohan, M.Sc. Agr., Ph.D., MP
Mr B Rixon, MP
Mr J Ryan BA (Hons), DipEd.(LP), MLC
Ms J Saffin, MLC

SECRETARIAT:

Mr J Jefferis, B.A. L.L.B., Director
Mr G Hogg, Dip.Law (B.A.B.), Dip.Crim., Legal Officer
Mr J H Donohoe, B.A., Dip.F.H.S., Committee Clerk
Mr D Beattie, Research Officer
Ms S Want, B.SocSc, Assistant Committee Officer

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

This report concerns the review of regulations on the most fundamental ground namely whether a regulation complies with the objects of the Act under which it was made. Unlike the Committees other grounds of review, if a regulation fails to comply with the objects of the Act under which it was made it is ultra vires and invalid.

When a delegation from the Regulation Review Committee attended the Fourth Commonwealth Conference on Delegated Legislation which was held in Parliament House, Wellington, New Zealand earlier this year it was surprised to find that the Regulations Review Committee of New Zealand while having this term of reference, did not consider it in its examination of regulations but preferred instead to leave the entire matter to the Courts.

The delegations from the Australian Committees were eager to respond that this ground is our starting point as, if the regulation is invalid, there is no use in going further and considering other grounds until that issue is resolved.

It would, in the Regulation Review Committees view, be impractical to leave the entire matter to the Courts as many regulations would be left in doubt until litigated, if at all. Although in a technical sense it could be said that if the regulation is invalid the Committee has nothing to consider as the purported regulation is invalid from the start, practically it requires a Court judgement to conclusively establish invalidity as it is often a matter on which there are differing legal opinions. Indeed the Compensation Court Rule referred to in this report demonstrates that Court Rules themselves can be found to be invalid by the Committee.

The Committees view has always been that if there is doubt about the validity of a regulation it is in the Ministers ultimate interest to amend or repeal it and start again at an early stage before any substantive obligations are imposed or benefits are gained. Otherwise the Minister runs the risk that in later years the regulation will be found defective when challenged in the Courts and thereby cause greater harm to persons who have organised their affairs in accordance with its provisions.

The Committee was pleased to find in connection with the Institute of Sport (Sporting Development Advisory Committee) Regulation 1995 that the Parliamentary Counsel supports the view that as the relevant clause is one whose validity can legitimately be the subject of varying views, and that arguments can reasonably be mounted against its validity, the clause should be repealed.

The Committee has previously expressed its concern over the difficult position in which the Parliamentary Counsel is placed in having to provide Government with the initial advice on the validity of regulations as well as any subsequent

advice when that validity is questioned. The Crown Solicitor recently advised the Committee that this has been the practice for some considerable time with respect to Subordinate Legislation. My Committee can see no logical reason for distinguishing between Primary and Subordinate Legislation in this respect.

Doug Shedden MP
Chairman
Regulation Review Committee

DESCRIPTION	Compensation Court Act 1984 - Rule
GAZETTE	28 June 1996 p 3688
MINISTER	Attorney General

OBJECTIVES

When the Committee considered this rule it noted that it conferred on the Court the power to make practice notes which prevail over the Court Rules themselves to the extent of any inconsistency.

The Committee wrote to the Chief Judge of the Compensation Court stating that this is a form of sub-delegation which would have to be authorised by the enabling Act, the Compensation Court Act 1984, before it could legally be made.

The Committee also stated that the rule did not include an explanatory note although such notes have been adopted for some time by the Rule Committees of the Supreme and District Courts. It accordingly requested the inclusion of explanatory notes in future cases.

The Committee said *"One of my Committee's functions is to consider whether a regulation complies with the objects and the spirit of the Act under which it is made. The Committee notes that Clause 2(b) of the rule enables practice notes to be issued for speedy determination of proceedings. These practice notes are said to prevail over any inconsistent rules although there does not appear to be any specific enabling power in the Compensation Court Act 1984 to permit practice notes to do so. I would be grateful if you could clarify this aspect."*

My Committee also notes that the rule is not accompanied by an explanatory note although such explanatory notes have been adopted for some time by the Rule Committees of the Supreme and District Courts. It would be of assistance if these could be provided in future cases".

RULE COMMITTEES RESPONSE

The Honourable Justice M W Campbell, Chief Judge of the Compensation Court responded, stating that the Rule Committee was taking advice on this provision and that it may have too readily assumed that it could adopt similar provisions in the Supreme and District Court Rules. The Rule Committee also agreed to include explanatory notes with rules that are not self explanatory.

The Chief Judge subsequently advised that the Rule Committee is of the view that the validity of the amendments conferring the power to make practice notes which prevail over court rules is questionable. The Rule Committee will undertake a general review of the rules and the practice notes and will probably delete the rule.

DESCRIPTION	INSTITUTE OF SPORT ACT 1995 - REGULATION (Institute of Sport (Sporting Development Advisory Committee) Regulation 1995)
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GAZETTE	5.7.96, Page 3833
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MINISTER	Sport and Recreation
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OBJECTIVES

The object of this Regulation is to make provision for the constitution and procedure of the Sporting Development Advisory Committee.

When the Committee considered the regulation it noted that Clause 10 purported to disapply certain Acts to make a special provision for the Board members. It was identical in this respect to clause 8 of Schedule one to the Act which already disappplied those Acts.

While an Act can disapply other earlier Acts a regulation cannot do this unless it is itself enabled by the Act to do so. This is not so in the present case and therefore the Regulation would be invalid.

The Committee drew the invalidity in clause 10 to the Minister's attention and requested the further opinion of the Parliamentary Counsel or independent legal advice.

MINISTERS RESPONSE

On 6.5.1997 the Minister advised that she had obtained the advice of the Parliamentary Counsel and provided a copy of this to the Committee. This advice states as follows:

"I refer to your letter of 12 November 1996 and the letter of the Regulation Review Committee concerning clause 10 of the Institute of Sport (Sporting Development Advisory Committee) Regulation 1996.

Clause 10 sets out standard provisions applying to bodies set up by legislation. Subclause (1) of clause 10 is declaratory rather than substantive in nature, confirming the employment position of the Committee members. They are appointed by the Minister under the Act and are therefore not employed under, or subject to, part 2 of the Public Sector Management Act 1988. Subclause (2) is directed at provisions requiring statutory officers to devote the whole of their time to the duties of their office. Such provisions appear in a number of Acts, and were included in the past in particular to ensure superannuation coverage

of the officers concerned. Subclause (3) in effect allows serving members of Parliament to serve on the body and may only be declaratory if members are not to be remunerated. The matter is now dealt with in the Constitution Act in a manner that would enable a House to allow one of its members to sit on the Committee, should this ever become an issue.

Subclauses (2) and (3) of clause 10 cannot operate to affect an Act that does not expressly permit its being so affected. However, they will operate to the extent to which an Act permits a regulation to be made affecting it in the respect set out in those subclauses. To the extent to which they may be permitted, subclause (2) may be necessary if there is a member in the position of possibly contravening a provision of an Act referred to in the subclause, and subclause (3) may be appropriate to override a conflict with the constitutional provisions referred to above.

There is thus a persuasive argument for the validity of the clause, namely, that it is merely declaratory or only operates to the extent that the affected Acts permit them to be affected.

I appreciate that the clause is one whose validity can legitimately be the subject of varying views, and that arguments can reasonably be mounted against its validity.

On reconsideration of the matter, and although I remain of the opinion that the clause could legally be made, I am of the view that the clause should be repealed, given that there is room for such arguments and that the purposes to which the clause is directed are minor, that the circumstances in which the clause is likely to be called in aid are extremely limited, and that consequently the clause has little practical effect.

Please let me know if it is desired to proceed with the repeal at this stage”.

The Minister informed the Committee that on the basis of this advice she had decided to repeal clause 10.
