



SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

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Regulations 2005

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**Scrutiny of Acts and Regulations
Committee**

**Subordinate Legislation
Regulations 2005**

Bibliography

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EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE
LEGISLATIVE COUNCIL

Thursday, 27 March 2003

- 2 **PARLIAMENTARY COMMITTEES** — Mr Lenders moved, by leave—
(1) **SCRUTINY OF ACTS AND REGULATIONS COMMITTEE** — That the Honourables Lidia Argondizzo and Andrew Olexander be members of the Scrutiny of Acts and Regulations Committee.

Question — put and resolved in the affirmative.

Tuesday, 14 September 2004

- 15 **SCRUTINY OF ACTS AND REGULATIONS COMMITTEE** — Mr John Lenders moved, by leave, That the Honourable Andrew Brideson be a member of the Scrutiny of Acts and Regulations Committee.

Question — put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE
LEGISLATIVE ASSEMBLY

Wednesday, 26 March 2003

- 7 **JOINT INVESTIGATORY COMMITTEES** — Motion made, by leave, and question — That —
(6) Ms D'Ambrosio, Mr Jasper, Mr Leighton, Mr Lockwood, Mr McIntosh, Mr Perera and Mr Thompson be members of the **Scrutiny of Acts and Regulations Committee**.

(*Mr Batchelor*) — put and agreed to.

TERMS OF REFERENCE

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 17 of the *Parliamentary Committees Act 2003* are —

17. Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are –

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but where an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- (c) to consider any Act that was not considered under paragraph (a) or (b) within 30 days immediately after the first appointment of members of the current Committee and to report to the Parliament with respect to that Act on any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;
- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

PRINCIPLES OF REGULATION REVIEW

The principles of regulation review are set out in Section 21 of the *Subordinate Legislation Act 1994* —

21. Review of statutory rules by the Scrutiny Committee

- (1) The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament —
 - (a) does not appear to be within the powers conferred by the authorising Act;
 - (b) without clear and express authority being conferred by the authorising Act —
 - (i) has a retrospective effect; or
 - (ii) imposes any tax, fee, fine, imprisonment or other penalty; or
 - (iii) purports to shift the onus of proof to a person accused of an offence; or
 - (iv) provides for the sub-delegation of powers delegated by the authorising Act;
 - (c) appears to be inconsistent with the general objectives of the authorising Act;
 - (d) makes unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of that Act;
 - (e) contains any matter or embodies any principles which should properly be dealt with by an Act and not by subordinate legislation;
 - (f) unduly trespasses on rights and liberties of the person previously established by law;
 - (g) makes rights and liberties of the person unduly dependent upon administrative and not upon judicial decisions;
 - (ga) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (gb) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (h) is inconsistent with principles of justice and fairness;
 - (i) requires explanation as to its form or intention;
 - (j) has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature;
 - (k) is likely to result in administration and compliance costs which outweigh the likely benefits sought to be achieved by the statutory rule.
- (2) A report of the Scrutiny Committee under this section may contain any recommendations that the Scrutiny Committee considers appropriate, including a recommendation that a statutory rule should be —
 - (a) disallowed in whole or in part; or
 - (b) amended as suggested in the report

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CHAIRPERSONS' FOREWORD

The Regulation Review Subcommittee continues its bipartisan review of every regulation made in Victoria. The Annual Review summarises the operations of the Regulation Review Subcommittee during 2005. This year the Regulation Review Subcommittee scrutinised 178 regulations.

The actual number of regulations made every year remains at a consistently high level. However it is fair to say this year there were fewer concerns raised by the Subcommittee in respect of the regulations. Overall, the Subcommittee is generally impressed with the quality of the Regulatory Impact Statements which accompany the regulations. This coincides with the new office of the Victorian Competition and Efficiency Commission. The Subcommittee enjoys a very constructive and productive working relationship with the Victorian Competition and Efficiency Commission. This can only assist the regulation making process.

The Regulation Review Subcommittee did not make any adverse reports to the Parliament in 2005. However, it did send 12 letters to Ministers seeking clarification of issues or raising concerns. Ministerial responses have generally been prompt and most helpful to the Regulation Review Subcommittee. The Regulation Review Subcommittee thanks Ministers for their responses. Our Legal Adviser, Ms Helen Mason also wishes to thank those departmental officers with whom she liaises on a daily basis. The prompt and friendly manner with which the officers respond to queries greatly facilitates the work of reviewing regulations.

This year has seen regulations made pursuant to the Premier's Guidelines which were tabled on 9 December 2004 in the Legislative Assembly and the Legislative Council. The Regulation Review Subcommittee has monitored the impact of the Premier's Guidelines. The Regulation Review Subcommittee has made some comments in this Annual Review about the impact of the Premier's Guidelines in respect of the 'basket approach' to fee increases. The Regulation Review Subcommittee will continue to consider these matters in a common sense manner.

We wish to thank the current members of the Regulation Review Subcommittee for their work and contribution to the review of regulations this year. Finally, we wish to thank our staff for their commitment and dedication. We thank Ms Helen Mason our Legal Adviser for her prompt and excellent advice. We thank Ms Sonya Caruana for her outstanding administrative support. We thank Mr Simon Dinsbergs for his constant and efficient editing of Reports when necessary.

The work of the Regulation Review Subcommittee is a valuable part of the regulation making process. Regulations affect the average individual in many different ways. It is important to ensure that the regulations are made properly. It is also important to ensure that concerns raised by individuals during the Regulatory Impact Statement process are addressed when relevant. The Regulation Review Subcommittee looks forward to another challenging year.

Peter Lockwood MP
Chairperson
Regulation Review
Subcommittee

Lily D'Ambrosio MP
Chairperson
Scrutiny of Acts and
Regulations Committee

8 May 2006

CHAPTER 1 – INTRODUCTION

This *Annual Review* examines the major issues arising out of the review and scrutiny by the Regulation Review Subcommittee (the Subcommittee) of regulations made in Victoria in 2005.

WHAT IS THE REGULATION REVIEW SUBCOMMITTEE?

The Scrutiny of Acts and Regulations Committee (the Committee) is a joint investigatory Committee of the Parliament of Victoria with members from both Houses and from the Government and Opposition. The Regulation Review Subcommittee is a subcommittee of the Scrutiny of Acts and Regulations Committee and is responsible for scrutinising regulations and for conducting any inquiries concerning regulations.¹

WHAT ARE ‘REGULATIONS’?

Regulations are often referred to as ‘subordinate legislation’ or ‘statutory rules’. Legislation made by Parliament is referred to as primary legislation or Acts of Parliament. Legislation cannot be made by bodies other than Parliament unless Parliament authorises those bodies (by means of an Act of Parliament) to make ‘subordinate legislation’ or ‘statutory rules’. The Subcommittee prefers the word ‘regulations’ to ‘subordinate legislation’ or ‘statutory rules’ as its members believe this is a more commonly understood term. In this *Annual Review* ‘regulations’ will be used to refer to all ‘statutory rules’ or ‘subordinate legislation’.

The term ‘regulations’ encompasses a variety of legislative instruments such as statutory rules, court rules, local laws, orders-in-council, proclamations, notices, guidelines, ministerial directions, codes of practice and so on. The power to make regulations is delegated by Parliament to the Executive and other non-Parliamentary bodies including government departments, statutory authorities and agencies. The powers delegated to the Executive by Parliament are contained in Acts of Parliament.

PARLIAMENTARY OVERSIGHT

The validity of a regulation depends upon the regulation-making power conferred by the Act under which the regulation is made.

Parliament authorises the Executive to make regulations because there is insufficient time to debate and pass all the legislation which needs to be enacted, especially where the proposed legislation is very technical or scientific. While regulations are sometimes perceived to be of lesser importance than Acts of Parliament, regulations do control and prohibit the conduct of citizens and may adversely affect the rights and liberties of citizens in much the same way as

¹ It should be noted that prior to 1 May 2000 the Regulation Review Subcommittee was known as the Subordinate Legislation Subcommittee.

Acts of Parliament. The potential for abuse of the regulation-making power and erosion of citizens' rights always exists. As Mr Justice Stephen commented in *Watson v. Lee*² the history of delegated legislation:–

reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed "requires an adequate measure of control if it is not to degenerate into arbitrary government".

Parliamentary scrutiny committees, with power to examine regulations made by the Executive, are one of the most important safeguards against the misuse of Executive power. Since the 1930s most Westminster style Parliaments have kept control over regulations through the use of scrutiny committees. Scrutiny committees exist in all Australian states and territories. Some of these scrutiny committees examine bills and regulations, while others examine only regulations.³

Victoria has had a committee to scrutinise regulations since 1956.⁴ From 1982 to 1992 the Legal and Constitutional Committee was responsible for scrutinising regulations. In 1992, the Scrutiny of Acts and Regulations Committee was created by the *Parliamentary Committees (Amendment) Act 1992* (Vic). It scrutinises regulations.

SCOPE OF THE SUBORDINATE LEGISLATION ACT 1994

The *Subordinate Legislation Act 1994* (Vic) (the Act) contains the procedures for making regulations and the scrutiny functions of the Regulation Review Subcommittee. Only those regulations which come within the definition of 'statutory rule' as contained in section 3 of the Act are subject to its procedures and to scrutiny by the Subcommittee. Section 3 defines 'statutory rule' to include:–⁵

- Regulations made, approved or consented to by the Governor-in-Council;
- Regulations which may be disallowed by the Governor-in-Council excluding regulations made by local authorities;
- Rules relating to a court or tribunal or the procedure, practice or costs of a court or tribunal;
- Instruments prescribed to be statutory rules by the Governor-in-Council; and
- Instruments deemed to be statutory rules by their own authorising Act.

² (1979) 155 CLR 374 at 394.

³ Australian jurisdictions which examine regulations and bills include the ACT, the Commonwealth, New South Wales, Queensland and Victoria and those committees include – the Standing Committee on Legal Affairs; Scrutiny of Bills Committee (Cth); Senate Committee on Regulations and Ordinances (Cth); Legislation Review Committee (NSW), Scrutiny of Legislation Committee (Qld) and Scrutiny of Acts and Regulations Committee (Vic). The New South Wales Legislation Review Committee only recently acquired the function of scrutinising bills under section 8A of the *Legislation Review Amendment Act 2002*. Previously the Committee was known as the Regulation Review Committee and it scrutinised regulations only.

Australian jurisdictions which examine regulations only include Northern Territory, South Australia, Tasmania and Western Australia and those committees include – Subordinate Legislation and Publications Committee (NT); Legislation Review Committee (SA); Subordinate Legislation Committee (Tas) and Delegated Legislation Committee (WA).

⁴ *Subordinate Legislation Act 1956* (Vic).

⁵ *Subordinate Legislation Act 1994* (Vic), s. 3.

Regulations in the form of statutory rules constitute only a small portion of the continually growing number of different types of regulations made each year. Some examples of regulations which fall outside the definition of 'statutory rule' are – guidelines, ministerial directions, local laws, codes of practice, notices, declarations and licences. Regulations which fall outside the definition of 'statutory rule' are not subject to:–

- the procedures of the *Act*. However they remain subject to any requirements contained in legislation under which they are made;
- scrutiny by the Subcommittee and generally not subject to Parliamentary review. However it should be noted that some regulations which fall outside the definition of 'statutory rule' are subject to specific Parliamentary review requirements. For example, planning schemes (and amendments) must be tabled in Parliament within 10 sitting days after being approved.⁶

The Committee remains concerned about regulations which fall outside the definition of 'statutory rule' because it means that they are not subject to consistent regulation-making procedures nor generally to Parliamentary review, allowing the potential for powers to be used improperly and for rights to be adversely affected. This issue is discussed in detail in the Committee's *Report on the Subordinate Legislation Act 1994*.⁷

ROLE OF THE SUBCOMMITTEE

The Subcommittee examines and reviews:–

- Regulations within the meaning of 'statutory rule' contained in the Act;
- State Environment Protection Policies and Waste Management Policies made under the *Environment Protection Act 1970* (Vic);
- Directions made under the *Public Sector Management and Employment Act 1998* (Vic).

The Subcommittee generally meets once each month to discuss regulations. Meetings of the Subcommittee are not open to the public. However the Subcommittee may invite members of the public or representatives from various organisations or government departments and agencies to address it at one of its meetings. At its meetings the legal adviser presents the Subcommittee with written and verbal advice in respect of each regulation. The Subcommittee members discuss each regulation and any issues and concerns. When the Subcommittee is satisfied that a regulation fully complies with the requirements of the Act it passes a motion approving the regulation.

Where the Subcommittee is dissatisfied with any matters or needs clarification, it corresponds with the responsible Minister. The Subcommittee will highlight its concerns to the Minister. It will seek in the first instance an explanation or amendment of the regulation. If the Subcommittee does not receive a satisfactory explanation it may prepare a Report to Parliament. This Report is submitted to all members of the Committee for formal approval and adoption.⁸ The Committee may adopt or reject the Report or part of it or make any changes it deems necessary.⁹ A Report to Parliament may include a recommendation that a regulation be amended or disallowed in whole or in part. Alternately a Report provided by way of information to the Parliament may simply outline the Committee's concerns. As a regulation has already commenced operation by the time it comes before the Subcommittee, the power to recommend

⁶ *Planning and Environment Act 1987* (Vic).

⁷ This Report was tabled in Parliament in September 2002.

⁸ The Regulation Review Subcommittee has all the powers and privileges of the full Committee. However it cannot report directly to Parliament.

⁹ *Parliamentary Committees Act 1968* (Vic), s. 4L(5).

disallowance is only used in exceptional circumstances. Generally, such a power would be used where all other efforts to resolve the issue have failed.

Where the Committee decides to Report to Parliament it may also recommend that a regulation be suspended whilst Parliament considers the issues contained in the Report.¹⁰ Such a course may be undertaken in the interests of justice and fairness. When regulations are suspended in this manner they are deemed not to have been made. This means they have no effect. People are not required to comply with them during the period of suspension.¹¹

DISALLOWANCE

Any Member of either House of Parliament may give notice of a disallowance motion but must do so within 18 sitting days of the tabling of the regulation in that House. Disallowance will not be effective unless that House passes a disallowance resolution within 12 sitting days of the disallowance notice. If the Committee wants to Report to Parliament recommending disallowance, it must also comply with the 18 sitting days requirement. This means that the Subcommittee must review and discuss all regulations within strict time limits.

SCRUTINY OF REGULATIONS

The Subcommittee scrutinises regulations after they have been made to determine whether they comply with the legislative principles specified in the Act.¹² These principles require the Subcommittee to ensure that regulations do not unduly trespass on rights and freedoms and comply with the procedural and practical requirements of the Act. The Subcommittee does not comment on matters involving government policy. The review focuses on the technical criteria contained in the Act. More specifically, under section 21 of the Act the Subcommittee ensures that regulations:–

- Are within the powers of the authorising Act;
- Do not, without clear and express authority;
 - have a retrospective effect;
 - impose a tax, fee, fine, imprisonment or other penalty;
 - purport to shift the onus of proof to a person accused of an offence;
 - provide for the sub-delegation of powers delegated by the authorising Act;
- Are consistent with the general objectives of the authorising Act;
- Do not make unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of the authorising Act;
- Do not contain any matters which should be contained in an Act of Parliament rather than subordinate legislation;
- Do not unduly trespass on rights and liberties of the person previously established by law;
- Do not make rights and liberties of the person unduly dependent on administrative rather than judicial decisions;

¹⁰ *Subordinate Legislation Act 1994 (Vic)*, s. 22(1).

¹¹ *ibid.*, s. 22(5).

¹² *Subordinate Legislation Act 1994 (Vic)*, s. 21.

- Do not authorise or require any acts or practices which may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000* (Vic);
- Do not authorise or require any acts or practices which may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2000* (Vic);
- Are consistent with principles of justice and fairness;
- Do not require explanation as to form or intention;
- Do not substantially or materially contravene the practical requirements of the Act or the Premier's Guidelines;¹³ and
- Are not likely to result in administration and compliance costs which outweigh the benefits sought to be achieved.

The Subcommittee also ensures compliance with the procedural requirements of the Act. Where a Regulatory Impact Statement (RIS) has been prepared, some of the procedural issues the Subcommittee examines include whether:–

- all appropriate certificates have been received by the Subcommittee;
- consultation is adequate and in particular whether appropriate organisations and individuals have been consulted;
- certificates are dated and signed by the responsible Minister;
- certificates contain all the required information; and
- the RIS is adequate and in particular whether it properly explains the nature and extent of the problem to be dealt with by the new regulation; the extent to which alternatives have been considered and the appropriateness of those alternatives; the costs and benefits of the proposed regulations and whether the benefits outweigh the costs.

Where a regulation is exempted or excepted from the RIS process, some of the procedural requirements the Subcommittee examines include whether:–

- the regulation is correctly exempted or excepted or whether it should have been made with a RIS;
- the regulation is exempted or excepted under the appropriate category in the Act;
- the exemption or exception certificate specifies the section under which the exemption or exception was granted;
- the exemption or exception certificate is signed and dated by the responsible Minister;
- the exemption certificate contains reasons for granting the exemption as required by section 9(2);
- a regulation exempted by a Premier's certificate sunsets within 12 months.

The Subcommittee also ensures that:–

- explanatory memoranda clearly set out the nature and extent of any changes and the reasons for the changes; and
- there is compliance with all notice, gazettal and tabling requirements of the Act.

¹³ Department of Premier and Cabinet, Premier's Guidelines, December 2004.

SCRUTINY OF ENVIRONMENT PROTECTION AND WASTE MANAGEMENT POLICIES

The Subcommittee also has responsibility for reviewing policies made under Part 3 of the *Environment Protection Act 1970* (Vic). These policies include State Environment Protection Policies and Waste Management Policies.

More specifically State Environment Protection Policies include:–

- policies concerning the environment generally;¹⁴
- policies concerning the removal, disposal or reduction of litter in the environment;¹⁵
- policies concerning the re-use and recycling of substances.¹⁶

Until recently waste management policies made under the *Environment Protection Act 1970* (Vic) applied only to industrial waste. With changes brought about by the *Environment Protection (Resource Efficiency) Act 2002* (Vic) waste management policies now apply to waste generally.¹⁷ Waste management policies are now enacted under s. 16A of the *Environment Protection Act 1970* (Vic).¹⁸

Waste Management Policies include policies dealing with:–¹⁹

- the generation, storage, treatment, transport and disposal and general handling of waste;
- the procedures to be implemented in the recycling, recovery, reclamation and re-use of waste and recycled substances;
- the methods of disposal of specified substances;
- the routes and methods of transportation of waste;
- the location of treatment and disposal plants;
- the allocation of responsibility for waste management operations and disposal; and
- the use and disposal of notifiable chemicals.

State Environment Protection Policies and Waste Management Policies are made by the Governor-in-Council on the recommendation of the Environment Protection Authority (EPA) by publishing an Order declaring the policy in the *Victorian Government Gazette*.²⁰ These policies must be tabled in each House of Parliament on or before the sixth sitting day after the Order is published in the *Victorian Government Gazette*.²¹

Section 18A of the *Environment Protection Act 1970* (Vic) sets out the requirements which must be followed when making State Environment Protection Policies and Waste Management Policies. Certain policies are excluded from the provisions concerning the preparation of policies. For example, the variation of a State Environment Protection Policy or Waste

¹⁴ *Environment Protection Act 1970* (Vic), s. 16(1).

¹⁵ *ibid.*, s. 16(1B).

¹⁶ *ibid.*, s. 16(1C).

¹⁷ See definition of 'waste' in the *Environment Protection Act 1970* (Vic), s. 4.

¹⁸ Previously Industrial Waste Management Policies were made under section 16(1A) of the *Environment Protection Act 1970* (Vic).

¹⁹ *Environment Protection Act 1970* (Vic), s. 16A.

²⁰ *ibid.*, s. 16(1).

²¹ *ibid.*, s. 18D(1).

Management Policy which the EPA determines to be fundamentally declaratory, machinery or administrative in nature. Otherwise the following procedures must be followed:–

- during a minimum period of 21 days, the EPA must publish on three occasions in a relevant newspaper – notice of intention to declare a policy. The notice must include the area affected and advise that any person affected may submit information to the EPA;
- the EPA must consider information provided to it by any person affected or likely to be affected;
- the EPA must consult with any government department or statutory authority whose responsibilities may be affected by the policy;
- the EPA must prepare a draft policy;
- the EPA must prepare a draft impact assessment;
- during a minimum period of 21 days the EPA must publish on three occasions in a relevant newspaper – notice of preparation of a draft policy. The notice must include the reasons for and objectives of the policy, a description of the area affected, details of where a copy of the draft policy may be obtained and specify that any person likely to be affected may make a submission;
- the EPA must allow a period of at least three months for submissions;
- the EPA must consider all submissions; and
- the EPA must write a separate letter to each person who has lodged a submission.

Section 18C of the *Environment Protection Act 1970* (Vic) sets out the matters which a policy impact assessment must discuss:–

- the purposes of the policy;
- the alternatives for achieving the objectives, including consideration of not declaring the policy or varying the existing policy; and
- an assessment of the possible financial, social and environmental impacts of each alternative in qualitative and, where practicable, in quantitative terms.

A copy of the following documents must be forwarded to the Committee:–

- the final policy impact assessment;
- a summary of submissions;
- a statement of the EPA's evaluation of the submissions and any changes made to the draft policy;
- a copy of the review panel's advice if there was a review panel.

The Committee may report to Parliament where these policies are beyond power or do not comply with the provisions of the *Environment Protection Act 1970* (Vic). Section 18D(3) provides that the Committee may report to Parliament where a policy:–

- does not appear to be within the powers conferred by the *Environment Protection Act 1970* (Vic);
- has been prepared in contravention of the *Environment Protection Act 1970* (Vic); or
- contains any matter in contravention of *Environment Protection Act 1970* (Vic).

Initial reviews of State Environment Protection Policies and Waste Management Policies are carried out by the Subcommittee. Where the Subcommittee is unable to resolve any issues, it may recommend to the Committee that a report be made to Parliament. A report to Parliament by the Committee may make any recommendations considered appropriate including that a policy be disallowed in whole or in part.²²

The disallowance provisions contained in sections 23 and 24 of the Act apply to State Environment Protection Policies and Waste Management Policies.²³ This means that the 18 sitting day deadline applies, that is the Committee must table a motion for disallowance within 18 sitting days after the Policy has been tabled before that House.

SCRUTINY OF DIRECTIONS OF THE COMMISSIONER FOR PUBLIC EMPLOYMENT

The Subcommittee also reviews Directions made by the Commissioner for Public Employment. These Directions concern the application of employment and conduct principles contained in sections 7 and 8 of the *Public Sector Management Employment Act 1998* (Vic). The employment principles require agency and public sector authority heads to establish employment processes that will ensure that:²⁴

- employment decisions are based on merit;
- employees are treated fairly and reasonably;
- equal employment opportunities are provided; and
- employees have a reasonable avenue of redress against unfair or unreasonable treatment.

The conduct principles require public sector employees to:²⁵

- act impartially;
- act with integrity and avoid any real or apparent conflicts of interest;
- be accountable for their results; and
- to provide responsive service.

Section 40 of the *Public Sector Management Employment Act 1998* (Vic) provides that the tabling and scrutiny provisions of the Act apply to Directions. This gives the Committee the power of review. If Directions do not comply with the tabling requirements or the principles of review contained in section 21 of the Act, the Committee may report to Parliament recommending disallowance in whole or in part or amendment.

Directions were last issued in 1998 – *Directions on Public Sector Employment and Conduct Principles in the Victorian Public Service 1998*. These Directions covered five major areas:–

- selecting on merit;
- managing and valuing diversity;
- managing under performance;
- reviewing personal grievances; and

²² *ibid.*, s. 18D(4).

²³ *ibid.*, s. 18D(6).

²⁴ *Public Sector Management Employment Act 1998* (Vic), s. 7.

²⁵ *ibid.*, s. 8.

- upholding public sector conduct.

The Subcommittee reviewed the 1998 Directions and found that adequate consultation had taken place and that they complied with the requirements of the *Public Sector Employment and Management Act 1998* (Vic).

CHAPTER 2 – SIGNIFICANT ISSUES

In 2005, the Subcommittee held 8 meetings. During those meetings it considered 121 statutory rules made during 2005. Of those rules 26 were accompanied by Regulatory Impact Statements. Of the total 178 regulations made, 57 were actually considered by the Subcommittee in early 2006.

The new Premier's Guidelines²⁶ (the Premier's Guidelines) were tabled on 9 December 2004 in the Legislative Assembly and the Legislative Council. The Premier's Guidelines superseded the edition²⁷ published in 1997. This statutory series was subject to the Premier's Guidelines. The Subcommittee has monitored the impact of the Premier's Guidelines during the course of this year in respect of the scrutiny of Regulations. It has commented in this Report and written to Ministers when appropriate.

The Subcommittee did not make any reports to Parliament during 2005. However of the statutory rules examined during 2005, the Subcommittee had concerns with twelve. In each instance it wrote to the responsible Ministers seeking clarification. Generally, the Subcommittee received satisfactory responses to the issues raised. The Subcommittee thanks the Ministers for their responses.

The Subcommittee's experience this year was that any problems it encountered in respect of the review of the regulations tended to fall within a discrete number of areas. For ease of understanding, the Subcommittee has classified the issues into particular categories. The categories however remain fluid and of course may change from year to year. The categories are as follows:-

(A) THE STATUTORY RULE HAS BEEN PREPARED IN CONTRAVENTION OF ANY OF THE PROVISIONS OF ACT THE OR OF THE GUIDELINES WITH RESPECT TO THE STATUTORY RULE AND THE CONTRAVENTION IS OF A SUBSTANTIAL OR MATERIAL NATURE	12
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²⁶ Department of Premier and Cabinet, Premier's Guidelines, December 2004.

²⁷ Department of Premier and Cabinet, Premier's Guidelines, December 1997.

(G)	SECTION 21(1)(I) – REQUIRES EXPLANATION AS TO ITS FORM OR INTENTION	24
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(A) THE STATUTORY RULE HAS BEEN PREPARED IN CONTRAVENTION OF ANY OF THE PROVISIONS OF THE ACT OR OF THE GUIDELINES WITH RESPECT TO THE STATUTORY RULE AND THE CONTRAVENTION IS OF A SUBSTANTIAL OR MATERIAL NATURE

Under section 21(1)(j) of the Act the Subcommittee examines regulations to ensure that they have been properly prepared. It examines them to see whether they have been prepared in contravention of any of the provisions of the Act or of the guidelines with respect to the statutory rule. It examines the regulations to see whether the contravention is of a substantial or material nature.

This year no statutory rules came within this category.

(B) CONSULTATION

Section 6 of the Act sets out the requirements for consultation. These requirements apply to regulations made with or without RIS's. Responsible Ministers must ensure that there is consultation “where the guidelines require consultation”²⁸ with “any sector of the public on which an appreciable economic or social burden may be imposed.”²⁹

The Premier’s Guidelines³⁰ provide as follows:–

5.19 If the proposed statutory rule is likely to impose any appreciable burden, cost or disadvantage on any sector of the public, consultation must take place with that sector, eg business groups, community groups, special interest groups. That consultation should include discussion of the need for and method of the proposed regulation.

The Premier’s Guidelines indicate that the “nature and degree of consultation that is appropriate for any particular rule will vary with the nature of that rule”.³¹ This places the final responsibility on Ministers to ensure that appropriate consultation takes place and includes all those affected by a proposed regulation.

While the Premier’s Guidelines provide assistance with the consultation process, the Subcommittee acknowledges that some sections are unclear and ambiguous. This makes it difficult for department and agency officers to determine in what circumstances consultation

²⁸ Section 6, *Subordinate Legislation Act 1994*.

²⁹ *Ibid.*, Section 6(b).

³⁰ Paragraph 5.19, Premier’s Guidelines, December 2004.

³¹ *Ibid.*, Paragraph 5.13.

should take place. There is, for example, an inconsistency between the *Act* and the Premier's Guidelines as to whether consultation **must** or **should** occur in accordance with the Premier's Guidelines. It is the strong preference of the Subcommittee that consultation take place with all those affected by a particular regulation and that the current ambiguities be resolved.

The Subcommittee considers it is important for all consultation certificates to provide details of all those consulted.

(C) CONSIDERATION OF SUBMISSIONS – GENERAL EXPECTATION – RESPONSE REQUIRED

Section 11(3) of the *Act* imposes a duty on Ministers "to consider all submissions and comments received on a draft statutory rule where a RIS has been prepared".³² The Premier's Guidelines also emphasise the need for proper consultation³³ before a regulation is made.

The Subcommittee considers that appropriate consultation is essential for the effectiveness of the regulatory system. The Subcommittee expects that submissions will be appropriately considered. To that end, a considered response from the Department to an individual submission is tangible evidence that matters have been considered. The Subcommittee's firm view is that responses ought to be sent to those who have taken the time and effort to send in a submission.

The Subcommittee understands that occasionally there may be a large number of submissions in respect of a particular regulation. However, the Subcommittee's view is that the number of submissions does not alter the expectation that an appropriate response should be sent. It simply means that there are a large number of people who have issues with the proposed regulation. Whilst this may mean an increased workload occasionally, the Subcommittee's strong view is that this is simply a part of the democratic regulatory process. Appropriate weight and consideration ought to be given to the submissions sent in. Transparency is a critical part of the process. The Minister is required to perform his or her duty in accordance with section 11(3) of the *Act*. The Subcommittee's firm view is that publication of a response to issues on a website is a quite inadequate response.

This year the Subcommittee has noticed a considerable improvement in the quality of responses prepared by the Departments in respect of submissions. Generally, Departments prepare a table summary of the issues raised in the submissions. This is the case particularly where there are a large number of submissions. The Subcommittee finds this to be extremely helpful. This year, in many regulations where there were a large number of submissions, Departments sent a general letter covering the various themes to those who made submissions. In other instances where there were a few submissions, Departments wrote individual letters to those who made submissions. The letters discussed the matters raised in detail. Frequently, the Subcommittee has written commending a particular Department on its outstanding work.

The Department's response in respect of *SR No. 98 – Local Government (Electoral) Regulations 2005* was outstanding. The Subcommittee was provided with an extremely thorough analysis of the eighty six submissions. In addition, a detailed letter was sent to each organisation or individual responding to the issues raised. Below is the Subcommittee's letter to the Minister.

³² Section 11(3), *Subordinate Legislation Act 1994*.

³³ Paragraphs 5.12 - 5.17, Premier's Guidelines, December 2004.

Example 1:

SR No. 98 – Local Government (Electoral) Regulations 2005

Subcommittee's Letter³⁴

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 26 September 2005.

Eighty six submissions were received during the regulatory impact statement process. The Subcommittee was provided with an extremely thorough analysis of the submissions. The comprehensive manner in which the Department summarised the issues facilitated the Subcommittee's work. In addition, the Department wrote a detailed letter to each organisation or individual responding to the issues raised.

The Subcommittee wishes to acknowledge the outstanding manner with which the Department dealt with the submissions. The Subcommittee commends those involved and requests that you forward its comments to the relevant officers.

In respect of SR No. 103 – Fisheries (Recreational Abalone) Regulations 2005, the Subcommittee was again provided with a thorough summary of the issues raised. The Subcommittee's view is that transparency is an important part of the regulatory impact statement process. To that end, the Subcommittee's view is that an appropriate response ought to be communicated to those members of the public involved in the process. The fruit of the considerable labour already undertaken needs to be shared to add a further degree of transparency. The Subcommittee wrote in those terms to the Minister.

Example 2:

SR No. 103 – Fisheries (Recreational Abalone) Regulations 2005

Subcommittee's Letter³⁵

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 9 November 2005.

One hundred and fifty seven submissions were received during the regulatory impact statement process. A summary of the issues raised was sent to the Subcommittee. This greatly facilitated the work of the Subcommittee. From the material provided to the Subcommittee it appears that a number of changes were made as a result of the consideration of the submissions.

While the Subcommittee acknowledges the considerable work already undertaken, its general expectation is that a written acknowledgement responding to the issues raised or a general letter covering the various themes should be sent to those who made submissions. In this instance recommendations were made as a result of the consideration of the submissions. Transparency is an important part of the regulatory impact statement process. To that end, the Subcommittee's view is that an appropriate response ought to be communicated to those members of the public involved in the process. Or to put it another way, the fruit of the considerable labour already undertaken needs to be shared to add a further degree of transparency.

³⁴ Letter dated 29 September 2005 to the Hon, Candy Broad, MP, Minister for Local Government from the Regulation Review Subcommittee.

³⁵ Letter dated 10 November 2005 to the Hon. Bob Cameron, MP, Minister for Agriculture from the Regulation Review Subcommittee.

The Subcommittee thanks those officers involved in the preparation of the summary. The Subcommittee would appreciate it if you could also advise the relevant officers of the foregoing.

Minister's Response³⁶

I refer to your letter of 10 November 2005 about the Fisheries (Recreational Abalone) Regulations 2005.

The Department of Primary Industries (DPI) implemented an extensive communication strategy to inform relevant stakeholders of the new regulations, both before and after their introduction on 1 September 2005. The communication strategy involved a variety of tools and mediums to communicate the outcomes from the Regulatory Impact Statement (RIS) process.

Initiatives included a comprehensive media announcement before 1 September 2005 advising of the new regulations, in addition to newspaper, diving magazine and DPI website advertisements. Letters were provided to peak bodies, dive clubs, dive shops and other relevant fisher associations. Pocket sized cards containing advice on the new regulations were distributed in Chinese, Maori, Cambodian and Chilean. The Victorian Recreational Fishing Guide 2005 was also updated to reflect the new amendments, and maps were produced showing bag limits, size limits and open season information.

I have noted your suggestion to write to each person who made individual submissions to the RIS, advising them of the outcome of the RIS. Whilst this is usually done, it was considered to be unnecessary in this instance, given the extensive communication strategy implemented by DPI. I have asked that in future, the Department provide direct responses to these members of the public involved in the submission process.

Late submission to the Subcommittee

The Subcommittee received a late submission in respect of *SR No. 103 Fisheries (Recreational Abalone) Regulations 2005*. At the date of receipt, the Subcommittee had already approved the Regulations. However, the Subcommittee considered it carefully and sent it to the Minister for his comments. The Subcommittee sent the following letter to the Minister:—

Subcommittee's Letter³⁷

The Regulation Review Subcommittee (the Subcommittee) considered and approved the above Regulations at a meeting on 9 November 2005. The Subcommittee also notes that a number of changes were made to the regulations as a result of consideration of the submissions. The changes included an increased daily catch limit and additional recreational fishing days.

The Subcommittee received a late fourteen page submission (the submission) from the Scuba Divers Federation of Victoria on 22 December 2005. The Regulation finally expires in the Legislative Assembly on 8 February 2006. I enclose a copy of the submission for your perusal.

The submission raises various matters. In particular: -

³⁶ Letter dated 30 November 2005 to the Regulation Review Subcommittee from the Hon. Bob Cameron, MP, Minister for Agriculture.

³⁷ Letter dated 24 January 2006 to the Hon. Bob Cameron, MP, Minister for Agriculture from the Regulation Review Subcommittee.

1. *It challenges the basis of scientific data used or unused in the regulatory impact statement.*
2. *It asserts there is no proper quantification of the scale of the theft of the abalone.*
3. *It asserts that the closure dates in relation to the submissions were confusing.*

The Subcommittee would be grateful for your comments in respect of the above matters as soon as possible.

Please do not hesitate to contact me should you wish to discuss any aspect of the above.

Minister's Response³⁸

Thank you for your letter of 24 January 2006 regarding the Fisheries (Recreational Abalone) Regulations 2005 and requesting comments on various matters raised by the SCUBA Divers Federation of Victoria (SDFV) in their submission to the Regulation Review Subcommittee.

The scientific information used in determining the need for the regulations was highlighted in a Primary Industries Research Victoria report titled "Assessment of abalone population on inshore reefs accessible to recreational divers along the central Victorian coast". The report noted that abalone populations on the inshore reefs were in lower abundance than the main commercially fished populations found in deeper less accessible reefs. In addition to this, it was noted that central Victorian inshore reefs are likely to have a lower capacity to sustain such fishing pressure compared to main commercially fished reefs. For that reason, the report supported the need for measures aimed at increasing protection to inshore populations of abalone.

It is not possible to definitively quantify the scale of illegal abalone taken however, due to the regular frequency of this activity along the coast, it was estimated the cumulative impact is likely to be relatively high. As such, a regulatory response by the Government was warranted.

Advertising the release of the Regulatory Impact Statement (RIS) and the public consultation period was part of the Department's extensive communication strategy. The RIS was publicly advertised in a daily newspaper, 'Fish-e-fax', as well as the Department of Primary Industries' external website. Furthermore, an advertisement was placed in the Government Gazette on 8 November 2004, extending the consultation period to 7 December 2004, providing more than three months for public comment.

The recreational fishing peak body, VRFish was informed of this extension by the Department.

The tighter controls on recreational abalone fishing have now been in place for a period of six months and the majority of the 60 open days for the year commencing 1 September 2005, have now passed. Advice from Senior Fisheries Officers and commercial abalone divers located in central Victorian waters is that the new management regime is having a positive impact of the resource by significantly reducing fishing pressure previously occurring due to this form of activity.

³⁸ Letter dated 23 February 2006 to the Regulation Review Subcommittee from the Hon. Bob Cameron, MP, Minister for Agriculture.

The Department has endeavoured to consult the SDFV throughout the development and introduction of the new regulations. Whilst I understand that there may be some concern amongst the SDFV regarding the new regime, the issues raised in their submission were thoroughly considered during the RIS process.

The Subcommittee also reminded the Ministers of its expectations in relation to SR No. 76 – Cemeteries and Crematoria Regulations 2005 and SR No. 69 – Transport (Ticketing and Conduct) Regulations 2005.

Example 3:

SR No. 76 – Cemeteries and Crematoria Regulations 2005

Subcommittee's Letter³⁹

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 29 August 2005.

The Subcommittee made enquiries of the Department and was advised that a bulletin provided stakeholders with information about the number of submissions received and the key issues that were identified. The Subcommittee understands that training sessions were conducted after the close of submissions in April and May 2005. The Subcommittee considered the bulletin with which it was provided. Whilst the bulletin identifies briefly some issues raised in the written submissions, the Subcommittee is of the view that many more issues were raised by the fifty seven submissions. Some of those fifty seven submissions were lengthy.

Whilst the Subcommittee acknowledges the work already undertaken, its general expectation is that a written response is an appropriate manner in which to deal with the many issues raised by the submissions. The Subcommittee understands that occasionally there may be a large number of submissions in respect of a particular regulation. However, this does not alter its view that an appropriate written response should be sent. It simply means that there a large number of people who have issues with the proposed regulation. Whilst this may mean an increased workload, this is simply part of the democratic process.

The Subcommittee would appreciate it if you could advise the relevant officers of the foregoing.

Minister's Response⁴⁰

Thank you for your letter of 6 September 2005 on behalf of the Regulation Review Subcommittee of the Scrutiny of Acts and regulations Committee, concerning the Cemeteries and Crematoria Regulations 2005.

I have made the department aware of the Subcommittee's comments, in particular the need to provide an appropriate written response to submissions made in response to the Regulatory Impact Statement.

The department has advised me that in this particular case a written response was not provided because the department considered it had satisfied this requirement through

³⁹ Letter dated 6 September 2005 to the Hon. Bronwyn Pike, MP, Minister for Health from the Regulation Review Subcommittee.

⁴⁰ Letter dated 25 October 2005 to the Regulation Review Subcommittee from the Hon. Bronwyn Pike, MP, Minister for Health.

other communication means. In particular the ten full-day training sessions conducted throughout Victoria for cemetery trusts and funeral directors, which amongst other things, facilitated direct feedback on the discussion of the issues identified through the RIS process.

The Subcommittee's advice has been duly noted by the department and will be incorporated into future processes for the development of legislation.

Thank you for bringing this to my attention.

Example 4:

SR No. 69 – Transport (Ticketing and Conduct) Regulations 2005

Subcommittee's Letter⁴¹

The Regulation Review Subcommittee considered and approved the above Regulation at a meeting on 29 August 2005.

The Subcommittee notes that twenty eight submissions were received. Generally, those submissions were short. However, there was one submission from the Homeless Persons' Legal Clinic which was some twenty five pages in length. It raises such matters as alternatives to fixed monetary penalties such as unpaid community work and an education program. There was also a submission from Youthlaw which was nine pages in length. Some emails were sent from the Department to individuals clarifying the operation of the Regulations. However, it seems no response or acknowledgment was given to all those who made submissions.

The majority of the issues were considered in the summary of submissions provided to the Subcommittee. Whilst the Subcommittee acknowledges the work already undertaken, its general expectation is that a written acknowledgement of the submissions or a general letter covering the various themes should be sent to those who made submissions. The Subcommittee understands that occasionally there may be a large number of submissions in respect of a particular regulation. However, this does not alter its view that an appropriate written response should be sent. It simply means that there are a large number of people who have issues with the proposed Regulation. Whilst this may mean an increased workload, this is simply part of the democratic process.

The Subcommittee would appreciate it if you could advise the relevant officers of the foregoing.

Minister's Response⁴²

Thank you for your letter of 6 September 2005 on behalf of the Scrutiny of Acts and Regulations Committee regarding the Transport (Ticketing and Conduct) Regulations 2005.

I am pleased to advise you that responses or acknowledgements were sent to all individuals or groups who made submissions, with the sole exception of the Victoria Legal Aid (VLA). The VLA submission comprised an unsigned letter which was received

⁴¹ Letter dated 6 September 2005 to the Hon. Peter Batchelor, MP, Minister for Transport from the Regulation Review Subcommittee.

⁴² Letter dated 6 January 2006 to the Regulation Review Subcommittee from the Hon. Peter Batchelor, MP, Minister for Transport.

by the Department of Infrastructure (DOI) late, and by email. It was understood that a signed hard copy would be received from the VLA in due course, but this did not eventuate. However, verbal acknowledgement of the receipt of its submission was provided by the DOI to the relevant officer from VLA.

The responses that were provided to the Committee were those that were thought to be of interests. The others were not provided because it was considered both that the Committee would not wish to read through similar acknowledgements, and that the Minister's certificate under section 10 of the Subordinate Legislation act 1994 would be sufficient. I regret that this was not made clear in the letter accompanying the documents.

Copies of the acknowledgements not previously provided are now attached. The relevant officers in the DOI have been made aware that the Committee wishes to see all responses and acknowledgements.

Thank you for bringing this matter to my attention. If you require further information, please contact Alana Chinn of the DOI on telephone (03) 9655 2064.

(D) TECHNICAL MATTERS – INCOMPLETE CERTIFICATES – DATES OF PUBLICATION IN THE GOVERNMENT GAZETTE AND NEWSPAPER – PREMIER'S CERTIFICATE – DETAILS OF 'SPECIAL CIRCUMSTANCES'

The Subcommittee is concerned to ensure technical compliance with the Act. Pursuant to section 11(a) and (b) of the Act, the RIS must be published in the Government Gazette and a daily newspaper circulating generally throughout Victoria. All relevant certificates should accompany the regulations and be signed and dated. Failure to do so will ensure a letter from the Subcommittee requesting rectification of these matters.

Example 1:

SR No. 161 – Land Tax (Indexation Factors) Regulations 2004

Subcommittee's Letter⁴³

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 16 March 2005.

The Subcommittee notes that the section 8 exception certificate is undated. The Subcommittee requests rectification of the same.

Please do not hesitate to contact me should you wish to discuss the matter.

Minister's Response⁴⁴

Thank you for your letter dated 24 November 2005 in relation to the Land Tax (Amendment) Regulations 2004 and the Land Tax (Indexation Factors) Regulations 2004.

⁴³ Letter dated 16 March 2005 to the Hon. John Brumby, MP, Treasurer from the Regulation Review Subcommittee.

⁴⁴ Letter dated 19 November 2005 to the Regulation Review Subcommittee from the Hon. John Lenders, MP, Minister for Finance.

With respect to the matter of undated certificates I wish to confirm that I signed the certificates on 24 and 29 November 2004 respectively in my capacity as Acting Treasurer. I attach a copy of the briefs on which approved the making of the Regulations. This shows evidence of the date of the approval and therefore the date of signing. I have also attached a statement to the original certificates confirming the date on which they were signed.

I trust the above is satisfactory to the Committee.

Attachment

I, John Lenders, Minister for Finance, confirm that the certificates associated with the as Land Tax (Amendment) Regulations 2004 and the Land Tax (Indexation Factors) Regulations 2004, listed below and attached, were signed by me on 24 and 29 November 2004 respectively in my then capacity as Acting Treasurer –

- *Certificate of Exception under Section 9 of the Land Tax (Amendment) Regulations 2004*
- *Certificate of Exception under Section 8 of the Land Tax (Indexation Factors) Regulations 2004*

Example 2:

SR No. 65 – Audit (Public Bodies) Regulations 2005

Subcommittee's Letter⁴⁵

The Regulation Review Subcommittee considered and approved the above Regulation at a meeting on 29 August 2005.

The Subcommittee notes that the section 9 certificate is undated. The Subcommittee requests rectification of the matter.

Minister's Response⁴⁶

I refer to your letter dated 6 September 2005 relating to the above Regulation in which you note that the section 9 certificate forwarded to the Regulation Review Subcommittee was undated. This was an administrative oversight which has now been rectified. Please find enclosed a copy of the dated section 9 certificate for you records.

Should you have any queries in respect to these Regulations please contact me on 9651 5310.

(E) SETTING A PACKAGE OF FEES – 'THE BASKET APPROACH' – THE PREMIER'S GUIDELINES

The Premier's Guidelines⁴⁷ provide as follows:–

⁴⁵ Letter dated 6 September 2005 to the Hon. John Lenders, MP, Minister for Finance from the Regulation Review Subcommittee.

⁴⁶ Letter dated 21 September 2005 to the Regulation Review Subcommittee from the Mike Hogan, Assistant Director, Budget and Financial Management, Department of Treasury and Finance.

⁴⁷ Paragraphs 5.12 - 5.17, Premier's Guidelines, December 2004.

5.25 It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

In SR No. 57 – Plumbing (Fees Amendment) Regulations 2005 increased a number of fees. This was done using the 'basket approach'. In this instance, four of the seventeen fee increases exceeded the Treasurer's approved rate of 2.25% although the actual monetary increases were extremely small. In addition, the package as a whole fell within the Treasurer's approved rate. The increases were 0.03% above the approved rate. The table set out below illustrates the dollar value of the four fee increases which were marginally above the approved rate. In real terms, the largest monetary amount above an increase of 2.5% was eight cents. The smallest monetary amount above an increase of 2.5% was three cents.

Item	Current Fee	Proposed Fee	Dollar Increase Based on 2.5%	% Increase	Actual Increase
For registration under section 221O or a renewal of registration under section 2221ZB	\$237.00	\$243.00	\$5.92	2.53%	\$6.00
For provisional registration or renewal of provisional registration	\$79.00	\$81.00	\$1.97	2.53%	\$2.00
For restricted registration or a renewal of restricted registration	\$237.00	\$243.00	\$5.92	2.53%	\$6.00
For an application to modify the plumbing regulations under section 221ZZO	\$79.00	\$81.00	\$1.97	2.53%	\$2.00

The Subcommittee is bound by the Premier's Guidelines. A strict interpretation of the Premier's Guidelines leads to the view that as a matter of principle individual fees in a 'basket' package should not exceed the Treasurer's annual rate. However, the Subcommittee is of the view that fee increases and the Premier's Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a 'basket' package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee's view is that it is a matter of balance. The 'basket' of fees in its entirety must not exceed the Treasurer's approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer's annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each Regulation will be examined on its merits and in context.

During the year, there have been informal discussions with officers from the various Departments and the Legal Adviser. The discussions suggest that a strict interpretation of the Premier's Guidelines may make it difficult for Departments in practical terms in setting a

package of routine fee increases. Ultimately, Regulations are the practical arm of the legislation. They need to function and be made in a commonsense and practical manner where possible. The Subcommittee will continue to monitor the impact of the Premier's Guidelines. If and when appropriate it will recommend changes to the wording of the Premier's Guidelines. At this stage, the Premier's Guidelines have only been in operation for over a year. The Subcommittee's will carefully scrutinise the Regulations and the Premier's Guidelines during the coming year. The Subcommittee welcomes input from Departments.

Example 1:

SR No. 57 – Plumbing (Fees Amendment) Regulations 2005

Subcommittee's Letter⁴⁸

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 29 August 2005.

The new Premier's Guidelines which were tabled on 9 December 2004 provide as follows: –

5.25 It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business

The Subcommittee notes that four of the seventeen fee increases exceed the Treasurer's approved rate of 2.25%. To that extent, the Regulations do not conform with the Premier's Guidelines. In this instance, the Subcommittee notes that the actual increases in monetary terms are small. The increases are 0.03% above the approved rate. As a matter of principle the Subcommittee wishes to reinforce its view that individual fees in a 'basket' package should not exceed the Treasurer's annual rate. However the Subcommittee is of the view that fee increases and the Premier's Guidelines need to be read in a commonsense manner. The Subcommittee will continue to monitor such 'basket' packages closely in the future. The Subcommittee would appreciate it if you could advise the relevant policy officers of the foregoing.

Minister's Response⁴⁹

Thank you for the Committee's comments regarding four fee increases in the above regulations which exceeded the Treasurer's rate by 0.03%.

I am advised that the four fees were rounded to the nearest whole dollar in accordance with section 8(2) of the Subordinate Legislation Act 1994 (SL Act).

I note the Committee's advice that the Premier's Guidelines made under section 26 of the SL Act do not refer to rounding in accordance with section 8(2).

⁴⁸ Letter dated 6 September 2005 to the Hon. Rob Hulls, MP, Minister for Planning from the Regulations Review Subcommittee.

⁴⁹ Letter dated 10 November 2005 to the Regulation Review Subcommittee from the Hon. Rob Hulls, MP, Minister for Planning.

Relevant officers have been advised of the Subcommittee's view that individual fees in a package of fees must not exceed the Treasurer's rate.

(F) SIGHTING OF MATERIAL INCORPORATED BY REFERENCE

Regulations often include a table of applied, adopted or incorporated matter in accordance with the requirements of regulation 6 of the *Subordinate Legislation Regulations 1994*. Such a table lists all the material applied, adopted or incorporated by reference in the regulations. Occasionally, the Subcommittee is placed in the position where it has to consider and or approve regulations without sighting the material which is incorporated into them. Where the Subcommittee does not sight the material it cannot form a view as to whether it conforms with the requirements of the Act.

The Premier's Guidelines provide some assistance.⁵⁰

7.03 Section 32 of the Interpretation of Legislation Act 1984 prescribes the procedural requirements which must be fulfilled whenever a statutory rule applies, adopts or incorporates material by reference. Section 32(5) of the Interpretation of Legislation Act 1984 provides that a failure to comply with the tabling requirements does not affect the validity, operation or effect of a statutory rule but agencies should nevertheless ensure compliance with the requirements of section 32 as amended by the Subordinate Legislation Act 1994.

7.04 When considering whether to incorporate a particular document in a statutory rule it should be remembered:

- that the provisions of the rule will only refer to the incorporated material and members of the public affected by the rule must see the incorporated document before they can understand the contents and effect of the rule:*
- that the incorporated material may not be readily available at a reasonable cost:*
- that the procedures set out in section 32 are designed to facilitate Parliamentary oversight of incorporation of material and to ensure that such material is publicly available so that members of the public affected by the rule can have access to the rules with which they must comply.*

7.05 It needs to be remembered that the incorporated material may not be a single document. The problem is exacerbated by the drafting style adopted by the Standards Association of Australia as these standards are frequently not self contained but adopt the provisions of other standards. This can create a chain of material incorporated by reference leading to the possibility that the need to table a particular document will be overlooked.

7.06 Consideration should also be given in drafting statutory rules as to whether the reference to an Australian Standard should be to a specific standard (eg AS 1234) or to a specific version of a standard by reference to its date (eg AS 1234, 1997). The latter approach means that if a later amended version of a standard is to be adopted it will require the amendment of the statutory rule and the undertaking of the RIS process. The former approach may result in significant changes to the effect of the statutory rule with no automatic mechanism to review the changes to the costs and benefits of the statutory rule.

⁵⁰ Paragraphs 7.03 - 7.08, Premier's Guidelines, December 2004.

7.07 The aim of the procedures set out in section 32 of the Interpretation of Legislation Act 1984 is to guarantee the availability of any material which is incorporated into a statutory rule by reference, to ensure that citizens may have access to the laws with which they must comply.

7.08 In deciding whether to incorporate material by reference, agencies need to take care to balance the drafting convenience with ease of access to the incorporated material and understanding of it by those affected by it or required to comply with it. Agencies should reserve the use of incorporated detailed and extensive technical material to regulations concerning industries familiar with and using the material. The use of the material then has the benefit of removing duplication. In such cases agencies should also consider whether performance standards are the more appropriate means of regulations.

The Subcommittee's preference is that all material is provided to it simultaneously so that it can all be considered in the context of the regulation.

This year the Subcommittee has again noticed that generally material incorporated by reference has been provided to it with the original material in respect of the regulation. This certainly makes the Subcommittee's task easier. The Subcommittee wishes to acknowledge and thank those Departments who make the effort to forward to it additional material.

(G) SECTION 9(1)(A) – SECTION 21(1)(I) – REQUIRES EXPLANATION AS TO ITS FORM OR INTENTION

There were not any regulations this year in respect of which this head of power was raised.

(H) OTHER MATTERS – GENERAL CLARIFICATION – DELAY IN MAKING REGULATIONS – THE 'BALANCED SCORECARD APPROACH' – WHAT IS IT?

Often the Subcommittee considers the overall operation of a regulation. It may consider just how a regulation works in practice. The Subcommittee sometimes writes to a Minister seeking general clarification of various matters.

Delay in making Regulations

One matter which concerned the Subcommittee this year was the delay between the advertisement of the regulatory impact statement and the making of the regulations. In *SR No. 18 – Heritage (General) Regulations 2005* the delay was actually three years. These Regulations prescribed forms, fees and specified the circumstances under which the Heritage Council can waive fees. The Subcommittee made considerable enquiries about the process from the Department. It was advised that additional consultation in the form of letters to stakeholders took place during that time. In this instance, nearly all the stakeholders approved the making of the regulations. Nevertheless, the Subcommittee wrote to the Minister expressing its view that it is not preferred practice to have such a long delay between the advertisement of the regulatory impact statement and the making of the regulations.

Example 1:**SR No. 18 – Heritage (General) Regulations 2005****Subcommittee's Letter⁵¹**

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 4 July 2005.

The Subcommittee notes that the regulatory impact statement was first advertised for public comment in February 2002. The Regulations finally commenced operation on 15 April 2005. The Subcommittee notes that during the three year period the regulatory impact statement was not re-advertised. The Subcommittee also notes that some consultation in the form of letters to stakeholders took place during that time. The Subcommittee also notes that nearly all the stakeholders approved the making of the Regulations.

However, the Subcommittee wishes to express its view that it is not preferred practice to have such a long delay between the advertisement of the regulatory impact statement and the making of the regulations.

The 'Balanced Scorecard Approach' – What is it?

Another matter which concerned the Subcommittee was the use of the 'Balanced Scorecard Approach' in a RIS. The Subcommittee seems to encounter the use of the 'Balanced Scorecard Approach' in RISs with increasing frequency. In *SR No. 136 – Transport (Tow Truck) Regulations 2005*, the RIS which accompanied the Regulations included a summary of alternatives. The summary of alternatives included a Table. The Table contained a subjective assessment of the proposed regulations and the alternatives compared to the 'Base Case' using the 'Balanced Scorecard Approach'. It is fair to say that the Subcommittee does not find that the use of such a Table provides great illumination in the context of an assessment of alternatives. On one view, the inclusion of such a Table to the average reader of the RIS adds little in terms of understanding and clarity. If such a Table is to be used, then there ought to be appropriate commentary which explains it. The Subcommittee wrote to the Minister in the following terms.

Example 1:**SR No. 136 – Transport (Tow Truck) Regulations 2005****Subcommittee's Letter⁵²**

The Regulation Review Subcommittee (the Subcommittee) considered and approved the above Regulations at a meeting on 8 March 2006.

The Regulatory Impact Statement (RIS) which accompanied the Regulations included a summary of alternatives at page v. The summary of alternatives included a Table. The Table contained a subjective assessment of the proposed Regulations and the alternatives compared to the 'Base Case' using the 'Balanced Scorecard Approach'.

⁵¹ Letter dated 4 July 2005 to the Hon. Rob Hulls, MP, Minister for Planning from the Regulation Review Subcommittee.

⁵² Letter dated 14 March 2006 to the Hon. Peter Batchelor, MP, Minister for Transport from the Regulation Review Subcommittee.

The Subcommittee made enquiries and understands that the inclusion of the table and the 'Balanced Scorecard Approach' comes from the new Victorian Guide to Regulation published in February 2005 at pages 5-12 and 5-13. It seems to the Subcommittee that the inclusion of the Table to the average reader, adds little in terms of understanding and clarity. What are 'weighted scores' and 'scores'? How are the scores given? On one view, any numbers can be chosen to ensure that 'weightings' come out in favour of the proposed Regulations. The description of the Table in the RIS uses the words 'subjective assessment'. How does this 'subjective assessment' or indeed the Table assist the average reader of a RIS in terms of understanding?

Whilst there is some explanation (one paragraph at page 5-13), in the Victorian Guide to Regulation of the 'Balanced Scorecard Approach', the average reader would not generally use such a document. The Victorian Guide, so the Subcommittee understands, was prepared principally for those involved with the preparation of RISs and business impact statements.

The Subcommittee is in the process of finalising the Annual Report for publication. These matters will form part of the Annual Report.

The Subcommittee would appreciate your explanation and comments as soon as possible.

Minister's Response⁵³

Thank you for your letter of 14 March 2006 regarding the use of the Balanced Scorecard Approach in the Regulatory Impact Statement (RIS) for the above Regulations.

The Scrutiny of Acts and Regulations Committee (the Committee) has commented that the weightings and scores given are subjective and add little in terms of understanding and clarity. On one view, any numbers can be chosen to ensure that "weightings" come out in favour of the proposed regulations. It further commented that while there is some explanation (one paragraph at page 5-13) in the Victorian Guide to Regulation (the Guide), the average reader would not generally use such a document and the Guide was prepared principally for those involved in the preparation of RISs and business impact assessments.

The use of the Balanced Scorecard Approach in the RIS was adopted on advice from the Victorian Competition and Efficiency Commission (VCEC). The view of the VCEC is that the Balanced Scorecard was the most appropriate decision criterion to assess various regulatory alternatives in the RIS, given that most of the benefits arising from the regulations were qualitative in nature. Further, VCEC independently certified the RIS as "adequate" under section 10(3) of the Subordinate Legislation Act 1994.

It is the understanding of the Department of Infrastructure (DOI) that the use of the Balanced Scorecard Approach is often used in RISs where there are qualitative benefits which are difficult, costly or impractical to estimate. For example, after advice from VCEC, the RISs for the Transport (Ticketing and conduct) Regulations 2005 S.R No.69/2005 and the Transport (Taxi-Cab Licences – Market and Trading) Regulations 2005 S.R No. 164/2005 also adopted the Balanced Scorecard Approach.

The Guide provides two paragraphs of explanation of the Balanced Scorecard and a fully worked example (the explanation covers all but two lines of page 5-13). It should

⁵³ Letter dated 27 April 2006 to the Regulation Review Subcommittee from the Hon. Peter Batchelor, MP, Minister for Transport.

be noted that the other decision criteria (net present value and benefit-to-cost ratio) only have explanations of one and two paragraphs respectively.

While only those involved in preparing RISs would generally read the Guide, the fact that the principles and processes in the Guide must be reflected in the RIS appears to contemplate that the Balanced Scorecard Approach is thought to be within the capacity of the average reader.

While the weightings and assigned scores are the subjective views of DOI, they are published in the RIS to provide transparency. The view of the VCEC on the use of the Balanced Scorecard Approach is that the weightings and scores are subject to public scrutiny, and that readers can make submissions on what the appropriate weightings and scores should be. It should be noted that quantitative estimates in RISs can result in substantial differences, depending on the assumptions and methodology used and the reliability or accuracy of the data.

DOI is confident that the RIS provides sufficient analytical rigour, as well as transparent evidence, for the community to be satisfied that the regulations meet their objectives and do not impose an undue burden on businesses and the community.

Thank you for bringing this matter to my attention. If you have further questions in relation to the use of the Balanced Scorecard Approach, I suggest that the Committee raises any changes with VCEC as VCEC is responsible for administering the Guide and the use of the Balanced Scorecard Approach in RISs.

The Subcommittee also wrote in identical terms to the Minister in respect of SR No.132 – Metropolitan Fire Brigades (General) Regulations 2005.

Example 2:

SR No. 132 – Metropolitan Fire Brigades (General) Regulations 2005

Subcommittee's Letter⁵⁴

The Regulation Review Subcommittee (the Subcommittee) considered and approved the above Regulations at a meeting on 8 March 2006.

The accompanying Regulatory Impact Statement (RIS) included Table 8 at page 38. The RIS states that the criteria for choosing between alternatives that are relevant in the context of the underlying regulatory objectives are those of efficiency and equity together with a degree of administrative complexity. Table 8 is entitled "Choosing between the proposed fees regulations and identified alternatives" The Table scores the alternatives considered in terms of the three criteria using the 'Balanced Scorecard Approach'.

The Subcommittee made enquiries and understands that the inclusion of the table and the 'Balanced Scorecard Approach' comes from the new Victorian Guide to Regulation published in February 2005 at pages 5-12 and 5-13. It seems to the Subcommittee that the inclusion of the Table to the average reader, adds little in terms of understanding and clarity. What are 'weighted scores' and 'scores'? How are the scores given? On one view, any numbers can be chosen to ensure that 'weightings' come out in favour of the proposed Regulations. How does this 'subjective assessment' or indeed the Table assist

⁵⁴ Letter dated 14 March 2006 to the Hon. Tim Holding, MP, Minister for Police and Emergency Services from the Regulation Review Subcommittee.

the average reader of a RIS in terms of understanding? In the Subcommittee's view, it does not add substantially to a better understanding of the matters discussed in the RIS.

Whilst there is some explanation (one paragraph at page 5-13), in the Victorian Guide to Regulation of the 'Balanced Scorecard Approach', the average reader would not generally use such a document. The Victorian Guide, so the Subcommittee understands, was prepared principally for those involved with the preparation of RISs and business impact statements.

The Subcommittee is in the process of finalising the Annual Report for publication. These matters will form part of the Annual Report.

The Subcommittee would appreciate your explanation and comments as soon as possible.

Minister's Response⁵⁵

Thank you for your letter of 14 March 2006 regarding the 'Balanced Scorecard Approach' in the Regulatory Impact Statement (RIS) for the Metropolitan Fire Brigades (General) Regulations 2005 (the Regulations).

The table using the 'Balanced Scorecard Approach' was included in the RIS at the request of the Victorian Competition and Efficiency Commission (VCEC). The purpose of the 'Balanced Scorecard Approach' is to provide a means of comparing the proposed regulatory solution to other alternatives.

The main benefit of this approach is to provide a transparent means of demonstrating the judgements made about alternative approaches to the regulations proposed. It also provides a visual aid to assist the reader. The table in the RIS aims to demonstrate how the benefits of the regulations outweigh the costs. This approach is useful where it is not possible to assign monetary values to the impacts of a proposed measure.

The 'Balanced Score-card Approach' is one of the decision criteria available (the others are 'net present value', 'benefit-to-cost ratio', and 'break-even analysis'). In this instance, the other criteria were not appropriate, as monetary values could not be quantified.

The proposed regulations and alternatives are listed in the table. An assessment of the options is based on the selected criteria of equity, efficiency and administrative cost. These are qualitative criteria, rather than quantitative, and hence, the other decision criteria do not apply.

The Victorian Guide to Regulation (the Guide) notes that weightings may be applied to each criterion. This then allows an overall 'weighted score' to be derived, which reflects the relative significance of the criterion (i.e. by multiplying the assigned score by the weighting). All scores reflect a subjective judgement based on information about the proposal and any alternatives. By applying the same weighting to each alternative, a simple comparison can be made of each alternative.

As you should be aware, the text preceding and following table provide an explanation of why the alternatives attract particular scores. As such, I utterly reject any suggestion that values have been attributed to ensure that the scores come out in favour of the proposed Regulations.

⁵⁵ Letter dated 21 April 2006 to the Regulation Review Subcommittee from the Hon. Tim Holding, MP, Minister for Police and Emergency Services.

I note and agree with your observation that the Guide is not likely to be used by the 'average reader'. Nonetheless, it is an essential tool to assist those involved with the preparation of RISs and business impact assessments (BIAs). I also note that the readers of RISs and BIAs are generally those who are informed in such matters and familiar with relevant requirements.

In the absence of other applicable decision criteria, I believe that the approach used in this instance was appropriate and assists in demonstrating why the Regulations are a preferable option to identified alternatives.

Thank you for raising this matter with me.

On a more general note, a RIS should be user-friendly. Whilst a RIS may deal with difficult technical matters, the author should be conscious of drafting it in a 'common sense' fashion. Glossaries of technical terms may be useful. Length in a RIS is not always desirable. Rather, the RIS should be precise, structured and deal with the matters required under the Act.

(I) NATIONAL COMPETITION POLICY – THE IMPACT OF THE PREMIER'S GUIDELINES

Pursuant to the Premier's Guidelines, the Subcommittee no longer has the jurisdiction to scrutinise National Competition Policy Certificates and accompanying assessments. The Subcommittee wrote to the Premier requesting an explanation and the reasons for the changes made to its jurisdiction.

Example 1:

Premier's Guidelines made pursuant to the Subordinate Legislation Act 1994

Subcommittee's Letter⁵⁶

The Subordinate Legislation Act 1994 (the Act) requires the Premier to make Guidelines in relation to the development of statutory rules. The most recent Guidelines (the new Guidelines) were tabled in the Legislative Assembly on 9 December 2004.

The Regulation Review Subcommittee (the Subcommittee) is bound by the Act and the new Guidelines. Consideration of statutory rules is undertaken in the context of the Act and the new Guidelines. When considering SR 49-2005 Meat Industry Regulations the Subcommittee noted that the new Guidelines do not include any National Competition Policy requirements. More specifically, the following materials from the previous Guidelines are not included in the new Guidelines: -

- *Part 14 – Competition Policy Requirements*
- *Attachment B – Tests for restriction on competition and benefits and costs to the community*
- *Appendix 1 – Defining the market*
- *Attachment C – Certificate of Compliance where subordinate legislation does not restrict competition and certificate of compliance where subordinate legislation restricts competition.*

⁵⁶ Letter dated 6 September 2005 to the Hon. Steve Bracks, MP, Premier from the Regulation Review Subcommittee.

The complete removal of the National Competition Policy material from the new Guidelines effectively prevents the Subcommittee from scrutinising it. Whilst the Subcommittee may have regard to the Victorian Guide to Regulation, its power to scrutinise such material derives from section 10(1)(f) of the Act which includes ‘any other matters specified by the Guidelines’

The Subcommittee requests an explanation and the reasons for the changes made to its jurisdiction.

Premier’s Response⁵⁷

Thank you for your letter dated 6 September 2005 concerning the revised Premier’s Guidelines that were tabled in Parliament on 9 December 2004 and published in accordance with section 26 of the Act. Your letter noted that the revised Guidelines removed the National Competition Policy (‘NCP’) requirements that appeared in the previous edition and requested an explanation of this change.

As the Committee is aware, the revised Guidelines came into operation on 17 January 2005 and supersede the edition published in 1997. The Competition Policy Requirements set out at Part 14 of the 1997 edition (and the corresponding attachments) were drafted to ensure compliance with the NCP. They were also supported by the separate Guidelines for the Application of the Competition Test to New Legislative Proposals issued by the Department of Premier and Cabinet in 1995 (“the Competition Guidelines”).

When the revised Guidelines were prepared in late 2004, the Commonwealth indicated that NCP funding for State Governments would cease in 2005. This effectively brought a ten year NCP reform period to an end. As the future NCP agenda was uncertain, it was decided that the references to NCP be removed from the revised Guidelines and that other mechanisms be put in place to assess the competition implications of regulations.

On 1 July 2004, the Government established the Victorian Competition and Efficiency Commission (“VCEC”) to maintain and improve competition and efficiency in the Victorian economy. VCEC’s functions include taking over the responsibilities of the Office of Regulation Reform. A consolidated Victorian Guide to Regulation was developed in February 2005 that subsumed many existing guides including the Competition and Premier’s Guidelines. VCEC is required to assess Regulatory Impact Statements (‘RISs’) and Business Impact Assessments (‘BIAS’) prepared under these consolidated guidelines.

Despite the uncertainty surrounding the NCP’s future, the Victorian Government has shown its commitment to competition principles by establishing VCEC and strengthening the RIS and BIA processes.

I trust this addresses the queries raised in your letter.

The Subcommittee notes that VCEC’s role differs from that of the Regulation Review Subcommittee.

⁵⁷ Letter dated 2 December 2005 to the Regulation Review Subcommittee from the Hon. Steve Bracks, MP, Premier.

(J) SECTION 9(1)(A) – IS THERE ANY APPRECIABLE ECONOMIC OR SOCIAL BURDEN ON ANY SECTOR OF THE PUBLIC?

Many regulations are accompanied by a section 9(1)(a) certificate of exemption which states that they do not impose an appreciable economic or social burden on any sector of the public.

Paragraph 5.33 of the Premier's Guidelines⁵⁸ set out the particular requirements in respect of the exemption certificates.

The Minister must include in the exemption certificate detailed reasons as to why the proposed rule does not impose an appreciable economic or social burden on a sector of the public under section 9(2). It will not be sufficient to simply assert that there is no appreciable economic or social burden on a sector of the public in the exemption certificate.

The Subcommittee also takes the view that it is not sufficient to simply assert that there is no appreciable economic or social burden on a sector of the public in the exemption certificate. The Subcommittee expects that detailed reasons will be given as to **why** there is no appreciable economic or social burden on a sector of the public and will examine those reasons closely.

This year there have been no regulations on which the Subcommittee has commented in respect of this matter. The Subcommittee acknowledges the high standard of the exemption certificates provided to it. The quality of the work presented to the Subcommittee has made its consideration of these matters easier. The detailed nature of the exemption certificates signifies to the Subcommittee a very real attempt to grapple with whether there "is an appreciable economic or social burden" imposed or not. The Subcommittee's is guided by the Premier's Guidelines. It also uses a common sense approach. Each regulation will be considered in its context and on its merits.

Following are matters that the Subcommittee may consider in the context of a regulation: –

- What does this regulation do specifically?
- Who does it effect?
- How many people does it effect?
- How does it effect them?
- What is the extent of the effect?
- Is there an economic burden imposed?
- Is there a social burden imposed?
- Are these burdens "appreciable"?

Example 1:

SR No. 28 – Sale of Land Regulations 2005

The Sale of Land Regulations 2005 ("the proposed Regulations") remake the Sale of Land Regulations 2004 to implement amendments to the Sale of Land Act 1962 ("the Act") made by the Fair Trading (Enhanced Compliance) Act 2004 in December 2004. The amendments provide an exemption from the prohibition on vendor bids at public auctions of land for co-owners, or their representatives, who genuinely wish to bid

⁵⁸ Paragraph 5.33, Premier's Guidelines, December 2004.

purchase the property from their co-owner or co-owners, if the auction rules allow such bids and the auctioneer announces that such bids may be made.

The proposed Regulations set out the rules and pre-auction announcements that will allow co-owner bids. They prescribe three new sets of rules and auctioneer announcements to cover the three circumstances in which genuine co-owner bids are made and amend the information statement required to be displayed at auctions to include information on co-owner bidding. The proposed Regulations also simplify the announcements that auctioneers must make about vendor bids and prohibited conduct at auctions and clarify provisions in the existing information statement.

The proposed Regulations will come into operation on 1 July 2005 thereby providing the real estate industry with certainty about the new requirements and sufficient time to prepare for their introduction.

I, Marsha Thomson, Minister for Consumer Affairs, exempt the proposed Regulations from the requirement to prepare a regulatory impact statement under section 7 of the Subordinate Legislation Act 1994 (“the SLA”) as I have formed the opinion that they are of a fundamentally declaratory or machinery nature (section 9(1)(c) of the SLA), and would not impose an appreciable economic or social burden on a sector of the community (section 9(1)(a) of the SLA).

The reason for forming the opinion that the proposed Regulations are of a declaratory or machinery nature is that they prescribe the rules and announcements which the Act requires to be made to enable the exemption for co-owner bids.

The reason for forming the opinion that no appreciable burden will be imposed is that consultation has revealed that the proposed Regulations impose only a minor cost. The Real Estate Institute of Victoria which represents real estate auctioneers has confirmed that the cost of industry compliance will be minimal. The documentation which auctioneers are currently required to purchase and display will be replaced, in part, by the new rules and a revised information statement. The purchase of the new documents will involve only a small and infrequent cost for auctioneers as they can be readily produced as a single sided A3 or A4 pages and used on repeated occasions, as is the case with the current documents. Any additional burden imposed on an auctioneer by selecting and displaying the appropriate documentation for a particular auction will be offset by the benefits achieved through allowing co-owners, who had previously been prohibited, to bid at public auctions of land in Victoria.

Example 2:

SR No. 91 – Petroleum Products (Terminal Gate Pricing) (Amendment) Regulations 2005

I, Marsha Thomson, Minister for Consumer Affairs, and Minister responsible for administering the Petroleum Products (Terminal Gate Pricing) Act 2002 (‘the Act’), certify under section 9(1)(a) (no appreciable social or economic burden imposed by the regulations) and 9(1)(c) (regulations are of a declaratory or machinery nature) of the Subordinate Legislation Act 1994 that, the Petroleum Products (Terminal Gate Pricing)(Amendment)Regulations 2005 (‘the Regulations’), in my opinion are exempted from the requirement to prepare a Regulatory Impact Statement under section 7 of that Act.

The proposed Regulations amend the Petroleum Products (Terminal Gate Pricing) Regulations 2001 (‘the existing regulations’) to implement amendments to the Act made by the Petroleum Products (Terminal Gate Pricing)(Amendment) Act 2004 (‘the

Amendment Act'). The amendments to the Act provide declared suppliers with an exemption from the requirement to supply a particular class or classes of declared fuel where there is a shortfall in the availability of that fuel. Previously, declared suppliers were required to provide a notice to the Director of Consumer Affairs Victoria with details of their supply capacity and commitments before refusing to supply a customer.

The proposed Regulations specify the circumstances for the new exemption as a shortfall in the availability of fuel that would hinder a supplier's ability to meet its commitments to its contracted customers if it were to be required to supply a new customer. They also specify the notification requirements for a declared supplier where the exemption issued as grounds for refusing to supply a customer (a distributor or retailer). These requirements include a notice from a declared supplier to their customer, either orally or in writing and within 1 business day of the refusal to supply, giving the reason for the refusal to supply and the expected duration of the shortfall. Amendments are also proposed to the current record keeping requirement to remove the requirement that declared suppliers keep a certain category of records.

The proposed Regulations will come into operation on 1 August 2005, which is the date the exemption provision in the Act is to commence.

The reason for forming the opinion that the proposed Regulations are of a declaratory or machinery nature is that they prescribe the circumstances for the exemption authorised by the amendments to the Act and make consequential changes to the notification requirements and remove a requirement to keep certain records that will no longer be relevant following the amendments to the Act.

The reason for forming the opinion that no appreciable burden will be imposed is that consultation has revealed that the proposed Regulations impose only a negligible, if any, cost on declared suppliers. There will be four suppliers declared for the purposes of the Act: BP Australia Pty Ltd, Caltex Australia Petroleum Pty Ltd, Mobile Oil Australia Pty Ltd and The Shell Company of Australia Limited. These are the multi-national petroleum refining companies that operate in Victoria.

While the proposed Regulations will exempt these companies from the requirement to supply fuel in certain circumstances it will impose on them an obligation to provide certain information to their customers. In particular, they will be obliged to give a notice to a customer at the time of refusing supply advising that the reason for the refusal is a shortfall in the availability of fuel. As it is currently common practice for a declared supplier to provide this information, no additional cost is imposed by this obligation. The proposed regulations also require that the notice include a reasonable estimate of the likely duration of the shortfall. This is information which is fundamental to the effective operation of a terminal business and would be known by the terminal manager or readily available to them. Some declared suppliers already supply this information to their customers. The notice is simple to prepare and flexible in that it allows a supplier to choose the manner of providing the information which is most effective in the circumstances, either orally or in writing, and allows a reasonable amount of time for the notice to be provided, up to 1 business day.

Furthermore, it is unlikely that declared suppliers will be required to provide many notices. Knowledge of a shortfall generally circulates rapidly through the market and means that the risk of a declared supplier being approached by a new customer during such periods is significantly reduced.

Declared suppliers have confirmed that any financial cost resulting from the notice requirements is small and does not impose on them any appreciable social or economic burden.

Non-compliance with the notice requirement provokes a fine of up to 20 penalty units. The major oil companies are significant public players with reputations to protect. They have advised that as the requirement reflects common practice, compliance is not a burden and, therefore, it is unlikely that the penalty will be imposed, except on rare occasions.

Example 3:

SR No. 96 – Dangerous Goods (HCDG) Regulations 2005

I, John Lenders, Minister for WorkCover and Minister responsible for administering the Dangerous Goods Act 1985 (DGA), certify under section 9(1)(b) of the Subordinate Legislation Act 1994 (SLA) that the proposed Dangerous Goods (HCDG) Regulations 2005, in my opinion, are exempt from the requirement to prepare a Regulatory Impact Statement (RIS) under section 7 of the SLA.

The reason for forming this opinion is that the proposed Regulations are required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme. An RIS was prepared by the Department of Prime Minister & Cabinet in relation to the regulation and control of security-sensitive ammonium nitrate, and was released with the proposed Regulations for public comment. The Commonwealth Office of Regulation Review (ORR) has provided written advice that the RIS meets the Australian Government's regulatory best practice requirements and contains an adequate level of analysis for the decision-making stage. The ORR's advice is attached to this certificate.

VWA obtained independent advice on the adequacy of the Commonwealth RIS from Concept Research Pty Ltd prior to the release of the proposed Regulations for public comment. Concept Research, in a written advice, noted that the RIS did not provide a specific cost/benefit analysis but argued that the data in the RIS allows an inference that the benefits are likely to exceed the costs of the proposal. Further, the data indicates that the costs for business in Victoria are expected to be significant and likely benefits would exceed costs. Concept Research's advice is attached to this certificate.

In line with paragraph 5.33 of the SLA Guidelines, I have taken care to ensure that the impact of the scheme, particularly on Victorian business, has been properly assessed and I am satisfied that there has been adequate consultation with the business community. A list of the organisations consulted on the proposed Regulations is contained in the Certificate of Consultation under section 6(c) of the SLA.

The majority of the proposed Regulations will commence on 1 October 2005, however, most of the provisions necessary for enforcement of the scheme will not commence until 1 January 2006. The reason for this delayed commencement is to provide industry and farmers sufficient time to organise compliance strategies.

Office of Regulation Review Attachment

Thank for the draft Regulation Impact Statement (RIS) for the regulation and Control of Ammonium Nitrate.

The Office of Regulation Review (ORR) advises that the RIS meets the Australian Government's regulatory best practice requirements as set out in the Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies and contains an adequate level of analysis for the decision making stage.

Please note that the ORR ID number for this issue is 5965. Please quote this number for compliance reporting purposes. Mr Jason Walsh is your Department's contact officer for RIS compliance reporting.

If you have any queries in relation to this advice, please contact me on 6240 3258. Thank you for consulting the ORR.

Concept Research Attachment

I refer to your request to assess the Regulatory Impact Statement in relation to the regulation and control of ammonium nitrate prepared by the Department of Prime Minister and Cabinet. Specifically, the assessment should determine whether the RIS is considered adequate for the purposes of meeting the requirements of the Subordinate Legislation Act 1994.

Section 9(1)(b) of the Act allows, inter alia, for an exemption from the RIS process where the relevant Minister certifies that the proposed statutory rule is required under a national uniform legislation scheme and an assessment of the costs and benefits has been undertaken under that scheme.

Section 10(2) of the Act states that the assessment of the costs and benefits must include an assessment of the economic, environmental and social impact and the likely administration and compliance costs including resource allocation costs.

The RIS canvasses the security related issues with respect to ammonium nitrate – specifically its potential use as a terrorist weapon. The report recommends that security sensitive ammonium nitrate (SSAN) be subject to a licensing system throughout its supply chain in each state and territory. Persons seeking an authority to import, manufacture, store, transport, supply, export, use or dispose of SSAN would be required to:

- a. demonstrate a legitimate need for access to SSAN*
- b. provide safe and secure storage and handling procedures*
- c. report any loss, theft, attempted theft or unexplained discrepancy*
- d. undergo background checking*
- e. be a minimum of 18 years of age, and*
- f. provide verifiable proof of identity.*

The RIS provides evidence of:

- i) the amount of SSAN manufactured in Australia*
- ii) the amount of SSAN imported into Australia*
- iii) total usage of SSAN by the mining and agricultural sectors (the only users of SSAN)*
- iv) the number of farmers using SSAN (including use in Victoria)*
- v) estimated costs of a licence*
- vi) examples of the costs and lives lost in terrorist incidents involving the use of SSAN.*

The RIS does not provide costs associated with increased secure storage. Nor does the RIS provide an explicit estimate of whether the benefits associated with the regulatory proposal would exceed their costs. From an RIS perspective, this is not such a problem as the aim of the regulatory proposal is to prevent (or lower the likelihood of such incidents). Further, it is not known if or when such incidents may occur – for example,

year 1, year 10, or year X. This makes conventional economic modelling of the costs and benefits very problematical.

However, the data provided is such as to allow an inference that the benefits are likely to exceed their costs. In other words, should an incident occur, the likely costs associated are such as to easily exceed the costs of compliance with the regulatory proposal. More specifically, the data included in the RIS would indicate that the costs are not expected to be significant in Victoria, given the relatively low use of SSAN compared with the other states and territories and, as a consequence, the likely benefits would exceed their costs in Victoria.

I note that the proposed Regulations will now refer to High Consequence Dangerous Goods rather than SSAN. Further, SSAN will be the only HCDG initially on the associated Schedule and that SSAN will be defined such as to include calcium Ammonium Nitrate (CAN). The following points may be made with respect to these changes:

(i) although the Schedule may subsequently be amended to include other HCDG in addition to SSAN, this will not pose a problem from an RIS perspective. The regulatory analysis can only be undertaken on the goods listed on the Schedule. If other HCDG are subsequently added to the list, these will require an impact assessment at the time of their proposed inclusion:

(ii) the re-definition of SSAN to include CAN should not invalidate the Regulatory Impact Statement in relation to the regulation and control of ammonium nitrate prepared by the Department of Prime Minister and Cabinet. The available evidence would indicate that the inclusion of CAN will not significantly alter the number of affected parties or associated costs.

It should also be noted that should the regulatory proposal proceed, there are no issues related to the competition principles. In other words, the regulatory proposal would not restrict competition.

In conclusion, it is my professional opinion that the RIS can be deemed to be an adequate assessment of the costs and benefits associated with the regulatory proposal for the purpose of compliance with Section 10(2) of the Subordinate Legislation Act 1994. As a consequence, this would allow the proposed Regulations to be exempted from the RIS process under Section 9(1)(b) of the Act.

(K) COMMENDATIONS

On several occasions this year the Subcommittee has commended Ministers for the particular attention to detail in respect of the work presented to it. The Subcommittee acknowledges properly drawn certificates. The Subcommittee also acknowledges the excellent work from some Departments in responding to the large number of people and organisations who sent in submissions in respect of a particular Regulatory Impact Statement.

Example 1:

SR No. 88 – Safe Drinking Water Regulations 2005

Subcommittee's Letter⁵⁹

The Regulation Review Subcommittee considered and approved the above Regulations at a meeting on 26 September 2005.

Twenty six submissions were received during the regulatory impact statement process. The Subcommittee was provided with an extremely thorough analysis of the submissions. The comprehensive manner in which the Department summarised the issues facilitated the Subcommittee's work. In addition, the Department wrote a detailed letter to each organisation or individual responding to the issues raised.

The Subcommittee wishes to acknowledge the outstanding manner with which the Department dealt with the submissions. The Subcommittee commends those involved and requests that you forward its comments to the relevant officers.

⁵⁹ Letter dated 29 September 2005 to the Hon. Bronwyn Pike, MP, Minister for Health from the Regulation Review Subcommittee.

APPENDIX 1 – REGULATIONS 2005⁶⁰

REGULATION IMPACT STATEMENTS

SR No. 3	Co-Operative Housing Societies Regulations 2005
SR No. 8	Surveying (Registration Fees) Regulations 2005
SR No. 9	Fisheries (Levies) Regulations 2005
SR No. 13	Forest (Thomson River Forest Reserve) Regulations 2005
SR No. 18	Heritage (General) Regulations 2005
SR No. 21	Casino Control (Licence Fees) Regulations 2005
SR No. 31	Alpine Resorts (Management)(Amendment) Regulations 2005
SR No. 35	Births, Deaths and Marriages Registration (Amendment) Regulations 2005
SR No. 49	Meat Industry Regulations 2005
SR No. 51	Building (Interim) Regulations 2005
SR No. 56	Surveying (Cadastral Surveys) Regulations 2005
SR No. 60	Gambling Regulation (Signage) Regulations 2005
SR No. 61	Gambling Regulation Regulations 2005
SR No. 62	Road Management (Works and Infrastructure) Regulations 2005
SR No. 63	Road Management (General) Regulations 2005
SR No. 66	Transport (Passenger Vehicles) Regulations 2005
SR No. 67	Transport (Taxi-Cabs) Regulations 2005
SR No. 69	Transport (Ticketing and Conduct) Regulations 2005
SR No. 74	Electricity Safety (Electric Line Clearance) Regulations 2005
SR No. 76	Cemeteries and Crematoria Regulations 2005
SR No. 77	Private Security Regulations 2005
SR No. 88	Safe Drinking Water Regulations 2005
SR No. 98	Local Government (Electoral) Regulations 2005
SR No. 101	Corrections (Police Gaols) Regulations 2005
SR No. 103	Fisheries (Recreational Abalone) Regulations 2005
SR No. 104	Magistrates' Court (Fees, Costs and Charges)(Amendment) Regulations 2005
SR No. 122	Agricultural and Veterinary Chemicals (Control of Use)(Fertilisers) Regulations 2005

⁶⁰ This Appendix lists all regulations made during 2005. The Appendix categorises regulations according to whether they were made with a Regulation Impact Statement or whether they were exempted or excepted from those requirements. The Committee did not move for disallowance of any of the regulations made in 2005, however the Regulation Review Subcommittee did correspond with responsible Ministers concerning some regulations.

SR No. 128	Public Transport Competition (Fees) Regulations 2005
SR No. 132	Metropolitan Fire Brigades (General) Regulations 2005
SR No. 135	Non-Emergency Patient Transport Regulations 2005
SR No. 136	Transport (Tow Trucks) Regulations 2005
SR No. 141	Charities Regulations 2005
SR No. 150	Fisheries (Aquaculture Fees and Levies) Regulations 2005
SR No. 151	Domestic (Feral and Nuisance) Animals Regulations 2005
SR No. 154	Marine (Personal Flotation Devices and Other Safety Equipment) Regulations 2005
SR No. 164	Transport (Taxi-Cab Licences – Market and Trading) Regulations 2005

EXCEPTIONS UNDER SECTION 8

S. 8(1)(a) — Fee Increases

SR No. 42	Metropolitan Fire Brigades (General)(Fees and Charges) Regulations 2005
SR No. 43	Country Fire Authority (Charges) Regulations 2005
SR No. 44	Chattel Securities (Fees) Regulations 2005
SR No. 45	Road Safety (Drivers)(Fees) Regulations 2005
SR No. 46	Road Safety (Vehicles)(Fees) Regulations 2005
SR No. 57	Plumbing (Fees Amendment) Regulations 2005
SR No. 82	Marine (Fees) Regulations 2005
SR No. 100	Children’s Services (Fees) Regulations 2005
SR No. 105	Intellectually Disabled Persons’ Services (Fees) Regulations 2005
SR No. 111	Mental Health (Fees) Regulations 2005
SR No. 112	Health Services (Supported Residential Services) (Fees) Regulations 2005
SR No. 113	Health Services (Private Hospitals and Day Procedure Centres)(Fees) Regulations 2005
SR No. 114	Health (Medical Radiation Technologists)(Fees) Regulations 2005
SR No. 115	Health (Pest Control)(Fees) Regulations 2005
SR No. 116	Health (Radiation Safety)(Fees) Regulations 2005
SR No. 117	Drugs, Poisons and Controlled Substances (Fees) Regulations 2005
SR No. 142	National Parks (Fees and Charges)(Amendment) Regulations 2005
SR No. 163	Transfer of Land (Fees)(Amendment) Regulations 2005

S. 8(1)(b) — Court Rules

SR No. 5	Magistrates’ Court Civil Procedure (Amendment No.12) Rules 2005
SR No. 7	Supreme Court (Chapter VI Amendment No.6) Rules 2005
SR No. 10	Magistrates’ Court General (Amendment) Regulations 2005
SR No. 15	Magistrates’ Court Civil Procedure (Amendment No.13) Rules 2005
SR No. 22	Supreme Court (Chapter VI Amendment No.7) Rules 2005
SR No. 30	Administrative Appeals Tribunal (Planning Appeals)(Revocation) Regulations 2005

SR No. 34	Victorian Civil and Administrative Tribunal (Amendment No.15) Rules 2005
SR No. 47	Supreme Court (Chapter V Amendment No.1) Rules 2005
SR No. 59	Magistrates' Court (Occupational Health and Safety) Rules 2005
SR No. 95	Supreme Court (Chapter VI) Amendment No.8 Rules 2005
SR No. 99	Magistrates' Court General (Penalty Units) Regulations 2005
SR No. 106	Victims of Crime Assistance (Procedure) Rules 2005
SR No. 107	County Court (Chapter 1 Amendment No.16) Rules 2005
SR No. 125	Supreme Court (Chapter 1 Amendment No. 29) Rules 2005
SR No. 133	Supreme Court (Adoption) Rules 2005
SR No. 147	Supreme Court (Legal Profession References Amendment) Rules 2005
SR No. 148	Supreme Court (General Civil Procedure) Rules 2005
SR No. 165	Magistrates' Court Civil Procedure (Amendment No.14) Rules 2005
SR No. 166	Magistrates' Court (Judicial Registrars) Rules 2005
SR No. 167	County Court (Chapter 1 Amendment No.17) Rules 2005
SR No. 168	County Court (Chapter 1 Amendment No.18) Rules 2005

S. 8(1)(d)(iii) — Extension by 12 Months

SR No. 1	Subordinate Legislation (Corrections (Police Gaols) Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 2	Subordinate Legislation (Victoria State Emergency Service Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 14	Subordinate Legislation (Trustee Companies Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 26	Subordinate Legislation (Australian Grand Prix (Works) Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 36	Subordinate Legislation (Prostitution Control Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 40	Subordinate Legislation (Drugs, Poisons and Controlled Substances Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 58	Subordinate Legislation (Equipment (Public Safety)(General) Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 87	Subordinate Legislation (Administration and Probate (Deposit of Wills)(Fees) Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 89	Subordinate Legislation (Workers Compensation Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 134	Subordinate Legislation (Livestock Disease Control Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 146	Subordinate Legislation (Water Industry Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 153	Subordinate Legislation (Trade Measurement Regulations 1995 – Extension of Operation) Regulations 2005
SR No. 157	Subordinate Legislation (Estate Agents (Fees) Regulations 1996- Extension of Operation) Regulations 2005
SR No. 161	Subordinate Legislation (Guardianship and Administration Board (Fees) Regulations 1996 – Extension of Operation) Regulations 2005

EXEMPTIONS UNDER SECTION 9

S. 9(1)(a) — No Economic Burden

SR No. 17	Victorian Civil and Administrative Tribunal (Fees)(Amendment) Regulations 2005
SR No. 20	Racing (Racing Appeals Tribunal) Regulations 2005
SR No. 24	Parliamentary Allowances (Travel and Electorate Allowances) Regulations 2005
SR No. 25	Parliamentary Committees (Allowances) Regulations 2005
SR No. 38	Casino Control (Boundary Redefinition Fee) Regulations 2005
SR No. 41	Health (Pest Control)(Qualifications) Regulations 2005
SR No. 48	Conservation, Forests and Lands (Infringement Notice)(Amendment) Regulations 2005
SR No. 65	Audit (Public Bodies) Regulations 2005
SR No. 81	Transport (Taxi-Cab Licences – Trading) Regulations 2005
SR No. 84	Commonwealth Games Arrangements Regulations 2005
SR No. 90	Fair Trading (Safety Standard)(Children’s Toys)(Amendment) Regulations 2005
SR No. 92	Electricity Safety (Equipment)(Amendment) Regulations 2005
SR No. 94	Sex Offenders Registration (Amendment) Regulations 2005
SR No. 102	Forests (Timber Promotion Council)(Revocation) Regulations 2005
SR No. 124	Firearms (Amendment) Regulations 2005
SR No. 145	Road Safety (Vehicles)(Registration Renewal) Regulations 2005
SR No. 155	Marine (Infringements) Regulations 2005
SR No. 158	Electricity Safety (Network Assets)(Amendment) Regulations 2005
SR No. 159	Livestock Disease Control (Amendment) Regulations 2005
SR No. 160	Agricultural and Veterinary Chemicals (Control of Use)(Ruminant Fees) Regulations 2005
SR No. 169	Estate Agents (Exemption) Regulations 2005
SR No. 170	Liquor Control Reform (Prescribed Substance) Regulations 2005
SR No. 172	Conservation, Forests and Lands (Infringement Notice)(Royal Botanic Gardens) Regulations 2005
SR No. 173	Firearms (Further Amendment) Regulations 2005
SR No. 175	Transport (Rail Safety)(Amendment) Regulations 2005
SR No. 176	Road Safety (Road Rules)(Emergency Vehicles) Regulations 2005
SR No. 177	Road Safety (Vehicles)(Emergency Vehicles) Regulations 2005
SR No. 178	Land Tax Regulations 2005

S. 9(1)(b) — Uniform Legislation

SR No. 96	Dangerous Goods (HCDG) Regulations 2005
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S. 9(1)(c) — Fundamentally Declaratory

SR No. 6	Petroleum (Amendment) Regulations 2005
SR No. 11	Mineral Resources Development (Amendment) Regulations 2005
SR No. 23	Fair Trading (Infringements) Regulations 2005

SR No. 27	Wrongs (Part VBA Claims) Regulations 2005
SR No. 29	Retirement Villages (Transitional) Regulations 2005
SR No. 32	Subdivision (Procedures)(Amendment) Regulations 2005
SR No. 33	Planning and Environment Regulations 2005
SR No. 37	Serious Sex Offenders Monitoring Regulations 2005
SR No. 55	Liquor Control Reform (Amendment) Regulations 2005
SR No. 64	Occupational Health and Safety (Entry Permits) Regulations 2005
SR No. 68	Transport (Infringements)(Consequential and Restructuring Amendments) Regulations 2005
SR No. 70	Prevention of Cruelty to Animals (Fee Units) Regulations 2005
SR No. 80	Petroleum (Submerged Lands)(Amendment) Regulations 2005
SR No. 97	Teaching Service (Appeals) Regulations 2005
SR No. 108	Estate Agents (General, Accounts and Audit)(Amendment) Regulations 2005
SR No. 109	Residential Tenancies (Amendment) Regulations 2005
SR No. 110	Victorian Institute of Teaching (Elections)(Amendment) Regulations 2005
SR No. 120	Road Safety (General)(Speed Measuring Devices) Regulations 2005
SR No. 121	Prevention of Cruelty to Animals (Rodeos) Regulations 2005
SR No. 127	Mental Health (Amendment) Regulations 2005
SR No. 137	Transport (Infringements)(Tow Truck) Regulations 2005
SR No. 138	Transport (Alcohol Controls) Regulations 2005
SR No. 149	Legal Practice (Admission)(Amendment) Rules 2005
SR No. 162	Retirement Villages (Records and Notices) Regulations 2005

S. 9(1)(d) — Administration between Departments

SR No. 16	Public Administration (Reviews) Regulations 2005
SR No. 174	Public Administration (Review of Actions) Regulations 2005

S. 9(3) — Premier's Certificate

SR No. 85	State Owned Enterprises (Trade Practices) Regulations 2005
SR No. 118	Tobacco (Grands Prix Events) Regulations 2005

EXCEPTIONS AND EXEMPTIONS UNDER COMBINED SECTIONS

S. 9(1)(a) — No Economic Burden and S. 9(1)(b) — Uniform Legislation

SR No. 119	Road Safety (Vehicles)(Mass, Dimension and Load Restraint) Regulations 2005
SR No. 152	Legal Profession Regulations 2005

S. 9(1)(a) — No Economic Burden and S. 9(1)(c) — Fundamentally Declaratory

SR No. 4	Health (Infectious Diseases)(Further Amendment) Regulations 2005
SR No. 12	Fisheries (Levies)(Amendment) Regulations 2005
SR No. 19	Transport (Infringements)(Amendment) Regulations 2005

SR No. 28	Sale of Land Regulations 2005
SR No. 39	Drugs, Poisons and Controlled Substances (Amendment) Regulations 2005
SR No. 50	Pharmacy Practice Regulations 2005
SR No. 53	Architects (Amendment) Regulations 2005
SR No. 54	Crimes (Family Violence) Regulations 2005
SR No. 71 –	Whistleblowers Protection (Amendment) Regulations 2005
SR No. 72	Police (Amendment) Regulations 2005
SR No. 73	Major Crime (Investigative Powers) Regulations 2005
SR No. 75	Cemeteries (Incorporation of Trusts)(Amendment) Regulations 2005
SR No. 78	Private Agents (Amendment) Regulations 2005
SR No. 79	Terrorism (Community Protection)(Chemicals and Substances) Regulations 2005
SR No. 83	Surveillance Devices Regulations 2005
SR No. 86	Fisheries (Prescribed Criteria) Regulations 2005
SR No. 91	Petroleum Products (Terminal Gate Pricing)(Amendment) Regulations 2005
SR No. 93	Health (Exempt Businesses) Regulations 2005
SR No. 123	Fisheries (Miscellaneous Amendments) Regulations 2005
SR No. 126	Road Safety (General)(Heavy Vehicle Safety) Regulations 2005
SR No. 129	Road Safety (Road Rules)(Amendment) Regulations 2005
SR No. 139	Children and Young Persons (Children’s Court)(Amendment) Regulations 2005
SR No. 140	Melbourne City Link (General)(Amendment) Regulations 2005
SR No. 143	Food (Forms and Registration) Regulations 2005
SR No. 156	Police (Special Constables Revocation) Regulations 2005
SR No. 171	Liquor Control Reform (Prohibited Supple) Regulations 2005

S. 9(1)(a) — No Economic Burden and S. 9(1)(d) — Administration between Departments

SR No. 52	Public Administration (Reviews)(Amendment) Regulations 2005
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S. 9(1)(b) — Uniform Legislation and S. 9(1)(d) — Administration between Departments

SR No. 144	Transport (Ticketing And Conduct)(Amendment) Regulations 2005
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APPENDIX 2 – MINISTERIAL CORRESPONDENCE

This Appendix contains a list of correspondence sent to responsible Ministers by the Subcommittee regarding regulations made in 2005. The Appendix categorises correspondence in accordance with the nature of the issue raised by the Subcommittee

Regulation	Minister	Issue
SR 18 – Heritage (General) Regulations 2005	Minister for Planning	Failure to comply with RIS Process – A 3 year delay between advertisement for public comment and the regulations commencing operation.
SR 21 – Casino Control (Licence Fees) Regulations 2005	Minister for Gaming	Undated section 6 certificate.
SR 26 – Subordinate Legislation (Australian Grand Prix (Workers) Regulations 1995 – Extension of Operation) Regulations 2005	Minister for Tourism	Undated section 8 certificate.
SR 57 – Plumbing (Fees Amendment) Regulations 2005	Minister for Planning	“Basket” Fee Approach
SR 58 – Subordinate Legislation (Equipment (Public Safety)(General) Regulations 1995 – Extension of Operation) Regulations 2005	Minister for WorkCover	Undated section 5 and 8 certificates.
SR 62 – Road Management (Works and Infrastructure) Regulations 2005	Minister for Transport	Commending the Policy Officers for their outstanding effort on an extremely thorough analysis.
SR 65 – Audit (Public Bodies) Regulations 2005	Minister for Finance	Undated section 9 certificate.
SR 67 – Transport (Taxi-Cabs) Regulations 2005	Minister for Transport	Failure to respond to those who made submissions.
SR 69 – Transport (Ticketing and Conduct) Regulations 2005	Minister for Transport	Failure to respond to those who made submissions.
SR 74 – Electricity Safety (Electric Line Clearance) Regulations 2005	Minister for Energy Industries	Failure to respond to those who made submissions.

Regulation	Minister	Issue
SR 76 – Cemeteries and Crematoria Regulations 2005	Minister for Health	Failure to respond to those who made submissions.
SR 88 – Safe Drinking Water Regulations 2005	Minister for Health	Commending the Department for their outstanding effort on an extremely thorough analysis of the submissions.
SR 98 – Local Government (Electoral) Regulations 2005	Minister for Local Government	Commending the Department for their outstanding effort on an extremely thorough analysis of the submissions.
SR 103 – Fisheries (Recreational Abalone) Regulations 2005	Minister for Agriculture	Failure to respond to those who made submissions.
Premier's Guidelines made pursuant to the Subordinate Legislation Act 1994	Premier	Removal of any National Competition Policy requirements from the Premier's Guidelines.
SR 132 – Metropolitan Fire Brigades (General) Regulations 2005	Minister for Police and Emergency Services	Seeking clarification on the 'Balanced Scorecard Approach'
SR 135 – Non-Emergency Patient Transport Regulations 2005	Minister for Health	Commending the Department for their outstanding effort on an extremely thorough response to submissioners.
SR 136 – Transport (Tow Truck) Regulations 2005	Minister for Transport	Seeking clarification on the 'Balanced Scorecard Approach'

APPENDIX 3 – COMMITTEE PRACTICE NOTES

Exemptions and Exceptions

- **Dating Certificates.** The Subcommittee has been presented with a number of undated exemption and exception certificates. The Subcommittee expects all certificates to be dated.
- **Reasons for Exemption.** The Subcommittee has occasionally received regulations exempted under section 9 with certificates of exemption which fail to adequately explain the reasons for granting the exemption or with reasons for granting the exemption contained in the Explanatory Memorandum. It should be noted that it is a requirement of section 9(2) of the *Subordinate Legislation Act 1994* (Vic) that certificates of exemption 'specify the reasons for the exemption'. The Subcommittee expects all exemption certificates to contain adequate explanations of the reasons for granting the exemptions.
- **Extension of Regulations for Periods up to 12 months.** Regulations expire 10 years after they have been made. The Subcommittee has been presented with a number of regulations made under sections 8(1)(d)(iii) and 5(3) extending regulations due to expire for periods up to 12 months. Before an extension of time can be granted, the Minister must certify that due to 'special circumstances' there is insufficient time available to comply with the formal regulation-making requirements of the *Subordinate Legislation Act 1994*. The Subcommittee expects details of the 'special circumstances' to be contained in the section 5(3) certificate itself as required by the *Subordinate Legislation Act 1994*.
- **Using Appropriate Exemption and Exception Categories.** Department and agency officers need to be careful when determining which category to use when exempting and excepting regulations from the Regulation Impact Statement process. The Subcommittee has received regulations which are incorrectly exempted and excepted.
- **Typographical Errors.** Department and agency officers need to be careful when preparing certificates to ensure that they do not contain typographical errors.

Explanatory Memoranda

The Subcommittee expects an Explanatory Memorandum to comply with the requirements contained in Paragraph 8.10 *Premier's Guidelines*. An Explanatory Memorandum must contain:–

- A brief outline of each provision;
- An explanation of the changes effected by each provision;
- A statement of the reasons for making the rule;
- Where applicable, the reasons why no regulatory impact statement was prepared;

- a statement as to whether consultation has taken place, and if it has not taken place, an explanation as to why a decision was made not to consult.

Fee Increases: 8(1)(a) and 8(2)

Regulations increasing fees made under section 8(1)(a) of the *Subordinate Legislation Act 1994* (Vic) must not increase fees by more than the percentage set by the Treasurer. For each financial year a percentage increase is set by the Treasurer. The Treasurer notifies the Subcommittee in writing of the relevant percentage increase.

A regulation may increase a number of fees, with some individual fee increases falling outside the rate set by the Treasurer. However when the total average of fee increases for that regulation is calculated, it falls within the rate fixed by the Treasurer. This practice is referred to as the 'basket approach'. Paragraph 5.25 of the Premier's Guidelines provides that:–

It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

Section 8(2) of the *Subordinate Legislation Act 1994* (Vic) validates the rounding up of fee increases to the nearest whole dollar. Sometimes the total average increase may be greater than that set by the Treasurer but may be validated on the basis that there has been rounding up to the nearest whole dollar. The Subcommittee may only approve such increases where the extra amount can be considered trifling when compared to the whole fee. Where the amount is significant in proportion to the whole fee, the Subcommittee may request the Minister to reconsider the increase.

The Subcommittee is bound by the Premier's Guidelines. A strict interpretation of the Premier's Guidelines leads to the view that as a matter of principle individual fees in a 'basket' package should not exceed the Treasurer's annual rate. However, the Subcommittee is of the view that fee increases and the Premier's Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a 'basket' package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee's view is that it is a matter of balance. The 'basket' of fees in its entirety must not exceed the Treasurer's approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer's annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each regulation will be examined on its merits and in context.

At this stage, the Premier's Guidelines have only been in operation for over a year. The Subcommittee will continue to carefully scrutinise the regulations and the Premier's Guidelines.

The preparation of a table showing new and old fees and including an indication of the percentage increase or decrease is of great assistance to the Subcommittee. The Subcommittee provides the following as an example.

Description	Current Fee	Proposed Fee	% Increase
Application for ...	\$100.00	\$105.00	5.0
Application for	\$320.00	\$325.00	1.6

Independent Advice Certificates: 10(3)

Under section 10(3) of the *Subordinate Legislation Act 1994* (Vic) a Minister must ensure that independent advice as to the adequacy of a Regulation Impact Statement is obtained. The provision of that independent advice assists the Subcommittee in its review of the regulations.

Legislative Instruments outside the Subordinate Legislation Act 1994

The Subcommittee plays a vital role in ensuring that rights are adequately protected. It cannot do this if provisions are incorporated in legislative instruments outside its scrutiny. The Subcommittee prefers department and agency officers not to use Guidelines and Codes of Practice. Where Guidelines and Codes of Practice are used the Subcommittee would like those Guidelines and Codes of Practice to be published and available to the public at the same time as the regulation commences operation.

Provision of Documentation to Regulation Review Subcommittee

The Subcommittee needs to receive Explanatory Memoranda, all certificates, RISs and comments and submissions made in relation to RISs within 7 days after a regulation has been made. The Subcommittee has a limited time within which to review regulations. If the Committee wants to move for disallowance of a regulation it must do so within 18 sitting days of that regulation being tabled in Parliament. Prior to the Committee moving a motion for disallowance, the Subcommittee corresponds and negotiates with the particular Minister. The Subcommittee needs sufficient time for this process to take place.

Paragraph 5.51 of the Premier's Guidelines provides that:—

All certificates required under the Act are to be signed and dated with the date of the day of signing. Copies of all certificates prepared in the course of making statutory rules are to be forwarded to SARC within 7 days of the making of the statutory rule, or within 7 days of the establishment of SARC (whichever is the longer period of time).

Recommendations

The Subcommittee notes that some regulations are made on the recommendation of a Minister or some other authorised body. If the Subcommittee is provided with a copy of the recommendation, it can certify that the regulations have been validly made in accordance with that recommendation. Where the Subcommittee is not provided with a copy of that recommendation, it cannot certify that the regulations have been validly made. The Subcommittee would appreciate receiving copies of all recommendations.