Regulation Review Committee
Parliament of New South Wales

Proceedings of the International Conference on Regulation Reform Management and Scrutiny of Legislation

Parliament House, Sydney
9 - 13 July 2001

Report No 19/52
November 2001

This report was compiled using Microsoft Word 97
and printed by Parliamentary Printing Services

New South Wales Parliamentary Library cataloguing-in-publication data:

International Conference on Regulation Reform Management and Scrutiny of Legislation (2001 : Sydney, N.S.W.)
Proceedings of the International Conference on Regulation Reform Management and Scrutiny of Legislation, Parliament House, Sydney, 9-13 July 2001. [Sydney, N.S.W.] : Regulation Review Committee, Parliament of New South Wales, 2001. – 1 v. (various foliations) ; 30 cm. (Report no. 19/52, September 2001)

ISBN 0 7347 6826 5

1. Delegated legislation—Congresses.
I. Parliament of New South Wales. Regulation Review Committee.
II. Title
III. Series: New South Wales. Parliament. Regulation Review Committee. Report ; 52/19

348.025 (DDC21)

TABLE OF CONTENTS

APPENDIX: FINANCIAL STATEMENT

COMMITTEE AND SECRETARIAT MEMBERS

Mr Gerard Martin, MP, Chairman
Hon Janelle Saffin, MLC, Vice Chairman
Hon Malcolm Jones, MLC,
Hon Don Harwin, MLC,
Dr Liz Kernohan, MP,
Ms Marianne Saliba, MP,
Mr Russell Turner, MP,
Mr Graham West, MP,

Mr Peter R Nagle MP, Chairman of the Regulation Review Committee, resigned from Parliament on 13 July 2001

SECRETARIAT
Mr Jim Jefferis, Committee Manager
Mr Greg Hogg, Project Officer
Mr Don Beattie, Committee Officer
Ms Rachel Dart, Assistant Committee Officer

CHAIRMAN'S FORWORD

It is a pleasure to present the proceedings of the International Conference on Regulation Reform Management and Scrutiny of Legislation. These proceedings are Part 2 of the scheme by the Regulation Review Committee to improve regulatory management and controls in New South Wales.

Part one of that enterprise, entitled *Re-Engineering Regulations in New South Wales for the Twenty-First Century*, is comprised in Report No 9/52, tabled in Parliament in June 2000. Part 3, to be published separately, will deal exclusively with the Australian viewpoint on regulatory management and reform. Part 4 will contain recommendations for change to the New South Wales regulatory system.

The proceedings of this international conference show the importance accredited world wide to effective regulatory management and scrutiny of legislation. Lord Mayhew in his address said that almost all of the 29 OECD member countries now have a regulatory reform program in place. In the 1980's there were only three or four.

In his keynote address, the Chief Justice of the High Court of Australia, Chief Justice Gleeson, spoke of the vast increase in the bulk of legislation and that in many areas the burden of compliance with regulations, in terms of knowledge, time and exposure, is so great that citizens give up the attempt. This indicates how important it is to have in place effective scrutiny mechanisms that test the justification for new and existing laws and that screen out unnecessary ones.

We are fortunate to have had strong OECD participation and the workshop on the role of Parliament in ensuring the quality of law and regulation will have a lasting usefulness for us all. All scrutiny committee's depend for their success particularly on support at the Ministerial level. The OECD has put this repeatedly at the top of its list in terms of importance.

The excellent address by the Hon Justice Spigelman, Chief Justice of the Supreme Court of New South Wales, contains a wealth of cautionary advice on permitting the regulatory decision-making process to be dominated by matters that are capable of measurement at the expense of qualitative considerations. The former he says, have acquired an entirely inappropriate significance by reason of their concreteness. The Chief Justice concluded his address with the words:

"In my opinion it is of some significance to appreciate that the importance of what can be measured varies from one area of discourse to the other. There is a tendency in the literature on cost-benefit analysis and performance indicators to act on the assumption that the methodology is equally appropriate to any area of discourse. That is not the case, in my opinion. There are some areas of government regulation or public administration in which the things that can be measured are the important things. There are other areas – and the law is one of those areas – in which the things that can be measured are not central to the objectives and functions preformed by the organisations involved. Computation

can be of great utility. However, in significant areas there is no escaping the centrality of judgement of a qualitative character".

Ms Sue Holmes, on behalf of the OECD, gave us a reassuring response on this issue by saying that while quantification of costs and benefits is considered the best practice, the OECD has also said that the most important contributor to the quality of regulatory decisions is not the precision of calculations but the action of analysing, questioning, understanding real-world impacts and exploring assumptions.

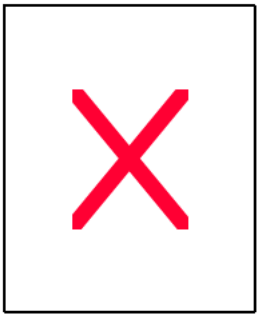
The transcript and papers in these proceedings contains a discussion and analysis of many fundamental regulatory problems. It was the basic objective of our New South Wales Committee to produce this type of dialogue so that the usefulness of the Conference could continue well after the close of it.

At the closing session my colleague, Mr Peter Nagle MP, thanked all delegates and all those who assisted in the organisation of the Conference, in particular the Hon John Murray MP, Speaker of the Legislative Assembly of New South Wales and the Hon Dr Meredith Burgmann, President of the Legislative Council.

The importance of the Conference is reflected in the resolution of the delegates to accept the generous invitation of Mr Steve Gilchrist, Co-Chair of the Ontario Red Tape Commission, to host the next International Conference in the Legislative Assembly in the Province of Ontario on a date to be fixed. I wish that conference well and I look forward to participating in it.

Mr Gerard Martin MP
Chairman

CONFERENCE PROGRAM



OFFICIAL OPENING

Her Excellency Professor Marie Bashir AC
Governor of New South Wales

KEYNOTE SPEAKERS

The Hon. Chief Justice Murray Gleeson AC,
Chief Justice of the High Court of Australia

The Hon. J Spigelman,
Chief Justice of the Supreme Court of New South Wales, Australia

Professor Margaret Allars (Australia)
Mr Gary Banks (Australia)
Mr Mick Bates (Wales)
Professor John Braithwaite (Australia)
Senator Helen Coonan (Australia)
Senator Barney Cooney (Australia)
Hon Norman George (Cook Islands)
Mr Steve Gilchrist MPP (Canada)
Mr Chandra Gowda (India)
Ms Sue Holmes (OECD, France)
Mr Peter R Nagle MP (Australia)
Mr Peter Pike MP (UK)
Mr Graham Samuel (Australia)
Lord Mayhew of Twysden (UK)
Mr Richard Worth MP (New Zealand)
Mr David Mundell MSP (Scotland)

CONFERENCE WORKSHOPS

Mr Paul Beck (Australia)
Mr Luigi Carbone (Italy)
Ms Sue Holmes (OECD, France)
Dr Philippa Tudor (UK)

CONFERENCE DINNER ADDRESS

The Hon Justice Michael Kirby
Justice of the High Court of Australia

DAY 1 – MONDAY, 9 JULY 2001

0900 – 1300 **REGISTRATION**
Parkes Room, Level 7, Parliament House

0900 - 1000 **TEA & COFFEE**
Jubilee Room, Level 7, Parliament House

1000 - 1020 **TRADITIONAL ABORIGINAL WELCOME CEREMONY: Parliament Forecourt**

1025 - 1030 **ARRIVAL OF HER EXCELLENCY PROFESSOR MARIE BASHIR AC, GOVERNOR OF NSW**

1030 - 1045 **WELCOME**
Legislative Assembly, Level 7, Parliament House

Mr Peter R Nagle MP,
Chairman - Regulation Review Committee, New South Wales and Chairperson – Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

1045 – 1100 **OFFICIAL OPENING OF CONFERENCE**
Legislative Assembly, Level 7, Parliament House

Her Excellency Professor Marie Bashir AC
Governor of New South Wales

1100 – 1130 **Keynote Address**
The Hon. Chief Justice Murray Gleeson AC
Chief Justice of the High Court of Australia

Chair/Facilitator: Mr Peter R Nagle MP,
Chairman - Regulation Review Committee, New South Wales and Chairperson – Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

1130 – 1200 **Keynote Speaker**
The Hon. J Spigelman,
Chief Justice of the Supreme Court of New South Wales, Australia

Chair/Facilitator: Hon. Janelle Saffin, MLC,
Vice-Chairman, NSW Regulation Review Committee, Australia

1200 – 1230 **When Enough is Enough: The Limits of Regulation-Making Powers**
Lord Mayhew of Twysden,
Member, Delegated Powers and Deregulation Committee, UK

Chair/Facilitator: Mr Peter R Nagle MP,
Chairman - Regulation Review Committee, New South Wales and Chairperson – Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

1300 - 1700 **Harbour Cruise departing from and returning to Circular Quay**

EVENING AT LEISURE

DAY 2 - TUESDAY, 10 JULY 2001

LEGISLATIVE ASSEMBLY & LEGISLATIVE COUNCIL CHAMBERS, LEVEL 7, PARLIAMENT HOUSE, MACQUARIE STREET, SYDNEY

0830 – 1500 **REGISTRATION**
Parkes Room, Level 7, Parliament House

0930 – 1000 **Challenges for Australia and the Commonwealth in Regulatory Reform**
Mr Gary Banks,
Chairman, Productivity Commission, Australia

Chair/Facilitator: Mr Gerard Martin MP
Member, NSW Regulation Review Committee, Australia

1000 – 1030 Mr Steve Gilchrist MPP
Co-Chair Ontario Red Tape Commission, Canada

Chair: The Hon. Lloyd Black, MLC
Virgin Islands

Facilitator: Hon. Janelle Saffin MLC,
Vice-Chairman, NSW Regulation Review Committee, Australia

1030 – 1110 **Morning Tea**
Stranger's Lounge, Level 7, Parliament House

1110 – 1150 **Regulatory Horror Stories – Australian and International**
Mr Peter R Nagle MP,
Chairman - Regulation Review Committee, New South Wales and Chairperson - Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

Chair/Facilitator: Mr Peter Pike MP,
Chairman, Deregulation Select Committee, UK

1150 – 1230 **The Role of Parliament in ensuring the quality of Law and Regulation**
Ms Sue Holmes
Administrator, Regulatory Management and Reform Public Management Service, PUMA, OECD

Chair: Mr Richard Worth MP
Member, Regulations Review Committee, New Zealand

Facilitator: Ms Marianne Saliba MP
Member - NSW Regulation Review Committee, Australia

1230 – 1430 **Lunch**
Stranger's Dining Room, Level 7, Parliament House

1430 - 1630 **CONCURRENT WORKSHOPS**

WORKSHOP ONE Legislative Council Chamber Level 7, Parliament House		**WORKSHOP TWO** Legislative Assembly Chamber Level 7, Parliament House	
1430-1515	**Why Reinvent the Wheel When the Australian Scrutiny Model Works?** Dr Philippa Tudor, Clerk Delegated Powers and Regulatory Reform Committee, House of Lords, UK *Chair: Mr Tad Tazamala* *Director of Research and Public Affairs* *Botswana*	1430-1515	**Future of Regulation & Scrutiny of Legislation in Italy: An In-Depth Perspective** Mr Luigi Carbone, Deputy Director, Simplification Unit, Prime Minister's Office, Italy *Chair: Dr Liz Kernohan MP,* *Member, NSW Regulation Review Committee, Australia* *Facilitator: Mr Dallas McInerney* *NRMA Insurance Limited*
1515-1545	**Afternoon Tea** Stranger's Lounge, Level 7, Parliament House	1515-1545	**Afternoon Tea** Stranger's Lounge, Level 7, Parliament House
1545-1630	**Continuation of Workshop 1**	1545-1630	**Continuation of Workshop 1**

1830 - 2130 **RECEPTION AND NETWORKING COCKTAIL EVENING**
Stranger's Lounge, Level 7, Parliament House

Hosted by The Hon. John Murray MP,
Speaker of the Legislative Assembly

DAY 3 – WEDNESDAY, 11 JULY 2001

LEGISLATIVE ASSEMBLY & LEGISLATIVE COUNCIL CHAMBERS, LEVEL 7, PARLIAMENT HOUSE, MACQUARIE STREET, SYDNEY

0830 - 1700 **REGISTRATION**
Parkes Room, Level 7, Parliament House

0930 - 1010 **United Kingdom Regulatory Reform Bill: Impact on Deregulation Process**
Mr Peter Pike MP,
Chairman, Deregulation Select Committee, UK

Chair: Mr Dylan Hughes, Deputy Legal Adviser, Legislation Committee National Assembly for Wales

Facilitator: Mr Russell Turner MP,
Member, NSW Regulation Review Committee, Australia

1010 – 1050 **The Devil in the Detail – A New Zealand Perspective of the Scrutiny of Delegated Legislation**
Mr Richard Worth, MP
Parliament of New Zealand

Chair: Mr Luigi Carbone,
Deputy Director, Simplification Unit, Prime Minister's Office, Italy

Facilitator: Ms Marianne Saliba MP
Member, NSW Regulation Review Committee, Australia

1050 – 1120 **Morning Tea**
Stranger's Lounge, Level 7, Parliament House

1120 – 1200 **National Competition Regulation Policy**
Mr Graham Samuel,
President, National Competition Council, Australia

Chair: Ms Mary Gillett MP
Chairperson, Scrutiny of Acts and Regulations Committee, Victoria

Facilitator: Hon Geoff Squibb, MLC
Chairman, Standing Committee on Subordinate Legislation, Tasmania

1200 – 1215 **Video - A Review of United States Regulatory Policy**
Office of Management and Budget, Washington DC, USA

Chair: Mr Russell Turner MP
Member, NSW Regulation Review Committee, Australia

1215 - 1300 **Scrutiny of Legislation - A Scottish Perspective**
Mr David Mundell MSP
Member, Subordinate Legislation Committee, Scotland

Chair: Senator Barney Cooney
Chairman, Standing Committee for the Scrutiny of Bills, Australian Parliament

Facilitator: Hon. Malcolm Jones MLC,
Member, NSW Regulation Review Committee, Australia

1300 – 1430 **Lunch**
Stranger's Dining Room, Level 7, Parliament House

1430 - 1630 **CONCURRENT SESSIONS**

WORKSHOP ONE Legislative Council Chamber Level 7, Parliament House		**WORKSHOP TWO** Legislative Assembly Chamber Level 7, Parliament House	
1430-1510	Senator Helen Coonan, Chairman, Standing Committee on Regulations and Ordinances, Australian National Parliament and **Regulatory Impact Assessment – When, How and Why** Mr Paul Bek, Director, Office of Regulation Review, Productivity Commission, Australia Ms Jennifer Bryant, Director, Office of Regulation Review Productivity Commission, Australia *Chair: Mr David Mundell MSP Member, Subordinate Legislation Committee, Scotland* *Facilitator: Mr Russell Turner MP, Member, NSW Regulation Review Committee, Australia*	1430-1510	**The Role of Parliament in Ensuring the Quality of Law and Regulation – An In-Depth Perspective** Ms. Sue Holmes, Administrator, Regulatory Management and Reform, Public Management Service, PUMA *Chair: Hon. Don Harwin, MLC, Member, NSW Regulation Review Committee, Australia* *Facilitator: Dr Liz Kernohan Member, NSW Regulation Review Committee, Australia*
1510-1550	**Afternoon Tea** Stranger's Lounge, Level 7, Parliament House	1510-1550	**Afternoon Tea** Stranger's Lounge, Level 7, Parliament House
1550-1630	**Continuation of Workshop 1**	1550-1630	**Continuation of Workshop 1**

1900 - 2300 **CONFERENCE DINNER**
Guest Speaker: Hon. Justice Michael Kirby,
Justice, High Court of Australia
Strangers' Dining Room, Level 7, Parliament House

DAY 4 – THURSDAY, 12 JULY 2001

LEGISLATIVE ASSEMBLY & LEGISLATIVE COUNCIL CHAMBERS, LEVEL 7, PARLIAMENT HOUSE, MACQUARIE STREET, SYDNEY

0930 - 1000 **Valuing the Community's Knowledge – Information Technology, the Web and the Scrutiny Process**
Hon Norman George
Deputy Prime Minister, Cook Islands

Chair: Mr Greg McLean
Public Service International - ASU, Australia

Facilitator: Hon. Malcolm Jones MLC
Member, NSW Regulation Review Committee, Australia

1000 – 1030 **Rules, Principles and Legal Certainty in Regulation**
Professor John Braithwaite
Faculty of Law, Australian National University, Canberra

Chair: Mr Mandla Nkomfe
Chair of Chairs, Gauteng Provincial Legislature, South Africa

Facilitator: Dr Liz Kernohan MP
Member, NSW Regulation Review Committee, Australia

1030 - 1100 **Morning Tea**
Strangers Lounge, Level 7, Parliament House

1100 - 1300 **Delegates wishing to speak on regulation, reform and scrutiny may do so (duration: 15 minutes each speaker)**

Mr Firoz Cachalia MPL	Speaker, Gauteng Provincial Legislature, South Africa
Dr Liz Kernohan	Member, New South Wales Regulation Review Committee, Australia
Hon Malcolm Jones MLC	Member, New South Wales Regulation Review Committee, Australia
Mr Russell Turner MP	Member, New South Wales Regulation Review Committee, Australia
Ms Marianne Saliba MP	Member, New South Wales Regulation Review Committee, Australia
Mr Andrew Homer	Senior Legal Adviser, Victorian Scrutiny of Acts & Regulations Committee, Australia
Hon Angus Redford MLC	Presiding Member, South Australian Legislative Review Committee, Australia
Hon Geoff Squibb MLC	Chairman, Tas. Standing Committee on Subordinate Legislation, Australia
Dr Philippa Tudor	Clerk, Delegated Powers and Regulation Reform Committee, UK
Mr Greg McLean	Public Service International - ASU, Australia
Hon Ray Molomo	Speaker of National Assembly, Botswana
Mr Peter Pike MP	Chairman, Deregulation Select Committee, UK
Senator Barney Cooney	Chairman, Senate Standing Committee for the Scrutiny of Bills, Australia
Hon John Hargreaves MLA	Deputy Chairman, ACT Standing Committee on Justice & Community Safety, Australia

Chair: Mr Steve Gilchrist
Co-Chair, Ontario Red Tape Commission, Canada

Facilitator: Hon. Don Harwin MLC
Member, NSW Regulation Review Committee, Australia

1300 - 1400 **Lunch (own arrangements)**

EVENING AT LEISURE

DAY 5 – FRIDAY, 13 JULY 2001

LEGISLATIVE COUNCIL, LEVEL 7, PARLIAMENT HOUSE

1000 - 1030 **Speaker**
Mr Chandra Gowda,
Minister for Law & Parliamentary Affairs, Karnataka, India
and Mr David Simeon,
Chairman, Karnataka Legislative Council, India

Chair: Lord Mayhew of Twysden
Member, Delegated Powers and Deregulation Committee, UK

Facilitator: Hon. Janelle Saffin, MLC
Vice-Chairman, NSW Regulation Review Committee, Australia

1030 - 1100 **Regulatory Reform – a Welsh Perspective**
Mr Mick Bates
Chair, Legislation Committee, Wales

Chair: Hon Janelle Saffin MLC
Deputy Chair, NSW Regulation Review Committee, Australia

Facilitator: Hon. Don Harwin MLC,
Member, NSW Regulation Review Committee, Australia

1100 - 1120 **Morning Tea**
Strangers Lounge, Level 7, Parliament House

1120 - 1150 **Citizen Participation in Legislative Rule Making: The Impact of Federalism and Internationalisation**
Professor Margaret Allars,
Faculty of Law, University of Sydney, Australia

Chair: Mr Gerard Martin MP
Member, NSW Regulation Review Committee, Australia

Facilitator: Ms Marianne Saliba MP,
Member, NSW Regulation Review Committee, Australia

1150 - 1220 **The Spirit of Scrutiny: Wisdom is the Way**
Senator Barney Cooney,
Chairman, Standing Committee for the Scrutiny of Bills, Australian Parliament

Chair: Hon Peter Collins Q.C. MP
Member, NSW Parliament

1220 - 1300 **Motions for Conference Resolutions: debate**
Chair/Facilitator: Mr Peter R Nagle MP,
Chairman - Regulation Review Committee, New South Wales and Chairperson - Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

END OF CONFERENCE

1300 – 1500 **Lunch**
Labour Party Caucus Room, Level 12, Parliament House

PHOTO OF CONFERENCE DELEGATES

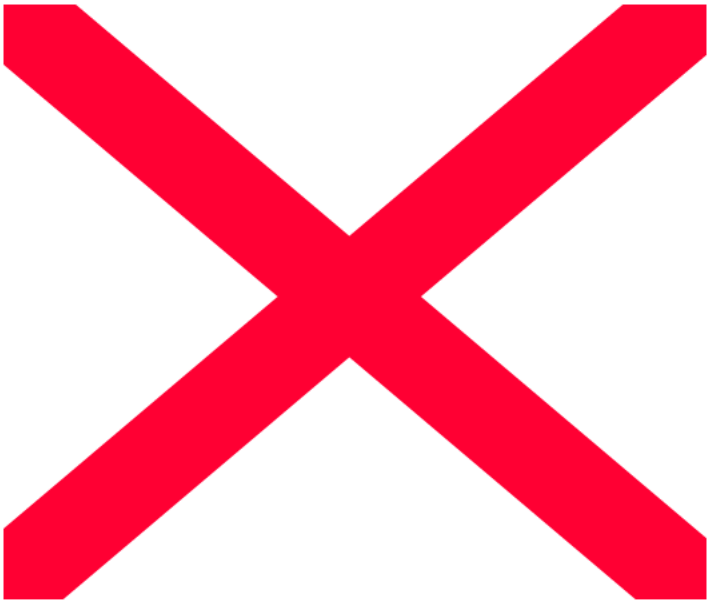


Photo by James Trifyllis

LIST OF DELEGATES

ALLARS, Professor Margaret
Faculty of Law, University of Sydney
Australia

ANDREWS, Mr Tony
NSW Fisheries
Australia

ANDRIEUX, Ms Rhonda
NSW Treasury
Australia

ANYONA, Mr George
Kenya

BANKS, Mr Gary
Chairman, Productivity Commission
Australia

BARRETT, Ms Lisa
Ministry of Economic Development
New Zealand

BATES, Mr Mick
National Assembly for Wales
United Kingdom

BAYNE, Mr Peter
ACT Legislative Assembly
Australia

BEK, Mr Paul
Office of Regulation Review
Australia

BENSON - POPE, Mr David
New Zealand

BESSELL, Mr Neil
Secretary, Senate Standing Committee on Regulations
Australia

BEST, Mr Roderick
NSW Department of Community Services
Australia

BETJEMAN, Ms Mia
Legislative Council of Western Australia
Australia

BLACK, Hon Lloyd
Member for the Eighth District
British Virgin Islands

BOTTONLEY, Professor Stephen
Legal Adviser, Senate Standing Committee on Regulation
Australia

BRAITHWAITE, Professor John
Faculty of Law, Australian National University
Australia

BRYANT, Ms Jennifer
Office of Regulation Review
Australia

BUCKLAND, Senator Geoffrey
Member, Senate Standing Committee pm Regulations & Ordinances
Australia

CACHALIE, Mr Firoz
Gauteng Provincial Legislature
South Africa

CARBONE, Mr Luigi
Italy

COGHLAN, Mr Paul
Office of Regulation Review
Australia

CONNORS, Ms Kate
Australian Law Reform Commission
Australia

COONAN, Senator Helen
Chair, Senate Standing Committee on Regulations and Ordinances
Australia

COONEY, Senator Barney
Senate
Australia

CORKE, Mr Kerry
KM Corke & Associates
Australia

DAVENPORT, Mr Scott
NSW Agriculture
Australia

DAVIS, Professor James
Faculty of Law, Australian National University
Australia

DIXON, Ms Susan
NSW Department of Fair Trading
Australia

DOWNING, Mr Terry
NSW Department of Fair Trading
Australia

DUNCAN, Miss Angela
Land Transport Safety Authority
New Zealand

DUNCAN, Mr Tom
Secretary, ACT Scrutiny of Bills and Subordinate Legislation Committee
Australia

GEORGE, Hon Norman
Deputy Prime Minister/Attorney General
Cook Islands

GILCHRIST, Mr Steve
Red Tape Commission - Government of Ontario
Canada

GILLETT, Ms Mary
Chair, Victorian Scrutiny of Acts & Regulations Committee
Australia

GISBOURNE, Ms Juliet
Small Business Development Corporation, Perth
Australia

GOWDA, Sri D B Chandre
Minister for Law and Parliamentary Affairs
Government of Karnataka
India

HANLEY, Mr Terry
Secretary, NT Subordiante Legislation and Publications Committee
Australia

HARGREAVES, Mr John MLA
Deputy Chair, ACT Committee on Justice and Community Safety
Australia

HARWIN, Hon Don MLC
Member, NSW Regulation Review Committee
Australia

HAWKLESS, Ms Caroline
Hawkless Consulting Pty Ltd
Australia

HIRD, Mr Harold MLA
Member, ACT Committee on Justice and Community Safety
Australia

HOLMES, Ms Sue
PUMA, OECD, Paris
France

HOLTUS, Dr Jos B G M
Department of Economic Affairs
Netherlands

HOMER, Mr Andrew
Senior Legal Advisor, Victorian Scrutiny of Acts and Regulations Committee
Australia

HORNER, Senator Maxine
Oklahoma State Senate
United States

HUGES, Mr Dylan
National Assembly for Wales
Wales

HUGES, Mr Peter
Northern Ireland Assembly
United Kingdom

HUMPHREY, Mr Richard
Attorney General's Department
Australia

JONES, Hon Malcolm MLC
Member, NSW Regulaiton Review Committee
Australia

KADIAN, Shri Satbir Singh
Speaker, Haryana Legislative Assembly
India

KAINE, Mr Trevor MLA
Member, ACT Standing Committee on Justice and Community Safety
Australia

KENNEDY, Mr Danny
Northern Ireland Assembly
United Kingdom

KERNOHAN, Dr Liz MP
Member, NSW Regulation Review Committee
Australia

LAWRENCE, Ms Margaret
Attorney General's Department
Australia

LEE, Ms Natasha
NSW Environment Protection Authority
Australia

LUDWIG, Senator Jospeh
Member, Senate Standing Committee on Regulations
Australia

MACDONALD, Mrs Margaret
Scottish Parliament
United Kingdom

MALKKI, Mr **Mika**
NSW Fisheries
Australia

MANCHEE, Mr Rory
Lawbook Company
Australia

MARCIO, Deputado Cunha

MARTIN, Mr Gerard MP
Member, NSW Regulation Review Committee
Australia

MARTIN, Mr Iain
NSW Department of Health
Australia

MAYHEW, Lord Patrick
House of Lords
United Kingdom

MCCLELLAND, Mr Donovan
Northern Ireland Assembly
United Kingdom

MCLEAN, Mr Greg
Public Service International – ASU
Australia

MCNEILL, Mr Ian
Clerk, NT Legislative Assembly
Australia

MGIDLANA, Mr Gengezi
Director Parliamentary Operations
Gauteng Provincial Legislature
India

MOLOMO, Mr Matlapeng Ray
Botswana

MORTIMER, Mr Leo
Ministry of Transport
New Zealand

MUNDELL, Mr David
Scottish Parliament
United Kingdom

MUTURI, Mr Justin
Kenya

NAGLE, Mr Peter MP
Chairman, NSW Regulation Review Committee
Australia

NKOMFE, Mr Gladstone Mandla
Chair of Chairs, Gauteng Provincial Legislature
India

OAKES, Mr Brian
Attorney General's Department
Australia

OWENS, Ms Sharon
NSW Department of Local Government
Australia

PARKINSON, Hon Doug MLC
Deputy Chair, TAS Legislative Review Committee
Australia

PAULL, Ms Janice
Research Officer, Senate Standing Committee on Regulations
Australia

PEDDLE, Ms Wendy
Secretary, TAS Subordinate Legislation Committee
Australia

PERTON, Mr Victor
Chairman, Law Reform Committee
Australia

PIKE, Mr Peter
House of Commons
United Kingdom

PRATT, Mr Nigel
Advisor, WA Joint Standing Committee on Delegated Legislation
Australia

RANKIN, Mr Alasdair
Clerk to Subordinate Legislation Committee
Scotland, United Kingdom

REDFORD, Hon Angus MLC
Presiding Officer, SA Legislative Review Committee
Australia

REECE, Mr Robert
NSW Roads and Traffic Authority
Australia

RENKO, Ms Jenny
NSW Treasury
Australia

ROFE, Ms Alexandra
DGJ Projects
Australia

ROSS, Ms Pauline
NSW Ministry for Police
Australia

SAFFIN, Hon Janelle MLC
Vice-Chair, NSW Regulation Review Committee
Australia

SALIBA, Ms Marianne MP
Member, NSW Regulation Review Committee
Australia

SAMUEL, Mr Graeme
President, National Competition Council
Australia

SEBBA, Mr Jardel
Brasil

SIMEON, Mr David
Chairman, Karnataka Legislative Council
India

SIRACUSA, Mr Jospeh
DGJ Projects
Australia

SKELTON, Hon Ronnie
Territorial At Large Member
British Virgin Islands

SMITH, Dr D Orlando
Leader of the Opposition
British Virgin Islands

SMITH, Mr Matt MP
Member, TAS Subordinate Legislation Committee
Australia

SQUIBB, Hon Geoff MLC
Chairman, TAS Subordinate Legislation Committee
Australia

STRONG, Hon Chris MLC
Member, VIC Scrutiny of Acts & Regulations Committee
Australia

TAHSILDAR, Sri Manohar
Deputy Speaker, Karnataka Legislative Assembly
India

TUDOR, Dr Philippa
Clerk, House of Lords
United Kingdom

TURNER, Mr Russell MP
Member, NSW Regulation Review Committee
Australia

VAN HOOFT, Mr Luke
Office of Regulation Review
Australia

VANTERPOOL, Hon Mark
Legislative Council
British Virgin Islands

VARVARESSOS, Ms Angela
NRMA Insurance Ltd
Australia

WAINWRIGHT, Mr Jeremy
Attorney General's Department
Australia

WALKER, Mr Christopher
NSW Roads and Traffic Authority
Australia

WARMENHOVEN, Mr James
Secretary, Senate Scrutiny of Bills Committee
Australia

WOODS, Mr John
Business Regulation Reform Unit
Australia

WORTH, Hon Richard
Member, NZ Regulation Review Committee
New Zealand

TRANSCRIPTS OF PROCEEDINGS

INTERNATIONAL CONFERENCE ON REGULATION REFORM MANAGEMENT AND SCRUTINY OF LEGISLATION

RE-ENGINEERING REGULATIONS AND SCRUTINY OF LEGISLATION FOR THE 21ST CENTURY

NEW SOUTH WALES STATE PARLIAMENT
SYDNEY, AUSTRALIA

MONDAY 9 JULY 2001

WELCOME

VICE-CHAIRMAN (The Hon. Janelle SAFFIN): I formally welcome delegates to the International Conference on Regulation Reform Management and Scrutiny of Legislation. The welcoming ceremony was wonderful. We are blessed to have such a rich culture in this country. I call upon the Chairman of the New South Wales Regulation Review Committee, Mr Peter Nagle, to formally welcome Her Excellency the Governor of New South Wales. I note also the presence in the Chamber of the Chief Justice of the High Court of Australia and the Chief Justice of the Supreme Court of New South Wales.

CHAIRMAN (Mr Peter NAGLE): I welcome Her Excellency the Governor of New South Wales, Professor Marie Bashir; the Chief Justice of the High Court of Australia, the Hon. Chief Justice Murray Gleeson; and the Chief Justice of the Supreme Court of New South Wales, the Hon. Chief Justice James Spigelman. I thank Her Excellency for consenting to open the International Conference on Regulation Reform Management and Scrutiny of Legislation and for the prestige that she brings to this conference. I also thank the chief justices of the Commonwealth and New South Wales for consenting to address the conference this morning. To all my parliamentary colleagues, distinguished overseas and interstate guests, ladies and gentlemen, welcome to Sydney: the home of the 2000 Olympic Games and the first International Conference on Regulation Reform Management and Scrutiny of Legislation.

I hope that most delegates had the opportunity to view the traditional Aboriginal welcome and smoking ceremony held in the forecourt of Parliament a short time ago. For the Aboriginal people, the land has a spiritual connection; it is their mother. The human spirit is born from the land and returns to it upon death. The land supplied Aboriginal Australians with everything they needed for living. However, land has become increasingly harder for Aboriginal people to access for traditional purposes. Its appearance and use in urban areas has changed. Aboriginal people are concerned for the land and wish to be part of the healing process. They can do this by being actively involved in its management or by conducting ceremonies. The smoking ceremony, which we have just seen, is an example of this. Green leaves from plants used by the group conducting a ceremony are placed on a small fire and the smoke is used to cover the participants' bodies, ridding them of what is not needed. It also cleanses the area, helps to remove troubles and allows something new to begin. The ceremony ends with entertainment, such as dancing and singing. This ceremony is one of the oldest in the world and it is still practised today by many Australian tribes.

In New South Wales this conference forms the second stage of a program of intended reform to the State's regulatory system. The first part of that process involved an initial overview of the strengths and weaknesses of current New South Wales regulatory controls. This was the subject of a report to our

Parliament in June 2000 by my Regulation Review Committee entitled "Re-engineering Regulations in New South Wales for the 21st Century". After a decade of the Committee's industrious and successful operation, my parliamentary Committee feels that it is now in a position to build on our experiences that have been gained through regulatory analysis and parliamentary debate. By putting forward for consideration by this Parliament changes that my Committee believes will enhance the regulatory controls of the State, we can also persuade Ministers, government administration and the people of the worthiness of having a scrutiny of legislation committee to oversight legislation.

For that purpose, we are hoping that your attendance at and participation in this conference will give us information and insights into regulatory reform and the scrutiny of legislation. Today we will gain unique experience from the various persons who have excelled in this field through their professional expertise, and who will deliver to us the breadth and depth of their knowledge. I believe the one factor that unites us is the struggle against the avalanche of regulations and legislation, and our aim is to secure better and fewer laws and regulations while allowing the administration of the State or country to continue effectively. The Chief Justice of the High Court of Australia, His Honour Chief Justice Gleeson, has kindly agreed to give the keynote address this morning on the subject of the growth of legislation and regulation. On behalf of my Committee and the New South Wales Parliament, I thank you, Judge. I am sure that your remarks will provide some helpful approaches to this issue.

Incidentally, over the past 18 months the New South Wales Regulation Review Committee has struggled not only with regulations or this conference but with what is the most suitable symbol for this conference. I thank Jim Jefferis and Mr Greg Hogg for coming up with a pin to be distributed to all delegates, and I thank Don Beattie for organising its production. The pin design represents the famous fight in Greek mythology between Hercules and the Hydra, a seven-headed snake that grew numerous new heads as one was decapitated. As legend would have it, Hercules' was nearing exhaustion as he struggled to free himself from the Hydra. As he cut off one head another seven grew until Hercules learned that he could kill the beast by cauterising each of its stumps. The Committee likens this struggle in legend to the coils of regulatory red tape surrounding business, commerce and government in day-to-day life. However, please do not leave here with the idea that I, as Chairman of the New South Wales Regulation Review Committee, advocate that we cauterise all legislators. I certainly do not support that course—although I might allow one or two exceptions, but that is a speech for another day.

The conference planned to have France Bassanini, former Lord Mayor of Naples who is now a senator in the Italian Parliament, address us during this session about the future of regulation and scrutiny of legislation in Italy. In the previous Italian Government the Senator was Minister for Public Affairs, an office that carried with it the responsibility for substantial regulatory reform in that country. Unfortunately, the Senator is unable to attend the conference because of last-minute personal and professional obstacles. Therefore, I especially welcome Mr Justice Spigelman, Chief Justice of the New South Wales Supreme Court, for coming this morning to address the conference. However, Mr Luigi Carbone of the Italian Prime Minister's Office will give the Senator's address. Luigi is the Director

of the Regulation Unit of the Italian Department for Institutional Reform. He has a great knowledge of the regulatory reform initiatives in Italy and in recent years has frequently chaired sessions of the Organisation for Economic Co-operation and Development [OECD] on country regulatory reviews.

Also present is Lord Mayhew of Twysden, who is a member of the Delegated Powers and Regulation Committee of the United Kingdom. Our attention is drawn to his address with the challenging title, "When Enough Is Enough—The Limits of Regulation Making Powers". I am also very pleased to welcome Mr Peter Pike MP, Chairman of the Deregulation Select Committee of the United Kingdom Parliament. He will give us an account of what the United Kingdom is hoping for as a result of the passage of the Regulatory Reform Act. Mr Steve Gilchrist from Canada's Ontario Red Tape Commission will tell us about the work of the Commission, which he co-chairs; and Mr Richard Worth MP will give us a New Zealand perspective on the scrutiny of legislation. I would like to thank the OECD for its support in arranging this conference and for sending Ms Sue Holmes to run a workshop, which will be supplemented by her address on ensuring the quality of law and regulation.

We have other international speakers, including delegates from Wales and David Mundell and Mr Alasdair Rankin from the Scottish Parliament. We expect the information that they will give us will be invaluable, as will their thoughts about the future of this conference. I also welcome guests from India, Botswana, South Africa, the United States of America, Northern Ireland and the Republic of Ireland, as well as Australians and other eminent persons from overseas who work in regulatory reform, management and scrutiny of legislation. I particularly welcome to our conference the Deputy Prime Minister of the Cook Islands, Mr Norman George, and Mr Chandre Gowda, former speaker of the Bangalore State Parliament who has served in both national houses of the Indian Parliament and his State Parliament since 1971. He is the political father of this conference.

I thank also Rachel Dart of the Committee's secretariat; former staff member, Susannah Dale; Mr Francis Child of Conference Action; and finally the Speaker, the Hon. John Murray, and the President of the Legislative Council, the Hon. Dr Meredith Burgmann for allowing, and indeed encouraging, us to hold this important conference here in the oldest Parliament in Australia. I also thank all of you for giving your time.

The conference program includes four workshops. I encourage all delegates to visit and participate in those workshops, which will be recorded on CD ROM and subsequently issued to all delegates for your future use. I look forward to talking to you all informally over the next four days, particularly on the harbour cruise this afternoon—we were hoping for a sunny day, but it looks as though it has clouded over. Thank you all for your attendance at, and support of, this conference. I now call upon Her Excellency the Governor of New South Wales, Professor Marie Bashir, to officially open this conference.

Professor MARIE BASHIR (Governor of New South Wales): Thank you, Mr Peter Nagle, Chairman of the New South Wales Regulation Review Committee; the Hon. Tony Kelly; the Hon. Janelle Saffin, Deputy Chairman of the Regulation Review Committee; the Hon. Murray Gleeson, Chief Justice of the High Court of Australia; the Hon. James Spigelman, Chief Justice of the Supreme Court of New South Wales; and all distinguished guests. I was indeed most delighted to accept the invitation extended by the Regulation Review Committee to open this conference today. At the outset, I would like to record my respect for the original custodians of this land, the Kadigal Eora people, representatives of whom you saw earlier.

New South Wales is indeed honoured to have so many distinguished international and national speakers to address the critical issue of regulatory reform. As one who has spent a professional lifetime in the health and medical field, I appreciate that this is one arena where emergent technology is creating new challenges for government. The nature and extent of regulation reform to ensure public welfare is a challenge to you all. The committees that scrutinise regulations have a considerable obligation to keep abreast of these developing fields in order to ensure an in-depth understanding of the issues that they raise. I note, for example, that the host committee—the New South Wales Regulation Review Committee—is required, when examining a regulation, to consider whether the special attention of the Parliament should be drawn to it on the grounds that the regulation trespasses unduly on personal rights and liberties. A further aspect that must be considered is whether the regulation may have an unfairly adverse impact on the commercial sector, taking into account of course that the wellbeing of the community must always have first priority.

I would expect that there must be a degree of tension between these grounds when, for example, you consider a regulation pertaining to genetic engineering. There, the rights of individuals must be weighed against the impact on the business of corporations holding patents on life-saving technologies or on new types of crops. It is imperative, therefore, that committees which scrutinise regulations are also able to analyse adequately the international perspective on such issues and relate them to their own national environment, both internal and external. Hence this conference, and its international perspective, is of paramount importance.

Another significant area of review for the New South Wales committee is whether the requirements of the Subordinate Legislation Act 1989 for regulatory impact statements and consultation have been met. It is surely essential to consult the community before one makes any regulations. However, this requirement has been mandatory only since 1989.

This conference is not the first occasion on which the New South Wales committee has sought to compare itself with international best practice in regulation reform. In 1999 the committee commissioned the OECD to compare regulatory impact assessment in New South Wales with international experience and with other Australian jurisdictions. The OECD concluded that the basic

approach to regulatory impact assessment in New South Wales was sound and that limited, but important, gains in terms of regulatory quality and public participation in the regulation process had been achieved.

However, they also considered that the Act should be substantially redrafted to address a number of significant weaknesses. In particular, they recommended that the Subordinate Legislation Act should be broadened to incorporate appropriate mechanisms which would ensure that regulatory impact assessment disciplines were applied to primary legislation equivalent to those applicable to delegated legislation.

I am informed also that a proposal for the establishment of a national scrutiny committee to examine national scheme legislation is currently under consideration. I am sure you will hear more of these issues as the conference proceeds. Indeed this promises, as Mr Nagle has foreshadowed, to be a most interesting and absorbing conference, as indicated by the challenging topics on offer, including the limits of regulation-making powers, regulatory horror stories, the role of Parliament in ensuring the quality of law and regulation, and citizen participation. Clearly, there is much to consider which would impact nationally and internationally.

I wish you all well in your deliberations. I look forward to learning of the outcomes, and I have much pleasure in declaring this conference open.

CHAIRMAN: Governor, thank you for your address on opening the conference. We are greatly indebted to you.

CHAIRMAN: I now call on the Chief Justice of the High Court, Justice Gleeson, to give the keynote address.

The Hon. MURRAY GLEESON: Mr Chairman, Chief Justice Spigelman, distinguished guests, ladies and gentlemen. May I begin by adding a welcome to all of the delegates who are attending this conference, and in particular those who are visiting Australia from overseas. I am most honoured by the invitation to speak to you.

The subject matter of your concern is technical. I am sure that amongst you there is a very high level of experience and expertise, so I will not attempt to recite matters about which you are at least as well informed as I am—some of you no doubt a great deal better informed. What I would seek to do is make some brief observations about what is a familiar, but important, topic from the point of view of a judge.

You do not need me to tell you about the constantly increasing volume of legislation, primary and delegated, and regulation that governs the conduct and affairs of citizens in a modern democratic community. Every country has its own striking examples. In Australia, you only have to compare the size and complexity of the Income Tax Assessment Act of the Commonwealth with the legislation when it was originally enacted in 1936. The current reprint of the 1936 Act, as amended, occupies four substantial volumes. The original Act would have occupied less than a third of one of those volumes.

You could make a similar comparison between the legislation that embodies our current Corporations Law and the Companies Act of New South Wales and that which applied when I commenced legal practice 40 years ago. During my time in the legal profession there has been a vast increase in the sheer bulk of the information needed by a lawyer to advise clients as to their rights and obligations. Statutes, regulations and bylaws are rarely made simpler. But you do not necessarily make a game fairer by multiplying the rules. And the same applies to life.

Legislation and regulation on this scale represent a major change in the role of government. To an extent, that in turn reflects a change in community expectations. It also reflects a change in the nature and understanding of law itself. In ancient times law-making authority, legislative authority, might be employed to clarify and codify the law, but very rarely to change it. F. A. Hayek pointed out that in early times a legislator might endeavour to purge the law of supposed corruptions, or to restore it to its pristine purity, but it was not thought he could make new law.

The same author observed that, as late as the seventeenth century, it could still be questioned whether the English Parliament could make law inconsistent with the common law. In the days when monarchs exercised personal law-making power a typical cause of complaint by their subjects was that the laws they made were different from the ancient laws and customs of the kingdom. You find such a

complaint in Magna Carta. Even in the nineteenth and early twentieth centuries, when Parliaments became enthusiastic about their function of altering the law, and when executive governments and local authorities began to exercise extensive regulatory power pursuant to statutory delegation, the scope and reach of that activity was modest by current standards.

One consequence of significance to courts is the increasing complexity of the interrelationship between the common law and statute law. The common law, developed by judicial precedence, involves a technique of induction. Principles of general application are derived from earlier decisions in particular cases, and then they in turn are applied to resolve the case at bar. In that connection I emphasise the words "general" and "principles".

The characteristic judicial task, especially when performed by a court having authority to modify and develop the common law, is to identify general principles appropriate to produce a just result in future cases where the detailed facts and circumstances are unknown and unknowable. A principle of common law does not legislate for a specific outcome regarded as individually just in a particular case. Discretionary decisions of courts, exercising judicial power in particular cases, might do that, and such discretions are often given to courts by statute. But the concern of the common law is general principle.

Much legislation takes the same form as the common law. Much legislation is consciously modelled on rules of the common law. The express purpose of some legislation is to alter the common law. At the other extreme, a lot of legislation and regulation consists of detailed directions at a high level of particularity on matters that require regulation for the orderly conduct of society. A lot of modern legislative activity is devoted to extending and modifying or altering common law rules and principles. At the same time, when courts modify and develop the common law they need to take into account the way that the common law will relate to legislation and regulation operating in the same field.

You only have to think, for example, of the matter of actions for damages for a work-related injury. The rights and liabilities of employers and employees concerning causes of action, defences and measure of damages are the product of a complex pattern of statutory provisions and rules of common law. Legislation now frequently limits, or caps, the damages to which an injured person may be entitled at law. There is a constant interaction between laws made by Parliament and principles developed and applied by courts.

In those areas where there is this overlap between the activities of courts and Parliaments, the need for conscious regard by each to the activities of the other is becoming more important, and more difficult. What are sometimes generously described as unintended consequences of legislation might be the result of a failure to advert sufficiently to the rules of the common law that are affected, directly or indirectly, by the legislation. There are unintended consequences of court decisions too. Courts attempt to develop the common law in a manner that preserves the coherence of the entire legal system, of which the common law is only a part.

Cross-referencing between legislative and judicial activity is becoming more and more difficult. Where a proposed statute under parliamentary consideration is the outcome of a report by a Law Reform Commission, or of detailed consideration by a Minister's department, it might reasonably be expected that cross-referencing of this kind will have been undertaken. But not all departments that propose legislation are necessarily aware of, or even concerned with, areas outside their particular interest. And the amendments to legislation made in the course of the passage of a bill through Parliament might arise in circumstances where only a narrow range of considerations has been taken into account.

But courts have the same problem. We rely on the assistance of counsel. Judges rely on their own knowledge and experience. But judges who are considering the development or refinement of common law rules might find it very difficult to satisfy themselves that they are fully aware of all of the statutes and regulations that could affect the practical consequences of their decisions, or that their decisions might affect. As the law grows more and more complex, the sheer task of understanding the consequences of particular changes in the law, whether legislative or judicial, becomes increasingly burdensome. And the development of techniques to deal with this problem is a great challenge.

I would like to refer a little more particularly to this subject of unintended consequences. You would all know that there are more pungent expressions that could be used to refer to unintended consequences. In fact, whether something is an unintended consequence or is more pungent might depend on whether you are on the political side that proposed it or on the political side that opposed it. But there is one circumstance in modern legislative activities which, above all, in my experience is productive of unintended consequences—and that is the legislative crackdown. In this country at least, cracking down is a popular form of legislative activity, regardless of the complexion of the government in power at any time. We crack down on dangerous driving, drug dealing, tax avoidance—all manner of anti-social behaviour. Crackdowns, if well timed and well targeted, are hugely popular. Sometimes crackdowns are stimulated by administrative recommendations to government. But whatever the stimuli to which they are responding to a suggestion to have a crackdown, it is a cause of great satisfaction.

The problem with the popular crackdown is that the legislation is rarely opposed. Indeed, the typical response of an Opposition of whatever political colour to a well-timed and well-targeted crackdown is to say it does not go far enough. The worst thing you can be seen to be during a crackdown is soft on whatever it is that is the subject of a crackdown. The consequence of that is that crackdown legislation is rarely opposed and rarely scrutinised, and this is the area that produces above all, in my experience, the unintended consequence. Indeed, there is a kind of rule of parliamentary democracy or of the nature of parliamentary democracy that I think would be formulated: the more popular the legislation the more likely the unintended consequence.

To an outside observer this suggests the need for an institutionalised devil's advocate. In the adversary system that operates in our courts judges feel most uncomfortable, and judges are most likely to make decisions that have

unintended consequences, in cases where there is no contradictor. The adversary system has many weaknesses, but it has one great strength. It usually produces, if proceedings take their natural course, a contradictor whose function of great practical importance is to remind the judge of the perils of overenthusiastic acceptance of one side of the argument. I imagine there are various kinds of parliamentary procedures that are designed to secure the presence of a contradictor: committee scrutiny of legislation and many other expedients of the kind that are probably in the forefront of your concern at a gathering such as this. But I am here to advocate encouragement of the adversary system in parliamentary procedures as well as in courts.

Legislation that is passed virtually by affirmation is legislation which, above all, is in need of some kind of institutional contradictor. The burden of complying with modern regulatory regimes is well understood, but there is an aspect of the burden that is sometimes left out of account. In a society where citizens are subjected to such a detailed regulation that it is unreasonable to expect that they will be aware of all the laws and rules with which they have to comply and where the cost of compliance is onerous, there arises a risk of selective law enforcement. When I speak of citizens being aware of the laws with which they have to comply, I do not suggest that there ever was a golden age in which ordinary people knew the detail of all the laws that bound them. But access to legal information and advice is costly and is not equally available across the community.

There are many areas in which the burden of compliance with regulations, in terms of knowledge, time and expense, is so great that many citizens give up the attempt. That unfairness might be diminished by a policy of law enforcement that tolerates non-compliance in cases regarded as worthy of benevolent treatment, but who decides what those cases are? I am not intending to suggest that law enforcement authorities should be deprived of discretion; on the contrary, there are many circumstances in which it is appropriate and necessary that commonsense and, from time to time, mercy should prevail over blindly rigorous law enforcement. Even acknowledging that, it is a dangerous condition of society—potentially subversive of the rule of law, and demoralising—if officers of the Executive Government exercise a wide-ranging power to decide which citizens will be required to obey the law and which citizens will not.

The more difficult it becomes for ordinary people to know the legal obligations and to comply with them, the greater use the temptation to seek practical relief in the exercise of discretion by law-enforcement agencies. Arming the Executive with an appropriate discretionary power to dispense with compliance in advance of the need for compliance might be one thing, selective enforcement of the law after it has been broken might be another. The possible abuses that can result from a general tolerance or even expectation of selective law enforcement are too obvious to require explanation. But the effect on the morale of the community and upon its respect for and willingness to obey the law also needs to be taken into account. Law and regulations that are not seriously intended to be generally enforced might arm the Executive Government or other authorities with a capacity to oppress individual citizens. Striking a proper balance between the preservation of a healthy discretion and opening the way to unhealthy discrimination in law enforcement is a difficult and sensitive area.

Of course, the fact that some offences against some laws frequently go undetected and unpunished does not necessarily mean the law is being selectively administered. For example, it may be that despite the best efforts of the authorities many customs offences go undetected. That is not the result of any failure to attempt to enforce the law; it is the result of the nature of the offences in question, which might be difficult to police. You could give many similar examples. But if a certain kind of law is widely seen to be disregarded or even publicly flouted and the authorities responsible for enforcing the law appear to behave capriciously in its enforcement, then respect not only for that particular law but for the entire system of law and justice is placed at risk. And the citizens who are lulled into a false belief that non-compliance will be tolerated might find themselves embarrassed or even oppressed by an unfavourable exercise of administrative authority. The result might be not only injustice to an individual but also a gross disturbance of the balance between legislative executive and judicial power.

This is an area where oversimplification is dangerous. We can all think of laws that are necessary for the protection of public safety or morals but which the general public would be alarmed to see comprehensively enforced. Part of the solution is found in establishing independent prosecuting authorities armed with appropriate discretions but manifestly free of political influence and separate from the Police Service. Some statutes expressly provide that certain kinds of prosecution could only be instituted with the consent of the Attorney General. The principles according to which decisions not to prosecute alleged serious breaches of the law might be made are generally available to the public in Australia. I referred to the cost of compliance but, of course, you have to take into account also the cost of enforcement. Law enforcement authorities and regulatory agencies have finite resources and often have to set priorities that result in some, perhaps many, possible offences going unpursued. But this problem again is magnified by the increasing volume of regulation.

A part of the solution is sometimes found in legislative provisions for private law enforcement, which might include actions for damages or injunctive relief. Working out the proper role of private enforcement of public law is a challenge that faces both parliaments and courts. In courts the issue usually arises in relation to the standing of a plaintiff to bring an action. Those issues often turn on statutory construction. I am sure these are matters with which you are all familiar. A final consequence of growth in law and regulation I want to mention from the point of view of the courts and its effect on the work of the courts is what is sometimes called the democratic deficit. The theory that in a representative democracy all legislation is an expression of the will of the majority is only true in a remote and formal sense. Very occasionally at parliamentary elections a single issue emerges that so dominates political debate that a government, when elected, can claim to have a mandate to introduce legislation. In a case of that kind it might be said that the law, when enacted, accords with the wishes of the majority of voters, but cases like that are rare.

Issues at elections are more complex and outcomes are determined by influences that usually make it impossible to identify most Acts of Parliament with the specific will of an electoral majority. As a rule, it is more accurate to say that

the legislative process is democratic than it is to say that a particular legislative outcome is desired by the majority of the people. But you increase this problem when what is under consideration is not a statute enacted by Parliament after a process of public debate and political conflict but a regulation made pursuant to authority and delegated to the Executive Government or to a local authority by statute. No doubt it is in an attempt to diminish this democratic deficit that you are giving consideration to the important matter of parliamentary scrutiny. The problem I wish to raise about it concerns the role of the courts.

I mentioned earlier the role of the courts in modifying and developing the common law. As you probably know, there is a lively debate about the extent to which it is appropriate for courts to engage in law-making activities in current circumstances and there is no single or simple answer to that question. But people who seek to encourage courts to engage in what is sometimes and perhaps misleadingly called judicial activism put the argument that so many laws are now made in an undemocratic fashion that it is a fantasy to regard parliamentary legislation as the only or even the principal alternative to judicial law making. Those who counsel judicial restraint on the basis that in a representative democracy it is for Parliament to make a change the law are sometimes met with the response that modern parliaments have largely abandoned their law-making role to the Executive Government.

That is not an argument I find attractive, but the fact that it is made at all shows the importance of the task in which you are engaged in your conference. Where the democratic deficit exists, it is not only a threat to the legitimacy of the institutions of democratic government; it is something that feeds upon itself. Political legitimacy in a representative democracy is the proper basis for legislative activity. If the absence of a democratic process in the manner in which laws and regulations are made becomes a justification for legislative activity on the part of authorities that lack political legitimacy, then the theory of democracy becomes even more remote from the practice. I thank you for the opportunity to join you for a short time this morning and I wish you well in your deliberations.

CHAIR: Thank you, Mr Justice Gleeson. Your comments have been very enlightening. I am sure some of my colleagues will write to obtain a copy.

VICE-CHAIRMAN: It is my pleasure to introduce the Hon. James Spigelman, Chief Justice of the Supreme Court of New South Wales. In doing so I would point out that Justice Spigelman was appointed to that position to fill a vacancy created by the appointment of his predecessor, the Hon. Murray Gleeson, as Chief Justice of the High Court of Australia. Perhaps we can see a pattern emerging! Prior to his appointment as Chief Justice of the Supreme Court in 1998, Justice Spigelman was Acting Solicitor General and a member of the New South Wales Bar, having been appointed Queen's Counsel in 1986. Some time before that, he had been an activist, in the best sense of that word. He actively spoke out against oppression, about things that were happening in our country and beyond our borders. He has a broad range of experience and has retained an active interest in community affairs. I believe that makes him, importantly, an even better Chief Justice. Australia is well served by having two Chief Justices of their calibre—one at the helm of the High Court of Australia and one in New South Wales. It is my pleasure and my privilege to call upon His Honour Justice Spigelman to address the conference.

The Hon. JAMES SPIGELMAN: Thank you, Ms Saffin. My style these days is less of a firebrand than you might have been led to expect. Thank you very much for the opportunity of addressing this conference. The subjects that I have seen on the agenda are of great importance to many nations, as witnessed by the scope of the delegates here today. The perennial discourse over the proper role of government can be characterised as a debate between those who emphasise government failure and those who emphasise market failure. Over the last two decades those who emphasise government failure have been in the ascendancy. This ascendancy has been reflected in a variety of changes. We all know the catchwords: privatisation, contracting out, deregulation, reinventing government, value for money, re-engineering, market-based solutions, downsizing, performance indicators, cost-benefit analysis, program budgeting, performance audits, strategic plans, citizen charters, et cetera, et cetera. There is a commonality to that theme. These changes have usually been called "reforms". I am reminded of a blistering attack on reformers by Senator Roscoe Conkling who, for the last few decades of the nineteenth century, was the Republican machine party boss of New York City. He said this in 1880:

> Some of these worthies masquerade as reformers. Their vocation and ministry is to lament the sins of other people. Their stock in trade is rancid, canting self-righteousness …Their real object is offence and plunder. When Dr Johnson defined patriotism as the last refuge of the scoundrel, he was unconscious of the then undeveloped poss bilities of the word "reform".

In a media-dominated age, with a public attention span not much longer than that of a gnat, the one dominant imperative of day-to-day public debate is this: to be seen to be doing something. The various changes and reforms which I have referred pander to this requirement rather well. The courts have not been, and cannot be, insulated from changes in attitudes about the proper role of government. The courts are an arm of government and have been subject, as other arms of government have been subject, to the greater salience given to what has been referred to as the "three e's"—economy, efficiency and effectiveness. These three e's have been in competition with other values of government activity, such as, accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. There is a conflict here.

The judiciary cannot and should not attempt to insulate itself from such changes in emphasis. Courts have responded, and must continue to do so. The primary judicial response to this change of attitudes to government activity to which I have referred, has been the acceptance by the judiciary of a greater role in case management—the management of cases before them. Judges are now concerned to ensure the efficiency and effectiveness of court proceedings. They intervene in proceedings to a degree which was unheard of even a few decades ago, outside specialist commercial lists. Courts are no longer passive recipients of a case load over which they exercise no control.

Advocates of a managerialist approach sometimes refer to their project as the new public management—indeed, it is sometimes referred to as NPM. "Management" is a term replacing the more staid, and seemingly more passive, traditional terminology of "public administration". Such advocates continue to advocate changes, significant changes, to the operation of the courts, including the full gamut of strategic plans, business plans, performance indicators and evaluation mechanisms. The issues that arise in this regard are not dissimilar to the issues that arise in the context of assessing the role of government as a regulator, which I understand to be the principal concern of the conference—including such particular matters of assessment of regulatory impact as the role of cost-benefit analysis. Similar issues arise in these contexts.

Many of the developments to which I have referred have been driven by a belief that a self-regulating market, such as is prevalent in the private sector, is the preferable mode of ordering human relationships. There obviously have been huge advantages from that application, but there is also a danger in an indiscriminate application of this role model. It tends to reduce citizens to consumers. There is nothing wrong with being a consumer or in ensuring that organisations take into account how well the functions they perform meet the requirements of people as consumers or clients. Nevertheless, it is important to recognise that a person's interest as a consumer is only one part of a person's status as a citizen.

The consumer analogy has become in many respects a feral metaphor that has acquired quite disproportionate prominence for this particular perspective. Consumers have desires or needs; citizens have rights and duties. The perspective of citizenship is of greater significance for most areas of public regulation than the perspective of consumerism; and that is true for the courts. In the context of court administration, the consumer perspective treats the courts merely as some sort of provider of dispute resolution services. Indeed, in Australia the most recently established court is the Federal Magistrates Court and that, by specific statutory provision, is permitted to be called the Federal Magistrates Service. It is the policy of the Government to prefer that denotation.

The identification of the courts as merely a publicly funded dispute resolution service is too narrow. Indeed, in my opinion, it is potentially subversive of the rule of law. Human life cannot be characterised simply as a series of consumer choices. Litigants are not consumers; litigants have rights. They come to court to assert their rights, not to exercise some form of consumer choice. This is clearest in the criminal justice system where, in substance, the community

asserts rights by way of protecting itself. There is no particular consumer there. However, in all cases, litigants are, and should be, treated in the courts as citizens not consumers.

The courts do not deliver a "service". The courts administer justice in accordance with law. They no more deliver a service in the form of judgments and decisions, than a Parliament delivers a service in the form of debates and statutes. I do not doubt that courts serve the people, but they do not provide services to the people. This distinction is not merely semantic, it is fundamental. Courts perform functions that go well beyond resolving disputes. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes—these are all public purposes served by the courts, even in the resolution of private disputes.

The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a broadly similar character to one of the functions performed by legislatures. This has no relevant parallel in most other spheres of public activity, let alone private activity. I have no doubt that there are important areas of government in which the emphasis on a consumer perspective and the analogy with the free market have been adopted with substantial benefits. However, not all areas of government are capable of being moulded by analogy with the operation of a free market. The administration of justice is an area in which this analogy has little useful to contribute.

No-one advocates that commercial corporations should conduct their affairs in public, nor that they should publish reasons for their decisions, or observe any of the other principles of open justice. Nor should the operations of commercial corporations be seen as having a determinative relevance to the administration of justice. One characteristic of the administration of justice is its inefficiency when compared with some other systems of decision making. This is not an accident. There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit in camera, dispense with the presumption of innocence, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, could act on the basis that no-one has any rights and not have to publish reasons for their decisions.

Even greater "efficiency" would be apparent if judges had made up their minds before a case began. There are places where such a mode of decision making has been, and indeed is being, followed. We do not regard them as role models. Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of governmental decision making in order to ensure that governments act with the consent of the government. The values that are served by our system of justice and our parliamentary institutions should not be regarded as subordinate to, let alone some kind of manifestation of, the allegedly superior values of the market system.

The courts have preserved—perhaps more successfully than some other areas of government over the last decade—a distinctive public service ethos. This has been possible, in significant measure, by reason of the constitutionally guaranteed independence of the judiciary. That distinctive ethos is not likely to change in the case of the courts. The global triumph of market ideology and a consumer perspective may be the market economy's own worst enemy. A balancing perspective is suggested by Rabbi Jonathan Sacks, the Chief Rabbi of the British Commonwealth, which you will bear with me if I quote at length. The Rabbi said:

> When everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our work is measured by how much we earn and spend, when the market is destroying the very virtues on which in the long run it depends.
>
> That, not the return of socialism is the danger that advanced economies now face. And in these times, when market seem to hold out the promise of uninterrupted growth in our satisfaction of desires, the voice of our great religious traditions needs to be heard, warning us of the Gods that devour their own children, and of the temples that stand today as relics ofcivilisations which once seemed invincible …
>
> The market, in my view, has already gone too far: not indeed as an economic system, but as a cast of thought governing relationships and the image we have of ourselves … The idea that human happiness can be exhaustively accounted for in terms of things we can buy, exchange and replace is one of the great corrosive acids that eat away the foundations on which society rests; and by the time we have discovered this it is already too late.

The managerialist focus in public administration, or public administration as it is now called, which is increasingly influential in courts administration, has sought to replicate a results-driven model, said to be characteristic of the private sector, where the free operation of market forces ensures efficient use of resources. This is an application that has been sought to be applied in many other areas of government activity.

One of the principal manifestations of this approach is the identification and targeting of performance standards or performance indicators in all areas of government activity, including courts. The problems of measurement which arise in this context are similar to the problems of measurement that arise in the context of cost-benefit analysis, which is the subject of one of the sessions of this conference.

The basic proposition is a simple one: not everything that counts can be counted. Some results or outcomes are incapable of measurement. They can only be judged in a qualitative manner. Justice, in the sense of fair outcomes arrived at by fair procedures, is, in its essential nature, incapable of measurement. The same is true of benefits and costs of government regulation in many different contexts. All practitioners of cost-benefit analysis, as far as I am aware, will accept that proposition. The problem is to determine how to treat the matters that can be measured, in a context in which it is acknowledged that other matters are also relevant to the decision-making process.

All the experience I have had access to with respect to these matters suggests that the matters capable of measurement acquire an entirely inappropriate significance by reason of their concreteness. It is all too easy to simply list other matters as qualitative considerations on both sides of the relevant equation. In the case of cost-benefit analysis, costs of a qualitative nature are set out in one list and the benefits of a qualitative nature are set out in another, and

the temptation is to conclude that in some vague and non-rational way the two lists balance each other out. The result is that the measurable factors actually determine the outcome of the decision-making process. All too often the qualitative factors are given only lip-service. The weight to be given to them is too contested to be accepted as determinative. The same effect is apparent in the context of decision-making processes based on performance indicators.

In these matters one can detect what can only be called a power struggle between different groups. Professionals involved in public decision-making processes, such as teachers, doctors or lawyers, tend to emphasise the significance of qualitative considerations. Treasury officials, departmental finance officers and auditors-general tend to emphasise measurable indicators. The latter often resent the high degree of autonomy of professionals and categorise their preoccupation with matters of quality as either rent-seeking activity or an invitation to an efficiency. They have a self-image as the true custodians of the objectives of an organisation, and often, as the only representatives of the taxpayer, in the interests of minimising expenditure.

There is a power struggle involved in this interrelationship. To the extent to which qualitative considerations are involved, the professionals will have the greatest say. Unless matters can be reduced to measurable standards or indicators, finance officers, auditors, et cetera, will not be able to exert influence. It is noticeable that in all areas in which the use of performance indicators has developed, the tendency has been to measure outputs of a concrete character, rather than outcomes, namely the ultimate results. The former are readily measurable; the latter involve matters of judgment. The better practitioners of this new managerialism understand that an output of taxation, as it has sometimes been described, is counterproductive, because too many important matters fall between the cracks of the performance indicators which are necessarily incomplete. The same is true of cost-benefit analysis.

In such analysis it is important to recognise the limitations of quantitative measurement so that the results of such analysis do not acquire a disproportionate and inappropriate influence over the sometimes amorphous and judgmental matters of quality. Quantitative measurement appears to be objective and value-free. Qualitative assessment appears to be subjective and value-laden. In fact, measurement, by reason of the inevitable selectivity of what can be measured, contains and conceals important value judgments.

If I can leave you with this thought. In my opinion it is of some significance to appreciate that the importance of what can be measured varies from one area of discourse to another. There is a tendency in the literature on cost-benefit analysis and performance indicators to act on the assumption that the methodology is equally appropriate to any area of discourse. That is not the case, in my opinion. There are some areas of government regulation or public administration in which the things that can be measured are the important things. There are other areas—and the law is one of those areas —in which the things that can be measured are not central to the objectives and functions performed by the organisations involved. Computation can be of great utility. However, in significant areas there is no escaping the centrality of judgment of a qualitative character. Thank you.

VICE-CHAIRMAN: Thank you, Chief Justice. As I predicted, your speech was extremely challenging. I am sure His Honour's comments resonated with all of us, whatever country or nation we are from, and he reminded us about what is important.

(Short adjournment)

CHAIRMAN: I welcome Lord Mayhew, of Twysden who is a member of the Delegated Powers and Deregulation Committee of the United Kingdom. Educated at Oxford, Lord Mayhew was admitted to the Bar in 1956 and made a Queens Counsel in 1972. He was elected to the House of Commons in February 1974 and served as Parliamentary Under Secretary for State, Department of Employment from 1979-81; Minister of State, Home Office, from 1981-83; Solicitor General from 1983-87; Attorney General from 1987-92 and Secretary of State for Northern Ireland from 1992-97. Lord Mayhew has also served as a member on the Parliamentary Select Committee on Parliamentary Privilege from 1977-99. I have attended and enjoyed immensely a high tea in the House of Lords. I have also had an occasional lunch there too. I enjoy the hospitality of the House of Lords.

Lord MAYHEW: I am glad that we were able to offer you something, though nothing, I am afraid, on the scale of the hospitality which you and your colleagues are offering us here in New South Wales today. It is a tremendous pleasure and privilege to be a participant in this conference that you and your colleagues have arranged. It is a privilege to have listened to the two speeches with which these proceedings have begun today, following the lead from the Chair. To have speeches from two Chief Justices has been a tremendous privilege. Of course, they rang bells for all of us.

I will begin by explaining what I intend to do. I intend in this speech, first, to suggest some general principles that should place limits on regulation-making powers and then to turn to the question of when enough is really enough. Modern Parliaments have got no choice but to delegate. If they do not delegate then proceedings would be clogged very rapidly. The Zimbabwean Minister of Justice said at the fifth Commonwealth conference on delegated legislation when it met at Harare in October 2000 that the "focus is therefore, rightly, on the extent to which delegation can take place". We all recognise that. At one extreme if you define the parameters too closely you will get paralysis. At the other, if you define them too loosely you will get, as he said, constitutional abdication. In other words, the art of the thing is to determine whether enough is enough, and when it is enough.

We share a common problem, and it is an urgent one. The problem is the well justified public perception that the weight of regulation is too great, is getting greater and it ought to be diminished. In all Commonwealth countries, at least, we call this red tape. We have heard that description given to us this morning. I think it aptly describes its entangling effect–your own illusion to the hydra-headed monster is very much in point. I have, as a barrister, to confess a sneaking affection for red tape because my briefs used to come tied up in red tape, but in that respect I recognise that I am a deviant. Regulatory reform has therefore become a growth industry. As one indication of this by January 1999 almost all the 29 Organisation for Economic Co-operation and Development [OECD] member countries had an explicit regulatory reform program in place. In the 1980s there was only three or four.

In our Committee in the House of Lords to which the Chair has kindly referred which is called the Delegated Powers and Regulatory Reform Committee, we view our Australian colleagues as world leaders in the field of regulatory

reform, and in the scrutiny of legislation. As I said to one person, today, we are one of your disciples. We based our own committee for the scrutiny of delegated powers on your model. It is said that imitation is the sincerest form of flattery but flattery, or no flattery, the United Kingdom delegation has good reason to be specially grateful to our hosts. For us, the OECD's report in 1996, which the Governor already mentioned this morning, on regulatory reform in Australia holds a particular resonance. The report said:

> The increase in delegated powers signals a gradual but major shift in decision-making from parliamentary to administrative authorities. This was noted even in 1980: [when a trade association reported that] "… the making of regulations … appears to have overtaken the use of Acts as the prime means of governing". [The Confederation of Australian Industry said] "This trend is disturbing from the points of view of public accountability and legislative control …" At the same time, however, regulatory reformers were pressing for more delegation in the cause of flexibility. In Victoria, for example, the reform unit advised that "Legislation should contain only broad statements of law. All extraneous detail should be included in regulations."

That report of the OECD vividly expresses the tensions between the reformers on the one hand and those who are concerned primarily with the maintenance of parliamentary supremacy. I thought it so interesting listening to Chief Justice Murray Gleeson this morning when he said that there are dangers in judicial activism, as it is called, but if you go on legislating in this way, creating these hydra-headed monsters that is what you will get. I thought that was a very interesting judicial viewpoint on our common problem. I mention in parenthesis that my colleague, Peter Pike, MP, sitting over there will speak on Wednesday morning about our Regulatory Reform Act enacted this year—the most recent achievement on the part of the reformers. Why do these tensions occur? We need to consider, first, the causes of the huge increase in regulation. In our country many of these are beneficent reasons, such as the development of the support systems in the welfare state.

More recently, there has been a vast increase in public attention to health and safety, environmental protection and consumer protection. Much of the resulting legislation is both necessary and welcome. Sometimes it is derived from some dramatic event, after an accident perhaps, leading the public to perceive a need for tighter legislative control. That perception may not have been justified and the accident may not have been caused by a shortcoming in legislation, yet it will be a brave Minister who stands out against that perception and brave Ministers are an endangered species. I guess, we all remember Sir Humphrey—a courageous Minister on occasions.

I guess we all recognise the wisdom of the words of the Chief Justice this morning when he spoke about the tendency for legislative crackdowns. But if hard cases make bad law, which is by no means always true, too many legislative responses to hard cases can make suffocating law. In the United Kingdom, to take an extreme example, our fire safety legislation is enshrined in approximately 120 Acts of Parliament, and a similar number of statutory instruments. You certainly need breathing apparatus to fight your way through that lot! Our new Regulatory Reform Act of this year is intended to be a means of ridding the statute book of such ridiculously complex legislation, without the need for primary legislation to do it. I will go on a little about this because there is a rich seam to be mined. The truth is that legislators rather like legislating. The first thought of many a member of Parliament faced with an emotive short-term political issue, and a groaningly full post bag about it, is to say something must be done, and we heard those words mentioned today by Chief Justice Spigelman. Usually, of course, that

includes legislation. If that can be a private member's bill introduced by himself, so much the better, that way lies immortality.

A classic example from the time when I was Attorney General is the Dangerous Dogs Act 1991 in our country. That was a rapid reaction by a jumpy Cabinet requiring heroically fast drafting by Parliamentary Counsel to a number of dog attacks on children and, in particular, to a shocking attack by a pit bull terrier on a young girl called Rucksana Kahn. Something had to be done. Within a matter of days we passed an Act of Parliament which introduced for the first time in the United Kingdom legislation relating to the control of specific breeds of dogs. That legislation also controversially introduced a mandatory destruction order for certain offences. No-one was going to be soft on dangerous dogs. The voice of the contradictor was silent in the land.

Legislate in haste and repent at leisure. The same newspapers which had been so quick to publish the horrifying images of mauled children moved seamlessly on to publicise moving cases of so-called innocent pooches on death row. Mr Nagle, even a Rottweiler can look soulful. A rock band called the Dangerous Dogs Act was formed. It was no good—the Act I mean, not the band. The band is still going, and we can provide you with names and addresses when you next come to the United Kingdom if you want to hear it. But the Government, in the end, put its hands up. One of its final acts literally was to lend its support to the Dangerous Dogs—yes—Amendment Bill. That was read a third time in the House of Commons on 19 March 1997, considered in the House of Lords on 20 March and it received royal assent on 21 March 1997—the very last sitting day of that Parliament. Fast in, fast out. The Act was neutered and the dogs were saved. We still lost the election.

Next we need to understand, as legislators, what happens when we try to regulate the unregulatable. Into that category I think comes the use of information technology. Last year, for example, our Parliament spent a lot of time discussing primary legislation on how to regulate electronic communications. But the Internet is essentially an anarchic force which is unlikely to submit to the legislative attentions of any parliament. Of course, there is scope for some regulation on the fringes of this area, but it has to be selective if it is to be practical. We went too far in the United Kingdom and we have had to row back. A good example is seen in a deregulation order which has now been passed to allow the undiscriminatingly banned electronic presentation of cheques, a measure which was estimated to save about £30 million a year for the banking system. That, of course, was wiped out to start with and we have had to row back.

Then we must notice the increasing importance of international inputs into the volume and content of regulation. Obviously, one welcomes common cause between governments and legislators. But the influence of international law on our domestic law at home has increased in ways which honestly were not imaginable when I started to practice—again something like 40 years ago. For European Union [EU] member States a significant proportion of our regulatory legislation now derives from EU directives over which, in truth, our ministerial members of the European Council and our members of the European Parliament have precious little control in practice. That is what the biggest ongoing political row at

home is all about. You are spared that in Australia. In politics, the goal posts are constantly moving. So, too, are the acceptable limits of regulation-making powers.

Most countries represented at this conference have their own deregulation programs with associated parliamentary processes. In Australia, the use of sunset provisions has slowed significantly the increase in the numbers of regulations. The OECD study to which I have already referred found:

> A number of jurisdictions cite indicators that suggest a decline in the rate of increase of new regulations after the introduction of reforms. New South Wales reported in 1993 a "marked reduction" ... Victoria reported in 1992 that its consultation and impact statement program had resulted in a withdrawal of 15 to 20 percent of proposals as unjustified. In Tasmania, regulatory review in the 1980s was reported to have led to a 35 percent reduction in a number of new proposals for regulations.

The OECD report also stated:

> Hence, even though the quantity of regulation has surely increased substantially in the past 15 years, it is poss ble that it would have increased even more without reform.

In the United Kingdom we have been rather slow in getting on to this. We have made little use of the sunset provisions so far. But we did put an important one into controversial legislation dealing with football spectators—again something that happened after a hideous catastrophe at a football match. The sunset provision was put in after the resulting, "Hurry, hurry we must do something" legislation at the instance of Bob Alexander, the chairman of our committee. That provision is almost a first. But we have other tools, in particular, the Deregulation and Contracting Out Act 1994, which is being superseded by the much wider reform about which Peter Pike will be telling us. When the deregulation procedure was launched it was with the aim of cutting red tape. It was launched about eight years ago now by the Government of which I was a member.

At the annual Conservative Party conference in 1993, a then Minister enjoyed himself when explaining what was going to happen with deregulation by using rolls and rolls of paper to demonstrate the hundreds of regulations that come spewing out of the government machine in Whitehall. I hope I shall not be thought indelicate if I said that the normal function of those rolls of paper was readily recognisable. The blue rinses from the Conservative Party in the conference hall especially loved it. It struck a chord with the electorate. But the attempt by deregulation to bring this red tape under control failed. After three years Parliament had approved only 42 deregulation orders, which was certainly a worthwhile improvement. But it seems that wherever you look, victims are still fighting for breath.

It is, however, from primary legislation that all regulation is derived, and primary legislation has proved astonishingly fecund. We are not limited to struggling only with its progeny. Let us examine the ways by which earnest scrutiny can render the parent less potent. Powers to regulate, as distinct from regulations which result from those powers, are studied in Australia at Commonwealth level by the Senate Scrutiny of Bills Committee, in the State parliaments, as we know, and also in New Zealand. I am looking forward to hearing about the experience of other participating countries. From our own committee's work since 1992 I think it is possible to draw some generalisations and in the rest of my speech that is what I will attempt to do.

My first generalisation, which might seem to state the obvious, is this: All primary legislation should describe in proper detail any powers to be delegated and the parameters and purposes of their use and it ought to specify the proper degree of parliamentary control over their use. The House of Lords Committee uses the term "skeleton bill" to describe bills which are little more than a licence for Ministers to legislate by order some time later so that flesh may ultimately be given at a more convenient time to the skeleton created by the bill. Luckily, skeleton bills are rare, or at any rate they are now rare in the United Kingdom. But every now and again governments—and my own was no exception to this—are evidently tempted to invite Parliament to delegate powers without giving sufficient information. It was partly in order stop this that the House of Lords Committee was created.

Ministers, in requesting the delegation of any power in a bill which they put forward to Parliament, now have to provide our committee with a memorandum explaining the need for it and justifying the degree of parliamentary control which it proposes should be provided for it. Ministers know that this memorandum will be carefully scrutinised, and we find that it concentrates their minds. During the eight years of our existence we found it necessary to denounce a bill as skeletal on only four occasions. The most recent of those was during the 1998-99 session when we reported on the Pollution Prevention and Control Bill. We described that bill as "essentially enabling legislation, conferring upon the Secretary of State powers to make regulations providing for a new system of pollution prevention and control". We said:

> … the width of the powers to be conferred … to regulate activities capable of causing environmental pollution or in connection with the prevention or control of such pollution is virtually unlimited.

We concluded that we were:

> … bound to report to the House that as at present drafted this is a "skeleton" Bill and so is an inappropriate delegation of secondary powers.

We went on to list a number of ways in which the House might want to consider amending the bill to flesh it out. We are very lucky as a Committee in that the Government—of whichever political persuasion—almost always accepts our recommendations, and so in due course the bill was amended accordingly. The bill, now in a much more corpulent form, is on the statute book. Actually, as a committee, we seem to have acquired something of a constitutional aura, and governments now tip their hats to us in a rather agreeable manner.

Generalisation No. 2 perhaps reflects our experience with the Dangerous Dogs Act. The exercise of delegated powers in bills that are rushed through Parliament should, as a general rule, be subject to tougher parliamentary scrutiny precisely because Parliament has had comparatively little time to consider the initial grant of those powers. For instance, if a power would normally be of the kind subject to the negative resolution procedure, it should be made subject to the affirmative resolution procedure when Parliament is asked to pass it at a gallop. If I may point out the obvious: the distinction is between taking effect in default of opposition—the negative procedure—and on the other hand not taking effect without prior express approval, each within a prescribed period of days.

My third generalisation relates to Henry VIII powers, which are powers to use subordinate legislation to amend or repeal primary legislation. The Lords Committee always pays jealous attention to these. I think we are more lenient than some of our counterpart committees in the Commonwealth and elsewhere. In our Committee's view, Henry VIII powers can sometimes be justified, even essential. Taking an extreme example, during a recent session we reported on the Building Societies Bill, which contained numerous delegated legislative powers among which there were 11 Henry VIII clauses. This was more than in any other recent bill. However, after looking at each of them with care, we were satisfied that suitable parliamentary control had been provided, given the nature and extent of each power. We enunciated the principle that:

> … a Henry VIII provision can never be so trivial as not to justify some Parliamentary scrutiny.

In connection with the Education Bill in the 1996-97 session, the Committee reported on two Henry VIII provisions that, exceptionally, were not subject to parliamentary scrutiny. We recommended:

> … it should be possible, by skilful drafting, to amend the Bill so that the Henry VIII provision is unnecessary. Should this prove impossible, the House may wish to consider whether it would be appropriate for the power in Clause 50(5) to require negative resolution procedure in spite of the very limited impact of the power.

"The House may wish" is House of Lords speak for "kindly see to it ". The House of Lords is a funny place: it has tremendously courteous forms but the stiletto can be used pretty effectively.

My fourth generalisation is that there is a case for tougher parliamentary scrutiny of powers in constitutional bills. I am deliberately leaving devolution issues to my colleagues from the Scottish Parliament and the Welsh Assembly, who will enlighten us about matters of that kind later in the week. However, the Committee deliberated particularly long and hard on the constitutional bills in the 1997-98 session. In our conclusions on the Scotland Bill, we noted:

> … the Bill has necessarily to make complex provisions and the Henry VIII powers are necessary for the purpose. It is, moreover, likely that the use of the powers will be confined to matters of detail.

Some of these Henry VIII powers were subject to affirmative procedure but the majority were subject to negative procedure. There were three provisions that would permit amendment of the Scotland Bill itself. In that condition, we said:

> There is also a separate and wider point on the Henry VIII powers. In the Government of Wales Bill there is a provision which applies affirmative procedure to any instrument "which contains provisions in the form of amendments or repeals of enactments contained in an Act". The Committee can see no relevant distinction between the Henry VIII provisions in the Government of Wales Bill and those in the Scotland Bill. The House may therefore wish to consider whether it would be appropriate for such a provision requiring affirmative procedure to be provided for the Henry VIII powers in the present Bill.

The Government complied.

My fifth generalisation is that some forms of regulation are now so complex that the normal affirmative procedure is not enough and what we in the United Kingdom call the "super affirmative procedure" is needed. What is that? The super affirmative procedure provides additional committee scrutiny, and, in the case of deregulation and regulatory reform orders, it makes consultation with the public compulsory, both at a pre-legislative stage and during the parliamentary process. This has worked so well with deregulation orders that we recommended that its use should be extended to remedial orders under the Human Rights Act 1998. A

word about that: the Human Rights Act was a constitutional innovation of enormous significance introduced during the 1997-98 session. It incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms into United Kingdom domestic law. Under the Act, the Minister may by order make such amendments to primary and subordinate legislation as he thinks appropriate to remove any incompatibility with the convention that has been identified. Such an order is called a remedial order. Our Committee reported that this was a Henry VIII power of the utmost importance. We said:

> The House may take the view that the " fast track " procedure to remedy speedily laws which have been held by the courts to be incompat ble with the Convention is necessary. The orders could, however, affect significant change in sensitive and important areas of existing law. We have noted the Lord Chancellor's statement to the House at second reading that the power could only be used under strictly limited circumstances. Without strict limitations, a secondary power of such potential width would be unacceptable.

Quite rightly in the Committee's view, when it was introduced into Parliament the bill required the affirmative resolution procedure for remedial orders. However, this did not allow either House to amend such an order. The Committee reported that, given the power had to be open ended in order to meet any need that could arise and that it might be used to make extensive changes to existing legislation, the House might wish to consider whether there was a case for developing a new procedure to scrutinise such orders modelled on the scrutiny of deregulation orders. Such a procedure could allow for a limited period in which the proposal to make a remedial order could be considered by both Houses of Parliament, with the opportunity that would give for amendments to be proposed. This recommendation was accepted by the Government, and any remedial orders under the Human Rights Act 1998 will now be subject to special scrutiny involving the new Joint Committee on Human Rights.

My sixth generalisation—the last but one—is that secondary legislation must not imply second-class drafting or sloppy treatment of the rights of citizens. I need not take too long on this point because I think it is self-evident. There is a distinction between the legislative drafting that is carried out by the expert parliamentary draftsman in our countries and that which is done by draftsmen within individual government departments. Naturally, the quality is not always the same. I think Parliament should be more rather than less vigilant in scrutinising orders from individual departments. To the regret of many, the United Kingdom Parliament is unable to amend most forms of secondary legislation other than that which is subject to the super affirmative procedure—which I have just tried to describe. It is all or nothing; approve or reject. I look forward very much to learning this week about the experience of other countries with second chambers that allow the amendment of secondary legislation.

I turn now to the question of when enough really is enough. It is tempting, but insufficient, to say, "You know it when you see it." The first part of the House of Lords Committee's terms of reference requires us:

> … to report whether the provisions of any bill inappropriately delegate legislative power.

That sounds all very well but Parliament has never defined what "inappropriate delegation" is. The question is left to be decided on a case-by-case basis by the parliamentary draftsman, whose view is then subject to the approval or otherwise of Parliament. Our counterpart committee in the Australian Senate, the Senate Standing Committee for the Scrutiny of Bills, is also tasked with drawing the

attention of its House of Parliament to occasions when Parliament's power may have been delegated inappropriately. That Committee has suggested the following examples of when legislation contains provisions that delegate legislative power inappropriately. It is worth citing those four examples, which state:

> (a) it may enable subordinate legislation to amend an Act of Parliament.
> (b) it may provide that matters that should be regulated by Parliament are to be dealt with by subordinate legislation.
> (c) it may provide that a levy or a charge be set by regulation.
> (d) it may give to the executive the unfettered control over whether and when an Act passed by Parliament should come into force.

It is obvious that different views are taken at Westminster about some of these tests of what is inappropriate, but this demonstrates that the suitability of delegating a particular legislative power must be judged against the background of earlier legislation and in the context of what I might call "the legislative culture".

In January 1993 the United Kingdom Government set out in its memorandum to the Committee, which was appended to the Committee's first report, the following criteria for deciding whether subordinate legislation was appropriate in any particular case. It should serve: to ensure flexibility in responding to changing circumstances, and provide a measure of ability to make changes quickly in the light of experience without the need for primary legislation; and to allow detailed administrative arrangements to be set up and kept up to date within the basic structures and principles set out in the primary legislation. All the same, our own consideration of provisions in recent years has led us to conclude that certain matters ought not to be left to delegation. These include:

> Provisions designed to ensure that legislation is clearly compat ble with the European Convention on Human Rights—

I have made my point about that—

> … substantial changes to the electoral law; the power to increase the severity of a sentencing power.

It remains to be seen how the Government will respond to our views. As my final generalisation I suggest the following overarching principle for judging when enough is enough in terms of ascertaining the limits of regulation-making powers. It states:

> … the aim of legislation should be that, in the absence of cogent reason to the contrary, all matters of important substance should be contained within the primary legislation.

Of course, you will spot at once "cogent reason to the contrary"—still the open door. I think it is impossible to be absolutely firm and clear; we must always have some wording of that kind. All politicians know that, whenever they make a generalisation, someone will come up with an exception, which will pop up to bite them—like one of those dangerous dogs that I mentioned. Ladies and gentlemen, having set out—at undue length, I am afraid—one generalisation after another, I hope that I have provided you with plenty to get your teeth into. It is my further presumptuous hope that, after due consideration, my proposals may meet even with super affirmative approval. Thank you.

CHAIR: Thank you, Lord Mayhew. Ladies and gentlemen, before we depart I must attend to a few housekeeping matters. If delegates wish to speak to

someone during the conference or you need a fax machine or some other information, you should contact a facilitator. These people are the Hon. Janelle Saffin, Ms Marianne Saliba, Mr Russell Turner, Mr Gerard Martin, the Hon. Don Harwin, the Hon. Malcolm Jones and Dr Liz Kernohan. I must thank my Committee staff for the great support that they have provided over the past 12 to 18 months in organising this conference. I am much indebted to them. The conference will resume tomorrow at 9.30 a.m. We propose to form a working committee tomorrow to consider preparing some motions for the conclusion of the conference regarding its future and a communiqué. Thank you for your attendance today.

The conference adjourned at 12.32 p.m.

TUESDAY 10 JULY 2001

CHALLENGES FOR AUSTRALIA AND THE COMMONWEALTH IN REGULATORY REFORM

CHAIRMAN (Mr Gerard MARTIN): There has been a change to the program. I will be chairing this session instead of Mr Victor Perton. This morning I would like to introduce Mr Gary Banks, who will talk about the challenges for Australia and the Commonwealth in regulatory reform. Mr Banks has been Chairman of the Productivity Commission, incorporating the Office of Regulation Review, since its inception in April 1998. Previously he was Executive Commissioner with the Industry Commission. He has headed a dozen major reviews on a variety of public policy and regulatory topics. These include inquiries into research and development, off-shore investment, regional adjustment, private health insurance, Australia's gambling industries—that would be a challenge—and currently is presiding commissioner on the review of the national access regime for monopoly infrastructure. Before joining the commission, Gary worked with the Centre for International Economics and Canberra and in earlier years with the GATT secretariat in Geneva and the Trade Policy Research Centre in London. I ask you to welcome Mr Banks to the podium.

Mr Gary BANKS: I appreciate so many people turning up the morning after such a late night. Probably like me, you were watching the tennis last night. Some of you were probably happy with the result; some of us clearly were not. I do not have to tell people here that regulation is essential to the proper functioning of a society. Rules create order and the basis for stability and progress. They shape incentives and they influence how people behave and interact. And they help societies deal with otherwise intractable economic, social and environmental problems. All that goes without saying. The more important issues have to do with the appropriate form and content of regulation. While good regulation is essential in achieving desirable social and economic goals, bad regulation can undermine a society's capacity to achieve both. The postwar divergence in performance among countries with different regulatory and government structures has provided ample illustrations of this.

There is no such thing, however, as a single regulatory ideal or a permanent general solution to a society's regulatory needs. All regulation has both positive and negative attributes, and most of it tends to obsolescence as a country's economic, social or environmental circumstances evolve. This is particularly evident today with the rapid changes brought on by technological advances and global integration. Australia, like other countries, therefore, faces two principal challenges in the regulatory domain. The first is to rid itself of bad regulation and the second is to ensure that new regulation is good regulation. We have made some important progress in recent years at the Commonwealth, State and, indeed, interjurisdictional levels but we still have some way to go.

What is good regulation? At the broadest level, the answer is almost tautological. Good regulation is regulation which, in achieving its goals, brings the

greatest net benefits to the community. But the little word "net" is important. It signifies that a regulation must be judged not only by its beneficial effects but also by the costs that arise in achieving them. For this overall net benefit requirement to be satisfied, regulation must meet three other tests. It must be the most effective way of addressing an identified problem, it must impose the minimum burden on those regulated and it should cause the minimum amount of collateral damage to others.

Experience both in Australia and internationally has shown that for it to meet these tests, regulation is to exhibit some important design features. Regulation should not be unduly prescriptive; where possible, it should be specified in terms of performance goals or outcomes, and it should be flexible enough to accommodate different or changing circumstances and to enable businesses and households to choose the most cost-effective ways of complying. Regulation should be clear and concise but should also be communicated effectively and be readily accessible to those affected by it. It should be consistent with other laws, agreements and international obligations. Inconsistency can create division, confusion and waste.

Regulation must be enforceable but it should embody incentives or disciplines no greater than are needed for reasonable enforcement and involve adequate resources for the purpose. Regulation needs to be administered by accountable bodies in a fair and consistent manner. Last but not least, it should be monitored and periodically reviewed to ensure that it continues to achieve its aims. So, clearly, a regulator's life was not meant to be easy. The Productivity Commission, my own organisation, whose role is to assess regulation and advise Australian governments on how to do better, finds that most regulation it looks at fails at least some of these tests and some of it fails all of them.

Experience has shown that regulation that restricts or distorts competition, which has been the traditional focus of the commission and its predecessors, has mainly imposed net costs on the Australian community. This includes regulations that restrict entry to markets or provide privileged treatment to insiders. Regulation of this type removes important incentives for enterprises to achieve higher productivity, lower prices and generally to be responsive to the needs of customers. As many of you know, it has been the target of a systematic interjurisdictional program of review in Australia under the National Competition Policy, which although not complete has led to some important reforms.

In the past decade or so governments have also asked the commission to look at a diverse range of other policy areas, including environmental and social regulation. Regulatory deficiencies have been manifest in all of them. For example, our examination of private health insurance in 1997 revealed that the regulatory framework at that time was promoting hit-and-run behaviour and deferred entry into funds. The resulting premium increases discouraged new entry into private health insurance, placing an unfair burden on long-term members, many of whom were forced out of private health insurance just when they needed it most. And those trends in turn generated pressure for further premium increases. A vicious circle of spiralling costs and membership decline was the result.

In the environmental area, we recently found that regulation has been hindering private sector initiatives which would add to the conservation of our biodiversity in Australia. For example, Queensland legislation creates 11 different types of licences and eight types of permits in three administrative regions. A private conservation provider requires different licences or permits for the taking, keeping, displaying, trading and movement of native wildlife. The commission's review of Commonwealth broadcasting regulation last year found that existing arrangements for introducing digital television in Australia were denying Australians the potential benefits from technological convergence and were at serious risk of failure—a judgment to which subsequent events have lent some weight.

And our current inquiry into cost-recovery practices by Commonwealth agencies has found that poor regulation is often being compounded by poorly structured charges for regulatory services. Our draft report reveals that most cost-recovery arrangements within government are ad hoc, lack transparency, and have poor accountability and review mechanisms. And some have questionable legal grounding. As a consequence, businesses may be unfairly burdened with excessive charges for services or facilities that may themselves be inappropriate. A final example which appears to be of wider interest is the regulation of gambling. Delegates that this conference need not venture too far to find a variety of legalised gambling. With the exception of Western Australia, community-based gambling is now widely spread across Australia's pubs, clubs and news agencies.

The liberalisation of gambling has brought harmless entertainment value to most Australians but it has also given rise to major social cost stemming from problem gambling. Indeed, in the case of electronic poker machines, the technology of which Australia leads the world, the commission found that those costs could conceivably outweigh the benefits, yielding a net loss to society. Apart from that questionable basis for their liberality, gambling regulations were found to be complex, fragmented and inconsistent. They were strong on financial probity, at least for some venues, but contained little provision for consumer protection or assistance to problem gamblers. They generally fail most of the tests for good regulation.

So why do governments' regulatory efforts so often fall short? The quick answer is that bad regulation is easier to implement than good regulation. The tests for good regulation are not easily satisfied. They are informationally demanding, requiring careful consideration of the policy problem to which they are directed, the alternatives available and their respective effects on various groups within society. A variety of pressures militate against such rigorous assessments. One is time pressure. The number of new regulations introduced each year is vast and growing. The commission's current inquiry into non-tax aspects of superannuation found itself grappling with more than 1,000 pages of legislation.

Our political representatives justifiably complain about their inability to digest and consider all this material. But without such digestion, necessary scrutiny and debate are diminished. A second and more fundamental force for bad regulation is the uneven political and bureaucratic pressures which favour those regulations that deliver benefits to particular constituencies. The costs being longer term, indirect and often more diffuse in their incidents across the

community tend to get left out in the political calculus. It can be both politically and administratively more convenient to ignore them. Once introduced, however, regulation which benefits particular groups at a collective cost tends to be very difficult to remove. Correcting such regulation not only imposes losses on some people who will naturally resist the change; it can bring uncertainty and adjustment costs.

Getting regulation right in the first place is, therefore, very important. Good regulation rarely just happens, given the political informational constraints. A disciplined approach to the development of regulation is necessary. Good process is the key to good regulation, or, putting it the other way, poor regulation is typically an outcome of poor regulatory processes. For example, the commission's examination of how the deficient gambling policies and regulations were developed revealed poorly specified and sometimes conflicting objectives and rationales, lack of rigour in assessment of costs and benefits of alternative options, lack of community consultation and little monitoring and evaluation of the consequences of decisions once implemented. This is symptomatic of a more general malaise in policy formulation.

In many cases laws and regulations throughout Australia have been put into effect without adequately addressing three questions that are fundamental to good policy making. The first is: What is the problem or the objective? The second is: What are the regulatory and other options for dealing with that? The third is: What is the most cost-effective solution? It is therefore not surprising that much of our accumulated regulation has also failed the ultimate test—demonstrating a net benefit to the community. As the New South Wales Regulation Review Committee stated in a valuable report which was released last year, prior to the introduction of a more systematic approach to the development of regulatory proposals in New South Wales, the system had "allowed numerous regulations to come into being with only the barest, if any, evaluation being made of their expected economic and social costs and benefits".

While the need to do something will often be first perceived by political representatives—after all, that is their job—the process of answering questions at the core of good regulation needs to begin with rigorous work by public officials. It is only then that fundamentally different approaches to identifying problems can be adequately considered. It is generally too late by the time a bill reaches the floor of Parliament. This is not to deny the valuable gate-keeping roles of parliamentary committees that scrutinise legislation. Theirs is an essential and complimentary element of the process. However, it is the policy development work beforehand that shapes the substantive provisions of regulation. With this in view, most Organisation for Economic Co-Operation and Development [OECD] countries now have adopted some form of regulatory impact analysis in the pursuit of regulatory best practice.

The purpose of the regulatory impact statement is to ensure that a proposed regulation jumps a number of hurdles that are designed to determine whether it is likely to result in net benefit to a community and to preclude it from being implemented if it does not. Also, by codifying good practice, that can help to embed a more disciplined, sequential approach into the development of policy. From the late 1980s Australia began introducing regulatory impact analysis for

subordinate or delegated legislation. In 1995 all Australian jurisdictions, through the Council of Australian Governments, took the important step of requiring proposals going to ministerial councils and national standard-setting bodies to be accompanied by regulatory impact statements. Of the Australian jurisdictions, the Commonwealth's quality control process arguably has the most comprehensive coverage; it is also the process with which I am most familiar and upon which I will initially focus my remarks.

Since 1997 Commonwealth departments and agencies have been required under a Cabinet directive to prepare regulation impact statements for all regulations that affect business. This includes primary as well as subordinate legislation, so-called quasi regulation and treaties. Regulation impact statements must justify the need for Government regulation and consider alternative ways of attaining policy objectives. I will run through the seven elements. This calls for an economy wide or community wide perspective in identifying who benefits from the regulation, who incurs the costs and whether the regulation achieves its objectives without unduly burdening the community. The regulation impact statement requirement forces policy makers to consult and to work through a sequential process of articulating the problem, assessing a range of options, recommending the best option and explaining why other options are not as good.

Taken together, these elements constitute a best practice policy development process which is designed to produce good regulations. In particular, the process prompts abandonment of the traditional regulate-first approach and seeks more careful selection and better justification of the preferred option. A critical feature of this process—the logic of which should be obvious—is that regulation impact statements are required to be presented to political decision makers in time to inform their decisions. The statements must also accompany bills and subordinate legislation into Parliament, enhancing the scope for well-informed political debate and providing a transparent account to the community of the reasoning underpinning the proposed regulation. The Office of Regulation Review, which is part of the Productivity Commission and shares its statutory independence, is the Government's watchdog over this regulation development process. It is complemented by the Senate Scrutiny of Bills Committee and the Regulation and Ordinances Committee which ensure that final bills and delegated legislation conform to important principles relating to citizens rights and liberties.

To accord with the requirements, departments and agencies are obliged to consult with the Office of Regulation Review from the outset in preparing regulation impact statements, and the office must verify that they are of an adequate standard. The Productivity Commission reports annually on compliance. How are we doing? In the Productivity Commission's latest annual report on regulation for 1999-2000, the Office of Regulation Review recorded that of the 207 regulation impact statements required in that year, 180 had been prepared for the decision maker; and of those, 169 were judged to be of an adequate standard. This translates to a compliance rate of 82 per cent at the end of the second full year under the new regime. It was 91 per cent at the subsequent stage when bills and delegated legislation are tabled in Parliament. This represents a significant improvement over earlier years and compliance has remained at about that level in the first half of the current financial year.

However, these aggregate results conceal some significant deficiencies. One is that compliance varies considerably among portfolios and agencies. For the major policy-making portfolios, compliance rates in 1999-2000 for the decision-making stage ranged from a low of 28 per cent for the Department of Health and Aged Care to 100 per cent compliance records for some other portfolios. A second, and not unrelated, finding is that compliance appears to be weakest where it matters most. The Office of Regulation Review ranked the regulation impact statements required in the year according to the perceived economic and/or social significance of the regulations concerned. It found that non-compliance at the decision-making stage was 26 per cent for highly significant or significant proposals and that was one-third higher than for proposals ranked at being of only moderate or low significance.

A third deficiency is in the timing of regulation impact statements. To be at all useful in helping to get better regulatory outcomes, regulation impact statements need to be prepared as an input to decision making; in other words, they need to be embedded in the policy-development process. Instead, in many cases they are being treated as an add-on and are essentially prepared after policy decisions have already been made. In those circumstances the regulation impact statement becomes little more than a rationalisation of predetermined approaches. Its content may end up being adequate, but its role is being subverted. This tendency is apparent in the aggregate compliance statistics for primary legislation which showed a much higher rate of compliance at the time that bills were tabled than at the earlier decision-making stage. But in many cases, even when regulation impact statements have been assessed as adequate at the decision-making stage, they have emerged only at the death knell. Little time has been allowed for the preparation by bureaucrats or for their practical consideration by Ministers.

This has contributed to a fourth deficiency in the informational and analytical content of regulation impact statements. In terms of the formal requires for adequacy, the aggregate picture looks pretty good. Only 11 of the 180 regulation impact statements prepared in 1999-2000 were assessed as not meeting the minimum necessary standard but, again, this hides a variation in performance among portfolios. For example, at the low end, of the 26 regulation impact statements prepared by the Department of Communications, nearly one-quarter were assessed as inadequate. It must also be said that the benchmarks for assessing a regulation impact statement as adequate, while rising somewhat over time as departments have become more familiar with the process, could still not be described as onerous. Yet, in many cases, draft regulation impact statements that were submitted to the Office of Regulation Review still do not even address the elementary requirements.

Identification and consideration of alternative options to the favoured regulation is frequently lacking, particularly the non-regulatory or self-regulatory options. There is often little attempt to collect information that is necessary to quantify the costs and benefits of options, even as to broad orders of magnitude. Admittedly the analysis of the cost and benefits of regulation can be very difficult. Often the available data will not support a qualitative assessment and some impacts may not be amenable to quantification. Some regulatory proposals may also not be significant enough to warrant a costly quantification exercise. But none

of this excuses an inability to identify classes of effects or to provide an adequate qualitative assessment of the pros and cons of different options.

It is inevitable that there will be some failure to meet best practice standards for regulation making. The political pressures described previously will sometimes be too great and the available time too short to accommodate the systematic, sequential approach that characterises good process. However, in many cases, poor performance is not always the result of exceptional circumstance but reflective of a lingering resistance within areas of government to the discipline of proper policy development process. Lack of commitment is manifest, too, in the poor quality of many regulation impact statements, particularly at the draft stage when we first see them and because of the fact that they are often prepared by junior staff. This underlines a broader and more serious concern—the failure to comply with the formalities of a regulation impact statement may reflect a deeper failure to do the broader policy work necessary to achieve good policy outcomes.

What can be done? At the end of the day, the key to achieving commitment to good process throughout government is having a commitment at the political level. There have been some important initiatives throughout Australia to achieve that, and bringing about the necessary cultural change within regulatory agencies can take time, as the Commonwealth experience has shown. Nevertheless, there have been significant improvements at State and Commonwealth levels on which to build. Indeed, our federal system in Australia provides a valuable basis for jurisdictions to learn from each other's experience. Key factors in the progress achieved thus far within the Commonwealth domain have been Cabinet endorsement of the regulation impact statement process, the designation of a Minister to oversee it, and the involvement of the Office of Regulation Review in guiding, monitoring and helping to enforce it.

Comparable bodies to the Office of Regulation Review exist in State jurisdictions and they, too, play a significant role. However they currently lack the formal independence of the Office of Regulation Review, being located within policy departments such as Premiers, State Development or Treasury. The Commonwealth experience is that independence is important if the duties of such an agency are to be exercised impartially and effectively; otherwise, pressure to go easy on particular pieces of regulation or particular portfolios could end up subverting the government's intent in establishing the process. Within government administration, the most appropriate home for such a body therefore would be a department with broad responsibilities but with little regulatory role. A department of finance would be one possibility, except that in State jurisdictions its functions are typically joined to tax policy or treasury responsibilities. Another possibility might be to locate such a body within an auditor-general's department which could provide formal independence equivalent to that applying to the Office of Regulation Review in the Commonwealth jurisdiction.

Having such watchdog institutions can make a difference, but that does not obviate the need for departments and agencies to take ownership themselves for the best practice processes embodied in a regulation impact statement. Again, this must begin at the top. The problems being experienced at operational levels within departments and agencies would suggest that there is scope to do more in

this respect. A logical concomitant of support for the regulation impact statement at the political level would be a more explicit commitment by heads of agencies, even to the extent of including the observance of regulatory best practice as an element in contracts and performance agreements. This would not only impose a degree of discipline on senior officials but would also empower them to ensure that their political masters were served with robust information and advice that good policy decisions require, even when their political masters are not sure that they want it.

A further area where there is scope for interjurisdictional learning is in the coverage and degree of enforcement of regulation impact statement obligations. A number of States have long had statutory requirements for the application of these processes to new subordinate legislation and reviews of existing regulation. The Commonwealth has, for several years, had a draft bill in place to achieve comparable results. It establishes a single system of legislation, publication and parliamentary scrutiny for delegated legislation and makes cost-benefit analysis a requirement for certain regulations affecting business. It would do much to bring visibility and order to this important stratum of regulation.

Another important provision at the State level has been the sunsetting of regulations. This forces policymakers periodically to consider whether regulation remains justified. When they do they so often find things have changed and that adjustments need to be made. While some attempts have been made at the Commonwealth level to identify and repeal regulation that is redundant and unproductive, a systematic approach is yet to be followed through to the extent that the States have pursued it. Of course, this is aside from the seven-year national competition policy review of Australian regulation that restricts competition, which has been an important achievement by any standards. For their part, the States could learn from the Commonwealth experience in subjecting primary legislation to the regulation impact statement requirements. While it is true that primary legislation achieves greater transparency through parliamentary scrutiny and debate than does subordinate legislation, it also generally has greater potential impacts on the community and thus warrants a similar degree of rigour and transparency in assessment processes. Regulation impact statement processes not only help inform government of the best regulatory approaches, attaching the statement to legislative bills can also help inform and thereby facilitate Parliament's decision to enact them.

That would seem to be an appropriate note on which to conclude a presentation in this place. At the end of the day communities look to their Parliaments for assurance that the rules that govern them are generally beneficial. That expectation has not always been adequately met in the past. The challenge is to ensure it can be in the future. Good process is the key to that, and an important start has been made. Indeed, this international conference hosted by New South Wales Parliament is itself a hopeful sign that further progress will be made. Thanks very much.

CHAIRMAN: Thank you, Mr Banks. Unfortunately time does not allow for questions but if anyone has any burning questions I am sure Gary will be quite happy to see them on a one-on-one basis. I now invite Mr Lloyd Black to take the chair to present our second speaker.

CHAIRMAN (The Hon. Lloyd Black): Good morning, everyone. It is a pleasure to see so many of you here this morning. I am from the British Virgin Islands. I welcome the opportunity to participate in chairing this session. Our next presenter this morning is Mr Steve Gilchrist MPP. Steve is co-chair of the Ontario Red Tape Commission in Canada. He was first elected to the Ontario Legislature in 1995. Mr Gilchrist served as chair of the Standing Committee on Resource Development from 1995 to 1997. He was the parliamentary assistant to the Minister for Municipal Affairs and Housing for 1997 to 1999 and Minister for Urban Affairs and Planning in 1999. In April 2000 Mr Gilchrist was elected chair of the Standing Committee on General Government, one of two committees that oversees the public hearing of all bills. His topic this morning will be "In Search of Regulatory Excellence". I now welcome Mr Steve Gilchrist.

Mr Steve GILCHRIST (Ontario): Thank you, Mr Black, and good morning everyone. I echo the previous speakers in thanking Mr Nagle and his committee for the opportunity to come down and share a few thoughts with such an august group of colleagues from all around the world. I must say, for those back home who think it is very exotic to be able to come to a locale like this, from what we heard from yesterday's presentations, from Mr Banks this morning and from talks yesterday on the cruise, I already have enough projects to launch into when I get back to keep me busy for the next month or so. I appreciate all the efforts so far and I hope the Ontario perspective might shed a slightly different light on how another jurisdiction has dealt with this problem.

There is no doubt that this conference is a great opportunity for us to share ideas, our experiences and our best practices and to learn from each other. We all have a common cause. Each of us at this conference is passionate about better and more effective government. I am particularly pleased to be in Australia because governments in this country have for quite some time been recognised as leaders throughout the world in implementing good government initiatives. Australian government at both the Federal and State level have served as models for some of the work we have done in Ontario.

Ontario is a province of approximately 11 million citizens, with its number of businesses now exceeding 400,000 and spread over a very large geographical area.. Ontario accounts for roughly one half of Canada's gross national product and our economy is the fastest growing amongst the major industrialised jurisdictions—in fact, I am proud to say that we have exceeded the G-7 rate of growth in each of the past four years. We have created well over 829,000 net new jobs in the past five years, largely by bringing in a discipline of cutting taxes, reducing red tape and making it more conducive to invest in the province.

Let me start by giving you a quick example of what we have done to change the way the Government works with people and with business. As little as five years ago anyone wanting to register a new business in the province of Ontario took an average of six to eight weeks. At that point registration could only be done by the regular mail system or in person at one government location. Again, I remind you that our Province is more than 1,000 miles from one end to the other, so that was not exactly customer service at its peak. Roughly one half of the applicants were rejected during their first try, increasing the average time

for them to 12 to 16 weeks. To top it off, after the initial registration of the business, the business owners had to go to an average of at least four separate government departments for licences or services specific to their businesses.

Our solution was to create something we called Ontario Business Connects, an electronic business registration system. This has reduced the time for registering a new business anywhere in the province, with automatic data transmission to every other ministry or agency that needs to know about the business, to 20 minutes. The registration can be done at kiosks that we have set up at over 100 locations, particularly malls that have a seven-day-a-week access, or online through the Internet 24 hours a day seven days a week. This service improvement remains one of the best examples of what our Province has done to make the Government work for the taxpayer instead of the other way around. It is part of the reason why a recent Harvard University-World Bank study named Canada as the world leader in the least amount of red tape facing business. I must editorialise at this point by saying that the Federal Government declined to send any information in, and Harvard used Ontario as the Canadian standard, so I will use Canada and Ontario interchangeably in any reference to that study.

I would like to share with you a few of the other things we are doing in Ontario to cut red tape. Ontario was relatively slow at recognising the importance of working hard to create a more efficient and effective public sector. Despite our slow start, we believe we have now made a more disciplined, detailed, thorough and to some extent original assault on red tape than almost anyone else in Canada and, we believe, North America. The Government of which I am a part came into power in June 1995 and shortly thereafter created what we called the Red Tape Commission, which immediately began the task of identifying rules, regulations and red tape that were burdening our businesses, institutions and individuals. The commission's first step was to consult with more than 500 different businesses, industry associations and individuals to identify problem areas as well as to get their ideas on how to cut and prevent future unnecessary red tape. I should note that in these past six years our focus has been on job-killing and investment-impeding red tape. We do not consider measures that protect public health, safety or the environment to be red tape.

Not surprisingly, our surveys found that people wanted government to be more responsive to consumers and businesses and to provide more effective and efficient customer service. Our consultations also resulted in 132 government-wide and ministry-specific recommendations to eliminate and prevent red tape. We have successfully implemented close to 80 per cent of those recommendations so far. It was interesting to hear Mr Banks' presentation because, in a totally independent way - we developed our own regulatory impact and competitiveness test, as we call it, to be applied to all new regulatory measures that have an impact on the business community. This test was designed to help prevent new red tape from being created and, more importantly, we launched the process of changing the very culture within bureaucracy to recognise and appreciate the importance of reducing and eliminating unnecessary burdens on business.

Unlike some jurisdictions that have seen red tape production as exclusively a bureaucratic or private sector-led exercise, Ontario chose to follow the path of

giving the job to a team of legislators. The commission is comprised of six members of Provincial Parliament [MPPs] and one additional non-elected member. In fact, he was a former MPP, who chaired the commission in its previous term. Each of the commission members is appointed by the Premier of Ontario and the commission itself is considered a department of the Premier's Office. We have found that the commission's ability to get answers and change from the bureaucracy was greatly enhanced by having the Premier's stamp of approval attached to its creation. The commission is supported by a group of 10 public servants, something we call the Red Tape Secretariat. Each of 21 different ministries in our government has staff designated as its red tape contacts, who help our small team of civil servants deal with the legislation, regulations, rules and policies housed in each ministry. Again I emphasise that the Red Tape Commission was not designed to somehow stop the publication of new regulations. We are all about good regulation, easy to understand and to work with. Our quest was the regulatory excellence, not uncontrolled deregulation.

An important part of our approach is to try to be especially responsive to the needs of small and medium-sized businesses. We know that large corporations and industry associations are skilled at working with government and have enough clout to make their voices heard in the corridors of power. On the other hand, small to medium-sized businesses, which happen to be the engine of growth in our community, often do not have the same degree of influence. As a result, the commission frequently intervenes on behalf of businesses, institutions and members of the public to ask for assistance on specific red tape problems. We have responded to requests from literally hundreds of businesses and individuals to fix their red tape problems. Sometimes all it has taken is a phone call or a letter to point out the problem to a specific ministry or agency, and sometimes it requires a more detailed briefing to require government departments to reconsider their requirements and their processes. If a case is reasonable, we have the support of the Premier to ask for and demand solutions that address the client's problem.

We continue to actively seek the input of citizens and the business community. We invite members of the public to write, call or visit our web site and to email suggestions to us. I think a copy of our brochure has been handed out. We have taken pains to distribute that through various chambers of commerce and industry associations to a wide range of businesses. I would think at this point the majority of all the businesses in the Province of Ontario have been alerted to the fact that we exist and that we are there to serve them. As we like to say, no Chamber of Commerce breakfast meeting is too early and no conference too far—as proved by this conference—for us to attend and hear first hand how government can improve the way it does business with business.

While dealing with the problems of individuals and businesses is important, sometimes the problem is larger and may require amending legislation or repealing old legislation altogether. The Red Tape Commission works with Cabinet Ministers, Cabinet committees and staff in the individual ministries to identify and get rid of legislation and regulation that is outdated, unnecessary or simply foolish. Since 1995 our Government has cut red tape with quite a determination. Our commission has co-ordinated the introduction of a series of omnibus bills that have cut red tape across government. Since 1995 we have

passed 14 red tape reduction bills. We have repealed more than 61 outdated Acts. We have amended more than 200 other Acts. In addition, we have revoked more than 1,700 unnecessary and outdated regulations.

Our mandate, in fact, calls for the introduction of at least one red tape reduction bill during each regular sitting of the Legislature. The most recent bill prepared by the Red Tape Commission was introduced in May this year and it contains 120 red tape or good government items from 15 ministries. The ideas and items for legislation to repeal or amend come from the ministries and their stakeholders. This tells us two things: first, that our bureaucracy has undergone a cultural shift in recognising the importance of eliminating red tape and, second, that there is still too much red tape to be cut. In fact, we require every ministry to go through an annual red tape reduction plan rather than the commission attempting to go through the literally hundreds of pieces of legislation and 45,000 outstanding regulations. We have challenged the ministries, which, in most cases, had never included sunset provisions as part of any previous legislation that had been passed in our Parliament, to go through and annually determine the relevancy and efficiency of the outstanding regulations and legislation.

While our red tape reduction bills have clearly been successful, the business community and our commission have noticed that the bills perhaps have become too focused on what some might call bureaucratic housekeeping or spring-cleaning, such as minor technical amendments to legislation or regulations or correcting administrative references, and less on the dealing with red tape that truly impedes economic growth, job creation and competitiveness. So, over the last couple of months the Ontario Government has refocused its approach to making government more effective, streamlined and accountable. On the red tape front we are now using a two-track approach. One track is to fight against job killing and investment in keeping red tape, and the other is keeping Ontario's legislative and regulatory regime up to date. The commission has been asked by the Premier to focus its attention on eliminating those job killing and investment-impeding red tape regulations in a far more strategic manner than had been the case before.

I would be the first to admit we were more reactive than proactive and, in most cases, as I mentioned, it took a business or ministry to come to us with a problem. We would then find the solution, but it involved people finding us first. The commission has decided to tackle some major red tape issues that cut across the government departments and economic sectors; issues that no single department in the past has been able to tackle on its own. Over the coming months the commission, affected ministries and industry stakeholders will begin looking at some of the areas that our provincial Chamber of Commerce has identified as the single biggest barrier to competitiveness of business in our province. The first is approving the administration of a provincial retail sales tax, an issue that was identified by the small business sector as absolutely its number one problem.

To give an example, when you buy a forklift truck in our province there are 14 different ways you can determine whether it is taxable. If you move product within your warehouse, it is not taxable. If you move it between two warehouses on your property, it is taxable, unless what you are moving between the two

buildings is raw material, in which case it is non-taxable et cetera. It is small wonder that so many businesses run foul of the taxman and wind up paying outrageous penalties and interest when, with the best of intentions, there is almost no conceivable way you can deal with the complexity of the tax system that has developed over the last century. I would not be exaggerating to say that our implementation and interpretation bulletins alone would stack that high, and there is no business or probably not even any of the large accounting firms that have truly come to grips with the overall complexity and can give their customers the best possible advice.

Clearly, this does not serve the business community and it does not serve government well. More than anything else, it has probably promoted a willingness to find ways to circumvent those laws. When policies are too difficult for even the Government to understand, we can hardly look askance when someone in the private sector decides to find ways to make their life simpler. So, working with the Ministry of Finance and with the full authority of the Cabinet, we have been given the power to review the administration of the sales tax over this summer. We are going to reduce the complexity and improve customer service while ensuring greater tax compliance.

Our second major project is to reduce the paper burden for business by reducing the number of forms and increasing the availability of electronic forms. We did a survey of all outstanding laws and regulations in the province and identified 1,500 forms that were provided in the regulations. Those are the legal forms in the province of Ontario, and even then 1,500 sounds like an awful lot. However, a quick survey of the various ministries and agencies has so far, and we are not finished yet, determined that there are in fact 40,000 different government forms are being used in our province. We think the final number, when we include all of the various agencies, will double that. It is a ridiculous number and, obviously, one that would make it almost impossible to develop electronic access to eliminate the need for any business or individual to go into a government office or that of an MPP to avail themselves of a form. Survey results have shown that a typical small business in Ontario spends six hours per week doing paperwork for the three levels of government: Federal, provincial and municipal. I have told you already about the 40,000 different forms; Cabinet has given us authority to reduce those forms and the time it takes to fill out government forms by, wherever possible, allowing for e-commerce. This will allow small business to focus more on what it does best: attending to the business, creating jobs, creating wealth. At the same time we intend to make data collection more efficient, effective and faster and allow for greater migration of that data between government ministries.

The third project we have taken on is something that might not be seen as naturally a regulatory review function, and that is improving highway incident management. Here again we identified the major problem to solving road impediment issues was that intrajurisdictional problem where the province in most cases build the roads and maintains a provincial police force, but any time that road goes through a municipality, of course the municipal police force, fire service and ambulance operate to their different codes and procedures. We have identified that the traffic incidents on our highways is costing our society somewhere in excess of $500 million a year. Highway 401, which cuts through the middle of the city of Toronto, is in fact by volume the busiest highway in the world.

So, you can well imagine what a one-hour closure of that highway will cost businesses, particularly the trucking industry. We have decided to find the solutions even if that means provincial legislation of the way ambulances, fire departments and municipal police services operate.

So far we have been able to find examples of possible solutions throughout the world, including Chicago, which has implemented a public process of removing accidents to clear highways in an average of nine minutes. I can assure you that we are far off that standard in Ontario. But again the commission saw this as an opportunity to deal with the root problems that were impacting on Ontario's ability to be the most competitive and lowest-cost jurisdiction in North America. The success of our efforts in eliminating major red tape will mean significant savings for the Government, taxpayers and businesses across the economy. Over the long term the commission and its partners are going to conduct public consultations to identify and fix major red tape challenges across the entire business sector. The three projects we propose to start in September will deal with everything affecting rural businesses, everything affecting auto manufacturing, which is our number one industry in the province, and everything affecting transportation and shipment of goods, regardless of the mode.

As you can see, we have a lot of work ahead of us. As important as it is to deal with the elimination of existing red tape, we also work with government ministries to make sure they do not add any new red tape. We have heard from Mr Banks and, as many of you can already boast, we have followed a path now of implementing a far more strict regime in the review of any proposed new regulation. Prevention is often conducted behind the scenes, invisible to our constituents, but we believe prevention of further red tape is essential. How can you stop a boat from sinking unless you first plug the hole where the water is coming in? No amount of bailing is going to compensate if you do not first deal with the root problem.

We all know that it is far more difficult and expensive for us as governments to correct mistakes than it is to avoid them in the first place. We spend a considerable amount of our time and effort reviewing proposed legislation and regulations to ensure that new red tape is not being created as quickly as we eliminate existing problems. To that end, the Premier took the somewhat extraordinary step when the commission was created to order that nothing could go to Cabinet before it had first been reviewed by the Red Tape Commission. We are quite unique in Canada and again I believe in North America in that regard. While we have now come up with the new regulatory test that I mentioned earlier as a further evolution, even at a very anecdotal level and before we had put in place formal structures, the Premier had guaranteed that a group of members, backed by civil servants able to do any amount of research that they were requested to do by those MPPs, would be the sounding board for any proposed legislation or regulation that went to Cabinet.

The Premier recently reiterated his commitment to the process and in fact demanded that Cabinet Ministers give even greater time to the commission to review significant pieces of new legislation or major regulatory change. A number of years ago we introduced the first version of our regulatory impact and competitive test—RICT—that ministries were asked to complete when proposing

new regulations. While the RICT has been helpful in the fight against red tape, the voluntary nature of the test when it was created meant that some ministries had chosen not to complete it as part of the regulatory development process. I found it interesting to hear from Mr Banks that, not unlike our jurisdiction, the Ministry of Health was the least co-operative and least able to deal with providing a business test for proposed regulation. I can assure him that it seems to be a universal problem, and certainly one that we are facing.

So, the commission has taken upon itself the development of a new business impact test [BIT] to address some of our concerns about the RICT. The BIT is a two-stage test that will greatly assist the commission in focusing on its core mandate of dealing with those regulations that have the potential to have a negative impact on business and Ontario's economic competitiveness. The first stage of the BIT is a simple screening of all regulatory proposals to identify those that have a high probability of impacting negatively on business. This first screen is purposely simple, fast and easy to do. Its purpose is solely to highlight regulatory proposals and to ensure that if appropriate they continue along the approval process. For the regulatory proposals highlighted by the first stage ministries will be required to complete a more fulsome BIT report.

The second-stage review focuses on ensuring that the Ontario Government does not use its regulatory powers to get in the way of businesses and industry, unless there is clear evidence that a problem exists, government action is justified, regulatory action is the best alternative open to their Government, the benefits outweigh the costs and stakeholders have been properly consulted and the views poorly presented and addressed. The new BIT will be compulsory by the end of the summer for all ministries. The BIT will be completed prior to any regulatory proposals being scheduled for consideration by any Cabinet policy committee. We are giving serious consideration to enshrining the BIT in legislation; and, again having heard the success of various Australian governments, it is an even greater likelihood coming after this conference.

By capturing only the items that ought to be looked at in detail and then applying the appropriate test we believe we can prevent red tape from creeping into new legislation and regulations. The BIT will ensure that the costs and benefits of proposals are assessed rigorously and that implementation and compliance support the Government's objectives and promote good customer service. An important but often overlooked element of our work is challenging ministries and their agencies, boards and commissions to undertake sunset or performance reviews of their policies, legislation or regulations to ensure that they are still relevant and effective. As part of our efforts, we require all ministries to prepare annual red tape reduction plans, as I mentioned earlier.

Let me give a couple of quick examples of some of the things we discovered. A couple of years ago, the commission's first bill dealt with something called the Oleo Margarine Act 1956 that said margarine could not be the same colour as butter. More importantly, because the customer could not be trusted to be able to spell, you were not allowed to use a dairy scene of any kind on a margarine package. When our Government was elected the previous Government was losing $11 billion a year. I say that only for the benefit of an international audience because it was certainly well known in Ontario. One of the things we

discovered when we reviewed the regulations of the Ministry of Mines was that the previous Government had mandated that when you are filling in your claim form, if you were starting a new mine in Northern Ontario, you had to use red ink. We joked that they used to get a volume discount buying that colour ink, but still it was ridiculous to suggest that government should tell you what colour pen you should use to fill out a form.

Some of our changes dealt with even more frivolous and historically relevant but perhaps now anachronistic aspects of doing business in the province, including one dating from a time when our buses were all built with wooden floors and they had no rear safety access. Until a couple of years ago it was still law in the Province of Ontario for buses to carry an axe. However, that presented a problem when a bus hit the United States border, if it was a Greyhound or one of the other bus lines that frequently cross over at Niagara Falls or at Windsor, because the Americans considered an axe a dangerous weapon. Of course, guns are okay, but an axe was a dangerous weapon. The bus driver would be forced to get out of the bus, hide the axe in the bushes somewhere on the side of the highway, and pick it up on the way back.

Obviously, that is the sort of thing that we joke about here, but that was on the books. That is precisely what these red tape annual reduction plans have helped us to identify. That is probably not the sort of horror story that we will hear from Peter Nagle about the overall complexity of regulations, but we have dealt with 1,700 different irritants of that nature. So the Red Tape Commission plays an active part in reviewing every ministry's business plan to ensure that the red tape reduction plan is strategically and systemically focused on eliminating and preventing future red tape. That will involve creating a schedule in which the ministry submits it legislation, regulations and policies to sunset or performance reviews. We have just completed one-on-one meetings with senior staff from all the different ministries regarding their plans for this year.

The exchange of ideas and information was rewarding and our game plan for reducing red tape now and in the future has become stronger and even clearer. The activities of the Red Tape Commission that I have presented to you today represent more than six years of work on the part of our Government to tackle excessive government red tape that has been building for more than a century. We know that we are yet to challenge a lot of major issues, but we also know that we are on the right track. We believe that by listening, by reviewing and by responding to the concerns that we hear from business we will make their lives a lot easier and lot more profitable. We have also provided in that small pamphlet a web site address. I invite delegates to access that web site to see how we have tried to make the involvement of the public as easy as possible by providing an interactive form. Access to the Commission takes no more time than it takes to key in a problem that is vexing you and to note the relevant ministry. At the press of the send button, that problem is received by one of our staff and that staff member will start reviewing that concern literally the next business day.

Again, I thank you for the opportunity to share a bit of what has happened in Canada. I blush when I hear about Australia's accomplishments in formally legislating for this sort of process, but we are playing catch-up. I look forward to talking with you throughout the conference about the ways in which we can share

ideas that have been developed in our different jurisdictions. I think we have a lot to learn from each other. I appreciate the opportunity of sharing a few words with you today. Thank you.

CHAIRMAN: Thank you, Steve. Before we adjourn I will permit one or two questions or comments.

The Hon. Richard WORTH: Steve, how much of your time as a legislator is actually spent on this task?

Mr GILCHRIST: As a result of the mandate we have been given to initiate new reviews it will probably be the single biggest requirement of my job. The fact that we have a group of six different legislators has given me the flexibility to develop six different major reviews. Each MPP will be assigned as the overseer of one of those reviews. We have the ability as well to second whatever amount of staff we need from any other ministry. When we look at the tax issue, for example, we will have the power to take Ministry of Finance staff under our wing and assign them specific projects. Having said that, at least two days of my week are already fully dedicated to red tape projects.

Out of all this there is one step that we have not taken but that we are seriously considering. Over the years we have debated the traditional ways of looking at government by ministry and by the specific policy that we are trying to implement as opposed to the types of services being provided. For example, we have developed a shared services policy. At present each ministry does not have pay functions and legal functions; they have all been moved into one office. Then they are shared to all the ministries and they are billed appropriately. The question that is developing is whether something like red tape should be formalised by the creation of a ministry that does nothing but oversee past efforts, implement the business impact task and administer it in the future. In the meantime, for my colleagues and I, this will be our single biggest task. I am excited at the fact that the Premier has literally given us the power to initiate these reviews. It has developed a healthy new respect for the commission in the eyes of a lot of civil servants.

CHAIRMAN: When dealing with some of the government departments that were reconsidering requirements and processes, what were some of the things that were used to determine whether those processes were excessive or lengthy?

Mr GILCHRIST: The simplest test to which we put them—as Gary Banks said earlier—was to force them to identify all the various options and then, as a result of that, to determine whether the status quo was the option that met the test by forcing them to go through a cost-benefit analysis in the way in which we dealt with a specific problem. I did not mention that, in addition to 1,700 regulations, we have eliminated dozens and dozens of fees and taxes. In the course of that review we identified that it was actually costing government more to collect a specific fee than what we were receiving in revenue. So, unfortunately, there is no simple answer to your question. We challenged some of the ministries, such as the Ministry of Health, to go through a wholesale review of everything to do with how it was delivering services. Because there are so many stakeholders involved in that ministry, that process was far more complex than the process carried out in

some of our smaller ministries, which was to simply have the commission go through it. We read the outstanding laws and we came up with the solutions.

CHAIR: Thank you very much. I thank Steve for sharing with us what he and his colleagues are doing in Canada, as he aptly put it, to make government work more efficiently through the tax sphere.

[*Short adjournment*]

REGULATORY HORROR STORIES—AUSTRALIAN AND INTERNATIONAL

CHAIRMAN (Mr Peter Pike): I feel a bit of a fraud in chairing this session, because I am to introduce Peter Nagle, whom we already know through being our host. He is to speak on regulatory horror stories. Peter is Chairman of the Regulation Review Committee of the New South Wales Parliament. He has been the member for Auburn since 1988 and has been Chairman of the Committee on the Independent Commission Against Corruption and Chairman of the Legislative Assembly Parliamentary Ethics Committee. He is a barrister of the New South Wales Supreme Court and the High Court of Australia. Peter's policy interests include law and order, police, education, transport, tourism, anticorruption, ethics and the Australian legal system. He has been an extremely welcoming host to all of us here in Australia—certainly to me, this being my first time here. Peter, we are grateful to you for being such a good host to date.

Mr Peter NAGLE: When the world forum was in Melbourne there was a massive riot. The police, on their horses, charged the demonstrators and arrested various of them. One of them had made some very foul comments to precipitate being arrested by the police. When the matter went to the magistrate, the prosecutor laid out his case and said that the words were so vile he could not really speak them, so they called the sergeant to give the evidence. The sergeant said the words were so vile that he could not speak them, but he would write them down. The words were written on a sheet of paper, which was passed to the magistrate. It was then passed to the defence counsel, and then to the prosecutor. Everyone was really shocked.

At the end of the case, in which the defendant refused to give evidence, the Crown said, "This is a case that we cannot lose, Your Worship. He is guilty." His Worship said, "Well, I don't think so." The Crown asked, "Why?" The magistrate said, "Because when I read those words I can only conclude that he was talking to the horse." The reason I tell the story is that that is basically how people get around the law.

I chose the title for my paper after I was shown a site on the Internet published by a body in the United States called "Regulation Org". This site contains regulatory studies, statistics and information which, it says, "facilitates a better understanding of the complexity of the regulatory state." Under the heading "Regulation Horror Stories & Outrages" I noticed that there were references to several books with rather lurid titles: *Strangled by Red Tape*, published by Heritage Press; *Shakedown: How the Government Screws You From A to Z*, by James Bovard, published by Viking Press; and *The Death of Commonsense: How Law is Suffocating America*, by Philip K. Howard, published by Random House.

I was given a copy of the last book when I visited the United States in 1999. I had hoped that the author Philip Howard would be able to join us today, but unfortunately he has other commitments, namely, he has written another book looking directly at Federal Government bureaucracy, and I await my copy. In his book, Philip outlines a number of examples of regulations that are out of step with

the practicalities of modern life. I would like to mention a few that I raised as the Chairman of Australian Scrutiny Committees last year, which I think bear repeating:

> In the winter of 1998, nuns of the Missionaries of Charity (Mother Teresa's group) were walking through the snow in the South Bronx in their saris and sandals to look at an abandoned building that they might convert into a homeless shelter. Mother Teresa, the Nobel Prize winner and head of the order, had agreed on the plan with Mayor Ed Koch after visiting him in hospital several years earlier. The nuns came to two fire-gutted buildings on 148th Street and, finding a Madonna among the rubble, thought that perhaps providence itself had ordained the mission.
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> New York City offered the abandoned buildings at $1 each and the Missionaries of Charity set aside $500,000 for the reconstruction. The nuns developed a plan to provide temporary care for 64 homeless men in a communal setting that included a dining room and kitchen on the first floor, a lounge on the second floor and small dormitory rooms on the third and fourth floors. The only unusual thing about the plan was that Missionaries of Charity, in addition to their vow of poverty, avoid the routine use of modern conveniences. There would be no dishwashers or other appliances; laundry would be done by hand.
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> For New York City, the proposed homeless facility would be (literally) God's send. Although the city owned the buildings, no official had the authority to transfer them except through an extensive bureaucratic process. For a year and a half the nuns, wanting only to live a life of ascetic service, found themselves instead travelling in their sandals from hearing room to hearing room, presenting the details of the project and then discussing the details again at two higher levels of city government. In September 1989, the city finally approved a plan and the Missionaries of Charity began repairing the fire damage.
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> Providence, however, was no match for the law. New York's building code, they were told after almost two years, requires an elevator in every new or renovated multi-storey building. The Missionaries of Charity explained that, because of their beliefs, they would never use the elevator, which also would add upward of $100,000 to the cost. The nuns were told the law could not be waived even if the elevator didn't make sense.
>
> Mother Teresa gave up. She didn't want to devote that much extra money to something that wouldn't really help the poor. According to her representative, "The sisters felt they could use the money much more usefully for soup and sandwiches." In a polite letter to the city expressing their regrets, the Missionaries of Charity noted that the episode "served to educate us about the law and its many complexities".

Philip Howard goes on to refer to obsolete design rules which have little place in modern America, and states:

> Have you ever noticed how new housing subdivisions have an open, almost empty look? It isn't just the absence of trees. The streets are 50ft wide, about 50% wider than streets were a few decades ago. Why? Because the traffic engineers who wrote the standard code after World War II believed that streets should be wide enough to allow two fire engines going in opposite directions to pass each other [without crashing] at 50mph.
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> Andres Duany, a Miami architect who specialises in designing new towns, maintains that the traffic engineers have thereby depleted human interaction and fellowship from modern America. He calls them "the devils". The two-fire-engine rule did not evolve because it was sensible or by amazing coincidence of judgment by town boards around the country. It was part of a model code that was accepted as "modern", and cities and towns fell before it like dominoes. Once the words were designated as law, there was no longer a need to think about it. Almost no-one who builds new houses today knows why the requirement is there. Nor do bureaucrats. They abide by it because they have to. It's the law.

I give this final examples from Philip Howard's book:

> In the late 1980s Dr Michael McGuire, a senior research scientist at UCLA, found himself in trouble. His lab, which sits on 5 acres, is funded by the Veterans Administration. Its lawn needed to be cut. When the lawnmower broke, Dr McGuire decided to go out and buy another one. He filled out no forms and got no approvals. He also told VA mechanics they could use the broken lawnmower for spare parts.
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> During a routine audit, the federal auditor asked why the lawnmower was different. Dr McGuire told the truth, and thus launched an investigation that resulted in several meetings with high-level federal officials. "I couldn't understand," Dr McGuire notes, "why important agency officials would spend this time in this way." Finally, after months, they rendered their findings: They could find no malice, but they determined Dr McGuire to be ignorant of the proper procedures. He received an official reprimand and was admonished to study VA procedures "about the size of an encyclopaedia".
>
> Dr McGuire has not yet achieved the proper state of attrition: "I guess I made the egregious mistake of tossing a broken federal lawnmower." One other fact: Dr McGuire bought the lab's lawnmower with his own money.

I am sure we can find equally inappropriate bases for regulations in our own jurisdictions. This is not to say that there may not have been good reason for designing regulations in this form when they were first introduced, but logic tells

us that they need to be regularly reviewed to ensure that they remain relevant to the current social and legal framework. That is the purpose of the staged repeal programs in a number of our jurisdictions. Apart from staged repeal of regulations—otherwise known as sunset clauses—we have the requirement for the preparation of regulatory impact statements in New South Wales and a number of other Australian jurisdictions.

I have included in this paper some web site addresses that delegates can access. I will not give those addresses at this point, but they will be published in the paper. That will give a good insight to information on regulatory reform and management. Of course, the reliability of the source material must always be thoroughly checked, but there is no better tool for getting an instant snapshot of the available data than the Internet. I could discuss a major problem with the Internet, but I will leave that for you to look at. It is quite interesting that the United States Government outsourced its Internet system.

There are horror stories regarding what happens in other jurisdictions. One is a regulation that says that if you walk slowly across a pedestrian crossing you can be fined $A55. The question in law then is: What is the definition of "slowly"? Who is going to infringe the person walking slowly? What is the appropriate speed when walking across a pedestrian crossing? What of elderly people or the disabled? These questions lead to absurdity, because that regulation really cannot ever be enforced.

In the State of New South Wales we have three types of traffic indicating signs. They are: No stopping, no parking, no standing. "No stopping" means that a motorist may not stop in any circumstances, except if held up in a line of traffic. "No standing" means you may stand to set down a passenger or pick someone up, but you cannot park. And "No parking" means no parking, but you can stay there for about five minutes before being moved on. The combined transport Ministers of Australia, in their wisdom, decided to have two signs instead of three—that is, "No stopping" and "No standing", and that "No parking" was to go. The estimated cost of eliminating that sign, if done quickly, would be between $20 million and $30 million. If done over a period of seven years, it would be between $4 million and $5 million. There is no need to change those signs, because they have three distinct meanings. However, the national scheme concept dictates it is best, in the interests of uniformity, that this should be done.

I will give you an idea of the absurdity of the bureaucracy. Let us call this woman Mrs X and let us assume that she is a senior executive of some government department overseas. She has a baby—congratulations to her, the father and the baby—whom she brings to a paediatrician for an examination. It is raining when the parents leave the paediatrician's surgery so they try to hail a taxi. A number of taxis pull up, but none of them has a baby capsule. The taxi that they hired originally to bring them into the city was specially equipped with a baby capsule. Mrs X returns to work and proceeds to write a regulation that says that all taxes must be fitted with baby capsules and child restraints. Half the taxis run on LP gas and have LP gas cylinders in their boots—the rear of the vehicle—so they have just enough room to store their passengers' luggage. When baby capsules and child restraint seats—which must be stored in the boot—were made compulsory in all taxis, the regulation created the absurd situation whereby no

luggage could fit into the boot. In this case, the taxi drivers went berserk and the regulation was revoked.

Unless parliamentary committees such as the Regulation Review Committee, which derives its powers from the New South Wales Subordinate Legislation Act 1989, investigates this type of legislation or regulation, people who are totally unaccountable to the electorate can make regulations that, at the end of the day, will affect the Government and its chances of re-election. Bureaucrats are never called to answer or to provide an excuse as to why they should create a regulation except for the fact that under our legislation they must prepare a compulsory impact statement stating the reasons why a particular regulation should be implemented. Our Committee then examines the regulation. Our Committee comprises eight members: four government members, three Opposition members, and one Independent member. We also have four staff members. An enormous number of regulations are introduced in this State, so it is difficult for the Committee to assess every one as to its veracity and necessity—unless someone like Greg Hogg has a good grasp of the issue and is able to highlight the problems and bring them to our attention.

You may have heard of legionnaire's disease, which is named for the ex-servicemen's conference in the United States where it was first identified. In 1990 or 1991 my predecessors on the Regulation Review Committee directed the New South Wales Department of Health to re-examine the requirements of cooling systems in air-conditioning units because of the legionnaire's disease problem. At a recent inquiry into the new regulations on behalf of the Department of Health it was discovered that that recommendation had been totally ignored. Despite the fact that many people had died not only in this State, but in Victoria—I told you that I would mention Victoria eventually, Mary—and in other States, the regulation was never taken on board. When questioned about the matter, the reply came, "We'll do it in our new revision". It has now gone further than that and the matter is being addressed as a separate item.

Every regulation that comes into being has either a benefit or a detriment depending on whom it benefits and whom it disadvantages. The Committee recently reported on harness racing—or trotting, as some delegates may know it. Horses are harnessed to sulkies that are raced around a track, and punters bet on the result. Like me, they sometimes make money and they sometimes lose money. It was argued that the Department of Gaming and Racing might have attempted to get around the Subordinate Legislation Act by privatising the rules and allowing regulations to be made through the use of rule-making powers. These rules denied natural justice by denying those who were accused of horse fixing the right to any legal advice or legal representation during the hearing of their case by lawyers. One consequence of this denial could be the loss of the right to earn a living. The rule is that whoever brings a horse with more than the prescribed dose of TCO_2 to a racetrack is guilty of an offence.

There are good arguments as to why lawyers should not be allowed to participate in the process due to the complexity of legal argument, time constraints and the cost of such an action. However, at the end of the day, a trainer could lose his or her livelihood and, as a consequence, suffer enormous financial damage. I draw delegates' attention to two relevant cases, the first of

which occurred in New South Wales. A trainer, Mr Turner, had been in the harness racing game for more than 50 years and had never had a black mark against him. However, one of his horses was 1 per cent over the prescribed limit and Mr Turner—an icon of trotting in this State—received 12 months suspension from racing. The other case involved a Queenslander whose horse was also 1 per cent over the limit. That trainer was also suspended for 12 months for what they call "milkshaking" a horse. I will not go into the details now; we might discuss it tonight at the networking function. His wife was a trainer and, while she and their children were allowed to remain at the matrimonial home on the farm, he could not live there—he could not even visit his home. That trainer was forced to live two or three miles up the road at his in-laws' place for 12 months because he had no way of appealing the decision against him.

Our Committee recently reached a decision about this matter, and made certain recommendations. Thanks to Greg Hogg's research abilities, we discovered that the rule-making power was ultra vires and absolutely void for certain reasons—I will not get into the technicalities of the matter. We were told that we were wrong, but we knew that we were right: the rule was invalid because no regulation could be made. The bureaucrats would not acknowledge that and recently tried to sneak an amendment into the miscellaneous reforms provisions legislation to get around the problem that they deny exists and to make the power retrospective because anyone who has suffered under this bad rule—the regulation could not be made because it was ultra vires—in the past four years is entitled to sue. However, certain people made sure that that did not happen—and my chances of becoming a Minister in any future Labor Government look pretty bad. But that is another story for another day.

Another example is the anti-gazumping laws of the early 1980s. Anti-gazumping prevents a prospective purchaser of a property from losing out to another buyer who makes a better offer at the last minute. The Committee and others argued that the regulation regarding forms was invalid because it was ultra vires the legislation. The matter was taken to the Supreme Court of New South Wales where it was argued that the regulation in regard to the forms that had to be utilised in the anti-gazumping legislation dealt with an issue that was invalid. The court then had to determine—and the Committee had to consider—the question: If the clause was invalid, could it be severed from the legislation? As the clause was fundamental to the whole gazumping legislation, if it could not be severed from it, what would be the consequences for the entire regulation? If the whole of the regulation were invalid and the whole basis of the regulation was based upon the legislation, was the legislation itself invalid also? If both the legislation and the regulation were invalid, they would be unenforceable—goodbye legislation, and away it went. Once the clause was determined to be invalid and could not be severed from the regulation—which was based upon the structure of the legislation—both the regulation and the legislation were invalid.

We all have a fondness for national and marine parks. I commend the Premier of New South Wales, the Hon. Bob Carr—a good mate of mine—for creating not only national parks within the State of New South Wales but marine parks. The regulation was introduced to establish the conditions for creating marine parks, but at the time there was no proclamation by government as to what areas would be designated marine parks. As I said earlier, every regulation

must have a regulatory impact statement. In the absence of any indication as to where the parks would be proclaimed, there could be no assessment of the impact of any such declaration or proclamation, and therefore the regulation had to be invalid. The regulation was created but they forgot to create the parks.

Another example is Sydney airport, which most of you came through when you arrived. As you came through the airport you would have seen various shops. Those retail shops were redesigned because of the Olympic Games. We extended the airport. We made it into a beautiful airport for the Olympic Games. Prior to the Government wanting to extend and revamp the airport, there were retail leases which had the effect of coming under the Retail Leases Act. Anyone who is in the business of retail shopping comes under the Retail Leases Act, which controls the way in which leases are created and the abuse of the lessor against the lessee.

The Government introduced a regulation which effectively permitted the airport authority to bypass the Retail Leases Act and to put conditions on leases or to terminate a release. However, there was a sunset clause which was later found to be invalid. The situation was that the airport wanted to extend the exemption clauses permanently, so every other business and shop with a retail lease would come under the Retail Leases Act except the businesses and shops at Sydney airport. We put an end to that as well. However, when the regulation was being created, no-one thought through as to the consequences of this invalid sunset clause. Those are some of the problems that you have to face when you are looking at various aspects of the regulations.

It is incumbent on my Committee to be ever vigilant and, as I suggested in an article in the Commonwealth Parliamentary Association's quarterly magazine, *Parliamentarian*, the Premier is the gatekeeper for good regulatory form and management. Recently I had the honour of representing the Premier at the annual general dinner of the conference of AUS.cid, which represents infrastructure bodies throughout Australia, in regard to its annual conference. I was asked to read out a message from the Premier of this State to the conference. The conference had created its 2001 Australian infrastructure report card, which dealt with the issues of infrastructure generally throughout Australia. It also had a communique from the members of the Australian Infrastructure Report Card Alliance.

One important issue in the report card was that of regulations at 1.3.1. The report card said that during the research undertaken for this report card a number of significant regulatory impediments were identified that retarded the management, maintenance and development of Australia's infrastructure. Major concerns are inconsistencies between States in the application of the regulatory framework and difficulties with competition reform. Where infrastructure regulation is under State legislation, each State has a slightly different view and approach, which increases compliance costs, reduces interconnectability and results in differing objectives and legal frameworks.

The conference noted that the Premier of Victoria had highlighted the lack of co-ordination between levels of government and had called upon other States to move away from competing for investment and to create a single regulatory climate for business in the rail, gas and transport industries—a view that I endorse. One example of the lack of consistent approach by the States was seen in train radio systems. Prior to the late 1950s and early 1960s, Australian States had their own gauges of line, that is, the gauge of railway tracks in New South

Wales was different to that for the tracks in Victoria and, I believe, the tracks in Queensland and in South Australia.

Therefore, if you were travelling by train from Sydney to Melbourne you would travel to the Victoria-New South Wales border town of Albury wherein you would then cross the platform to catch the Victorian train to Melbourne. But by the end of the 1950s and early 1960s the gauges had become one. However, even with a national standard gauge network there are incompatibilities, and that is seen with train radio systems. For example, a train crossing the country from Brisbane to Perth via Sydney, Melbourne and Adelaide would require 11 different radio systems because of the regulations that govern radio systems. There is no uniformity.

Also, with the three tiers of government—namely, Federal, State and local—there are currently differing concepts of environmental requirements for infrastructure. This involves infrastructure developers in excessive overlapping and sometimes contradictory approval processes. Various mechanisms have been introduced to overcome these hurdles, including the Federal Government's intervention through the Council on Australian Government [COAG] and National Competition Policy. However, the report states:

> Regulations and processes should support infrastructure investment, whilst protecting consumers and others from any anti-competitive behaviour. Unfortunately, overall, there are numerous examples of problems with national reforms hindering investment and competition.

The report goes on. At 1.4 the conference dealt with future directions, and it made a number of excellent recommendations to the provisions of infrastructure which overcome the problems at all levels of government. Therefore, regulations must play a significant part but also in the national context. My article in the *Parliamentarian*—I will make sure everyone gets a copy of it—deals with national scheme legislation, and I will come back to that later. There are many other difficulties and horror stories, one of which deals with the Parliamentary Counsel. From the outset let me just advise you that we have an incredibly efficient and excellently run Parliamentary Counsel office. The function of this office is to prepare legislation and regulations to meet the standards required by the Legislature and the Executive. In so doing, it has an enormous task.

In the past eight years that task has become exceptionally difficult because of the growing number of Independents in both the Lower House and the Upper House with all their little pet projects that they wish to have passed in Parliament. No doubt some people will discuss that comment with me later. Many of their pet projects are called up but very few are chosen to be passed by the Parliament by either the Opposition all the Government. Nevertheless, the burden of preparing that legislation and regulations rests upon the Parliamentary Counsel. The Parliamentary Counsel is subject to the legislative document, the statute, and therefore must act in accordance with the statute and the policy document referred to it by the Minister. For example, in 1993 the Regulation Review Committee considered the following regulation: Traffic Act 1909—Regulation (Relating to bus lanes). The regulation stated:

> The Motor Traffic Regulations 1935 are amended:
>
> (a) by omitting from Regulation 54 (6) (z) (i) (f) the matter "paragraph (aal)" and by inserting instead the matter "paragraph (aal) or (aa2)"; and

(b) by inserting after Regulation 54 (6) (aal) the following paragraph:

(aa2) the words "bus lane crossing permitted" (with or without the addition of words or figures denoting distance) mean, and the direction represented by the traffic control sign on which they appear is, that despite the provisions of paragraph (z) the driver of a motor vehicle which is approaching the traffic control sign from the direction in which it is facing and along the traffic lane which is adjacent to a bus lane (as referred to in paragraph (z)) above or on which the sign is erected, displayed or marked may, between that sign and the next traffic control sign facing the driver on which appear the words "bus lane crossing zone ends", drive the vehicle across the bus lane for the purpose of gaining access to another traffic lane, provided that the crossing is made in accordance with the Regulations and may be made without the danger of a collision.

If I ever leave the Parliament you can be certain that I will make a fortune from defending people under that regulation. The explanatory note to the regulation stated that its purpose was to enable drivers not generally authorised to use bus lanes to cross them in accordance with relevant traffic control signs to gain access to adjacent lanes. While the explanatory note was quite clear, the Committee found the regulation itself incomprehensible and anything but plain English. It failed most of the practical tests for plain English adopted by Parliamentary Counsel.

Parliamentary Counsel applies the following five principles in his office on that day-to-day basis. First, a regulation should avoid long provisions. His office adopts a rule of thumb that a separate provision should not contain more than five lines. I give that a big tick. Secondly, it should avoid unnecessary paragraphing and subparagraphing. Another big tick. Thirdly, it should avoid cross references. Another big tick. Fourthly, does the regulation yield its meaning? Consider redrafting provisions that do not yield their meaning, at least in a general way, on first reading them. A big tick. Fifthly, wood for the trees—consider amending minor provisions to a more out of the way part of the regulation so that the wood can be seen for the trees.

The main reason given by Parliamentary Counsel for the failure to adopt plain English in this case was that the enabling provision in the Act was so drafted as to require this form of convoluted expression. That was a long time ago, under the old Traffic Act. You will be pleased to hear that the old Act was replaced by a whole new package of national scheme legislation designed to implement uniform provisions in the Australian States and Territories. That must be better. The Chief Magistrate of New South Wales said this to our Committee in response to a request for a submission on the new regulations in 1999:

I refer to your undated letter inviting comments on the Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999, the Road Transport (Safety and Traffic Management) General Regulation 1999 and the Road Transport General Regulation 1999. It is understood the regulations will come into effect on 1 December next and that they will repeal the Traffic Act 1909 and regulations, and that the Road Transport (Safety and Traffic Management) Act 1999, the Road Transport (General) Act 1999, and the Road Transport Legislation Amendment Act 1999 will commence on the same day. This legislation follows the Road Transport (Driver Licensing) Act 1998 and the Road Transport (Driver Licensing) Regulation 1999 which commenced earlier this year.

Therefore it appears that from 1 December next, the courts, legal practitioners and the general public will have to refer to at least eight sources to ascertain the traffic law in New South Wales. The fundamental matters of the penalties for serious traffic offences, the automatic disqualification for such offences and the consequences of driving while disqualified, cancelled or suspended are to be dealt with in three separate pieces of legislation.

Now it is proposed that the penalties and disqualification for serious speeding offences be contained in the Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999. The practical result is extremely unfortunate.

The Traffic Act 1909 had been much criticised for its complexity and confusing drafting, but at least the basic sources of law affecting road users were to be found in one legislative instrument. It is recognised that the drafting of the new legislation is improved and the legislative and regulatory scheme to be implemented is reflecting an attempt at a national approach to traffic law and road rules. But even before its commencement, this

> legislative framework is seen as leading inevitably to confusion and error. Such a prospect is completely unsatisfactory when the implications of these laws for the community are considered.

When we held our inquiry into the regulation, the police considered that it was virtually unenforceable as ordinary police officers could not seem to cross reference the different pieces of legislation. We now have the benefit of extensive discussions with the RTA and the police, and they have now provided a solution about the problem. Those are just a few of the stories you have to deal with. You should always remember that with every regulation that comes out of the constitutional document, that is, the statute, at the end of the road there is someone who has to deal with it. Someone will get a benefit from it or someone will suffer a detriment, and in most cases it will be a detriment. Therefore, if it is not done correctly, the consequences can be enormous.

I refer you to what the Chief Justice of Australia and the Chief Justice of New South Wales said yesterday: At the end of the day it is the ordinary people, the voters, who will suffer as a consequence of poor drafting of policy by Government departments. When it becomes difficult for anyone to deal effectively with a regulation, then that can have horrific consequences, such as we have seen in harness racing. I could give you many more examples, but hopefully the ones I have referred to will give you some idea of what has occurred and is happening not only in this State but throughout Australia. Finally, I simply say this is: Reread the speeches made by the chief justices because I think that is where the conclusion lies.

CHAIRMAN: In your speech you referred to taxis. Anyone who has been in a London taxi will know that the front space next to the driver is officially for hay, and it is still there for that now. There does not have to be any hay there because in theory the horse could have eaten the hay, but in this day and age you still have to have a place for the hay. Mr Nagle spoke about LPG, so Australia has moved on a lot further than has London. Are there any questions before I vacate the Chair? It looks as though there are not.

Mr NAGLE: That is a unanimous decision.

CHAIRMAN: The conference delegates are giving Mr Nagle an easy mind. Mr Nagle said that he is a lawyer and a lady also said that she is a lawyer: I am certainly not a lawyer. One comment I repeatedly made during my term as a member of the House of Commons, especially to various Ministers, has been that I always think that lawyers in Parliament legislate to make sure that other lawyers can make a lot of money out of interpreting what the law says. I think we have added to that.

CHAIRMAN (Mr Richard Worth): I welcome delegates to the third session and I also welcome Ms Sue Holmes who is leading this session and who will speak on the role of Parliament in ensuring the quality of law and regulation. There is much that I could say about Ms Holmes but I content myself with these observations. She certainly has a multi-State background. She was born in Brisbane, educated in Sydney, worked in Canberra and her parents come from Western Australia. She obtained her undergraduate qualifications in Sydney and completed her university training with a master's degree in econometrics from Southampton. She lives, romantically, in Paris and her current responsibility is as Administrator for the Regulatory Management and Reform Public Management Service [PUMA] as part of the OECD. PUMA studies how governments organise and manage the public service and it identifies emerging challenges that governments are likely to face.

Prior to that position, Ms Holmes worked in the Australian Commonwealth Office of Regulation Review and the Productivity Commission. In addition, she has worked briefly with the American Bar Association and assisted "Nugget" Coombs while he was writing his biography. Who was "Nugget" Coombs? That is a very good question to which all Australians know the answer. Apparently he was the Governor of the Reserve Bank during the Whitlam era. He was a Western Australian who made a substantial contribution culture, Aboriginal culture in particular. Ms Holmes is part of a four-person mission in the OECD which has German, Mexican and Danish representatives. They are currently in Turkey; she is currently in Australia.

Ms Sue HOLMES: Our working party also has an Italian Chair who is here today, Luigi Carbone. Over the past 10 years the Organisation for Economic Co-operation and Development [OECD] and has been developing best practice guidelines for achieving quality law and regulation. Much of this work originally focused on the role of the Executive, but increasingly attention has also been given to the role of Parliament. I should say at the outset that while the principles are broad and the elements of regulatory impact analysis are universally applicable, any regulation management system must be adapted to the culture and traditions of the country. We do see a lot of diversity. Regulation management is not a one model fits all although there are some features that ensure that countries get the best value from the instrument. I will go over these features and point out some options and raise questions about regulation impact analysis, or RIA, and about regulation management systems that can best be integrated into parliamentary law-making processes in order to produce good quality law and regulation.

Why are we interested in high-quality regulation deriving from regulatory reform? There are many benefits. Well-designed law and regulation boasts consumer benefits. It reduces prices for services and products such as electricity, transport and health care and increases choice in service quality. It supports sustainable, non-inflationary growth. It improves competitiveness, reducing the cost structures of exporting and upstream sectors in regional and global markets. It increases job creation and it reduces the risk of crises owing to external shocks because more flexible regulations mean greater ability to adapt quickly to unforeseen, outside events. It also makes regulatory protection more effective in

areas such as health and safety, the environment and consumer interests by introducing more flexible and efficient regulatory and non-regulatory instruments. From this it should be clear that regulation reform is not simplistic deregulation but smarter regulation, well chosen and well suited to its objectives. Ultimately it is about being effective at low cost.

Some studies show big gains from regulation reform. For example, price reductions resulting from reforms to particular sectors are real price reductions, such as the large-scale reform to the airline industry in the United States which occurred more than 10 years ago. We see similar gains in electricity, financial services and telecommunications. There have also been estimates of the long-term gains in GDP per annum from studies conducted by the OECD in the last three years. Of course, the worse state a regulatory system is in when one commences, the greater are the potential gains when the reforms are begun. Parliament has three broad functions which are: representation of a broad cross-section of interests through popular election of its members; law making; and oversight. Primarily within the law-making function, Parliament has five main roles that affect the quality of law and regulation: passing new laws; reviewing the stock of existing laws; a scrutiny role with some categories of delegated legislation; sometimes an overview role, either of independent regulators or the regulations they make; and ratifying international treaties. Each of these can benefit from good analysis and good procedure.

The first international standard defining regulatory quality was adopted in 1995 as a formal recommendation of the OECD. The OECD guidelines emphasise process and have two broad aspects. First, what questions should be addressed when preparing legal instruments? These are the elements of the regulation impact analysis [RIA]. Second, how can we ensure that best practice is made of the RIA so that it is about embedding the regulation impact analysis into law-making processes and giving it institutional support? The OECD recommendation focuses on building quality controls into process for law making and regulation. The emphasis is on procedure rather than outcome. This issue was partly debated at the time but OECD countries agreed that it would be more productive to focus on quality control procedures than on measuring actual regulatory outcomes.

The OECD checklist for law and regulation making contains 10 questions that can be applied at all levels of decision making. The first one is: Is this the problem? Also increasingly today we would say: Is the objective correctly defined? If this is important—and it is surprising how much disagreement there can be on what the problem and the objective are—then it is also vital, if we are to progress in addressing the problem and the objective. The second question is: Is government action justified? Is this a problem that justifies, and would benefit from, government action, given the nature the problem? The third element of the checklist is: Is regulation the best form of government action? Sometimes non-regulatory policy instruments are more effective and/or are less costly. An example would be an education program that is trying to change behaviour.

The fourth question is: Is there a legal basis for legislation? The fifth question is: What is the appropriate level or levels of government for this action? I do not know what should be done when one finds that one is at the wrong level of

government. The sixth question is: Do the benefits of regulation justify the costs? The seventh question is: Is the distribution effect across society transparent? The eighth question is: Is the regulation clear, consistent, comprehensible and accessible to users? The ninth question is: Have all interested parties had the opportunity to present their views? Regulation should be developed in an open and transparent fashion. All interested parties, such as affected businesses and trade unions and other interest groups, should have the opportunity to express their opinions. The last question is: How will compliance be achieved? How will the preferred option be implemented?

This checklist has taken on various permutations in countries which have adopted it. This is how it has been adopted by the Australian national government: problem; objective; options; which groups are affected and the costs and benefits to each; who has been consulted; what is the recommendation that is arrived at after the analysis; how will the recommendation be implemented; and when will a review of the recommendation take place to see that it did achieve the effects that were wanted, and is still the most appropriate way to be dealing with the problem. In the UK, there is a list of questions put by the UK Government. In many ways the questions are similar to those of Australia but there are some variations. It is interesting that the UK questions begin with identifying the purpose and attendant effect instead of the problem and the objective. Perhaps purpose implies a broader role for regulation, not just fixing problems. That is an issue for discussion.

While cost-benefit analysis, which is central to RIA, is an estimation technique that works better in some areas than in others, regulation impact analysis itself is a structured set of questions that can be applied to any question or any problem. For me, it can even be applied to conversations with my teenage daughter about how late she may stay up or how much homework she should do, and it is also well applied to matters of state. With regulation impact analysis, some countries use fully-fledged benefit cost analysis based on social welfare theory whereas other countries choose to focus on a specified list. This ranges from impact on legal quality to impact on the environment or on small and medium size enterprises or competition. Others include administrative paperwork burdens, impact on subnational governments and trade. In a recent survey of OECD member countries the information provided by the Executive to Parliament on impacts ranged widely: regularly Parliament was provided with budget information—about two-thirds of Parliament; a half provided information on business and household impacts; a third on public administration impacts; a few on environmental impacts; and one reported regularly on gender and human rights impacts. Full compliance costs were seldom regularly reported.

The assessment-specified impact can provide useful information. However, OECD best practice guidelines advise that all impacts and all costs and benefits should be assessed. An important feature of RIA is to bring together all impacts so that they can be weighed against each other and so that a decision can be made about what would be best in the public interest. Another problem arising from having many different and separate impact statements with each assessing a different impact makes it very difficult to weigh one against the other. Advice becomes diffused and contradictory, without pointing out the trade-offs and choices to be made. This lessens the role of RIA as a tool to support balanced

decision making. RIA can be used as a common integrating framework to expose impacts and linkages among policies and to give decision makers the capacity to weigh trade-offs. In this case, RIA is not only an analytical tool but a co-ordination tool for bringing together different interests.

I come to the qualification question. In light of comments made yesterday by Justice Spigelman I want to make some particular observations. While quantification of costs and benefits is considered the best practice, the OECD also acknowledges that costs are easier to quantify than benefits; that inability to measure does not equate to lack of importance, for example, justice, and that wildly qualitative estimates provide useful information, they should always be treated as partial information. The OECD has also said that experience makes clear that the most important contributor to the quality of regulatory decisions is not the precision of calculations but the action of analysing, questioning, understanding real-world impacts, exploring assumptions. In the light of these comments the role of political decision-makers becomes crucially important. Our democratically elected representatives can be informed by the quantitative and qualitative analysis contained in RIA but it is politicians in the end who make the judgment, for example, whether the cost of damming a river are outweighed by the benefits. I mention that because it is one of the concerns of politicians. They say, "Are you making the decision for us? If in the end the RIA says benefits outweigh costs, does that just give a tick to the policy?" That is not meant to be. It is a tool that contributes to the analysis.

Another important question is who do you consult with? It is an important way by which impacts are assessed. It helps policymakers to identify all the impacts, some of them not anticipated by abstract analysis. Typically, governments and parliaments consult with the representatives of employees and employers. Less often are other citizens and their representatives consulted. Other groups that could be consulted include consumers, those who are concerned about the environment, taxpayers, the unemployed and foreign interests. Another option is to allow those who comment on a proposal to the self-selective. The more broadly based the consultation, the more fully will the RIA explore all the potential consequences. One likely benefit of these is a reduced need to amend regulations after they have been put in place, as most of the consequences have already been considered and allowed for in the legislation. Other benefits are that it allows you to test assumptions, get ownership of outcomes and be as prepared as possible for what is coming.

Some countries see consultation as being just as important as cost benefit analysis and as being the cheaper way to get an assessment of impact. I point out two recent realisations being made in the OECD about consultation. Some countries are experiencing consultation fatigue, especially amongst groups such as consumers and environmental interests, who are usually under resourced and underrepresented. This becomes greater if that the Executive and Parliament use consultation to better understand impacts. I do not know what the solution to that is but some countries, and I think including Canada, fund those representative groups to turn up and spend time giving advice. As governments consult more extensively a tension is developing over who represents the people and some non-government organisations do not appreciate there is a difference between giving advice and having it acted on. Our democratically elected leaders should

have the final say, because that is a central feature of democracy. Another issue is how to avoid duplication by consultation by the Executive and Parliament.

RIA is widely accepted. It is required before adopting a regulation in 13 OECD countries, and a couple of other countries are in the process of instituting RIA. No country that has adopted RIA has subsequently removed it. I went to a conference in Estonia. It was a meeting of parliamentarians and public servants working in most of the Baltic and Balkan states. They immediately got the usefulness of RIA because it becomes a structured set of information and questions that will help their parliamentarians. In the European Union RIA has been looked at as a serious way to bring greater consistency across regulations from different directorates that are normally left to make their own regulations without necessarily thinking of the impact on business, and vice versa.

As another indicator of the success of RIA we see that the application of it has grown within those countries that have adopted it. So, between 1998 in 2000 more countries applied RIA to draft bills and to subordinate regulation. Even though it is usually harder to quantify benefits than to quantify cost, the number of countries estimating the benefits has doubled. Also, the number of countries requiring a proposal to demonstrate a net benefit has increased, and the number of countries requiring that RIA use public consultation almost doubled between 1998 and 2000. These are all positive trends and are indicative of the good value that countries get from RIA in guiding regulatory policy.

An issue, if RIA is to be applied systematically at Parliament, is that not all bills are initiated by governments. While on average only 2 per cent to 3 per cent of bills are initiated by non-government members of Parliament across the OECD, there is much variation in this figure. In the United Kingdom no bills are initiated by non-government members of Parliament. In Italy it is about 14 per cent and one-third in Poland. Also in Poland the President and citizens can initiate legislation. In the latter case a bill can be submitted to Parliament if it has 100,000 signatures. For all countries changes that are made to government drafts on the floor of the House are an important source of legal impact. These changes happen often and can have impacts, some of them quite unintended. In all of these cases the draft will not benefit from the analysis of RIA if the Executive is the sole writer of RIA.

With respect to government-initiated RIA, Parliament is the ultimate gatekeeper of laws but what control does it have over the advice it receives? How extensive should its cross-checking of information provided by government be? Should it check the adequacies of RIAs and should it prepare its own RIAs for non-government initiated drafts and changes? These are just questions I put to you. Oversight of Parliament is rare in OECD countries although there are indications in a few that this may be an effective means of quality control. In both Italy and the United States Congress legislators seem to take more interest in the use of RIA to judge the quality of laws and regulations. For example, in Italy a committee of legislation requires all draft bills from whatever source address some typical impact questions, including having acceptable costs.

So, we have looked at the RIA itself, the instrument that is used to ask a structured set of questions. The other half of ensuring quality regulation is implementing the RIA into a country's law and regulation-making procedures, and

that is the other aspect of the OECD recommendation. The OECD report on RIA concluded with 10 best practices that imbed RIA into the policy-making processes, a particular focus on the role of government in embedding RIA. What would it mean if Parliament were also to provide some of the enforcement and accountability mechanisms?

The first practice of the OECD list of 10 on how to imbed RIA is how to maximise political commitment to RIA. Of course, endorsement by Parliament is probably the strongest political commitment that can be achieved but this will not always translate into enforcement at the Executive level. The second item on the checklist is to allocate responsibility for the RIA program elements carefully. The questions that arise include would Parliament write its own RIAs? If so, how would it implement quality controls? What mechanisms could Parliament establish to provide a gatekeeping role on all sources of RIA, not just government? What resources would it have and what bodies would it allocate to the task, or do we continue to rely on the work done by government? Even within government RIA can have one or more checkpoints whether the gatekeeper either accepts or rejects the RIA, one common gate being the point at which a regulatory or legislated proposal is submitted to Cabinet. Would it be possible to have another checkpoint when a proposal enters Parliament? Would an interparty committee be given the job?

A third item on the checklist is to integrate RIA with the policy-making process and to begin as early as possible. This helps to avoid making RIA a justification report. However, the closer we get to Parliament the more political we get. The RIA is meant to be an evenhanded assessment of options and impacts and is not meant to be an advocate's document; a neutral document to be useful to all political adversaries. Keeping the RIA impartial will allow it to make its greatest contribution, but it will be one of the hardest things to achieve. You may be reassured that I am not going to go through each of the items but the other seven are these: train the regulators; use a consistent but flexible analytical method; develop and implement data collection strategies; target RIA efforts; communicate the results, involve the public extensively and apply RIA to existing as well as new regulations. Some of these we have already discussed in the context of RIA. Others are less central to our topic today.

I would like to conclude with some current and emerging challenges as we have seen them at the OECD. The first is increasing use being made of Internet and other communication tools to both gather and provide information. E-government is full of opportunity but it puts big strains on resources and requires methods that help parliamentarians get through to the essential. Using and managing consultation well is another big strain on resources if wide consultation is to be achieved. Challenges include avoiding duplication of consultation between Executive and Parliament; how to reduce consultation fatigue; and being clear that elected representatives are the final decision makers. That is a communication task and I am not sure who is going to get that message across. Even keeping RIA an evenhanded assessment, the closer we get to the Houses of debate will be another challenge. Finally, ensuring that all sources of law have the same impact and degree of analysis. Some subordinate law can have a bigger impact than Acts and the different sources are treated differently in the degree of analysis they receive. Thank you.

CHAIRMAN: Are there any questions or comments?

Senator COONEY: Can I ask you this about keeping the RIA an evenhanded assessment. There must be some value judgments in what you do. Can I use an example that is current in Australia at the moment, legislation about unauthorised arrivals or illegal immigrants, and you must be on top of that. The efficiency of keeping them locked up as against the value of having people free, there are two values there, two values being put into operation. When you talk about the non-government organisations and consultation fatigue, that comes around because people are coming from different angles. How does the system check that or is it just an economic analysis or do you go into morals? Do morals have anything to do with this? Can you give a some idea of how all this works out?

Ms HOLMES: On the value judgments and making sure it is an evenhanded document, by the structure of the RIA the important thing is to identify all the groups affected and then to say in what way they are affected and the positives and negatives. In that respect it stays evenhanded in that you are not meant to ignore some of the effects that you do not like the sound of. It is meant to say that policy X may be good but it also has some adverse consequences. So, you are making very clear all of the impacts.

The thing about the value judgments is the role of a politician in the end. If the public servants had done their jobs well they would have spelled out the things over which there are no controversies and they leave for the politicians to address the final value judgments. I do not know what you call the final issue here—equal treatment or freedom. Whatever it is, what value has that against the other costs? So, the value judgment is taken out of public servants' hands and handed over to the politicians. You also had a question about consultation fatigue?

Senator COONEY: Yes. The reason you get consultation fatigue is that you have people coming from different angles, as you know. For example, take the present dispute with the Otway Ranges on the Great Ocean Road in Victoria. Should you allow clear felling, which is what the timber industry wants, or should you preserve the forests, which is what the environmental movement wants? You can consult about that forever and perhaps you should. In the end, some decision has to be made and that is the political decision I suppose you are talking about.

Ms HOLMES: Yes, that is right.

Senator COONEY: I take it that most legislation goes through uncontested. What does your body do, just boils it down to, say, that 10 per cent of matters that are disputed?

Ms HOLMES: It should cover all matters, depending on which country and the requirements, but it would boil down to the unresolvable issues; these are the issues on which you need to focus. As you say, consultation takes you so far, but in the end someone has to make the hard decision. However, the more information about the different points of view of the different groups and hard facts

on economic impacts and so on, the better informed they are in making that decision.

CHAIRMAN: I guess some countries that are members of the OECD are not interested in your work and would rather do their own thing. What sort of unsubtle or unsubtle sanctions do you have to enforce compliance with the philosophies that you believe are worthwhile?

Ms HOLMES: I think the strength of the OECD's work is by the quality of the advice it gives. That is our main tool really, and transparency. We try to report on the behaviour of different countries, but it is always up to the country to decide what it is going to do.

CHAIRMAN: If you had an errant government you would seek to shame it into compliance with what you think is best practice, is that the position?

Ms HOLMES: I am not sure that shaming is the focus. I think it is more keep giving good information that may change their mind.

Mr BANKS: You said the OECD had promulgated these principles and they seem to coincide pretty much with what we have in Australia. You said there were about a dozen OECD countries that have provisions for this regulation impact analysis and that the OECD has been reviewing those. Would you comment on what those reviews have shown of the experience across countries? Are there particular ingredients that are really important to ensuring an effective process?

Ms HOLMES: We have been doing in-depth reviews of a number of countries and we have completed 12 so far and will do four more this year. It is called regulation reform in each country. We look at the capacity to make and review regulation and also how regulation affects trade and competition. We look at some sectors like telecommunications, quite often transport, and energy. The essential features to making a regulation management system work well are the good questions in the RIA, and political support is probably the most crucial. If you have strong political support most of the rest will follow. If you do not have that, it probably will not happen. The other important features are probably that the departments or ministries are primarily responsible for writing the RIA, but there has to be some sort of quality control central body that gives it a tick or cross and hopefully works constructively with the departments to get better quality.

Mr R. W. TURNER: Throughout your speech you spoke about consultation and said that if the Polish Government gets 100,000 petitions it had to bring in legislation. I am a member of the New South Wales Government and also local government in my area. Everyone is encouraged to be part of the consultation process. We get to the situation where, for instance, environmentally it would be quite easy to get 100,000 petitions, but if we had to bring in legislation as a result, it would have an enormous impact on farmers to competitively farm. People that have no interest in farming whatsoever would be quite happy to import all food into Australia so that the country was put back to what it was. In Orange at the moment, as happens in many country towns, and I am sure all over the world, we have the big issue of constructing the road bypass around the town or city. We

proceeded through the consultation process. We then finally adopted the particular route that was going to be adopted anyway because that was the only practical way to go. The handful of people affected say, "You haven't listened to us. What is the good of consultation when you don't take any notice of us" when 99 per cent of the people in the town agreed with the decision. We are then accused either of not consulting or that when we do of not taking any notice. That is the difficulty we face.

Ms HOLMES: That is one of the challenges I mentioned that the end; consulting does not mean you have to follow, but not everybody understands that. That is one of the communication challenges: how do you get that idea across. Having cited the Polish example, it was not necessarily a recommendation. I was just saying it is interesting that there are all these different sources of law. Also, as I understand it, if the 100,000 signatures are obtained, it does not become law. It becomes a draft bill that is submitted to Parliament and is subject to the same degree of scrutiny. So, it is not the same.

Mr Simon SMITH: Most of the work we have heard about RIA is to do with ensuring regulations do not have negative impacts on competition or other economic parameters like employment. How much interest is there around the world in RIA looking at impacts on society or the environment?

Ms HOLMES: First it is an instrument that can be used. Countries vary in the reasons they use it and some are interested only in impact on business. Others very much see it as this even-handed assessment of all impacts and they want to know overall how this affects society, and I guess they are interested in total social welfare. I guess Australia does that, the United Kingdom does and there are other examples. I guess the answer is that it is variable in how it is used.

Mr CACHALIE: I am a member of the Gauteng Provincial Parliament in South Africa. I have two questions about the consultation process. First, I would like you to comment more fully on the issue of duplication. It seems to me that the rationale for consultative processes that the Executive might follow and which might subsequently be followed in Parliament are different. There is a logic to the argument that once the Executive has consulted, Parliament has no role. Could you comment more fully on that issue? My second question relates to a problem we are trying to confront at home but which I suspect is a universal problem: how you avoid capture of the policy-making process? Put another way, how do you ensure that those constituencies which may have an interest in the outcome of a policy-making process but which lack the resources to participate effectively are brought into the process?

Ms HOLMES: Duplication is an issue for which I do not have an answer. I guess one question is, Can the Executive and Parliament co-ordinate on that issue? Is it possible to say, "Okay, we will have one big consultation period and that information will then be used both by the Executive and Parliament." It is very much a question of Parliament trusting the Executive in doing that job, if that is how it works. An alternative model would be no consultation to get to Parliament, but in some ways that would undermine the purpose of RIA, which is to start early to understand all the impacts. The main thing is that we have all been saying consultation is good, but it is clear that it has limits in terms of the fatigue problem.

I suppose that is not a clear answer. It is a problem that we are now starting to say we can address.

In relation to capture, RIA is one of the instruments that addresses that problem. If it does its job well the policy is not being driven just by one interest group; it is saying what are the impacts on all interest groups. So, it should give you that even-handed assessment. I guess the other thing that addresses capture is transparency. Moreover the decision and the reasons you have made the decision and assessed alternatives also lessen the scope for capture by particular interest groups.

CHAIR: They were tricky and searching questions. Thank you, Sue, for coming such a long distance and for presenting your paper.

(The Conference adjourned at 12.27 p.m.)

WORKSHOP ONE

WHY REINVENT THE WHEEL WHEN THE AUSTRALIAN SCRUTINY MODEL WORKS?

CHAIR (Mr Tazamala): My name is Tad Tazamala and I am from Botswana. For those who do not know where Botswana is, it borders on South Africa, Namibia, Zambia and Zimbabwe. We are a landlocked country with more than 50,000 elephants. I am representing the Speaker of the Botswana Parliament who is unwell. My position in the Botswana Parliament is Director of Research and Public Affairs. I welcome you to workshop one where we will be discussing "Why Reinvent the Wheel when the Australian Scrutiny Model Works?" Our presenter this afternoon is Dr Philippa Tudor, Clerk, Delegated Powers and Regulatory Reform Committee, House of Lords, United Kingdom. Before joining the staff in the House of Lords in 1982 Dr Tudor taught history at Oxford University. For the last four and a half years she has been Clerk of the Delegated Powers and Regulatory Reform Committee at the House of Lords. In 1997 she became the first woman practising at the table of the House of Lords. Ladies and gentleman, please welcome Dr Tudor.

Dr TUDOR: Thank you very much. I should begin by saying that I hope that this workshop will be very much a participatory one. I propose to introduce the theme but then through the chairman it will be open to you. I should also say, as a way of introduction, that one of my unpleasant jobs in the House of Lords from time to time is to stop members from speaking. It is something that I hate doing. So today I am relishing the fact that I am in role reversal—I am here to encourage you to speak about this subject. In preparing this workshop I tried to think of three good reasons for reinventing the wheel in relation to the parliamentary scrutiny of regulations. I would have liked to have thought of more than three, but I could come up with only three. Maybe you could think of others about which you could tell me in the question session.

The first reason that I could think of was that you have lots of time on your hands—either you as members or as officials. I do not have a lot of time on my hands. However, that is one possibility. The second thing is that your electorate will thank you if you develop new, exciting and trendy ways to effect parliamentary scrutiny. You may have a more sophisticated electorate than the British electorate. The British electorate is so sophisticated that, in the recent general election, less than 60 per cent turned out to vote. I understand that in Australia things are rather better. But if you think that people will vote you into parliament if you develop new parliamentary scrutiny that might be one way of going for it. The final and obvious thing I thought of is that the wheel might be broken.

That was by way of introduction. Let me explain my title. About a decade ago there was a strong feeling in the House of Lords that there was a need for greater scrutiny of delegated powers—the powers which Parliament grants to Ministers to make the rules and regulations, which we refer to variously as

delegated or secondary legislation. For as long as I can remember—and in this sense it goes back to 1982 when I joined the House of Lords service—the House of Lords has taken a particular interest in these powers. This interest was reflected in lengthy and sometimes anguished debates; not necessarily well informed but well intended debates. About 10 years ago a committee of the House of Lords looked to see what other parliaments did about this problem and therein is the reason for the theme: Why reinvent the wheel? At that stage the reputation of the Australian scrutiny committees was already strong. Following a visit, sadly, not by me, to the Federal Senate Committee for the Scrutiny of Bills which had been established in 1981, a recommendation was made that a similar committee was needed in the House of Lords.

It was agreed that a House of Lords committee, with more restricted terms of reference, should be set up concentrating on delegated legislative powers. That was done on an experimental basis only. At that stage the House of Lords was willing to commit itself for only one session in 1992. The experiment was quickly judged such a success that the committee is now reappointed swiftly, within days, at the beginning of each session of Parliament. The committee is now considered one of the jewels in the crown of parliamentary scrutiny at Westminster and it is proud of its Australian roots. I am particularly delighted, therefore, to be here today. Lord Mayhew, who is in the Chamber, spoke yesterday at this conference and acknowledged these Australian roots.

Parliamentary scrutiny of regulatory powers is different from any other committee work. I should confess to the fact that I have been involved in parliamentary committee work for the 1ast 18 years or so. I would like, with your agreement, to suggest the following three themes for discussion in this workshop. The first of those themes is the influence of parliamentary scrutiny. There seems to be no point in doing any parliamentary scrutiny unless people are going to do what you say. The second theme is the use of information technology, which I think is an important and often a cheap tool for regulatory scrutiny and reform. The third theme is the importance of consultation. To totally misquote the words of our current Prime Minister I would like to say: Consultation, consultation, consultation; you really cannot have too much of it. Before we enter into discussions I thought that I should set the scene as to why we are here. It interested me that so far in this Conference figures have not been given to reflect the huge growth in statutory instruments over the last five decades or so.

I suspect that if you created a similar chart for your countries—I have seen charts for some other countries—you would get a figure similar to the shocking figure displayed on this slide. Believe it or not, this next slide is slightly different. It shows similar growth. The top line in the previous slide was over 3,000 a year. It is appalling that that is our top figure now in the United Kingdom. The more important statutory instruments are those that are subject to parliamentary procedure, as opposed to those that are not really controversial at all. But something needed to be done and they have been laid before Parliament in some way. As you can see from that slide, the figure is just going up and up. The rate of increase is 50 per cent in the 15 years to 1996—from under 1,000 a year to around 1,500 a year.

Those last figures are given by session. In the United Kingdom Parliament we tend to measure these things by session and by year. I would love to be able to say that, in the last session of Parliament, we finally cracked this at Westminster. I would love to be able to say, "This is how to do it." But it would be a total fake because the last session leading up to the general election was a short session. It lasted only for about six months. That is always extraordinary in any parliament. So that explains why the figures go up and down. We have not cracked it. I believe that every country represented here today is having to race ever faster to keep still in the battle against this increase in regulations. The red tape, the paperwork and just keeping up with everything are bad enough, but it gets worse.

I do not know whether the next part of the story is similar for your parliaments. On the whole, parliamentary procedures at Westminster have failed to keep up with the great increase in the quantity of secondary legislation, which is getting more and more important. It is not just that these instruments are getting bigger and longer; the subject matters which are covered are often increasingly sensitive. Much of our secondary legislation deals with subjects that touch, for instance, on human rights issues. Immigration issues are terribly important, yet that is done by secondary legislation. Frankly, some of the subject matter is almost incomprehensible. Some of the information technology stuff might be well intended, as Lord Mayhew said yesterday, but do legislators actually understand what they are supposed to be scrutinising? I just do not know.

This slide is intended to show that, at its most optimistic, the House of Lords spends 4 per cent of its time—and that is an optimistic figure which I do not actually trust—discussing statutory instruments, compared with 54 per cent of its time discussing public bills. I am here to represent the House of Lords but, even if I were not, I would be the first to say that it is not that members of the House of whom I am so proud, shirk their work. I have the privilege—sometimes it seems to me to be a slightly dubious privilege—of working for the parliamentary Chamber, which sits longer, however it is measured, than any other parliament in the world. The Chamber I work for is the red Chamber reflected on the slide, which sat 158 days in the last normal session. Bear in mind that we can have very long sittings. The worst one with which I was involved had the House starting at a normal time and sitting to 9.40 a.m., which was extreme. The Westminster Parliament is used to sitting and working long hours. It does not just sit for a couple of hours in the afternoon here and there.

I am rather proud of the fact that we pipped to the post—just by one day—the House of Commons. I do not know whether this is a fair comparison—it is one that we make in the European context—the European Parliament sits for 60 days. Of course, members of any parliament spend a vast amount of their time not at Westminster dealing with their constituents, with committee work and so on. But I think that that measure has some validity. The next figure illustrates how members of Parliament really have to work harder and harder. The time that is reflected on the slide is the time that was spent in the House of Lords on government bills in recent years. You can see that it has more than doubled. There are other measurements, for example, the number of questions that are tabled, you name it. Any other measurement that I can think of that can be used pretty much reflects that the House is doing more, but it is still not enough.

When I showed you the pie chart I said that I did not actually trust that figure. That was the figure given to my by the information office. I always think that you should question people's figures. So I had my own research done. You can see that in a very short period of time, that is, in a period of just five years, while the quantity and importance of secondary legislation have increased, the parliamentary time devoted to debating it has gone down. Five sessions ago, from 1995 to 1996, 4.3 per cent of the time of the House of Lords was spent debating affirmative instruments. Three sessions ago it was 3.7 per cent; the next two sessions it was 2.9 per cent; and last session, that is, the session leading up to the general election, it dropped still further to 2.4 per cent. Usually, affirmative instruments are the most important ones. The figures are similar for negative instruments, the slightly less important ones. I find this a chilling figure. When studying the use that the House of Lords makes of its time I found that the late twentieth century House of Lords spent more time praying to the Almighty, which it does at the start of each sitting day, than it did praying against negative instruments. Maybe one needs to pray more but I think more scrutiny is also needed because I do not think that all those prayers are working.

At Westminster, which I think is different from other Parliaments—and I would be particularly interested to hear about this—there is a further limitation on the House of Lords scrutiny of statutory instruments. Between 1968 and the year 2000, that is, last year, the House did not exercise its equal right with the House of Commons to vote down secondary legislation. It did that last year and those in favour of that vote have since argued that the newly reformed House of Lords was right to have acted in that way. A very topical subject back home at the moment is whether the House of Lords should be exercising this right. It is significant to us that there was this 32-year gap. Indeed, the previous fatal division—the Rhodesian sanctions order—was obviously significant in a number of ways, partly on the domestic economy of what was then Rhodesia and what is now Zimbabwe and partly in relation to the UK's potential standing in the United Nations. Domestically at the time almost successful discussions were going on about House of Lords reform. The Government was so cross with the House of Lords for voting down that sanctions order that it called off debate back in 1968 on House of Lords reform. Those who were in favour of House of Lords reform—obviously the jury is very much out on that—would argue that 30 years of potential reform were lost as a result of the House of Lords exercising its right in that way.

I have set a gloomy background. I think I am probably right in saying that some but not all of that background would be reflected in your parliaments. Of course, we scrutinise regulations in the UK. First, there is and there has been for many years a joint committee, that is, a committee of both Houses, on statutory instruments. That has very detailed terms of reference which I know are reflected in the terms of reference of a number of what we call wider commonwealth Parliaments, in particular, perhaps India. I think the Indian Parliament and our Parliament have almost identical terms of reference for our committees on statutory instruments. You can see from that slide, if you can read it, that the terms of reference of that committee are limited. It is dealing with vires, or powers and whether it is okay to make that statutory instrument. It is dealing with drafting. It is not dealing with the merits of individual instruments. It does not consider policy. It meets week in and week out and it churns through 1,500 or so

instruments a year. It is doing essential, important, but unexciting work. I know how unexciting it is because I was clerk to that committee between 1983 and 1984.

Both Houses consider policy issues. However, under the Westminster model they can only approve or reject instruments. Obviously, if you have a bicameral system of Parliament it makes life easy if you have a take it or leave it approach. In practice that means that sometimes—and this applies in the House of Lords as I sit through House of Lords debates—members can approve statutory instruments because they are necessary but they know that there is some detail in them that is just plain wrong. But there is no mechanism for changing them. That must be frustrating for members of Parliament. In the House of Commons most affirmative instruments are not even considered on the floor of the House. They go before a standing committee on delegated legislation, which sits for up to an hour and a half. Mr Pike would be able to tell you more about it than I can because he has chaired some of those committees. All that that committee is required to report to the House is that it has considered a statutory instrument. It is not required to say what it actually thought of it. So again, a cynic would say that not very much is achieved there. By contrast, in the House of Lords all affirmative instruments are debated on the floor of the House, but with this take it or leave it attitude. At least it means that members potentially can get some publicity. Members speak, if they choose to, in debate on those affirmative instruments.

It was partly because of that democratic deficit that the committee for which I work—the newly renamed Select Committee on Delegated Powers and Regulatory Reform was formed based, as I said, on the Australian model in 1992. During the committee's scrutiny of delegated powers, the committee considers, first, whether it is appropriate in the primary legislation to grant the power at all. It considers whether the bill contains sufficient information about the power. It considers the appropriate form of parliamentary control—whether you should use the affirmative or negative procedure or maybe none at all. It considers whether the legislation should specifically provide for consultation in draft before the instrument is laid before Parliament. We have consultation on all our statutory instruments now, but obviously it is better to do it before rather than later. The committee also considers whether the operation of a statutory instrument should be governed by a code of conduct.

The next slide, which is rather blurred, is designed to show what the committee did last week. Basically the committee has a huge workload. It reports on all public bills before they reach the Committee stage in the House of Lords and it specifically looks at delegated powers. An important part of that scrutiny is that the committee receives a memorandum on the powers in each bill from the Government—from civil servants. That means that those memoranda have to be approved by Ministers. The Government now has to justify each power that it is seeking. That, in itself, is quite a good check because it stops overenthusiastic civil servants thinking, "Oh well, I will take this power just in case." If it is not needed, they cannot think of a justification for it and they do not put that in writing, some of the powers might not get to us in the first place, which is helpful. Committee members consider the powers in draft bills when they are available—and by no means are draft bills always available; in fact, there are usually only a

few available. This, hopefully, will be a growth industry in the UK. We have not been very good at publishing bills in draft and having them scrutinised before Parliament. It makes great sense. Indeed, with the Regulatory Reform Act, about which Mr Pike will speak tomorrow, the committee was active both at the formal draft stage when the draft bill was referred to the two committees and at the pre-drafting stage. I know that changes were made to the draft bill—which is now an Act—as a result of that. That is highly satisfying.

Significantly—and I deeply regret this—the committee considers, and has done this for the past two sessions, government amendments to bills containing delegated powers. There used to be a fear amongst parliamentarians that this committee looked at the bills after their introduction in the House of Lords and then the Government could churn out amendments. There might be a temptation for departments to think, "We want these naughty delegated powers. We will wait until after the bill has been introduced. We will shove in the naughty powers in the Committee, report or third reading stages in the House of Lords. In that way we will get round the committee." Two sessions ago the procedure committee in the House of Lords, without reference to the committee, decided that the committee should do this scrutiny. The committee has undertaken that scrutiny. I said earlier that I regretted this as it represents a vast amount of work looking at all these pieces of paper which float in from anywhere and coming up with a single sentence, "The committee sees nothing in these amendments or in the delegated powers in the amendments which it wishes to draw to the attention of the House." The work behind that is horrendous, but it is a service that we are providing for better or for worse and I hope that the House appreciates it.

Finally, the Committee has a dual regulatory reform remit. We have a particular mechanism for regulatory reform which used to be called deregulation orders. As Lord Mayhew mentioned yesterday, we have just 42 of those in one Parliament. Starting in 2001 we have regulatory reform orders. There is a distinction between the two. I do not want to steal Mr Pike's thunder as he will be speaking at length about this matter tomorrow. However, deregulation orders bite only on a small bit of legislation and, typically, on one item. The electronic presentation of cheques was made possible, as was mentioned by Lord Mayhew yesterday, which saved the industry 30 million pounds sterling or so a year. That is a big saving and typically the savings have been smaller. By comparison, the regulatory reform process could be huge. The anomaly that Lord Mayhew mentioned, the fire safety regime is spread across 120 pieces of primary legislation and 120 pieces of secondary legislation. It will be possible to reform that under the regulatory reform process. It would not have been possible to reform it under the deregulation process.

We have this great new tool which has not been tried in other countries which have their own mechanisms for regulatory reform, for example, the sunset provisions in Australia, which we are not into in a big way. Obviously, we must have adequate safeguards. The Government would say that the biggest safeguard against the abuse of deregulation and the regulatory reform power are the two parliamentary committees. Pre-legislative scrutiny is crucial. Unlike normal affirmative instruments or negative instruments, both committees can and do recommend the amendment of draft orders. So the results should be better legislation and none of the silliness of agreeing to stuff that you actually know is

wrong, whether or not it is wrong on its merits or wrong on its technicalities. Necessary protection has to be maintained. It is probably best if I give you an example of unnecessary protection. Under the deregulation system people travelling on the British waterways used to be required, through some sort of loophole in the legislation, to fill in two separate permit forms to two different people. Now they have to fill in only one form. So the protection is still maintained but the unnecessary protection or the silly bureaucracy has gone. There are other examples of unnecessary protection. Of course, necessary protection must be maintained. The committee polices that severely.

The second issue is that the burden—typically a burden on business—must be reduced. There must be consultation, an issue to which I hope we will return later in discussions. Consultation is required throughout what was the deregulation process and what is now the regulatory reform process. Consultation is required by statute; it is not just an add-on by the Government. There are other new tests: reasonable expectations, proportionality and fair balance. The Government's explanatory material has to be adequate.

I would like now to move on to other points which I hope we can take up in discussion. One of the key features of the committee's work is that it has a 99 per cent acceptance rate for its recommendations. I always say that to cover myself in case there is a blip in the system. Last session the success rate was 100 per cent. The committee produces 30 to 40 reports each session. Its workload just seems to be going up all the time. Increasingly, there is informal advice to Ministers and to civil servants. Sometimes people want to talk to the chairman and sometimes they want to talk to me. It can help to talk behind the scenes, but obviously with major caveats.

I think the key reason for the high success rate is obvious. Any select committee report or any parliamentary activity has to be timely. If you cannot get your message across to Parliament or to Ministers in the right time you must just forget it. When I talk to people in industry that is one of the key things that I say. They complain about red tape and so on and they say, "What can I do?" My first message is often, "Go to the Confederation of British Industry, to your trade association or whatever." Sometimes they say that they do not like them or that they do not take any attention of them and my advice is just get your message in direct to Parliament. That same message, which I think is true to industry—we heard this morning from the Canadian speaker about how much they encourage that in Canada—is also true for parliamentary select committees. You must publish your reports in time to influence the legislation, otherwise there is no point.

The committee produces short, punchy reports with clear recommendations. Often people say that parliamentarians need more information. I think that is rubbish. Parliamentarians have far too much information. What they need is the right information. They need it to be short and clear and it must get to the point. You must be clear what you are actually recommending. So the committee does not produce great long reports; it sets out what needs to be done. The next major point is that the committee is constructive. I often describe it as a tool and not a weapon. It is easy to say—and parliamentary select committees in Westminster often do this—that something is the worst thing imaginable, the Government has got it all wrong and so on. The committee never does that. It

really moderates its tone. The next point relates to low-key non-confrontational language, which is so important. The committee almost never uses superlatives. It is a low profile committee. In a period of 4½ years I have not issued a press release for it. It is a specialist industry. The Government, Ministers and civil servants know about it. I know that the committee is discussed in Cabinet committees. I know how much the committee can be feared if it is not on-side. That could be serious for the Government, but the committee is low profile.

The committee is held in high regard by members on all sides of the House. Lord Mayhew is a Conservative member of Parliament. During his membership of the committee one would not have known that. You cannot tell in committee discussions what are the party politics of the nine members. The members truly act in a non-political way. So the first of three themes that I suggest as a topic of discussion is influence.

The second thing is the use of information technology. For the last few years all statutory instruments in the UK have been published on the Internet. Some countries do not have all their legislation in print. I know that several of those countries are not represented at this conference, but a number of central and eastern European states used to be in that situation. Publishing statutory instruments and legislation on the Internet is a cheap means of publication. Of course, not everybody has access to the Internet, but most people can get to some sort of library to access the legislation that way. All government consultation documents are available on two Internet sites. I can go into that in more detail if you want. People who are interested in a particular topic should be able to surf around and find a key word relating to the legislation that is planned. I think that is important. I have already said that the committee must work very fast. It helps me enormously that the committee receives most of its evidence by email. That helps the printing process enormously. We prepare our reports, which typically are published overnight, for the printer as camera-ready copy. That saves staff time and money. The committee has only one full-time member of staff, so that is really helpful. Finally, the committee's reports are published on the Internet the day after they are agreed. So that is another way of making them available. Information technology is my second possible theme for discussion.

The third and final theme is consultation, consultation, consultation. As I said earlier, consultation is at the heart of the statutory deregulation process and now the regulatory reform process. It is required during pre-legislative scrutiny and it is required during parliamentary consideration. One point that I like in particular is that citizens in our country are able under this statute to respond either to the Government or to the Parliament or both. Quite a lot of people do not trust civil servants. Technically, I am not a civil servant; I am a parliamentary official. Some people just do not like government. I think it is helpful that those people can go direct to Parliament. So I get people writing, often not very much and not very many, about the draft documents that concern them. I had an avalanche when we were discussing Sunday dancing on a commercial basis. At one stage we were talking about taxi deregulation. I think my name or my contact details must have been published in the taxi guide or whatever, because I had several telephone calls from taxi drivers who I imagine must have been stuck in queues and who rang me up to tell me their views on that issue. The most important thing, and this is in the legislation, is that the Minister must, and not

may, take account of the views of the parliamentary select committees. That underpinning is a fantastic help.

I would like finally to plug a new consultation web site that Cabinet office of the British Government has, which is *www.consultation.gov.uk.* So those are the three themes that I propose to you for discussion. I have some helpful and relevant prizes to encourage those who wish to take part in discussions. This is supposed to be an illustration of how the committee influences the Government. The committee prepares short, punchy reports and there is a short punchy bookmark. Next we have the use of information technology. I have with me fifty fabulous House of Lords mouse mats, which plug our fabulous web site. Finally, on the consultation points I have some useful House of Lords post-it notes, which again publish the parliamentary web site address. I hope that these things offer some inducement to you to participate in this workshop.

CHAIR (Mr Tazamala): Thank you for such an exciting presentation. The question is: "Is the wheel broken?" Ladies and gentlemen, I welcome your comments and questions before we break for tea.

Mr S. SMITH (New South Wales): I have two questions. You mentioned that civil servants have to introduce explanatory material with proposed legislation. Does that mean that there is no formal requirement for cost benefit assessment of new regulations in the UK? My second question is: How does this committee select its powers from the 1,500 that could potentially be considered each session?

Dr TUDOR: All regulations in the UK are now subject to costs benefit assessments and regulatory impact analysis. Part of what I was talking about was to do with delegated powers material. There is no statutory requirement that the Government has to produce a memorandum for the committee, but it does. It is in the Government's interests to do that. If it does not do that the committee will put its own spin on that. The committee has an independent legal adviser working three days a week. So it has before it at each meeting and for each bill the Government's explanatory memorandum on the powers, the legal adviser's view which is usually prepared before the explanatory memorandum is available, and it has a draft report which is usually prepared by me. So it has those three things. For bills the memorandum is not a statutory requirement, but it just happens.

The 42 deregulation orders were not the choice of the committee. They are a special sort of statutory instrument which is over and above the 1,500 instruments a year. So, if you like, it is 1,542. That is very much the Government's choice. The Government has tried to tempt the committee into proposing its own reforms. I think that is dangerous, not least in buck passing. The chairman, very wisely, resisted that. The committee cannot take the whole burden for regulatory reform in the UK.

Mr S. SMITH: How does the committee decide which of the 1,500 matters are of interest to it?

Dr TUDOR: The committee is not looking at those 1,500. That is done by the Joint Committee on Statutory Instruments. The committee is looking at all bills,

all draft bills when they are available, all government amendments containing delegated legislative powers, deregulation orders—and there have been only just over 42 so far—and at this new procedure that we have for regulated reform orders. We have only the first one available at the moment. But the boring, detailed scrutiny of statutory instruments has nothing to do with me.

DELEGATE: I address the question of the influence of these committees. The Australian Capital Territory Committee on the Scrutiny of Bills is a committee with very strong powers. It looks at all bills and at all pieces of delegated legislation—from wide-ranging remits through to rights and liberties and the scope of delegated powers. So I am speaking in that context. I suppose that the most immediate audience is parliamentarians. That committee tries to influence parliamentarians into taking a course of action in relation to a particular piece of legislation—either to pass it, not to pass it, or to modify it in some way. We all know that that is unlikely to happen. It is not often that a committee will force a government to change a bill before the parliament or force people to amend a piece of legislation. Sometimes it will happen. But what I think committees are trying to do in that respect is to influence the mind set, if you like, of legislatures to induce a sort of rights culture within the parliamentary forum. I think that that is happening in the Australian Capital Territory. Report after report of this committee has harped on the theme that a bill might be trespassing on these rights and that the government should not do it. It is inducing in members a culture of looking at rights, and taking rights seriously when examining legislation.

That will occur only some way down the track. It will not impact so much on legislation because of the politics of the situation. So one has to play a long game when talking about the influence that this might have on legislators. I can see this happening over time. Naturally, legislators will say, "That is a good point. We should be protective of the rights of people when there is a proposal in a bill to search premises and that sort of thing." The other nexus in the influence model relates to the audience that one is talking to. When drafters put pen to paper or they put their fingers on the button when using word processors they must think, "If we do this we will get a reaction." So we really need a proper advocate to stop drafters putting things into legislation which these committees might find objectionable. That is how it works in Australia.

People in government have said that we, as drafters, must take note of what the scrutiny of bills committees says. We tell the departments that give us instructions, "It is no use telling us to put that in. They will object. Let us not do it." So one is trying to get to the drafters, which is a bit of a problem because drafters, by nature, do not like any public exposure. They like working in their little burrows or in their offices drafting reports. They are not likely to get out and talk to people. An important thing to look at in the whole scheme of things is whether we could formalise this a bit and improve the channel of communication between committees—which have their own ideas about what should and should not be in bills—and the drafters who put things or do not put things in bills. That connection exists, but it is very unclear. A useful reform in these procedures would be to get those two groups of people together every now and again to talk about what is going on.

Dr TUDOR: All that I can really say to that is that I agree.

Mr MARTIN (New South Wales): You talked about fatal and non-fatal divisions. What is the difference?

Dr TUDOR: I played with the language. That was the best that I could do with PowerPoint. A fatal division is something that kills off the legislation concerned. A non fatal motion is something that members sometimes do to get round what had been almost a convention in the House of Lords that the House of Lords did not vote against secondary legislation. Quite a lot of motions were tabled detailing what members of the House thought about a particular thing. We call those non-fatal divisions. Normally, a member of the two main political parties would not have tabled a fatal motion against statutory instruments. During the 1970s, 1980s and 1990s it was not considered the done thing. But some people did.

Mr HIRD (Australian Capital Territory): I ask a question that was asked in Wellington, New Zealand, a few years ago by an imminent senator: Who checks the checkers? Who checks your committee?

Dr TUDOR: Ultimately, it is for the House of Lords. Earlier a delegate referred to the committee's powers. In fact, the committee has very little power of its own. It has power for the deregulation and now the regulatory reform process, but it has no real statutory power over its comments on bills and amendments and all the rest of it. However, it does have authority. It is possible for parliamentarians to have a lot of power and no authority. This committee has authority and no power. It also has nine of the most fantastic members in the world.

The Hon. MALCOLM JONES (New South Wales): Ladies and gentlemen, I welcome you to the Legislative Council of New South Wales, which is the Chamber in which you are sitting at the moment. I have the great privilege of being a member of this House. I draw your attention to this Chamber and to what a remarkable place it is. It is one of the longest continually used Chambers in the British Commonwealth. The Legislative Council was founded in 1826 but we have been in this current Chamber since 1856. This building was originally a temporary building. On one wall is a wallpapered door. Behind that is the original packing cases from which this Chamber was built and lined with. It is quite an extraordinary building and it has a great deal of history to it. I thought it would be remiss if, during your time here, your attention was not drawn to these facts.

[*Short adjournment*.]

DELEGATE: It is general practice at the Commonwealth level in the Delhi Parliament that, after the presentation of the budget, quarterly accounts will generally be made for three months. Within that time joint committees of the upper House and lower House of the Parliament meet for 30 days and present reports. Later those reports are discussed. I would like to know what the practice is in Britain. Once subcommittees have presented those reports do they meet once every three or four months to establish what particular departments have done?

Dr TUDOR: I think the question related more widely to committees rather than to the delegated powers and regulatory reform committees. I must speak for

the House of Lords here. The Government normally has to respond in writing within two months to any select committee report. Clearly, it would be useless for the committee for which I work to respond within two months. By that time the bill concerned would probably be on the statute books. So the Government is now required to respond in writing as soon as possible. I am flexible as to how I advise departments to respond. If the committee has recommended in House of Lords speak—which, as Lord Mayhew said yesterday, is very mild—that the House may wish to consider amending the bill along the following lines, it is something that needs to be done. That really means that the Government should just get on with it and do it. What you really want to ensure is that those amendments are made. Often all that one is looking for is a letter stating that X, Y or Z amendments are being made—a very short response. So there is that follow-up. Of course I monitor it. Every time the committee makes a substantive recommendation I would make sure that each recommendation is followed up. But to have some sort of rule about timing just would not work for this committee.

DELEGATE: How do they measure the accountability for each department?

Dr TUDOR: There is not a formal measurement. It is in the interest of each department or each Minister to take account of the committee. It is acceptable if what is happening is what the committee wanted. I know that, for the last session of Parliament, the committee got 100 per cent of what it wanted. Is that not better than some formal measurement? You could not get better than 100 per cent.

DELEGATE: Does your committee scrutinise the budget?

Dr TUDOR: I am not talking about the budget; I am talking about our own Committee's success rates. The House of Lords does not scrutinise the budget. It is one of the few things that it does not scrutinise.

Senator COONEY (Federal Senate): You said earlier that you had a lawyer who advises you on this matter. I am wondering why you have a lawyer. Peter Bayne is a lawyer but he is also a man with great moral values. When you are introducing legislation do you not want legislation that is right rather than legal? Do you not want to tell the House of Lords, "This legislation is either decent legislation or indecent legislation" in the sense that is unfair and that it is not doing what is right by the community? Are those not the sorts of questions that you want answered? If you want those questions answered, why do you get a lawyer to advise you? From where do you get your values as to whether legislation is good or bad? Do you even worry about that in the House of Lords?

Dr TUDOR: I draw two points from that. It is delightful to me to hear from the Senate because it was specifically on the Senate committee that the House of Lords tried to model itself. In fact, it has even more successful than I have told you already. As a result of the success of this committee the chairman, the legal adviser and I gave evidence to the royal commission on House of Lords reform. As part of the Committee's written evidence initially I did a comparison between the Australian Senate's scrutiny structure and the House of Lords scrutiny structure and I identified the gaps. Partly as a result of that, last session the House of Lords had, for the first time ever, a constitutional committee that tried to

follow in a different sort of way the Australian Senate's example. From last session both Houses now have a joint committee on human rights. I do not think that that was as a result of our evidence. I believe that that would have happened anyway.

The House of Lords committee has a much more limited remit than the Australian Senate committee. To prove that I have with me a hard copy of the Senate's committee's terms of reference, which specifically talk about individual rights, liberties and so on. The House of Lords committee's terms of reference do not. Before there was a joint committee on human rights, the House of Lords committee, in the mildest way, looked at some of those issues. As Lord Mayhew mentioned yesterday, since 1998 we have had a Human Rights Act in the United Kingdom. We have incorporated the Eurpoean Convention on Human Rights into our domestic law. That is a huge change for us. But the two committees are different.

The second issue that Senator Cooney wanted to know was why we employed a lawyer. The Australian Senate committee—and there are similarities, even though I have never seen them myself—has a fantastic lawyer, Professor Jim Davis, whom I have met. I believe that he has been with the committee since its inception. He is an academic and he seems to do most of his work over the weekend. That seems to serve the Senate committee very well. Since 1992 the committee for which I have worked since its inception has been served on a part-time basis by a former Treasury solicitor—that is as high as we can go in solicitor terms in our country—Sir James Nursal. He is also working as the legal adviser to the Joint Committee on Statutory Instruments. He therefore advises over the whole gamut of statutory instruments and delegated powers in primary legislation. He is a fantastic authority and he has so much experience from being the Treasury solicitor. People listen to him.

You might say, "Why a lawyer?" A former member of the committee who is sitting in this Chamber is a lawyer. Half the committee members are QCs. For many years now the chairman of the committee has been Lord Alexander of Weedon, QC. He is one of the top lawyers in the UK. Why do we need more? I think it is important to have that independent source of advice.

Senator COONEY: You have not answered the question I asked about moral values. Does the House of Lords not take that into account? I refer to values as distinct from laws.

Dr TUDOR: The committee has a limited remit. The House of Lords and every parliamentarian must consider moral values. But the committee looks principally at delegated powers and, to a lesser extent, it looks at human rights. I will pretend for the moment that Lord Mayhew is not present. I can honestly say that the nine members of the committee are all without exception people of great standing in the United Kingdom. They are people that I admire and respect. Each of those nine members I love individually and collectively. The membership of the committee is not laid down in statute. But I can guarantee that all nine members have the highest moral values.

Mr HIRD (Australian Capital Territory): Senator Cooney is an eminent lawyer in the Australian legal profession. I find it interesting that he should ask for expressions. At the end of the day is it not a policy matter rather than a decision made by your chairman? The decision is arrived at co-operatively on a policy basis. Is that not the way in which these things happen?

Dr TUDOR: I am becoming increasingly aware of the fact that the way we work is not entirely the way in which you work. On delegated powers, my answer to that question would be no. The committee is trying to give objective advice based on a particular set of values. That is where the committee's authority derives from. It is not into quick fixes. It is not into easy solutions. It does not take political shortcuts. It is respected by members on all sides of the House. So my answer is no for delegated powers. Moving on to the regulatory reform and deregulation issue, yes, of course, policy issues come into that. One of the questions that the committee has to consider is whether it is appropriate to have this legislation at all. Of course there are policy issues. On a couple of occasions the committee said, "No. This is simply not appropriate." So the answer to the second half of your question is yes.

Mr SQUIBB (Tasmania): I refer to solicitors in Canberra. It was so cold in Canberra last week that they even had their hands in their pockets. I refer to your scrutiny role of subordinate legislation. How far does your role go in examining things such as prescribed fees to ensure that it is really just a fee for service rather than a tax? Is that part of the role of your committee?

Dr TUDOR: I would say yes and no. If it is a power regarding prescribed fees the committee has developed particular practices about those fees. The committee allows Henry VIII powers for the up-rating of fees in line with inflation. There is a strict distinction there, but it has developed its own rules. The Joint Committee on Statutory Instruments is very hung-up on fees. Perhaps that is because they are measurable. It really looked at those quite carefully. I do not work for that committee now. But I know that it considers those fees carefully.

Mr DUNCAN (Australian Capital Territory): I refer to the last dot point on the screen which states that members act in a non-political way. Has your committee ever had problems in relation to that issue? Do you have dissenting reports, or are your reports always unanimous? How does that translate when it comes to a vote in the House? Do committee members vote en mass? You said earlier that your committee was a low profile committee and that it had only nine members of Parliament. On the last page of your document entitled, "Consultation, consultation, consultation", you refer to the fact that citizens are able to respond either to the Government or to the Parliament or both. If your committee is a low profile committee—my committee is also a low profile committee—how does it communicate its views or express its concerns?

Dr TUDOR: When members are on the committee they do not act as if they are members of a political party. I know which party they are from, but you would not know that. I think that must be partly due to the restraint of members. To a considerable extent it is also due to the role of the chairman. He is completely outstanding and is a well-known figure in the UK. His style is to keep the discussion going until agreement is reached. One of his key expressions is, "Are you comfortable?" I know that he has done this in other fora.

So I think it is partly the members themselves, but to have such a fantastic chairman helps. On voting, the committee has never voted. There has never been a dissentient report. I refer to the low profile consultation point—and by "low profile" I mean that the committee never seeks publicity on its own behalf, although sometimes it sadly gets it. It would be all too easy for people to want to use the committee for party political purposes—not the members of the committee. It is all too easy for people to pounce on the committee and to say, “Hey, it said this.” Presumably, that is one of the reasons why governments of both political complexions so rapidly nowadays tend to jump and to do what the committee wants.

On bills, I get very little evidence other than from the Government. The committee does not invite evidence on the powers in bills. On the deregulation side of things, there are a number of ways that people can find out about us. Perhaps the least important thing is that I issue a blanket call for evidence on a weekly House of Lords committee mail-out. Anyone who is interested in House of Lords committees is put on that mailing list. The committee also issues a short report stating that it is inviting evidence and giving a deadline. More importantly, the Government both in its consultation document, which has things like my email address, tells people of the committee's existence. I advise the Government as to what it should say about the Committee. When people put their views to the Government, the Government reissues that data explaining that the committee will look at various issues. So that is a double banking in case somebody or something slips through the net. We do not get vast amounts of evidence but I think in a limited way it is covered.

DELEGATE: I have two questions, both of which have previously been asked. In the Commonwealth jurisdiction the scrutiny function of parliamentary committees is generally limited to issues of legality. In light of the committee's role in deregulation and the increasing importance of policy issues and cost benefit analysis do you think it is appropriate to limit the role of parliamentary scrutiny committees to these technical questions? My second question relates to the point you made about the committee's non-confrontation role and its low-key character. Most representative bodies tend to be partisan and highly confrontational, unlike the House of Lords, which is a peculiar institution in our modern democracy. Would you say, therefore, that there is a case for additional parliamentary forms of scrutiny of dedicated legislation?

Dr TUDOR: One of the things that I have learned about parliamentarians over the years is that, from time to time, you meet people at a party or whatever and they say, “You must read my speech on such and such”, and you hope that they will forget it. They then send you a copy and you think, “Oh no.” Last year I gave a lecture to the Statute Law Society in the UK. I hid behind my chairman, as it were, by saying things like, "Lord Alexander of Wheedon has suggested", and so on. If you want what I as a clerk admit should be done to reform parliamentary scrutiny of secondary legislation in the UK, I could I be like a parliamentarian and say, "Here is a speech. It is not in *Hansard* but that is what I have said before. I believe that it is inappropriate for me to say more about what I think should be done. In answer to your question, "Do I think it right", I think I should not in public say no.

Could I set the record absolutely straight? In both Houses of Parliament there is a variety of parliamentary scrutiny committees. In the House of Commons there are committees which shadow the work of each government department. So they are acting in a different way. Of course, they are looking at merits the whole time. In the House of Lords we have a different variety of committees. I am talking about just one of them. Looking at instruments in a broader way rather than just at the legal points is now almost guaranteed by dint of what I consider to be probably the committee's single greatest success. In the UK, under our Human Rights Act, Ministers have to say that primary legislation is compliant with the European Convention on Human Rights. The committee was worried because that obviously did not include secondary legislation and it is quite likely that most non-compliance, perhaps inadvertently, will actually be in the secondary legislation—a vast mass of stuff—and not in the primary legislation.

As a result of one of the committee's recommendations, the Government has agreed that all affirmative statutory instruments—and I know that there is some confusion about that but the most important ones include deregulation orders and human rights orders—will have a statement of compatibility with the European Convention on Human Rights. Furthermore, what we call Henry VIII negative instruments, that is, instruments that can amend primary legislation, must also have a statement of compatibility. So that is something that is done by the Government. As I said earlier, that is a significant achievement that the Government will, as it were, certificate in that way. There is a fuller answer my Statute Law Society Lecture.

Senator BUCKLAND (Federal Senate): You have made "Consultation, consultation, consultation" a big issue. Is there any consultation between the House of Lords and the House of Commons during this process of pre-legislative scrutiny and while an issue is actually being discussed? I think that goes back to the issue raised earlier by Senator Cooney. From my understanding of the House of Lords it appears as though it is somewhat aloof from the more common citizen. Information relating to the heart of these issues would come from the House of Commons rather than the real technical side. It worries me that consultation leaves out that human aspect in much of what you have been talking about.

Dr TUDOR: I am glad that you asked that question. If that is your impression I think I have been somewhat misleading. I would like to think that this committee is really leading the way in public consultation. People in the UK are less hung up than you might think about people being a lord, or about contacting the House of Lords. I suppose that that is because it has been in existence for hundreds of years. People are just used to it. So I do not think that the fact that I work for the House of Lords actually puts people off. I refer to a couple of points that have arisen. On the delegated powers part of the committee's work, that is something that is only done by the House of Lords. But on the deregulation side of things—and now regulatory reform—that is done by both the House of Lords and the House of Commons. That is because each piece of this secondary legislation could be equivalent to the work normally done in a government bill. Under our bicameral system that must go through the two Houses of Parliament.

Again—and this is a source of great delight to me—the committees have a complete exchange of papers. That is unusual in the Westminster system.

Sometimes you can have one House of Parliament looking at something and the other doing a fairly similar inquiry, which is a massive waste of effort of witnesses and whoever. We say to people in advance, "If you submit papers to one House you are automatically submitting those papers to another." I think that is very helpful. Peter Pike, MP, is chairman of the Commons Deregulation and Regulatory Reform Committee. I think he will say how well the system works. We really do swap papers. Often one committee will decide to lead on something. We take it in turns, depending on the subject matter. I do not think it is a problem.

CHAIR (Mr Tazamala): Ladies and gentlemen, we have reached the end of question time. In our culture when somebody talks likes this without a vote of thanks or without a thank you we simply ask, "Does this child not have parents?". This is one of the most exciting presentations that we have had since yesterday. In my country we are in the process of building our institution to this level. We realise that our Citizenship Act has been based on those aspects—low-key and non-confrontational committees and members acting in an unpolitical way. We realised as a nation that we have to do something. A presidential commission has been established to develop something to be debated at a parliamentary level. That is why this issue is so exciting. I ask Lord Mayhew to make a few comments.

Lord MAYHEW: Philippa has been describing the work of our committee, which we think is fairly successful. When this conference reconvenes in a few years time there will be a substantial change. I very much hope that the committee's success will be maintained because it has now become public that Philippa will shortly be seconded to look after the constitutional affairs of Scotland—a major and important change. If one refers to the question that has been asked, "How does the Committee obtain a 99 per cent acceptance rate for its recommendations", one finds that the answer is largely due to Phillippa's astonishing contribution—the wisdom with which she advises us and the speed with which she works. Few of us are indispensable, but she is one of those few. We shall miss her.

WORKSHOP TWO

Future of Regulation and Scrutiny of Legislation in Italy: An In-Depth Perspective

CHAIR (Dr Kernohan): Good afternoon everybody and welcome to Workshop No. 2. We will have a very interesting time this afternoon. It is going to be a little different to what is in the program. You will note that the program reads that we will have in the first segment: Future: of Regulation and Scrutiny of Legislation in Italy: An In-Depth Perspective. Following afternoon tea this will be followed by a continuation of this workshop.

The honourable Speaker and I had a little talk over lunch, and the problem is that Mr Carbone has to give a presentation that was going to be given by Senator Bassanini. We are going to divide the session into two segments of presentation. This will then be followed by a workshop discussion. The duration of the presentation will be approximately 25 minutes, and 20 minutes of workshop on each of the segments.

The first segment is going to include the framework of regulation review in Italy and Italian policy, an overview of legal instruments involved and, in very easy terms, the simplification strategy. The second segment, following afternoon tea, will cover the other three main strategies: codification, RIA [regulatory impact analysis] and consultation. We will then hear about the major participants in this process, that is, the stars, and then if time permits, a talk about regional regulations and the future.

Of course, as our special speaker this afternoon we have Mr Luigi Carbone, who is Deputy Director of the Simplification Unit of the Prime Minister's Office of Italy. He has a great knowledge of the regulatory reform initiatives that have been carried out in Italy in recent years. He frequently chairs sessions for the OECD. Mr Carbone is a magistrate at the Consiglio di Stato, the Italian Supreme Administrative Court, that protects the rights of citizens against public administration and he has over 10 years experience giving legal advice to the highest level of public administration in Italy. As a Chair of the OECD Committee and a member of the European Institute of Public Administration in Maastricht, Mr Carbone successfully managed to foster international co-operation and develop training programs on government matters.

As a member of the high-level consultative group established by the EU Ministers for better EU regulation, he is designing the regulatory reform of the EU system. In addition, Mr Carbone is one of the founders of the APEC OECD joint program on regulatory reform to improve the rights of citizens and businesses through better regulation. On a less serious note, and a much more interesting one, Mr Carbone is on his honeymoon. It is a wonderful way to mix business and pleasure. On a lighter note, I introduce Mr Luigi Carbone.

Mr CARBONE: Thank you very much, ladies and gentlemen. I assume that everyone attending this panel is interested in what is happening in Italy. In *The Economist* of this week, there is something on Italy and on reforms that Italy has done. Once again, the government reforms in Italy are mentioned because we are coming out of a period of about 50 years of deep reforms that have been deeply examined by the OECD. We are one of the 12 countries that has been reviewed by the OECD, and Peter from Quebec attended many of the sessions of our review. It was a very tough review but at the end, as you can see from the first quotation, they recognise that we have begun very late, perhaps much later than other countries, we have begun from a very bad situation. However, the effort and the relative speed—considering the short term we had—was considered remarkable. In other parts of the OECD report the word "impressive" is used. I am really pleased to say that this is not the word that we use, but the OECD does.

Of course, to enhance the growth potential of the Italian economy we need faster and deeper regulatory reform. What I would like to do this afternoon is not only give you a presentation of what we have done but also what we have to do, what we think it is good to do. I could really represent the sign of continuity between the former Government and this Government, although they are very different as you probably know. We were under a Government of centre-left, and now we are under Mr Berlusconi's Government of centre-right coalition. In simplification, the continuity that the new Minister seems to show is maximum, one of the signs of the times here was legal advice of Minister Bassanini who was supposed to speak here. I am now legal adviser for the Minister of Public Administration.

Before discussing the Italian situation, I would like to give you a very brief idea of the framework in which we were aware we were moving. Some of these points were already discussed this morning by Sue Holmes in her very good presentation. I will try to repeat them very quickly. The framework in which the Italian regulatory reform arrived is a framework in which many of the problems were common in the OECD countries and even in Australia and Pacific countries. First of all, there is the awareness that the regulatory system has a key role in boosting economic growth. In the new economy, and I will try to explain why, because in my opinion rule makers should not engage in a race with technological progress. If we try to regulate what the new is, we will always lose the race. It would be like sailing "Buena Rosa" against "Black Magic" in New Zealand. We lost five to zero. There is no match. Rather the Government should create the environment, the framework, to let the new economy correctly develop.

Giving the correct framework to let the other people play is, in my opinion, what was the awareness of the Italian action. There is a common awareness in many countries in recent years. Another common problem was the awareness of the weakness of the traditional commander in control regulatory style and we are moving from the pursuance. Once the only thing that mattered when we were writing a law or a government regulation was: Is that legal, is that correct, is that form correct? Now, in recent years, we are beginning to ask ourselves: Is this useful to the citizen, to the business? Peter Nagle said that. At the end there is the citizen, at the end of everything.

The second point is that once we had an authority-orientated regulation. When the politicians had the problem, would they just think, "Okay, we can solve it with just a law. We will just write a law and we will solve the problem." But perhaps there were already some laws or some other piece of regulation that would deal with that problem. Perhaps now we are trying to realise that we should change the law if it is really useful for the recipients, the business, the consumers, the citizens who are going to deal with it.

The third main idea—and it was very well said by the delegate from Ontario—that there is no time any more for a mere deregulation. Even Margaret Thatcher would agree on that now. A mere deregulation is much different and also less useful than an intelligent regulation—and a "smart regulation" was this morning's expression. I say high-quality regulation, which is the expression used by the OECD that dedicates a chapter of the review on the capacity of the Government to produce high-quality regulation. I have copied that chapter for you.

These were the common problems and we have also some common phenomena facing us in this recent period. I am talking about an evolution of the last three or four years. We would not have had this conversation seven or 10 years ago. In my opinion, the main phenomena in many countries—and it was in Italy for sure—is that regulatory quality is becoming what I call an autonomous public interest. Mr Chairman, as I learnt at lunch today, you are a very well-known scientist. When a regulation was adopted it was to protect a public interest—environment, employment, competition. These were the public interests. There was no public interest in just writing a law well, writing a law in a good language with the awareness of the impact on the citizen. It was not a specific interest, it was somehow indirectly protected. The sectorial interest was protected by the regulation. Now we are assisting to this growing of the regulatory quality as an autonomous public interest, without caring about the quality of the content of the regulation we are dealing with.

Beyond this autonomous interest we have an autonomous and specific policy with an autonomous political support. In Italy for three years we have had a specific delegation of the Prime Minister to the Minister for Public Administration—Minister Bassanini until three months ago. This delegation has now been renewed by Mr Berlusconi to the new Minister—Minister Fractini—of regulatory quality, on simplification of regulatory environment, specific Prime Minister delegation, and also by the creation of specific bodies that do not care—such as a committee on environment, Minister. They only care about regulatory quality and we see these bodies growing in the Parliament and in the Government. We are assisting the central units in the Government that were mentioned many times by Sue Holmes this morning, and by some sort of bipartisan committees, like your committees, in the Parliament.

The last part of the framework are some interesting characteristics that I think are common to many of our countries, but they are very evident in Italy. Regulatory reform is not something in itself, it is part of a more general government reform. We had a huge reform. I will describe it very briefly later. The word "reform" does not care about what is the legal or constitutional system of the countries involved. In the working party of the OECD, that I have the honour to chair, we have both common law countries, civil law countries, we have Japan, we

have Korea, we have completely different systems, all interested, all involved in the process of regulatory reform.

Another very interesting and common characteristic is what I call the sunset of the lawyers monopoly. Until now the true regulator was a lawyer, the one who knew the rules and the laws. Now we are seeing that the lawyer cannot do everything alone. We need the help of the economists, we need the help of the statistics, we need the help of the people of the sectors. We need a multidisciplinary approach with only just a simplification as a general policy, we need clear objectives and we have to measure the result. Our friend from Ontario gave us data, gave us numbers this morning. That is the only way of evaluating simplification, policy or a regulatory reform.

Another point is that to evaluate that you need to create a regulatory management, you have to create big capacity building, you have to create people who are experts with the tools of better regulation. Another crucial point is involving or, at least in some countries, being aware that you should involve citizens, business and other recipients of regulation in the rule-making process, which means consultation. You cannot do all this at the central level, you need to do this also at the regulatory level that exists in each country. For some countries, this is the Federal and State level; for countries like Italy it is the central and the regional level; for the European Union it is the communitarian, the national and the local level; and, of course, not forgetting the independent authorities. If you do a regulatory impact analysis you have to do it in the same way. All these regulators at different levels should speak the same language.

What were the specific Italian problems? I think we have done a little better than some other countries because we were really a bit worse. Our situation was really a bit worse—not much worse, but a bit worse. We have seen a huge regulatory inflation, we have over 35,000 primary laws of State and regions, very costly regulation with many unnecessary burdens on the public and business, and even on public administrations. We have this unclear, this ambiguous contradictory regulation. That is why in Italy we began a specific and ad hoc policy on regulatory reform. As I told you, it was part of a more general government reform, this so-called Bassanini reform, that included devolution to local authorities.

We gave a lot of powers to the region, so we reduced the central Government, we reduced the number of ministries from 22 to 12, trying to consider their core mission, their core business. We reformed the civil service, we had the huge privatisation process of the civil service and, believe it or not, it was supported by both the business and the trade unions. The unions had realised that the results were so bad that they could not ask for more money if they did not reform. There was really a common understanding on that, and we reformed the public budget.

As I told you, the very reform in Italy was concretised by a specific delegation to the Minister for Public Administration and we realised that we could not only have a mere simplification policy. At the beginning we faced specific single administrative procedures, we took them and we tried to streamline them, to simplify them. Now that we are in a more mature phase, we are now realising

that we should have a more global regulatory quality policy involved in the simplification process, also RIA, also consultation and also the whole reorganisation, the codification of a sector.

The summary has already been done, so I will not repeat it. I have given you the framework in which our reform moved. Now I will give you a brief overview of the two main legal instruments that previously existed, but which were used in a different way. These are the instruments of the regulatory laws and the instrument of the so-called delegislation that is not a deregulation. I will try to explain. These are two typical Italian instruments but wherever I go to describe them, they are considered very interesting. I will then mention the first strategy, the simplification strategy. In the second part we will face the codification, the regulatory and we will briefly talk about the crucial role of the centre of the Government, of the Parliament, and the importance of information technology.

Please interrupt me if you have any problems in understanding my terrible English and in understanding our perhaps complex system. I would like to explain to you the previously existing legal instrument—that is, the instrument of delegating laws, "leggi delega". A delegating law is a law enacted by the Parliament with the normal procedure which the Parliament gives to the Government—the power to adopt legislative decrees of primary level regulation. These are decrees with the full strength of a law enacted by the Parliament, with the only difference being that they are not written by the Parliament and not approved by the Parliament, but they are written by the Government.

When do we mostly use this delegating law? This is used to do the reforms that need a deep knowledge that the Parliament does not have and so the Parliament delegates to the Government the power of adopting this regulation. For example, with the reform of the civil service, the Parliament gave the guidelines, made this delegating law but then it was the Government which wrote this legislative decree, this 100-articles long legislative decree that has the same value of a law.

Another important use of this delegating law is for the codes, to codify what we call an organic sector, a sector that is coherent, environment, taxes, something like that. For example, if I want to have one code for the environment, I Parliament give to the Government the power of writing this law, which after will have the same value of a law. This is the first instrument and we use this instrument a lot. I think that the legitimacy of the decrees enacted by the Government in the last five years were more than 100, so this will help you understand how much this instrument was used to reform areas.

The second instrument is even more peculiar. This is the delegislation—I think that delegislation really does not exist in any language but it was my only way of translating the Italian word "delegificazione". It is something that is not a deregulation but is something in which the law abandons the field, abandons the area that previously was regulated by law. What exactly is delegislation? Delegislation is a mechanism by which a primary law, so called the "legge di delegificazione"—delegislation law—enacted by the Parliament with the normal procedure, identifies the general discipline of a certain issue and, watch out,

empowers the Government to repeal and substitute primary laws in that area with governmental delegislation decrees that are secondary level regulation.

The difference of this mechanism from the other is huge because in the previous mechanism we had the Parliament giving the Government the powers of doing sort of a law written by the Government. In this field the Parliament says, "Okay, I have this area, this procedure for example, the procedure of setting up a new business." I give the general discipline and then I say to the Government, "Okay, from now until for ever you can regulate this field with your secondary level decrees." This is secondary regulation, and we call this one the legislation decree. It is not a deregulation. We have a regulation in that area. It is a regulation of secondary level. What we have is a type of downgrading, downsizing the level of regulation.

The delegislation mechanism is mostly used to allow the Government to systematically streamline and simplify administrative procedures previously overregulated by the law—I will tell you that that was the main instrument we used in simplification strategy—and to reshape and simplify the organisation of public offices that were ruled by the law. We have two main areas of regulation that are administrative procedures and the organisation of the public offices that once were regulated by law. Now we are seeing more and more laws of the Parliament that abandon these areas, these procedures, giving the Government the power to regulate for ever with legislative decrees.

I would like to say that the simplification strategy is not one strategy; it is a rolling program. We have heard that in Ontario we have the annual promises of all the Ministers. We also have an annual simplification Act that delegislates a list of administrative procedures, dozens and dozens of administrative procedures every year. They are listed and the Parliament says, "Okay, from now you will regulate these procedures only with government decrees." Of course, it is the Government that has to present an annual simplification bill that is then enacted by the Parliament with the normal procedure. On this basis the Government sets up an annual simplification plan streamlining many of the delegislative procedures by substituting primary laws with governmental delegislation decrees. Before being adopted, the plan is submitted to the Parliament, and is also submitted to the Parliament every delegislation decree before being adopted by the Government. We have the Parliament also being involved in secondary regulation.

The criteria and guidelines for cutting red tape are really very common to every OECD country. They are: eliminating procedures that are completely unnecessary or when there is no more need to regulate that sector; cutting procedural phases; reducing terms; cutting the intervening authorities by reoganisation of offices competences and even suppressing useless ones. I will not read them out, as you have them on the slides. They are the usual instruments that are always the same size in every country. These are criteria and the guidelines. Here you have some first results of the simplification activity: in three years 184 procedures were delegislated by three Parliament laws, and we have streamlined in Government about 100 of them and another 50 of them we have studied them very carefully. We have realised that we do not need that delegislation decree to streamline them because the sectors have already been streamlined by repealing the substantial provisions or they have been replaced by

alternative measures to regulations. We have about 150 procedures already examined by the Government, up to 184, and this is an interesting example of a tool that worked very well, this so-called self-declaration. This example was also mentioned in this week's *The Economist*. Since 1994 we replaced authorisations and licences with a simple notification of the beginning of an activity, followed by the mechanisms of the silent consent in 194 cases.

For example, even to build a house we were having in most of the cases just a notification of the beginning of an activity to the municipality, and then the municipality has one month to say, "Stop, you are not doing something right." But in most cases they are really not necessary and so it works. We have seen that it works very well. Even more, we have improved this area of certificates, we have abolished almost 95 per cent of the certificates. A few years ago you had to produce a certificate that demonstrated that you were alive, for example, if you wanted to receive your salary. It was crazy. You can see the reduction in the number of certificates, a greater reduction in the certified signatures required by the public administration per year. For example, in 1996 if you wanted to enter the civil service you had to take an exam, you had to sign your request of being examined and you had to have your signature certified by a public authority because they had to make sure that you were the person signing the request.

Now we trust the people who want to do an examination, who want to enter the civil service, and in other millions of cases we have tests. But it is not only a question of numbers of certificates, it is a question of money. Here you have the million of Euros saved by Italian citizens under the self-declaration and self-certification program. In 2000 you have to consider that one Euro is about two Australian dollars. If we have saved 1,128 million Euros we have saved more than $2,000 million Australian dollars in less than three years in abolishing all the certificates.

The case of the Italian "one stop shop" is very similar to what we have heard about Ontario this morning . Once we had 43 different authorisations to set up a new business: the building licence, the commercial authorisation licence, everything. Now we have concentrated in the municipality. What the future business does is go the municipality—and now this can be done via the internet. This means that all the questions can be asked together. The municipality is the public authority which is nearest to the citizens, for the principle of subsidiarity. It is then the municipality which has to have a meeting, that has to invite all the other 43 authorities involved in those authorisations. Representatives sit around a table in what is called a "conferenza di servizi", which is a conference of all the public services involved. They say, "Okay, we have this request, what do you think?" If there is any problem they say. We have realised that we have moved from two to five years to get a final answer to normally three months and the average time is 57 days in a sample of 100 operational one stop shops.

As I told you, the structure is mostly an electronic structure accessible through the internet and we have tried to train people and to improve the establishment of this one stop shop. We are also encouraging small municipalities to pull together to make one multimunicipal one stop shop. If you have one small municipality, very little structure, you cannot deal with 43 different authorities. We encourage them to pull together and we have turn-key contracts for the supply of

109 one stop shops serving 785 municipalities. We have 8,000 municipalities all over Italy. In June 2001 we had almost 60 per cent of the municipalities covered: among them the biggest serving 77 per cent of the population. This closes the first part of my presentation.

CHAIR: Thank you. We were meant to have a facilitator at this workshop and that was Mr Dallas McInerney of NRMA Insurance Limited. Unfortunately, he received an urgent message that he had to return to his office. He asked me to convey his apologies. It therefore means that I will have to be the facilitator, as well as the Chairman. As I am not quite sure what a facilitator is meant to do, not being aware of modern management jargon, we will have to see what happens.

I found Mr Carbone's presentation of the delegislation concept fascinating because I have not heard anything about it before, or heard it used in that context. Does anyone else use this concept in their own parliaments? Does anyone have any thoughts about it?

Mr GILCHRIST (Ontario): We do not call it delegislation. We are vilified by the Opposition for the extent to which we have taken things out of legislation and put them into regulation in order to be more flexible. I have a question about what you are doing in Italy. I am very excited by the fact that your proposal seems to work and from the numbers, it suggests that this is quite an extensive process. You did not mention, though, when you talk about a proposal, just how broad that is. For example, when you do a review and you say that delegislation is inappropriate in a certain area—if it was in environmental protection, do you tend to deal with all air quality as part of your order, or would you say air quality resulting from vehicle pollution and you delegislate only that aspect? Give us a sense of just how broad a delegislation order might be.

Mr CARBONE: Thank you. That is a very good question. This question is between the first and the second part of my presentation because at the end I would have talked to you about that. What we thought is that in dealing with administrative procedures we have to identify very well every administrative procedure that was going to be delegislated. What our normal simplification laws do is have a list of the specific procedure. For example, procedure to have the authorisation to open a chimney or something like that, that would be about air pollution. We also list the laws that discipline that specific procedure. You will see that perhaps also in your country, every procedure has more than one regulation it needs. You have to list at least four, five or maybe 10 different laws on that same procedure.

We have done more than 150 procedures, so we have done a lot of work. What we are now seeing is that it would be even better to take a bigger section, what I call an organic sector, and that will be described during the codification strategy. Then we would put everything together in one code and, at the same time, simplify the several administrative procedures that you have. For example, if you take air pollution you will have many procedures: one for the authorisation for the chimney, one for the gas for the machinery, for vehicles. I suppose there would be about 20 or 25 different authorisations and thus different procedures. What we are realising is that it is better to simplify altogether, to put everything in

the same code and, at the same time, streamline and delegislate the procedural aspects of that sector. That is going to be described later.

Mr KAINE (ACT): We have the same approach that you do to simplifying things, to make it easier for people to do what they want to do. There are complications to that. One area in which we run into trouble—even with our Legislature—is the question of levying of taxes. When you delegate to public servants or others to perform administrative functions there is always the possibility that they will as part of that system, impose a charge for what they do. In our system as long as they are only imposing a charge to recover the costs of providing the Government service, that is fine. But if they go beyond that it amounts to levying a tax and only the Legislature can do that. What systems do you have in place if you are delegating all of these detailed administrative procedures? What checks do you have in place to ensure that your administrators are not in fact imposing a tax which in our system is illegal?

Mr CARBONE: I think it is also illegal in our system but I can give you a very clear example. First of all, as I told you, the legislation decrees written by the Government are examined by the Parliament. The simplification laws enable the Government to write this delegislation decree but before being adopted by the Government they have to receive the scrutiny of the Parliament. There are some guarantees. These guarantees are more formal than substantial because the only aid of a delegislation decree is to simplify.

Usually you do not charge the citizens more, you charge them less. We have seen that with the one stop shop, substituting 43 previously needed authorisations. The public authorities were losing a lot of money because 43 authorisations meant 43 or so small charges on the citizens. If you unify everything the citizens save a lot of money but you lose a lot of money. What we said is that we collected all the amounts of money needed for the 43 authorisations. It was, for example, 500,000 lire, that is $500 Australian, and we said that the municipality can ask up to 500,000 lire from the citizen. The citizen would have in any case spent that money, and they are already saving a lot of time, pressure, stress. If the municipality wants it can charge up to the sum previously needed, so we have quite a flexible system, and we are realising that mostly the citizens save money with simplification. We have seen with certificates it is a huge amount of money that they save. I do not think we really have this problem.

Mr KAINE (ACT): The problem is, of course, if it is interpreted in the courts of law that there has been a tax imposed, the responsibility comes back to the Legislature anyway. But the imposition of the tax was not committed by the Legislature, it was committed by the Minister for the organisations.

Mr CARBONE: In this case the responsibility will be with the Government, because it is a good legal specification that the secondary regulation, the governmental decrees, the delegislation decrees, can be appealed towards us, towards the administrative judges. A law cannot be appealed, but a secondary level regulation is considered like every other government Act that is an Act— that is appealable towards the administrative judge, that is the first instance administrative tribunals and then the administrative Supreme Court, our Council of State, of which I have the honour of being a Judge. In that case an Italian citizen would take the delegislating decree and bring it to the Council of State.

Mr ANOYA (Kenya): In Kenya there are many new restrictions. The Executive has overrun Parliament, and when Parliament makes some of the laws, and gives some leeway to the Executive to make regulations, those regulations are used to defeat the purposes for which Parliament enacted the laws in the first place. What reasonable rationale is there for doing that, and what control mechanism would you have to ensure that the spirit of Parliament is not negated by the Executive?

CHAIR: That is a very good question. Often the spirit of the thing is not enacted in reality, particularly when you have an Executive Government.

Mr CARBONE: Absolutely, I understand this, but of course we have to consider the peculiarities of every country. In Italy you have to consider that we have 35,000 laws that regulate almost the quality of the wood that must be put in the chairs for the schools. We have very detailed things regulated by law. If the Parliament abandons some areas, we really do not care very much about that. But we have many legal instruments of guaranteeing, of granting the respect of the Parliament's intention. As I told you, every secondary regulation can be appealed by the judge and that makes all our lawyers very rich. Of course, if you have a very delicate regulation the first reason of appeal would be the contrast with the legislating law, so there is a very sure, very clear tool of appeal.

As far as the first instrument I mentioned, the so-called delegated decree, decrees that have the same value of a law, in this case we do not have the administrative judge because you cannot appeal a law or an Act of the Government that has the same value of the law. But in this case we have an other very supreme, very high-level tribunal that is called the Constitutional Court, that is a court of only 15 judges like the American Supreme Court, that is the judge of the laws. In this case the Constitutional Court judges the respect of every law of the Italian Constitution, so if we have a legislative decree enacted by the Government that does not respect the delegating law the decree can be appealed towards this very high court because in violating the principles of the delegating law it violates the Italian Constitution that allows the Government to write these decrees. In every case, you have a guarantee, and we are quite happy to make the Parliament abandon as many sectors as possible.

Mr ANOYA: My point is that in our situation given the courts are part of the Executive Government—

Mr CARBONE: Not in our case.

Mr ANOYA: But that is the dilemma I am raising. How would you deal with it?

CHAIR: I think that this is a problem that happens in lots of countries where everybody has their own different systems. They might appear to be the same systems of government, but how they actually work can be quite different and I think that is something that has to evolve with time and you have to try to make it work as best you can. I sympathise, I know what you mean. Ladies and gentlemen, we will adjourn now for afternoon tea.

(Afternoon tea adjournment)

Mr BEK (ACT): We will go back to Mr Anoya's question. We see some dangers in taking law making out of the transparent process and scrutiny of Parliament yet through your delegislation decrees, it appears that you are doing that. What I have not been able to understand is what is it about your Parliament that makes regulatory reform difficult to achieve within the parliamentary process. Why do you need to have delegislation decrees to take laws out of Parliament to create regulatory reform? That is my first question.

My second question is that my old 1970s economic textbooks suggest that Italy had very poor economic growth in the 1970s and 1980s, and a huge black market. Now we see economic growth in Italy is very strong. Is this a product of merely just capturing the black market back into your legitimate market system—and therefore the statistics on the black market are adding to your GDP growth—or can you put it down to the results of regulatory reform?

CHAIR: Would you like to allow Luigi answer those two, and then the third?

Mr CARBONE: With reference to the first point, it is quite similar to the ones already raised by our delegate from Kenya. The problem is a matter of quantity. If you have a Parliament that regulates thousands of specific issues I do not think there is something to be worried if these issues are taken away from the Parliament. Second, about the transparency, of course the works of the Parliament are absolutely public, everyone can see them and watch them, and now we have them on the internet. Every day on the internet we have every single word spoken by our members of Parliament, so it is really transparent. Maybe this is really a form of transparency because in substance if you have hundreds of commissions and meetings every day, you really do not understand and you cannot really follow what is happening, even if it is fully transparent.

On the other side, if you concentrate that in delegating to the Government the work and the Government makes an incorrect consultation process—perhaps you have more opportunities to actively participate, instead of only transparently looking at what happens in the Parliament. I do not think it is so bad. I would like to see the Parliament doing its true and noble job—that is, keeping the principles and the main political choices of a country, giving the guidelines of a legislator. Our Parliament was mortified in the 1980s because you could see members of Parliament devoting their time to writing low-level regulations. I think that it would be better to improve the quality of what the Parliament does, instead of the quantity.

The second question related to the black market. We have to consider that the OECD report says that very well. We had a decade of very strong reforms that were campaigned by our clean-hands operation at the beginning of the 1990s. We had radically changed our political management at the beginning of the 1990s because most of them were involved in scandals. I think it was a clear policy, and thus a clear public administration. It was much more difficult to bribe and do dirty things. In *The Economist* of this week there is an article which relates to this, "Mr Berlusconi will find that some of the ground work has already been done for him

and of the most important reforms of the past half decade was brought by Franco Bassanini, Minister for Public Administration." If you have many complexities, in the old days they asked you everything and you cannot joke grimly that you still have to spend a lot of time proving to bureaucrats that you exist. The scope for bureaucratic delay and bribery was vast. Mr Bassanini's reforms have made a huge difference. I think it was really both—having better politicians who were devoted to reforms and of course hence the reforms.

CHAIR: By the way for those delegates who were a little late, we are just taking the final questions from the last session until everyone is here.

Mr BEK: My third question deals with the election, but it is prefaced by saying that in Australia if we attempt to reduce, simplify or take away laws, the major growth area of our laws has been tax—put tax aside, and it is the environment and consumer protection. We would receive a backlash from removing some of those laws in those areas. Then there was the point from Gary Banks that regulation ends up protecting sectorial interests. When you take away those legislative props you also have an outcry from the immediate people affected by it as well. Was the election where you changed governments affected at all as a backlash to regulatory reform?

Mr CARBONE: First of all I can tell you that we can protect. I think we can protect the environment and consumers interests in a more intelligent way and in a less costly way for business and other citizens. I think in this case we have a very strong and restrictive discipline in Italy. We have one of the biggest cultural heritages in our country. We have a very good environmental legislation. I was visiting an area of Spain—if you go to Majorca for example, it is a beautiful island and is fully built out by these high skyscrapers that you would never see in Sardinia or Sorrento. We have a more restrictive discipline, so I am not very worried about that aspect.

On the other hand, I do not think that the new Government will change a lot in that area, although they might in part. The last time they had six months of government—Berlusconi has already governed Italy for six months. In that time he was able to make an amnesty, not for criminals but for people who have built their houses illegally. Immediately he forgave every abusive builder up until that moment. That is bad! I was asked to write that regulation but I resigned from my office at that moment, because I would not write it. I cannot say this will not happen this time.

CHAIR: We will now take any other questions.

Mr HARGREAVES (ACT): I am interested in Mr Carbone's reaction. I have been listening, and it seems to me that what is happening is that you have your primary legislation overburdened with the detail and what in fact the Italian Government is doing is reducing it to bite-size chunks by putting in most of the detail into subordinate legislation. We as a baby Parliament of only 12 years are doing just that from the start. The chance than you mentioned for people to guard against inappropriate use of subordinate legislation, as my colleague mentioned, the possibility of levying taxes in it, is the appeal to the court system. We have in our system—as indeed in other Australian jurisdictions—the point where the

subordinate legislation, the deregulated legislation, is tabled in the Parliament and it has a life within that Parliament. In our case this is six sitting days, during which time any member can move a disallowance of that. This is a system in-between the court system and the creation of that legislation. I would be interested in your views on how you see that system working as opposed to the system as you seem to indicate where you have to "suck it and see", take it or leave it, through the court system.

Mr CARBONE: To do that would you please be so kind and explain a little more how it works.

Mr HARGREAVES: Certainly. What would happen was that in the creation of any law or through the dismantling of an existing law, the primary legislation is created which, in a sense, is like a head agreement which outlines the basics of what is the law—when it comes to the detail that is done in legislation, subordinate legislation to that primary legislation, when it comes to debating the primary legislation that is done on the floor of the Parliament and the detail of the primary legislation is open for debate. Such is not the case with the subordinate legislation that in fact is only open for debate if it is picked up in a motion of disallowance by a member of the Parliament. That sort of extra layer of scrutiny applies within the Parliament itself. In our system we have a scrutiny of bills and subordinate legislation committee, which also scrutinises the subordinate legislation. That is how we actually do it.

Mr CARBONE: Thank you, I now realise how it works. Everybody, every institutional subject should have that. Time is not unlimited, the time of the people and the time of the bodies. I would really see the Parliament involved in its main task, the guidelines, the high level performance of a discipline, and the Government regulating the lower level, the more technical things. The border between high-level political and technical regulation is very difficult. For example, I would appreciate your system more than the Italian one, in which the advice of the Parliament is mandatory on every secondary regulation that delegislates a sector. I see a type of fear of the Parliament in abandoning a certain sector. They do not like to see what happens. They decide not to legislate any more on this sector, but they want every time is to maintain a type of control of an advice. It is not very good. If they want to abandon a discipline of a sector to the Government it is because it is an administrative procedure.

It is not the high-level system, it is an administrative procedure. How many requirements do you need to have this authorisation or this other licence? If you decide to abandon that to a more technical or more detailed government regulation you should abandon it with no regrets. They want to control every time, so they would prefer this system. I understand that do not want to lose too much power so it is a compromise.

May I continue with the next part of my presentation? It will take 20 minutes.

CHAIR: Yes, that will be fine.

Mr CARBONE: The next part is codification, which is what I was trying to explain to our colleague. What we are realising is that it is becoming more useful in Italy. It not only simplifies specific administrative procedures—which was also mentioned by our colleague from Ontario—but also faces an organic sector and reorganisation. What we have created is this new model of codes, we call them consolidated texts. These consolidated texts have both of the legal instruments I

have described. They have in part the power of a delegating decree, so they have the power of changing the law with a code. They also have the power of delegislating, of downsizing the level of the administrative aspects and of the organisational aspects.

With the consolidated text we can both substitute all previous regulation, both primary and secondary level, and we can also delegislate and simplify the administrative procedures that are part of that sector. The Italian model of consolidated text is not only a codification of the existing legislation and regulation in a certain sector, but also it delegislates the administrative procedures that are contained there. I hope the description was not too long and not too ambiguous.

This work has been done by the unit of which I am the Deputy-Director. In one year we have already written six consolidated texts on administrative documentation, university, building, local government, civil service and expropriation. This has been done with the help of the sectorial Ministers. It involved writing 552 provisions and repealing 402 laws, and 6,198 articles. For one year's work this has not been too bad. It is really important that we are moving towards a mere simplification strategy towards this codification reorganisation strategy that includes the simplification itself.

Now let us move on to regulatory impact analysis, which everyone talks about. For us in Italy it should not be an ex-post justification, a justification of what has already been decided. It should not be a mere mathematical, just a cost benefits arithmetical analysis, but it should be an ongoing evolutionary process to inform the political choice to be set up at the beginning of the regulatory process. We should begin the RIA as soon as possible, as soon as the regulator has the idea of regulating. It should also include the view of stakeholders and the principles of subsidiarily and proportionality, especially at Federal and European level. So we should include consultation in RIA. We should consider both alternative regulatory options—making a law, making a decree, justifying the level of regulation—or the choice of not doing any regulation and choose an alternative to regulation.

I will describe to you the first experimental steps. We have introduced RIA with Law 50/99, and we are one of the first known Anglo-Saxon countries to introduce it, foreseeing an experimental period. We have the Prime Minister's decree in March 2000, which implements the introduction of both legal technical analysis and regulatory impact analysis. You have two kinds of analyses: the preliminary and the final. We want to begin with the preliminary regulatory impact analysis as soon as possible. I have circulated this decree for your information.

We understand that the main part now is working together with the administration, so we adopted the detailed RIA guide, which is a manual for the ministries that have to implement the RIA. We established a task force in the Prime Minister's Office with the assistance of our unit and we want to work together to support and create a help desk for the servants of the ministries who have to draft these RIAs. We also set up a large specific training program in RIA in all the legislative offices of the sectorial ministries involved. What are the further steps for the future? Of course, it is very difficult for us in our non-Anglo Saxon culture to change our bureaucratic and legalistic culture. Sectorial ministries will

need a strong initial support and strong push from our task force. We have to work together, and we want to do our first RIAs together with them. Actually, we are doing that. We are trying to extend the use of RIA to regions and to independent sectorial regulation with the next annual simplification bill.

I would also like to mention that I was very happy when the OECD ruled that our system is well designed because it takes into consideration OECD recommendations and information of best practices and contains interesting innovations such as the two RIA reports and the legal technical analysis reports. I was very happy to read that the OECD has at least theoretically approved what we have done—now we have to do it practically.

Now I would like to move very briefly to the fourth and last strategy for regulatory quality: that is consultation. I have already mentioned the need for a recipient-oriented regulation. Consultation in my opinion is not only an instrument of transparency and democracy—we always say, "We need consultation because of transparency." No, we need consultation because if we consult with the recipients we know where the problems are, which are the critical points of regulation. Sometimes I become upset with the representatives of business because they come to a meeting and they do not tell us what has to be reformed. That is what we want to know. It is much more than being transparent, it is being useful, and therefore consultation is a very important instrument—in my opinion it will become after the experiment, the first part of regulatory impact analysis.

We have decided to avoid every problem of representation, to build up, to set up a single consultative body. This is a very interesting experiment, this so-called "osservatorio per la semplificazione", an observatory, comprising one representative from every ministry, from regions, from local authorities, municipalities, et cetera, and business and consumers, unions, and social parties. We have this big table with about 40 or 50 people, and these are members of the "osservatorio per la semplificazione", and have an important role in both preparing, discussing new regulation to be introduced, and also monitoring the reforms recently adopted to see if they really work. An example of that is the work we are doing on the one stop shop. This is very important because they not only participate in the building of the regulation but they also are helping us in monitoring and fine tuning the reforms. After one year we approved a decree to correct some points of weaknesses that had emerged during this consultation process.

The crucial role of the centre of the Government is recognised by everyone, the utility of a central unit. Of course, sectorial ministries are the first responsible for regulatory quality, but a central structure—from four to 20 countries in OECD—have set up a central structure. This is exclusively devoted to regulatory quality and is highly recommended at the OECD level to reach a balanced mix of centralised and decentralised review because the OECD says it is often difficult for ministries to reform themselves, given countervailing pressures and maintaining consistency and systematic approaches across the entire administration is necessary, above all for RIA simplification and codification procedures.

That is why last year we set up this unit, of which I am a part, under the control and the guidelines of the Minister for Public Administration. This is the regulatory simplification unit composed of 25 experts, chosen from specialists not only on legal matters but also on drafting, economic analysis, policy analysis, cost-benefit analysis—and they work. We also have 40 people of technical staff, so it is a very large unit. The "nucleo per la semplificazione"—the regulatory simplification unit—should be attending the OECD report. This is one of the main guardians of regulatory equality, and in particular it deals with simplification of administrative procedures, so we drive the simplification and delegislation decrees when the sectorial ministries do not want to write it. We manage the drafting of consolidated text and we are now introducing the regulatory impact analysis, giving our support to all the ministerial legislative offices involved.

We have talked about the Government. Now what is the crucial role of the Parliament? We have a first kind of advice of our Parliament on legislative decrees, on primary regulation and consolidated text. In my opinion, the role of the Parliament should be reduced on delegislation decrees, but we have discussed this. In my opinion they do not want to lose the power—they abandoned the sector, but want to keep control in giving their advice. That is very important. In my opinion it is absolutely crucial in the role in the future. They still do not have some good instruments to do that in revising the RIAs of the Government on bills. To do that I would have liked to hear some more from Sue Holmes this morning. I think that the Parliament should build its own office. It should develop its own technicalities to revise the Government's RIAs. Otherwise, there would be no point in doing that. The Italian "Camera dei Deputati"—the Italian Main Assembly—has already created a bipartisan committee on legislative quality, not yet in the Senate.

I think that if they are going to take people that are experts in RIA as officers of the Parliament and the Parliament is absolutely able to do that, I think that it will work as it worked very well with the budget committee. You have to know that until 1995-1996 we were absolutely not able to enter the single European currency because the bills presented by the Government did not have a true budget control. Now the Parliament has its budget committee with its staff very tough on the Government's bills. They began to throw away all the bills that were not really well prepared on the public budget. Now we find the Parliament has really taught the Government to do good public budget analysis and I hope that they would do the same with regulatory impact analysis—it is a mutual help. We really need the help of the Parliament and we are working a lot with our colleagues in the Parliament.

CHAIR: Mr Carbone, we have three minutes remaining.

Mr CARBONE: I only have to talk about the future. Very quickly, I would like to mention the importance of information technology. As I told you, we already have on line Parliament's documents, bills, and we are going to introduce on-line updated versions of existing regulation, updated versions much more than the official Gazette has on line. You are able to go on to the internet and you can find the law as it is with the amendments introduced by the other laws. We will try to introduce on-line consultation so we will be putting on the internet and having notices and comments. Most of all, we are going to introduce a central electronic

register of bureaucratic formalities—it is already in the bill for next year. It is highly recommended by the OECD and it means that if I want to open a business I go on to the internet, I see what the requirements are, I fill most of them on the internet because it is already possible to do this, and that is the most important thing.

The administration cannot ask me extra burdens, extra requirements if they are not on the internet. In some ways, the internet is going to have the same value of the official Gazette, with the only difference being that it is much clearer and much more accessible. This is the judgment of the OECD which says that we are very good and I will illustrate this point. This graph shows that from 1998 to 2000 we have almost doubled our performance in transparency, use of RIA, structured decision processes, index of review activity and communication of regulatory requirements. This is a report from the OECD, which I am very happy about.

Among the main innovations that we still have to introduce are: moving progressively from a strategy of simplifying many single administrative procedures to a strategy to a strategy of global reorganisation of organic sectors; we have to strengthen the sectorial ministries. Like Ontario perhaps we have to introduce a responsibility of every Minister for simplification. We cannot do everything in the Prime Minister's Office. We are strengthening the pro-competition principle in systematically transforming the administrative concessions into mere authorisations. We want to get rid of the 35,000 pieces of law with a more drastic system, and we thought that the guillotine system, used by Sweden, was very good, just putting hundreds of laws in a list: 200 laws on environment. After two years you write a code on environment, and what ever is not in the code is guillotined.

We want to get rid of the huge quantity of laws and we have started this process already. I do not have the time to explain but it is very interesting. Perhaps we can have questions on that. Then we are going to establish a centralised electronic register. We want to use this body that we have—the "Conferenza Stato-regioni", which is a meeting between the central State and the regions to establish common parameters on the quality of regulation. We are going to introduce the use of RIA for regions and independent authorities for their regulatory measures because we have to speak the same language. We want to introduce on-line consultation and improve the consultative role of the "Osservatorio sulle semplificazioni". A lot remains to be done but I think we could really not do any more with our strength. Thank you very much, ladies and gentlemen.

CHAIR: You did very well, Luigi, getting through in that very limited time. Does anyone have any questions either from the first section or the second section?

Mr ANOYA (Kenya): Of course, the Italian system is slightly different from the system I am familiar with. I wanted to find out the role of Parliament with regard to the formulation and communication and control of the budget.

Mr CARBONE: I think Italy, like most countries, has the constitutional duty of having for every law the justification of the public expense. If I want to introduce more public expenses I have to cover them with some taxes. But of course you

have to calculate these expenses and in the old times—in the very happy old times—you could provide a lot of expenses for different things the politicians were interested in, without really saying that those things were going to cost that money. What happened is that the Parliament started to filter this kind of budget analysis, very easily made by the Government. They began to say that they would not approve this. They hired some very expert people on budget as high officers of the Parliament, and we have some very good politicians—professors of economy, et cetera.

The Government also had its experts, so these experts were made stronger by the Parliament's control. Perhaps these experts were already saying that they should have done this and that, but they did not have the authority of doing that when the Minister wanted to have the bill. I think that this mutual control strengthens the capacity of Italy in making good laws on the profile of budgets, well prepared laws. I hope this will happen in the time of regulatory impact analysis. At the moment we really have good budget laws, otherwise we could not stay in the single currency in Europe.

CHAIR: My understanding is once you delegate authority to your other group, it does not come back to the Parliament, is that right?

Mr CARBONE: As far as the budget is concerned, it cannot be delegated, the public expenses cannot be delegated. The Government presented bills, the budget law, every bill, and the Parliament had no capability of controlling it. They had to trust what the Government was proposing, they could vote, they could approve, they could change, they could add new expenses. But they could not really filter. Now what they have done very well is to build their capacity, their expertise in the Parliament to filter, to know what they are doing, what the effects on budget are going to be.

CHAIR: Does anyone else have any questions?

Mr NAGLE: I recall about 18 months ago that the OECD was recommending countries, including Italy, actually delegate the ability to make law further down your government level, down to your municipal level. Is that still going on as a pro-regulatory reform activity?

Mr CARBONE: Sorry, I did not catch the main point. What was the OECD recommending?

Mr NAGLE: That the ability to make laws be delegated from your central Parliament further down to the municipal level?

Mr CARBONE: Yes, but the OECD also recommends keeping control of the quality of the regulation that is delegated. That is even more dangerous than delegating from the Parliament to the Government. If you delegate from the Parliament to the Government you always stay in the centre, it is easier to control. If you begin to delegate to 20 different regions, like we have in Italy, the single discipline will become 20 different disciplines and you then cannot guarantee the quality of all the 20 disciplines. But we have to move towards a Federal system, we have to use the subsidiary principles, we have to delegate. So that is the

problem and that is the reason why the second point is trying to establish common parameters on the quality of regulation at central and local level. It will be much harder but it is the future so we have to do that.

CHAIR: I would like to ask one small question. You said there were 40 to 50 on your permanent consultative body. How are they appointed or selected?

Mr CARBONE: I did not have the time to mention what is called our Christmas agreement of 1998. It was made by the business and the unions and other social partners and it was a large consensus. Among that it was also foreseen the establishment of this forum. With the Prime Minister's decree, we put all the organisations that were involved in this agreement in that. We had all the main business representation, all the unions—we have large unions and they were all there—all the consumer organisations that have the power to appeal the Council of State because the consumer organisations have some powers of appealing in Italy, they cannot appeal to the administration. All these organisations are in the consultative party, with the representatives of the ministries, and with the local authorities. Until now it has worked. I hope it will continue to work.

CHAIR: Before I hand over to Peter, will you please join me in thanking Luigi for a great afternoon, two wonderful presentations.

Mr CARBONE: It was an honour, and I again apologise for Franco Bassanini who could not attend. He would have been delighted to be here, and I send warm greetings from him.

Mr NAGLE: You tell Senator Bassanini what he has missed.

Mr CARBONE: Yes I will, and you will tell him that you have at least understood something about Italy.

Mr NAGLE: Thank you again, Luigi, for an interesting discussion. I always enjoy your presentation. Thank you all for attending this afternoon.

(The Workshop adjourned.)

WEDNESDAY 11 JULY 2001

UNITED KINGDOM REGULATORY REFORM BILL: IMPACT ON DEREGULATION PROCESS

CHAIRMAN (Mr Dylan HUGHES): Good morning, ladies and gentlemen. Welcome to you all. To go through the formalities, I have been asked to point out that mobile phones, pagers, tape recorders et cetera should be turned off. People wanting to ask questions at the end of the session should do so using the microphones at the front of the Chamber. The first speaker is Peter Pike, MP. He is the chairman of the Deregulation Select Committee of the United Kingdom. Mr Pike has been a member of the House of Commons for the seat of Burnley since 1983 and served as Opposition front bench spokesperson on rural affairs from 1990 to 1992 and environment from 1992 to 1994. Mr Pike has been a member of the deregulation committee since 1995 and has served on numerous other committees, including procedure from 1995 to1997, and is currently a member of the Committee for Liaison and the Committee for the Modernisation of the House Of Commons. Mr Pike's interests include local government, energy, employment, trade and industry.

Mr Peter PIKE: I am very pleased to be attending this conference and speaking this morning. As we walked up the road from the hotel where we are staying I was thinking what a beautiful summer's morning it was: in my constituency of Burnley we would mark it down in our diary as one of the exceptionally beautiful days. As was said from the chair, I have been involved in this issue of deregulation since 1995 when the deregulation committee was established in the House of Commons following the 1994 Act passed by the previous Government. In page 20 of today's *Sydney Morning Herald*—the chairman is a guilty man in this regard; he is here partly looking at the Lions as well—it states that some 25 House of Commons MPs are missing from London here in Australia for three weeks following the Lions. I am not one of those 25, and I have not seen any of them as yet.

I have to confess that I am slightly here under false pretences. It was said from the chair that I am the chairman of the deregulation committee. I am not at the moment because the committee was only established on Wednesday of last week. It has not yet had its first meeting. In our House—I do not know whether it is the same in other parliaments—it is not to me to call the first meeting; it is to the member who has most seniority in the House. In this case it is a Conservative member, and he has agreed to a meeting being called on Tuesday of next week. The committee will then decide who will be the chair. Those things are sorted out beforehand: the Government takes a certain number of members and the Opposition takes a certain number. It is likely that once again I will be in the position of chair, but I have to be careful that I do not say anything here that means that the Government and Tony Blair do not get a report back that puts a black mark against my name so that I should not hold the position.

It was also mentioned that I am a member of the liaison committee. A few months ago that committee published a report called "Shifting the Balance". That is a major report in the House of Commons. The Government has not accepted it although it is a report published by a committee that has an overwhelming majority of Labour members. The membership of the committees are in exact proportion to the membership of the House. As Labour has some 400 members of the House and the Opposition has 240-odd—we have quite a comfortable majority—the committee reflects that. The Government does not accept the report because it suggests that we should give more power to select committees and move power back to Parliament and away from the Executive—away from Whitehall and back to Westminster. The Opposition is very keen for the Government to accept the report but I am sure that if the positions were reversed it would have a different view.

It was also mentioned that I serve on the modernisation committee of the House of Commons. We are trying to improve procedures in the House. One thing that we have copied from Australia is what Australia calls the Main Committee. We now have meetings in Westminster Hall—for about nine hours a week on three different days. This has been a tremendous improvement in our system. At certain times I chair those meetings. They are a few preliminary things I thought I ought to mention.

As people will know, the House of Commons and Parliament as a whole just before the general election passed a new Act dealing with deregulation, the Regulatory Reform Act. It was given royal assent very shortly before Parliament was dissolved before the general election of 7 June. It has given more scope, and I want to say more about that Act in the later part of my speech. Having said that, having listened to what some of the other people do—certainly listening yesterday morning to Canada and Italy in the afternoon—I have to say that to some degree in the UK we are only tinkering at the edge of deregulation and perhaps not doing is much deregulation as we should. Peter Nagle talked about the badge with the Hydra on it at the very first session. If the deregulation committee in the UK had to have a badge symbolising what it has done we might have a dice or roulette table on it because most of the measures that we have dealt with have concerned gambling issues rather than removing restrictions that exist in the UK. Hopefully, the new Act that has gone through will give us more scope and we can be a bit more ambitious over the next four years than we have been able to be up to date. So one is hoping that we move in the right direction.

Can we try to establish what we are really talking about when we are talking about deregulation and regulatory reform, because I think to some degree often when we are all talking we use the same words but we do not necessarily mean the same thing. It is important that we clarify what we mean. For much of the time it is the type of thing that has been discussed eagerly by government draughtsman and parliamentary proceduralists and backroom lawyers but it does not set many constituency management committees or party conferences alight with enthusiasm. That is certainly the case in UK and I am sure that it is the same in most of your countries. People do not say that this is the sort of thing we want to fight for when we get elected to deal with this type of issue. It is not always the case but occasionally the issue appears to surface in national political debate and sometimes does become an election issue, but not very often.

Are we really talking about less regulation? Are we talking about better regulation? Are we talking about simpler regulation? Are we talking about better ways of scrutinising the legislation that exists and that we know we have to live with? To look at less regulation for a moment, in the UK certainly parties to what we call the political Right always talk of getting rid of regulations and reducing the interference of the state. I am sure that is the same in many other countries; it will not be unique to Britain or the UK. The Conservative party has often said, "Vote for us and the burden of the socialist state or the nanny state will be lifted from you and you will be able to get on with your lives and your businesses unfettered by unnecessary rules and regulations." I have to say one thing on the side at the moment because I am out of the UK and am not wearing my pager because it would not work here. If in the UK we say "socialist" as a member of the Labour Party we get an electric shock down our leg—for the first time. The second time the message goes to Tony Blair, who immediately wants to know what is happening. But because I do not have my pager switched on I have managed to say the word once today without getting the usual electric shock. Seriously, you will understand the point that I am making there.

One of the mantras of the Right in Britain for many years before the 1979 election which brought Mrs Thatcher into power related to making a bonfire of regulations and quangos. A promise of less regulation has appeared from all parties at every election since the 1979 election. After 18 years of Tory rule, we ended up with more regulation at the end, despite whatever they tried to do, than when she came to office in 1979. Year by year regulation increases. The Conservatives—now the Opposition—ask questions time and again in the House about how many regulations we introduced in the previous year. We respond by saying, "But in 1997, just before you lost the election, you introduced even more regulations." People quote these figures and throw them around at each other. Of course there is pressure to regulate and in a civilised society the reality is that as things are, the has to be regulation in some form. But we want to get rid of unnecessary regulation and we have to have a sensible way forward. I have noticed during the few days that I have been here that many people have spoken about the television programs "Yes Minister" and "Yes, Prime Minister". They appear to have had excellent television coverage throughout the world.

The reality is that those two programs are very true reflection of how government works. I am sure that Lord Mayhew will have observed many scenes in those programs that one could easily say are reflected by government, Labour, Conservative or whatever it might be, because the civil service works in that way and has that power. When we are talking about regulation we want to try to make sure that everyone is playing on a level field, with the same goal posts, the same opportunities and the same rule book. In the United Kingdom at the present time we are looking after Edgbaston. We are thinking of having three innings for England and two for Australia in the next match to give us a chance of perhaps winning that one! Seriously, in respect of regulation we want to ensure that people have a level playing field, and know that they are working on the same basis and that there is a fair opportunity for them.

Ministers also discover that they have tremendous problems with the policy commitments they made to establish a national education curriculum in our

country, for instance—to free schools from local government control—and that they do not necessarily work exactly as planned. When looking at a single market in goods and services in Europe, the reduction of greenhouse gases or any other worthy cause, we have to have the imposition of further rules and regulations on business, industry, trade and possession. It is the price to pay if we are to deliver the things we have promised; to make sure that they will in fact be done. In some ways regulation is the price we have to pay if we are going to be free to be able to deliver what we want to deliver. Ministers have discovered that the complexities of government and the constantly changing external environment make it very tempting indeed to settle for framework legislation—what Lord Mayhew referred to as "skeleton legislation" —even if such bills in their purist form a very rare in the United Kingdom.

There is a tendency to avoid giving too much detail in primary legislation in order to preserve flexibility for future governments. Certainly, we, as the Labour Government, have looked at what the Tory Government did in its years in office and we have used it at times in exactly the opposite way to the way in which they intended it to be used. If they had had skeleton-type legislation that gives the Minister power and there are no restrictions on it, then of course there is an opportunity perhaps to use it in a slightly different way if the parliamentary system is not there to be able to check it. Resisting pressure. There are, of course, ways of resisting the trend towards more and more detailed State regulation. In United Kingdom there is a particular temptation for civil servants to go too far, particularly in respect of European Union [EU] issues. Much EU legislation is drafted in Brussels in only skeleton form.

A lot of things are drafted in skeleton form and it is up to each national government to decide how it is going to translate those directives into appropriate national rules. In the United Kingdom it is very much is standing joke that the United Kingdom opposes EU legislation so frequently and furiously only because British Ministers and members of Parliament know that we were will end up implementing them, whereas we believe that France and Italy totally ignore them and pretend that they do not exist. We in the United Kingdom also have a feeling that the Mediterranean States are virulent in this respect. They take a different line. Having said that, it also has to be said that we in the United Kingdom have a habit of doing what we call "goldplating" and adding to the European Union draft legislation. I used to lead for the Labour Party on rural affairs on one of the European standing committees. One occasion when we were discussing European legislation we had to deal with a sausage—when is a sausage a sausage?

In Britain a sausage does not contain as much meat as it does in the rest of Europe. Did we have to call it a "bread-filled elongated tube" with a bit of meat in it, or could we call it a "sausage"? What shape should a banana be, should it be straight? Those types of things. We had the habit, of course, of blaming Europe for that, but very often we had added little bits to the legislation and it is not necessarily true to say that it is all EU legislation. Goldplating, particularly in our terms, is very important. One other thing—something I will touch on again at a later stage, because it comes on in other committees—you may find it surprising that in respect of European legislation, if one of our Euro standing committees, as they are called in the House of Commons, amends the motion that the Government submits to it, when it goes to the House the Government does not report the amended motion; it reports the motion that it put to the committee and one can only vote on it forthwith. There is no debate at all. Members do not even know that the committee came to a different decision, which I think is an amazing erosion of democracy.

I used to sit on these committees for 2½ hours and we would pull a quick one and manage to defeat the Government and think: We are going to get a debate on this. But of course we got no debate at all because no one knew the committee had even carried the amendment. All we got was a vote. That, of course, continues under the Labour Government; we have not change that! If it was good enough for the Conservatives, now that we are in government is good enough for us. There is a this he also a place for self-regulation in some sectors, and certainly it is the devolving of regulatory powers where possible, particularly to the lower tiers of government. In United Kingdom there is a tradition of excessively detailed control by central with the others not having as much power as perhaps they should.

I will be quite interested to see what devolution for has meant Wales and Scotland. We now have a Welsh Assembly, a Northern Ireland Assembly—which I hope they will be able to find some way of keeping in being. I hope it is not going to have to be suspended because of David Trimble standing down—and a Scottish Parliament. In United Kingdom at the moment it is still very early days of finding out how these devolutions work. We have not got used to them at Westminster as yet. I think we now have a lot to learn about what these are going to be mean for a very changed political situation. The hiving-off of regulatory responsibilities to non-elected bodies representing the practitioners in protected sectors certainly has dangers. Lord Mayhew referred to the area of food hygiene.

As you will appreciate, for a variety of reasons food hygiene, particularly bovine spongiform encephalopathy [BSE], salmonella and things like that, have been a major headache for Britain over recent years. They have not been a political issue in that context, but have caused great problems in terms of how they have arisen and how to ensure we do not have a repeat of them. As we came into Cairns those of us from United Kingdom had to have our shoes inspected. I think the Lord Mayhew might have had to have a blade of grass removed from his shoe, because we wanted to make sure we were not bringing foot and mouth disease into Australia. Foot and mouth disease, certainly for England more than other parts of the United Kingdom, has been a major problem of recent weeks—including for the constituency next to my own.

Financial service industries is another case in point. For many years the United Kingdom resisted the need to subject this, what is major British industry, to detailed and enforceable regulation by the State. We have only moved slowly and very painfully towards establishing a regulatory structure. Even then we are allowing separate parts of the industry, not least the banks, to administer their own self-regulatory regimes. And in whose interest does a bank or someone exercise regulatory control? Whether they are looking after the interests of the customers, the banks, the shareholders, the building societies, the insurance companies or the stockholders is very important, because at the end of the day we want regulation to ensure that the people, the customers, are getting a fair deal and getting protection.

Our hands-off attitude by the State and an acceptance of ancient practice and customs has made this very difficult. We have seen the fiascos of BCCI, Lloyds, Barings and others that have been extremely damaging to Britain's financial reputation over recent years. We suddenly have to do a lot more in that direction. Let me go back again to the point that we need to have better regulation. At the end of the day that has to be what we do. One of the things that the Labour Government did were elected in 1997 was changed the name of the Deregulation Task Force to the Better Regulation Task Force. We believed that was an important change in name, although it has changed its name several times since then. One finds it difficult to keep up with what it is called.

Let us have a quick look at a better way of scrutinising regulations. In the House of Commons those familiar with the system of delegated legislation in Britain will know that in some ways this has been a failure to date. The House of Lords Committee, of course, does a very different job of to the committee that I chair in the House of Commons. They deal with a much wider range of responsibilities whereas in the House of Commons out powers are actually under two Acts of Parliament, the 1994 Act and the 2001 Act. Almost everything that is under the 1994 Act are things already in the pipeline that will disappear as we move on to the new legislation.

The House of Lords Committee has a different method of service; its members serve for only a certain number of years. Patrick Mayhew has been a very distinguished member of that committee. I think he has served three years on it, and, as a result of changes to the system in the new Parliament, he is now coming off the committee. In Britain, the number of formal Acts of delegated legislation peaked in the immediate post-World War period, and declined briefly

for a few years after that. Since the 1960s it has steadily increased, with some occasional dips. I continue to stress that that trend has continued regardless of which political party has been in government. So, again, people have said different things, but in the end, when one looks at the record, it shows that that trend has continued in one direction.

Thus, while the annual number of statutory instruments averaged some 836 in the 1950s and 1960s, the average had doubled in the 1990s, the all-time peak of 1,832 general statutory instruments being reached in the last four years of John Major's government, just before the 1997 general election. This, of course, is a worrying thing. While the number of statutory instruments has increased, the content of them has also more than doubled. That is another important aspect to remember.

At the same time, of course, the length of Acts of Parliament, and particularly the regulatory schedules attached to them, has grown even further. Just in recent years, the finance bill—which in the UK does not cover expenditure; it only covers procedures in relation to moneys raised—now comprises two very large volumes, which are quite difficult to handle. When you also have the explanatory notes along with it, it is quite a marathon to read. Either yesterday or the day before we asked someone to read out from one Act an explanation of what something meant. As I have said, lawyers are always good at wording bills to make sure that lawyers, who are not in Parliament, make a lot of money from interpreting what the law says.

To cope with the growth in delegated legislation, the House of Commons since World War II has adopted two parallel tactics. The first—which was initiated originally in the 1920s by the Lords—was to separate the technical scrutiny of delegated legislation from consideration of its merits. The second tactic was simply to relegate the consideration of merits to a largely insignificant sideline. People will find it very strange that the deregulation committee, or the regulatory reform committee as it is now called, does not actually consider the merits. It is not for us to judge whether this issue on gambling, or whatever it happens to be, is there. We have to judge it by a number of criteria which are laid down by statute, to see that it technically meets those criteria—for example, on protection, whether it is vires, and whether it is consistent with European legislation. The actual merits of the issue are not a matter for us to consider.

Since 1973 the scrutiny committees of the two Houses have been combined into a Joint Committee on Statutory Instruments. Its brief is to consider every statutory instrument laid before Parliament, as well as some which are not formally required to be laid, and to report whether the "special attention" of Parliament should be drawn to it on specific grounds, such as: that it imposes new expenditure not covered by the parent statute; that it has retrospective effect without authority; that its publication or laying was unjustifiably delayed; that there are concerns whether it is intra vires or that it makes "unusual or unexpected use" of the powers in the parent statute; or any other grounds.

In theory, it seems quite wide, even if the scrutiny committees are not allowed to consider the merits of the issue. Having said that, the committee has virtually no powers, other than to take evidence from officials. It is not even

allowed to take evidence from Ministers. Nothing very much happens even if the committee's report on a particular Act of delegated legislation is damning. It is of no consequence; it is just a formality. People who refer to the mother of parliaments—as many people refer to the Westminster Parliament—may well find it somewhat surprising that it is not terribly important in the way we conduct our business. So it is quite a silly procedure at the present time.

Whenever the Joint Committee does report adversely on an instrument, the usual—and so far acceptable—response from the government departments concerned is that it will "correct the error at the next suitable opportunity", that is, when they next introduce legislation in the same area. Only in cases where the actual vires of a statutory instrument are clearly in doubt is it usual for the Government to withdraw the instrument. It can say it is going to do something about it, and if it is proved to be vires it might withdraw it, but it does not have to actually do so.

The committee has a tremendous lack of resources, as do all our select committees in the House of Commons. I do not know about the House of Lords. It is surprising that, although we are in the same building but at opposite ends, we do not liaise very much. It is quite a good liaison between my committee, and the chairman of the committee lets me know what their committee is doing, and I let them know what we are doing. But the actual knowledge of what is happening in the Houses tends to be extremely distant; in fact, we could be in two different countries. As I have said, the committee has poor resources, and very often those resources are extremely stretched. We have a very small team of lawyers who are responsible for scrutinising 3,000 separate Acts of delegated legislation each year. I have to say that without the experts we have on the deregulation committee looking at what we have before us, we would not be able to do our job at all. But we know that we have only a very small number, and if that number is not increased as the workload goes up, we could be in serious difficulties, because the expectations are very high.

Fifty years ago the UK Parliament started well, and with the best of intentions, in trying to establish control over the Executive's exercise of delegated legislative power. Members were only two conscious of the great expansion of delegated powers during World War II. They also knew that this would not be reversed in the face of the demands of post-war reconstruction. So there were some changes as a result of that. We have what are called prayers against orders, if it is a negative procedure. But most of those issues are no longer debated, and some are referred to committee. I chair some of these committees, because I am also on the speakers chairman panel. It has to be said that when matters are referred to committees, very often a Minister will give a formal introduction of the item, the Opposition frontbench will ask a couple of questions, and the procedure will be over with in 10 minutes, and that will be it. I am sure that Lord Mayhew would say that when he was a Minister, in his various roles, that was the type of procedure that he became quite used to. Of course, it is exactly the same now.

I will now move on to deregulation. When the Act was passed in 1994, the Labour Party, in opposition, strongly opposed it every inch of the way and said it would be an abuse. And we remember the Conservative Party Conference when

Lord Mayhew got tremendous publicity on the television, with rolls of toilet paper that this Act was going to get rid of. It really did not materialise. We opposed it, and it finally came into being. I went on to the committee, and we tried to make it work. We have found that issues that are going before the deregulation committee have received better scrutiny than they would have done if they had been attached to a main bill. There also had to be much more in-depth consultation if the procedure was to be followed correctly.

The new Act has given certain additional powers. These are covered in the paper, and if anyone wants to speak to me during the lunch break or at any other time during the next couple of days, I would be happy to go into more detail. But we have removed some of the restraints that were there in the 1994 Act. The new Act allows another burden to be introduced, as long as the overall effect is the reduction of burden, so there is that relative qualification. It also says that post-1994 Acts can be dealt with under the deregulation procedure, whereas the 1994 Act said that it had to be before 1994. It is quite surprising that, having put that through in the new Act, we accept that some Acts we are putting through now may need, almost certainly immediately within a year or so, someone to consider whether something should be deregulated because the Act has got it wrong. So the new Act provides an opportunity to be able to do that.

The Deregulation Committee, as far as I am concerned, works extremely well, but it does not have enough business to deal with. And certainly we are hoping that we will have more come before us as a result of the legislation coming forward. At the end of the day, as a Labour MP I am certainly not one who believes we need no regulation; I strongly believe that we need better regulation. We need to get rid of unnecessary regulation, and to ensure that our industries are able to complete. One of the most important measures we carried under the old Act, which Lord Mayhew also referred to, was the one that dealt with the bank truncation Act, which allowed banks not to have to return every cheque in the country to the branch where the account actually existed. That saved banks something like £30 million a year.

One of the odd things we passed under the old Act was called the long pull. I am sure that most people in the UK would not know what the long pull was, and I am sure that you also do not know what the long pull was. We repealed this, as if it was a matter of great importance. But in 1914, when the First World War started, in those days a landlord in a pub used to give you a long last pull and therefore you got a bit more than your pint of beer. In 1914 an Act of Parliament was passed to make it illegal for a landlord to give you more than your pint of beer. Revoking this Act does mean, regrettably, that if you come to the UK none of the landlords have the power to give you a long pull and therefore more than your pint of beer. If you find a pub that does so, just let me know. That is one of the measures that we introduced.

As I have said, it has been very useful for us to listen to some of the things that have been done in other places. I would hope that we can take a message back to the UK that perhaps we have a lot to learn about what we do and could do a lot better with deregulation, or better regulation. I believe that, at the end of the day, in a civilised society you do need regulation, but it has to be appropriate and simple regulation that will help your country to survive and compete. Thank you.

CHAIRMAN (Mr Dylan Hughes): Thank you Mr Pike for a very interesting and humorous speech, outlining the strenuous efforts made for better regulation in Westminster in what are perhaps difficult circumstances. Unfortunately the clock has beaten us but Mr Pike will be available for questions throughout the day.

THE DEVIL IN THE DETAIL—A NEW ZEALAND PERSPECTIVE OF THE SCRUTINY OF DELEGATED LEGISLATION

CHAIRMAN (Mr Luigi CARBONE): The presenter of this paper is Mr Richard Worth, who is a member of the New Zealand Parliament. Richard has graduate degrees in law and in business. From 1986 to 1999 he was chairman of New Zealand's largest law firm, a Fellow of the International and Comparative Law Centre, Dallas, and an Honorary Fellow of the Institute of Law in the beautiful city of Southbourg in Austria. Richard is a member of the Regulations Review Committee. In 1996 he was appointed an Officer of the British Empire for services to New Zealand. Those who attended our panel heard me tell the story of *Luna Rosa* and *Black Magic*, but I have the honour to say that Richard is the director of a private company which for the first time backed Italy against New Zealand—although I am sure he will have the success of the New Zealand boat in his heart if *Luna Rosa* gets to the final once again. We have limited time, Richard, so I hope you can keep a few minutes for questions at the end of your presentation.

Mr Richard WORTH: Ladies and gentlemen, it is a privilege to be here. I will certainly watch the clock. I pay tribute, as others have done, to Peter Nagle and his organising team. I guess we are all drawn into politics for different reasons. Diane Abbott, the British Labour politician, I thought put it quite well when she said that being an MP is the sort of job that all working-class parents want for their children: clean, indoors, and no heavy lifting. The New Zealand equivalent of that is more robust. We liken politics to dairy farming: long hours, low pay, and constantly being shat on! I am going to speak about "The devil in the detail: a New Zealand perspective of the scrutiny of delegated legislation". On my left is the co-author of this paper, Debbie Angus, who is Legislative Counsel in the Office of the Clerk of the House of Representatives of New Zealand. Another member of the Regulations Review Committee here is David Benson-Pope. Because I have with me a co-author, it seemed only fair that she might answer the questions at the end of my presentation—certainly the tricky ones! That is the general plan.

New Zealand's is a unicameral Parliament. My impression, having heard what earlier speakers have said, is that our systems of regulations scrutiny may be a bit more simple, and I would like to talk generally and briefly about those. The areas I will cover are: the process of scrutiny of legislation by parliamentary committees in our country, particularly the work of the committee that I am on; second, a brief examination of the regulation-making powers in bills, just to give you a couple of case studies, which may have resonance in your countries, as to the types of problems that we are asked to deal with; and then I will deal with two inquiries that we are about to commence upon. The first relates to regulation-making powers that authorise international treaties to override any provisions of New Zealand enactments. The second is on the issue of tertiary legislation, and the extent to which it is appropriate for the Regulations Review Committee to inquire into those issues. Any one of those topics, of course, is substantial. So this is very much an overview of the overview.

I think a really good starting point is the comment made by Chief Justice Gleeson on Monday. Amongst, I thought, the many perceptive observations that he made was in his statement that the game is not necessarily made fairer by multiplying the number of rules. If I could now talk about the New Zealand Regulations Review Committee. It was established 16 years ago. The scrutiny of regulations is the backbone of its work. It examines regulations to divine the detail of legislative proposals, and to search out the devil. I make the point that others have publicly made: that that task of scrutiny can seem unremitting and unrewarding. We are involved in an examination of the primary legislation that delegates the power—that being very much at the heart of effective scrutiny and control. And the committee focuses on the regulation-making powers in bills, and the development of principle that will achieve good-quality legislation.

In terms of the role, we are looking at all of the regulations that are passed by the Executive; the consideration of draft regulations referred by a Minister, and reporting to the Minister; the consideration of any regulation-making powers in the bill before another select committee, and reporting to the committee; the consideration of any matters relating to regulations, and reporting to the House; and a role which—and I am keen to be challenged on this—I think is possibly unique in the context of the Parliaments represented here today, the consideration of any complaint made by a person or organisation aggrieved at the operation of a regulation. Although it is outside the scope of what I will say, any member of the public aggrieved by the operation of a regulation can complain to our committee. They have a right to be heard. They come before the committee with evidence, which is called orally. We reach a view on those issues and report to the Minister—generally, with a positive consequence from our recommendations.

So far as the New Zealand select committee system itself is concerned, all bills are referred to a select committee for consideration after first reading. We have 13 subject select committees and a variety of other committees, including the Regulations Review Committee. Those committees consider almost all bills, with the balance of select committee time spent in the scrutiny of government activity—which might be petitions, self-initiated inquiries, financial reviews, or consideration of estimates. Those select committees also consider public submissions on bills—submissions which are invariably sought—and recommend amendments to bills. Those amendments might be very far-reaching. They certainly go beyond drafting detail. And they look at the substantive merit of a proposed legislative change. There is a time limit for reporting back on bills, generally of six months or such lesser time as the House may determine. And, if the committee fails to meet the timeframe, then the bill goes back to Parliament and is set down for its next stage.

I now turn to the advantages of select committee scrutiny. The first is public participation, which is invariably the case. Second, members will be better informed. I guess there is also a greater public understanding of the proposed measure. Another aspect to this is that it also provides a worthwhile platform for the Opposition to beat up the Government. That is in the context of a public hearing of submissions. We have had bills proposing quite controversial matters. The legalisation of prostitution is a current hot topic. A second would be a common property regime for married couples and same-sex partners. There is a

very clear ability for the Opposition, in that select committee public hearing process, to beat up the Government.

Now to the disadvantages of select committee scrutiny. Clearly, there are additional costs incurred, and increased time, to pass any measure. Second, a bill may be introduced in an unfinished state—redolent of the comment made by Lord Mayhew on Monday about skeleton bills. Third, as I have already said, the final bill may differ greatly from the original bill that went to the select committee. General principles. In its role the Regulations Review Committee operates on three bases. The first is that regulation-making powers in the bill should represent good legislative process. Second, as other committees in other jurisdictions similarly operate, we do not assess the merits of government policy behind a bill. That policy is a matter for the select committee considering the bill, not for the Regulations Review Committee. Third, we have similar scrutiny grounds in the standing orders of Parliament, as do other Parliaments, which provide a starting point for the exercise of those principles.

I now come to common problems. The sorts of things that we are looking for in a search and destroy mission are, in the case of the Act of Parliament amended by regulation, we look to see whether matters of policy and substance are delegated to regulations where they should not be; and we also look for law-making powers delegated without providing for adequate scrutiny and control. In 1961 the Government commissioned a committee to develop a standard empowering provision for regulation-making powers. Although it has been put in modern English, that form of empowering provision is still in use today, and the expectation is that the model will be followed. This is to ensure, first, that the precise limits of a law-making power are set down as clearly as possible in the enabling Act; and the second key proposition is that the jurisdiction of the courts to review delegated legislation and to determine its validity is not excluded or reduced.

The Regulations Review Committee is very active. When Parliament is in session, it meets on Wednesday at about 8.30 for about an hour and a half; and, similarly, it meets in the afternoon of that same day to hear evidence. In the next slide I look briefly at those regulation-making powers and their consideration. The committee regularly reports to subject select committees on regulation-making powers in bills. The committee often is briefed by either the department or the Minister promoting the bill. The subject select committee considers and reports on any issues raised by the Regulations Review Committee. The legal adviser to the Regulations Review Committee, Debbie Angus, may brief the subject select committee. The reports of our committee are given serious consideration by the subject select committee. It is a heartening aspect of the work that we do that it is not ignored.

I thought I would now look at three case studies, to identify issues which, I am sure, are common in most jurisdictions. I guess the facts, of themselves, are not really important. The first case relates to the Misuse of Drugs Amendment Bill. As is the case in many countries, illicit drugs were becoming established in New Zealand before legislative changes could be made to outlaw them. One thinks of drugs such as ecstasy, fantasy and other new designer drugs whose use is spreading more quickly than our legislature can cope with. The Misuse of Drugs

Amendment Bill proposed that schedules listing class A, B and C drugs be removed from the Act and placed in regulations so that a particular mischief could be caught more quickly. The Regulations Review Committee was concerned that the bill offended the principle that matters of policy and substance should be dealt with by an Act of Parliament and that it was shifting these issues to regulations. By moving the schedules into regulations, the bill would allow regulations to define the magnitude of an offence committed under the principal Act. As a consequence, regulations were creating offence-creating provisions. We had real concerns about what the Government was seeking to do.

The relevant select committee—in this case the Health Committee—acted on our report and recommended a number of changes. Its first recommendation was that the schedules listing controlled drugs should be retained in the Act and not put in regulations. Secondly, the schedules could be amended by an Order in Council, which gave expression to the necessary speed required. As an additional safeguard, the Committee recommended that parliamentary approval of the amendments be required before any such regulations came into force. That is an interesting illustration of compromise positions being worked through in order to retain the key principle that matters of substance should be the subject of enabling legislation and that matters of detail should find their way into subordinate legislation. The New Zealand Minister of Health, Annette King, has commented on this matter—it is really a testimonial about the cleverness of the Regulations Review Committee.

The second case study concerns another recent piece of legislation, the New Zealand Public Health and Disability Bill, which relates to the restructuring of our health services. The schedules to the bill covered matters fundamental to the establishment of district health boards and committees; the appointment and election of members; the admission of the public to meetings; and issues relating to borrowing and investment. One would normally find those provisions in the body of the Act or in the schedules to the Act. However, in this case it was planned that they should find their way into the regulations. This is another illustration of the infringement of the principle that regulation should not override primary legislation. These were very broad regulation-making powers that went beyond matters of implementation and detail. We became involved in this issue and, as a result, the Health Committee recommended amendments to most of the regulation-making powers that we examined.

The final case study relates to the Electricity Industry Bill and I think is of incredible significance for constitutional lawyers. It is a really good example of an abuse of Executive power. By way of background, the bill was designed to encourage our privatised and reshaped electricity industry to develop its own solutions to ensure the sustainable delivery of electricity. The bill provided that, if the industry failed to deliver its own solutions, the Government could intervene via regulation-making powers. There were many problems with that Government plan. First, the bill limited disallowance. It provided that regulations could not be disallowed on the grounds that they contained matters more appropriate for parliamentary enactment—which is a classic infringement situation.

There was an attempt to limit parliamentary oversight of the regulations, and there were merged separate procedures of disallowance by the House and

reporting to the House by the Regulations Review Committee. The second problem was that there were very broad empowering provisions in the bill that could allow the regulations to determine some matters of policy. There were also limits on powers prescribed by Parliament, which were not defined clearly. The third problem was that the rule-making powers, as distinct from the regulation-making powers, excluded our Committee from review. They also provided that a rule was not invalid if process requirements were not followed. The fourth set of problems related to the establishment of a Crown entity.

The select committee considering the bill was evenly divided and deadlocked. This legislation is now set down for second reading in our Parliament, so those arguments will be considered on the floor of the House. As an Opposition member of Parliament, I consider this to be a critical test of the present Government. If we allow the Government to pass this legislation with a these egregious excrescences it will pose a real threat to the work of our Committee.

I will now touch on some of our inquiry work and show you this photograph of Henry VIII— it was taken recently by Holbein using a long lens. Reference has been made to Henry VIII clauses, which is what the inquiry that we have embarked upon is substantially about. It is examining regulation-making powers that authorise international treaties to override any provisions of New Zealand enactment. This is quite a common situation around the world in the context of Executive power and the Crown prerogative to make treaties. I do not doubt that delegates will have a number of illustrations in their jurisdictions where this issue has arisen. Our inquiry will examine the circumstances in which regulation-making powers that authorise the override have been used. We will consider alternative means of implementing international treaties; the appropriateness of enacting this type of regulation-making power; the general principles for enacting this type of regulation-making power; and the limits that should be imposed. We have called for public submissions and we often issue a draft as to any provisional positions that we might reach in order to excite responsive comments. We have also conducted a full-scale hearing.

Our second inquiry is examining the principles determining whether delegated legislation is given the status of regulations. This inquiry deals with those classes of instrument that academics sometimes call "tertiary legislation", which might have quite far-reaching effects but is beyond the scope of any meaningful scrutiny. The inquiry will focus on whether there are significant instruments that escape parliamentary scrutiny; why a particular instrument is classified as a regulation or its status is not specified; whether an instrument should be a regulation, subject to parliamentary scrutiny; the issue of the principles to be considered when primary legislation delegates law-making powers; how to assist law-makers in determining the status of a delegated legislative instrument and drafting law that makes that status clear; and, finally, whether our Committee should be able to examine certain delegated legislation instruments.

In conclusion, our Committee performs the following functions. It has responsibility for supervising the exercise of law-making powers that Parliament has delegated, and it uses those powers extensively to examine regulation-making powers in bills. It recommends changes to ensure that delegated

legislation conforms with established constitutional principles. It develops principles through its inquiry reports to assist law-makers, and it encourages select committees and Parliament to debate constitutional principles regarding delegated legislation. A copy of my speech is in delegates' conference satchels. I would now like to introduce Ms Debbie Angus from New Zealand, who will answer any tricky, searching questions that you might have.

CHAIRMAN: Thank you, Mr Worth. I will be sure to take two or three copies of your presentation back to my country. I finally understand how your system works, and it is really very interesting. We discussed yesterday the relationship between the Government and Parliament in Italy, so I think members of Parliament in my country will be very happy to see what you are doing so well in New Zealand. The floor is now open for questions.

Mr ANYONA: We do not have a Regulations Review Committee in Kenya as yet; perhaps one advantage of coming to this conference is that we may establish such a committee when I return home. Richard said that bills are referred to committees. The Kenyan Parliament has a committee system that was established a few years ago, and some bills are referred to committees. When committees recommend amendments to bills, do the committees bring those amendments to the House or are they referred to the Minister to amend the original legislation? That is not clear. I suspect that we may have borrowed this process for New Zealand.

Ms Debbie ANGUS: After a committee has heard public submissions, it reports the bill to the House with amendments. When a bill returns to the House from a select committee it contains a commentary in which the committee explains the reasons for making any amendments and changes. The bill comprises its original text plus an amended version, which is reported back to the House. Any amendments that the Government wishes to make to the bill—for example, by supplementary order paper—are made during the Committee stage in the House. However, the committee's amendments are reported in the text of the bill when it returns to the House.

The Hon. Geoff SQUIBB: In response to Richard's comments about the public's opportunity to have some input in regulations, while we do not have a formal scrutiny of bills process, we have a provision that allows individuals or organisations to appear before the Subordinate Legislation Committee. This body is a joint house standing committee, which, after hearing the evidence, has the power to refer legislation back to the department or to report not to the Minister but to Parliament. There is a provision for any individual to appear before the Committee, which reports to Parliament as to whether appropriate action should be taken to amend or disallow particular provisions—or even suspend them if Parliament is not sitting.

Senator COONAN: I was very interested in the notion of an aggrieved member of the public coming forward to make some complaint about regulations after they have been promulgated. How does that actually work? Can you just explain that a little bit? What do you do about it? Does someone have to seek a merits review if there is some other process before they come back to the committee?

Ms ANGUS: The complaints process is probably some of the most interesting work of the committee. There is a provision in standing orders that allows a person who is aggrieved at the operation of the regulation to complain to the committee. This means that a person can lodge a complaint about the regulation but it has to be in relation to the types of grounds under the standing orders; it is not a merits complaint. They cannot simply complain that they do not like a particular regulation or feel that it should not apply to them. It has to be an argument that a regulation trespasses unduly on personal rights and liberties—that type of argument.

In recent years in order to assist members of the public who wish to complain, the committee has promulgated a complaints handbook. Usually what happens is that if a person has a complaint, he or she might initially contact a member of Parliament. He or she might contact a committee staff member and he or she will be given a copy of the complaints handbook which sets out how to go about making the complaint. There is no formal mechanism. People usually write to the committee or they might write to their local MP who then brings the complaint to the committee. Unless the committee unanimously determines not hear the complaint, the person is entitled to a hearing.

The only time when the committee has determined not to hear a complaint has been when, on the face of it, there is either not a regulation or the complaint is about a policy matter, or one of the standing order grounds has not been addressed. Once a person complains, he or she is given a hearing. Usually what the committee does is contact the department that has been responsible for making the regulation and invites the department to send in a written response to the complaint and issues an invitation for the department to attend the hearing. The committee will then hear from both the complainant and the department or government agency, and the committee usually reports to the House in terms of determining this complaint.

The committee has received some very interesting complaints. It has had complaints from large business organisations, for example, over the payment of accident compensation levies. It has received quite a lot of complaints about the accident compensation system. For example, there was a complaint about travel agents who were categorised under regulations as having to pay the same compensation fee as people who fly helicopters, yet travel agents were working behind desks. There was also a complaint about window tinting and window glazing, as some people in attendance here will recall. This really is the most interesting part of the committee's work.

Mr WORTH: I think this is a really good initiative in the context of access-to-justice questions because it is an avenue for the little guy. The little guy, in challenging Executive power, is pretty much constrained to launching applications-for-review proceedings in the courts whereas this is a no-cost option, apart from the cost of travelling to the Parliament to confront the decision makers—the Ministers of the departmental officials. It is a highly effective alternative.

CHAIRMAN: I would like to collect the remaining questions because we do not have much more time.

The Hon. Geoff SQUIBB: I have a supplementary question in relation to process. Are there time limits involved when the regulation is gazetted or tabled? If so, while there is scrutiny or an opportunity for an individual to have an input, does the regulation come into force?

Ms ANGUS: There is no time limit. People can complain about a regulation that was made 40 years ago if it is still in existence. Because the committee looks at regulations once they are made, they are always in force at the time that the committee is examining them.

Lord MAYHEW: I have just a quick question about the electricity industry bill. Richard said that the health committee was equally divided. I suppose half of them took the view that these were egregious excrescencies and the rest of them thought that they were marvellous. Whilst there is a division on party lines, I think this bears on the issue raised yesterday by our colleague from South Africa. I do not know whether one can get non-partisan attention for these things or not.

Senator COONEY: Senator Coonan has made her usual magnificent contribution and I am glad to see her in attendance. Is there any ability on the part of the committee to enforce its decisions? In the Senate we have what is known as the disallowance motion. Given the numbers in the Senate, a regulation can be defeated if the Government does not follow the recommendations of the committee.

CHAIRMAN: I have a question. This has been a very high-profile legal presentation and I really have to thank Richard Worth and Ms Angus for it. My question is: In your work, which has a very high legal profile, do you also give consideration to regulatory impact analysis, or more economically oriented thinking? If so, what type of technical expertise is used to do that?

Ms ANGUS: I will quickly run through the questions. The electricity industry bill was considered by our comment committee, and it was the comment committee that could not reach a decision. The committee was divided. That was not the regulations review committee. The regulations review committee would consider the bill not on a policy ground but in a report to the policy committee. That is the way that the split works in New Zealand. The policy committee again has to consider the regulation review committee's report. It was the policy committee which would have been divided on party lines.

As far as enforcement of the decision is concerned, New Zealand has a regulation disallowance Act which is based on the Australian Commonwealth legislation. If a member of the regulations review committee moves a motion of disallowance, the regulation is automatically disallowed unless the House moves on that motion within 21 sitting days. There has never been a regulation disallowed in New Zealand. There have been a number of notices of notion but usually what happens—in fact, on every occasion when there has been a notice of motion given—the Government has moved to amend the regulation in some

way, thereby ensuring that disallowance has not occurred because the problem with the regulation has been addressed in some way.

It is not always addressed in the way that the committee has looked at it, but some move is made. Disallowance acts as a "nuclear deterrent" and there are a lot of things done to avoid disallowance. That really is the sanction that the committee has. In relation to the third question, the New Zealand committee does not look at regulations in terms of the economic aspect. There is a requirement that regulations have regulatory impact statements before they are introduced. These go to Cabinet, but it is not part of the role of the regulation review committee to be checking that aspect of them.

CHAIRMAN (Ms Mary GILLETT): It is my pleasure after morning tea to introduce Mr Graham Samuel. Graham is President of the National Competition Council of Australia. Graham was educated at the University of Melbourne and Monash University. Graham has previously served as President of the Australian Chamber of Commerce and Industry from 1995 to 1997 and has been chair of the Inner and Eastern Healthcare Network since 1995. Graham has served as director and executive director of numerous Australian companies and corporations. Graham's subject for us this morning is national competition regulation policy. I ask you to welcome Mr Graham Samuel.

Mr Graham SAMUEL: Thank you very much. I should mention that a copy of my complete paper is at the registration desk. I will only be summarising a few of the principal issues in the paper this morning. I want to talk briefly about the competition policy as an example of the broad-scale program of regulatory reform and to consider competition policy in the larger reform contact. In particular, I will highlight some of the key reasons for what has been the undoubted success of competition policy to date, as well as the challenges we are currently facing and some of the ways we intend to deal with them.

It is often thought that competition policy in Australia started in 1995. It actually started a quarter of a century ago, in 1974, when the then Federal Government introduced Australia's first serious legislative regulation of anti-competitive behaviour through what was called the Trade Practices Act. In summary, the restrictive trade provisions of the Act prohibit anti-competitive behaviour unless it can be demonstrated to an independent authority, which is either the Australian Competition and Consumer Commission or the Australian Competition Tribunal, after a rigorous, objective and transparent review, that there are public benefits outweighing the anti-competitive detriment of the behaviour. That is the principle of the Trade Practices Act. The architects of that Act recognised that although the Act is primarily designed to improve public welfare and economic efficiency by prohibiting anti-competitive conduct, there may be specific instances in which such conduct may still be in the public interest.

In 1995 a whole new series of agreements were entered into by all governments in Australia, supported by the major political parties throughout Australia. That is what is now commonly referred to as the national competition policy. It grew out of a review of competition policy that was commissioned by all Australian heads of government and completed in 1993. As a result of that report all governments, Federal, State and Territory, agreed to adopt an overarching policy to promote competition throughout the economy. The presumption that competition serves the interests of the whole community was carried forward into this national competition policy. Anti-competitive regulations, structures and behaviours are to be removed from those sectors of the Australian economy not already covered by the Trade Practices Act unless it can be demonstrated after an independent, rigorous, objective and transparent review that the public interest community benefits outweigh the anti-competitive cost of these regulations, structure and behaviour. So, it has carried forward the same principle as existed for 25 years under the Trade Practices Act.

The competition policy agreements entered into by all State and Territory governments and the Federal Government set out a number of specific commitments in order to put this principle in place. First, all governments agreed to review all their anti-competitive legislation against the public interest test and to implement necessary reforms over a five-year period—which has now been extended by about 18 months to June 2002. The key, underlying idea was that all regulatory restrictions on competition throughout the economy should be explicitly and transparently scrutinised against the public interest test. The public interest test is twofold: anti-competitive regulation should only be retained if the benefits to society as a whole exceed the costs; and there was no less anti-competitive way of securing those benefits. The test clearly places the onus on those seeking to justify the retention of restrictions on competition.

Second, governments agreed to implement competitive neutrality between government business enterprises and the private sector. That is, to eliminate the advantages enjoyed by government enterprises specifically because of the government ownership. Third, governments agreed to review all areas of government monopoly in the economy, particularly in energy and infrastructure industries, and to restructure them to implement competition as widely as possible. Fourth, the policy implemented an access regime to facilitate competition by providing open access to natural monopoly infrastructure on fair terms. Fifth, provisions of the Trade Practices Act, which covered a range of anti-competitive conduct, were effectively extended to all businesses, government and private. Previously they had been constrained from doing that because of some constitutional limitations that prevented the Trade Practices Act particularly applying to non-incorporated businesses that operate within the boundaries of one State. You can imagine the professions particularly were exempted from the Trade Practices Act until 1996.

The National Competition Council [NCC] was established to provide oversight of the implementation of this policy as well as acting as a policy advisory body on competition-related issues. We have published progress reports on the implementation of policy at two-yearly intervals, in 1997 and 1999, and one will be published within the next few weeks. We have been asked by governments to report annually into the future. At six years into this process it is widely regarded as a major success story in economic and regulatory reform. The longevity of the policy commitment is itself remarkable, particularly in the context of Australia's very short political cycles. In fact, the national competition policy has now survived changes in government in every one of the participating jurisdictions—that is, each of the States and Territories and the Commonwealth—and has stuck remarkably closely to the timelines originally agreed by the parties.

What are the key elements in ensuring success? Also importantly, what dangers have revealed themselves and what lessons have been learned? Finally, how have we responded to these challenges in continuing the implementation of the process? Competition policy is not about competition for competition's sake. Competition is a means to an end, and that end is the community benefit. The competition policy benchmark of community benefit is set out in a specific clause of the competition principles agreement, clause 1.3. That agreement provides that the merits of applying three particular reforms—competitive neutrality, the structural reform of public monopolies and the reform of anti-competitive

legislation—should be predetermined on a case-by-case basis using a public interest assessment.

The clause 1.3 test allows all relevant factors to be considered in determining whether restrictions on competition are warranted. It provides for consideration of an array of community interest considerations, including all those listed on the screen. I will not read them out, but you can see they encompass areas ranging from the environment to social welfare, to occupational health and safety and a range of other factors. The important thing is that that clause is not an exclusive clause, it is inclusive, allowing governments considerable discretion in determining what factors need to be considered when assessing the merits of a particular reform. Thus, it has always been open to governments to take account of matters not specifically listed in that list. The Council of Australian Governments, COAG as it is called, which is the heads of all governments meeting together, only recently encouraged governments to explicitly identify the impact of reform on specific industry sectors and communities, including assessing the adjustment costs. The National Competition Council has considered that this has always been implicit in the inclusive elements of the clause 1.3 test.

A challenging task for governments and review bodies is to make judgments on the importance of each factor in a public interest assessment. The council has made its view on this very clear. Certainly social and environmental matters are intrinsically as important as financial and economic considerations in determining where the public interest lies. In other words, all public interest considerations intrinsically carry equal weight. This does not mean, of course, that for a particular reform proposal every identified cost and benefit will be quantitatively or qualitatively equal in value, and the purpose of conducting the assessment is to weigh up those relative values.

The review process under competition policy has been based on clearly enunciated tests and requirements that apply across a wide range of areas of policy. It has also included clear timelines and reporting requirements from the outset. Each of the participating governments prepares annual reports on its progress and the NCC publishes periodic assessments of this progress. These reporting requirements ensure the pressure is felt by the participating governments, both in the benchmarking effect of comparing their progress with others and by providing the basis for pro-reform lobbying by business, consumer and other interest groups.

Substantial financial incentives in the form of reform dividends are paid by the Federal Government to State and Territory governments but these payments are conditional upon their satisfying prescribed benchmarks of progress in the reform program, providing an additional source of pressure to deliver on reform commitments. That is where some real difficulties arise, because State and Territory treasurers tend to include a forecast of their entitlements to these payments in their forward estimates and they worry afterwards about performing the investment in reform that has to be met to earn these payments. When the reform commitments are not met and the NCC is placed in the unenviable position of having to recommend that payments are not made, it is regarded as a penalty and something that causes great concern to State and Territory treasurers.

I should say, as a measure of success, it has only been on very few occasions that the NCC has had to, after a rigorous review, assess that a State or Territory has not met its commitments and therefore recommended to the Federal Treasurer a reduction in payments. To date, there have been no permanent reductions of payments recommended to the Treasurer. There have been temporary suspensions while States or Territories catch up on some reform commitments, but it is indicative of the success of this program that the timelines and benchmarks that have been set have allowed the National Competition Council to recommend, throughout the five-year period, payments totalling several billion dollars to the States and Territories. That indicates they have made their commitments.

The OECD has for some years argued strongly in favour of broad-scale integrated approaches to regulatory reform in preference to piecemeal efforts. Competition policy is regulatory reform at its broadest, involving the application of consistent public benefit tests to most of the statute books of each participating jurisdiction. Some 1,700 pieces of legislation have been reviewed over a six-year period, indicating just how widespread legislative restrictions on competition have been, even in a relatively market-oriented country such as Australia. Review processes under competition policy are required to be independent, rigorous and expert, and to involve stakeholders and the public. Governments are obliged to report annually on review and reform programs. Many, or perhaps most, review reports are published, as are our assessments of progress.

This means that there is a strong incentive to ensure that the quality of the analysis undertaken is high, as it must withstand detailed scrutiny from a range of sources. It also means that those affected can be engaged in the process and all views can be taken into consideration. The importance of these elements has also been underlined by the deficiencies in this element of the policy. While many review reports are published, there is no clear obligation on governments to publish them, or even to make them available to the Competition Council. Indeed, some governments have actually suggested that reports that they have undertaken to assess what is in the public interest should not be made available to the public to enable the public to determine what is in their interests. This was an important oversight, particularly in relation to the council's ability to assess whether review and reform activity complies with the policy.

It is also arguable that the process requirements have been inadequately specified. Complaints have arisen about a lack of independence in reviews in some cases, particularly where vested interest group representatives have been prominent on review panels. These problems clearly have the potential to undermine confidence in the resulting recommendations of review reports. However, in relation to the review process, the council accepts that in each case the scope of the review needs to be balanced to some extent against the significance of the issue. For example, the fact that there are 1,700 pieces of legislation to be reviewed indicates that this is a resource-intensive process. Because of this we think it is appropriate that relatively minor matters be reviewed within government rather than with a full public process. Conversely, it is not appropriate to exempt an area from reform without first conducting a rigorous

cost-benefit analysis. To do so would be to invite claims that reform has been suppressed to satisfy vested interests.

Competition policy clearly recognises that reform is not a one-off task but a process of regular benchmarking and reassessment. The policy implements this dynamic process through its requirements for regular review mechanisms to be incorporated in reform legislation. In addition, all new legislation is required to pass the same essential public benefit test as has been applied to existing legislation under the legislation review element of the policy. Thus, competition policy imposes permanent benchmarks on the legislative process. While competition policy has been undoubtedly one of the most successful programs of sustained reform undertaken in Australia, there certainly have been things that could have been done better. Many of you will know that, notwithstanding all the benefits competition policy has brought to the community, it has been widely controversial at times since 1995, and there is a constant challenge to maintain and improved levels of public support.

As the implementation of the program continues, many of the issues identified along the way are being addressed and a more focused approach to communicating the benefits of reform is being taken. I would like to highlight here a few of the issues that have been addressed and some of the lessons that have been learned. Reform needs to be embraced by the community as a whole, not just individual sectors. Accordingly, the community in the broader sense of the word needs to be involved from the earliest stages of any reform process. Community involvement provides a focus on and a sense of proprietorship over the solution. Where solutions are formulated by individual sectors in isolation there is a high probability that other sectors of the community will view these solutions with suspicion and as merely serving the self-interest of the proponents.

I have put up on the screen several principles that I suggest are successful economic reform principles—a basis for economic reform. The most important of these is the last: that is, that leadership of reform implementation requires wide consultation and extensive communication and education. Those in this room might have thought that these principles state the bleeding obvious. I would observe, however, that there have been times throughout this competition policy reform process when some of us at the council have begun to wonder whether what appears to be obvious has been overwhelmed by obduracy, for it has been apparent that both in business and in some governments there has been a tendency to lose sight of these fundamental principles, and particularly the last one of consultation, communication and education, with the inevitable consequence that the reform process has faltered.

At times, notwithstanding that there may be sound community benefit reasons for pursuing a reform, there will be substantial equity costs. That is, particular groups may suffer disproportionately. Whether adjustment costs flow from competition policy or the wider process of change, social assistance to change must become an integral part of reform. The lack of a clearly articulated policy on adjustment assistance within the competition policy framework is, I suggest, a major oversight. Such a clear articulation of policy would signal a commitment to assisting the losers from reform and provide the basis for a consistent and equitable approach. To date, governments have responded poorly

to this responsibility. The necessary response requires both commitment and vision. In particular, adjustment assistance is much more than money alone. A big cheque is an inadequate response if those affected by change do not know how to apply the proceeds to assist them to adjust.

Adjustment assistance should be about helping individuals and communities adjust to change in ways that will make them self-sufficient in the future. Sometimes money may not be appropriate at all. Managing change—effective change management—involves advice and assistance of a personal, financial and assistance nature, retraining, reskilling, access to services, and education in communication—specifically, by replacing lost services with alternatives such as enhanced communication structure. At the same time we need to draw a clear distinction between adjustment assistance and the calls for compensation routinely made by any interest group faced with a government intent on removing its long-held privileges.

The reality is that investments that are based largely or solely on regulatory restrictions or protections from competition are inherently risky and those who take on these investments do so in the knowledge that government policies can and do change. Reform agendas would quickly slow and stall if governments were required to meet all the paper losses suffered by investors in industries that are being reformed. Governments clearly have a very limited capacity to meet these kinds of demands and the question has to be asked as to why they should, particularly if it is evident that those investors had in the past profited handsomely at the expense of the community as a whole from anti-competitive restrictions and privileges that are now being reviewed in the interests of the community as a whole.

As I mentioned, competition policy is founded on an explicit public interest test. Unfortunately, a view has become quite widespread that the public interest test is based almost solely on narrowly economic concepts. I hope that I laid that to rest earlier in my comments. This was not and is not the case. But the perception that it is so has led to calls from a number of quarters for the test to be reweighted or re-established. The participating governments have responded to the calls in part by reaffirming the importance of transparency. The amendments to the competition policy framework adopted in November 2000 by the COAG included the insertion of a requirement that governments document and publish public interest reasons supporting a decision or assessment. Other amendments provide that any competitive legislation should be reviewed through a properly constituted review process and the outcome of a review must be within the range of outcomes that can be reasonably reached on the basis of information available. These amendments demonstrate that the participating governments are prepared to set rigorous disciplines on themselves in applying the public interest test for COAG has now formally accepted the requirement for a properly constituted review process and a reform outcome that falls within the reasonable bounds that could be expected from such a process.

I conclude by making a wider point about competition policy and about policy regulatory reform generally. I have spoken so far about the need to ensure that people understand what competition policy is and what it is not, about the need for an intelligent and careful approach to implementing and managing the

resulting changes and about highlighting and raising the understanding of the benefits. However, the fundamental message we need to ensure is delivered is that we have little alternative to pursuing the kinds of changes that competition policy and related reforms are promoting. Talk of globalisation and its impacts is a commonplace now but globalisation is the fundamental context in which we have to see the questions of reform. Australia's economy is undergoing rapid change driven by innovations in communications, financial and information based technologies.

Our companies now compete globally in an environment in which technological advances are driving down costs and enabling entry to markets that were previously sheltered by barriers of information and distance. With integration of markets, world's best practice is the new benchmark and survival depends on achieving it. Wealth creation is no longer simply about boosting aggregate production; increasingly it is about finding better ways of doing things and better ways of meeting consumer wants. The nations to prosper in this century will be those that adapt quickly to rapidly changing demand and supply conditions. Increasingly, it is irrelevant to talk about change in Australia or any other country as something distinct from global change. With the increased mobility of capital, interest rates and exchange rates—major influences on the wellbeing of all in the community—all are now being shaped by global capital markets and international perceptions of our responsiveness to the challenges that go with global change. To close ourselves off from the rest of the world through trade barriers and the like and anti-competitive restrictions may be one response to this challenge but it would be an extremely costly one. The isolationist route would mean taxing the inputs of our own industries and numbing them from the disciplines of competition. This would insulate us from the very impetus needed to sustain growth and employment in the years ahead. The isolationist approach is the road to becoming an economic backwater, and history has shown that the costs falls heavily on those least able to make them. Few countries would now even contemplate the idea.

CHAIRMAN: Mr Samuel has indicated he is prepared to take questions. Would any delegate like to ask a question?

Dr KERNOHAN: Can you please explain to me how the recent deregulation of the Australian dairy industry has been in the public interest, particularly that of regional and rural Australia?

Mr SAMUEL: Yes. For those not familiar, the dairy industry was previously subsidised by Australian consumers to the extent of $500 million a year. That subsidy was extended to dairy farmers in particular. Most of the rest of the industry in the process change has been completely deregulated but dairy farmers were subsidised through transparent subsidy schemes to the extent of $500 million a year by various governments. Since deregulation took place it has been revealed that an additional subsidy was built into the system because milk products have now fallen in cost to the consumer to the extent of about $120 million a year. Even that has another hidden subsidy in it because built into milk product prices is a levy of 11¢ per litre of milk, which has been levied upon consumers for the next eight years to pay for a $2 billion adjustment package that has been paid to dairy farmers throughout the country to assist them with change.

So the $120 million that is now clearly passing to consumers in reduced milk prices can be added to the 500 million and the $2 billion of subsidy to milk product prices. So you can see that the subsidy being paid to the industry was very extensive indeed. But if I can point out the exaggeration of that, dairy deregulation was led by Victorian and Tasmanian farmers. In Victoria they voted 95 per cent in favour of deregulation because 25 years ago they had adjusted to a deregulated environment and started to focus their industry on export markets and on producing manufactured milk products. Unfortunately, the industries in northern New South Wales and in Queensland had relied upon the subsidies and the various quotas and protection elements that were built into the system and had not so adjusted.

When dairy deregulation took place, more than 80 per cent of those involved in the industry in Australia were in favour of it because they benefited; but 20 per cent unfortunately suffered, because they had not adjusted over a 20-year period. They are receiving very substantial subsidies. In many cases those subsidies are not working for the various changed management reasons that I mentioned, that is, there has not been sufficient education as to the process of reform and what it all means. I would have to say to you that the vast majority of dairy farmers in Australia, particularly those based in Victoria and Tasmania, would say, "Three cheers. It's the best thing that could happened." Indeed, in southern New South Wales, where initially they objected to change, they are now responding positively to it because they are also adjusting in much the same way as the Victorian farmers have done. However, there have been dairy farmers in northern New South Wales and Queensland who have found the going difficult. So far as consumers are concerned, they are benefiting very extensively.

Mr MARTIN: I seek a comment. I do not want to strike a discordant note so far as national competition policy is concerned, but I would not like our international visitors to go away thinking it is the best thing since fried eggs. There is still a lot of vagueness in this country, particularly in regard to what is happening in the dairy industry. I do not want to go over all points you made, because we could argue all day about this issue. Do you think the problem in selling national competition policy is that it is seen by many of us as being just another part of the evil hand of economic rationalism?

Mr SAMUEL: There is a problem. Once again, I do not want to strike a note of discord, but the Competition Council is not able to conduct a publicity or communication campaign that actually explains the benefits of competition and what competition can bring. In fact I will reveal to you that the council's total budget for doing just that is $200,000 a year. When you have talk-back radio commentators, particularly in the state of New South Wales, that have several hundred thousand listeners that are railing against competition policy on a daily basis, it is not easy to compete against that on a $200,000 budget.

It is incumbent on governments that signed up to this reform program in 1995, and resigned and reaffirmed their commitment to the program in November last year—unanimously; without any debate or argument, but after three reviews by independent bodies, including a Senate committee and senior officials around the country—and who are undertaking the reform because they believe, as they

said in November last year, that it is in the community's interest, to explain why they are doing it. It is incumbent on those governments to explain why it is in the community's benefit, as they said in November last year, to pursue this reform. It is not, I suggest you, incumbent on those governments to use pejorative expressions and whipping-boy techniques to suggest that this is economic rationalism; or that it is damaging certain sectors of the economy.

I read that one particular politician, who has changed parties of recent days, said the other day that the collapse of an airline in regional Queensland was to do with competition policy were in fact it had nothing to do without all. It had to do with some internal factors associated with the airline. All I would say to you is changed management, which is the responsibility of governments not of an advisory body called the National Competition Council, involves consultation, communication, education and an economically and sociably sensible approach to structural adjustment assistance. Until governments are prepared to face up to that task, we will have to deal with these sorts of pejorative descriptions that you have used.

CHAIRMAN: Thank you, Graham. Might I just say that for most of the delegates in this room management of change is something that, if you're a politician, you are involved in trying to do for your community every day, knowing that you do not have very many allies. I commiserate with you about the loneliness that goes with being the President of the National Competition Council and I congratulate you on a wonderful speech today.

VIDEO—A REVIEW OF UNITED STATES REGULATORY POLICY

CHAIRMAN (Mr Russell TURNER): I represent the wonderful electorate of Orange in central west of the State, about 3½ hours west of Sydney. It is good to see so many of you here. There will be a video presentation for approximately 10 minutes. The video has been sent by the Office of Management and Budget [OMB], Washington, D.C. Given that we are ready a few minutes late there may be an opportunity after the presentation for some comments. The Office of Management and Budget in Washington assists the President of United States of America in the development and execution of his policies and programs. The OMB has a hand in the development and resolution of all budget, policy, legislative, regulatory, procurement and management issues on behalf of the President.

Mr MORRALL: I am from the Office of Management Budget and I would like to talk about a review of United States regulatory policy. Using regulatory impact analysis to promote efficiency, accountability and transparency. First, I would like to thank the organisers of this conference for inviting me. I am just sorry I could not come. The reason I am not here in person is that we are busy back in Washington doing what I am going to talk about. We have a new administration with a new regulatory program with much work to do. Thus, I apologise about communicating by video, but we think it important to tell you how OMB manages United States regulatory policy to promote efficiency, accountability and transparency, because we believe we have developed a program to deliver good economic results.

The basis of our program is a systematic and transparent analysis of the costs and benefits of regulatory options—what we call regulatory impact analysis [RIA]. These are reviewed by objective analysts at the centre of the Government. We believe that this leads to regulation in the national interest, not for special interests. OMB's regulatory impact and oversight program is not new with President Bush's administration. In fact it was developed and implemented by George H. W. Bush when he was vice president before President Reagan, almost exactly 20 years ago. As a young economist just out of academia, I was privileged to be part of that groundbreaking effort. Up until then regulations which basically mandate costs on consumers albeit for public purposes, were growing rapidly and haphazardly, with little or no accountability.

The United States RIA program operates today essentially as it did when established 20 years ago. Although considered revolutionary at the time because it shifted power to shape regulations from the agencies, congressional committees and special interest group—the so-called iron triangle—towards the president, it is now considered part of our political landscape. It is almost inconceivable today that a United States president would give up systematic oversight of regulatory policy. The Reagan-Bush program was implemented by executive order 12291. That order required agencies to issue only regulations whose benefits outweigh their costs and only after sending them to OMB for review and analysis before publication in the Federal register.

Many regulations defined as those having an impact on the economy of over $100 million had to be accompanied by RIAs. OMB was charged with reviewing and approving the RIAs and regulations submitted by the agencies. When President Clinton took over in 1993 he issued executive order 12866 which slightly revised the Reagan-Bush program by streamlining and increasing the public consultation and transparency requirements, but what was important was that he kept the basic program despite calls by special interest groups to ditch it. On January 20 2001 when President George W. Bush was sworn into office, he directed his chief of staff to issue a memorandum to the heads of departments and agencies. It directed them to freeze the regulations in the pipeline and to review them in accordance with executive order 12866.

As many of you know the United States was the first country to adopt governmentwide regulatory reform and quality control program. I would like to share with you why I think our program has worked and how it evolved from controversy to an essential component of United States economic policy. The United States government has recommended this program in both multilateral and bilateral discussions and indeed, perhaps as a result of our recommendations in success with the program, several international organisations such as the OECD and APEC and many countries including Japan, Korea, Mexico, Hungary, The Netherlands and Ireland, have endorsed or adopted similar programs.

Our RIA program serves three main objectives which work together and reinforce each other to improve regulations. The objectives are efficiency, accountability and transparency. A basic goal of the United States regulatory reform program is to promote economic efficiency and therefore economic growth, by regulating only where markets fail and when regulation is necessary by using cost-effective and market-based approaches. Its basic tool is the RIA requirement which has three parts. A statement of need for the proposed action—in other words—the identification of the market failure. An examination of alternative approaches, including non-regulatory approaches and finally, an analysis of the benefits and costs of the identified alternatives.

In March 2000 OMB issued guidelines to the agencies on how to do an RIA. The guidelines were previewed by eight top outside economists. On June 19 of this year, the director of OMB, Mitch Daniels, issued a memorandum to the heads of departments and agencies directing them to comply with the guidelines in preparing RIAs for draft rules. The memorandum also stated that, "If OMB determines that more substantial work is needed, OMB will return the draft rule to the agency for improved analysis". The guidelines document gives guidance and examples from RIAs on such subjects as what alternatives to evaluate, how to chose a base line, what to do with non-monetised benefits and costs. How to take the timing of costs and benefits into effect. How to value benefits, indirectly traded or not traded in markets at all, and how to treat distributional and equity considerations.

Accountability is enforced by all three branches of our government. First, agencies must demonstrate to OMB, acting as an adviser to the president, that the RIA is of high quality and supports a finding that the regulation is likely to maximise net benefits, and is in compliance with the law. Under executive order 12866, OMB has 90 days to review the RIA and regulation at both the proposal

stage and again at the final stage. We can ask for more time and better analysis and ask other agencies for their input. We also receive comments from the public and hold meetings with interested parties under conditions that those communications are placed in the public record.

Secondly, after OMB's sign-off and publication in the Federal register, congress reviews the regulation. Under the Congressional Review Act, major regulations cannot go into effect until 60 calendar days after the later of the publication of the Federal register board's submission to congress. Congress has 60 legislative days—and under expedited rules—to enact the law rescinding the regulation. This provision was recently used to reverse a controversial $5 billion per year workplace ergonomics regulation issued by the Clinton administration in November of last year.

Congress also keeps tabs on the regulatory system and RIAs by requiring OMB to issue a report each year estimating the costs and benefits of regulations in the aggregate, by agency and agency program and by regulation. This is not an easy task. We basically have to make a lot of assumptions and add a lot of very different government and academic studies together to produce our estimates. We have produced three reports. One of the reasons I am in Washington and not with you is that I am working on the fourth report. Believe me, I would rather be with you. A respite from last year's report is the annual cost to the public of social regulation. That is about $200 billion with the annual benefits to the public in the range of $250 billion to over $1.75 trillion. Just last year we issued regulations with the annual costs of about $33 billion in the annual benefits range of $36 to $110 billion.

These estimates, especially the high benefit estimates are controversial and have generated quite a few public comments. We hope to be able to refine the estimates and narrow the range, particularly for the benefit estimates in our future reports. Whatever the exact estimates, their magnitude indicate a huge potential to make society better off by more reason to regulate. Congress also advise us in our report to recommend existing regulations that should be rescinded or changed in order to increase benefits to the public. We have asked the public to provide us with such suggestions by August 15.

Our third branch of government—the judicial system—also plays an important role in promoting accountability. After the rule goes into effect, affected parties can bring suit against the agency issuing the rule. Efficiency and accountability are enhanced by making both regulatory processes and the RIA transparent. The RIA program is fully integrated with the requirements of the Administrative Procedure Act. That Act requires that agencies go through a notice in common process, open to all members of the affected public, both United States and foreign. Before agencies can issue a final regulation, they must respond to public comments, make sure that the final regulation is a logical outgrowth of the proposal in the public record and is not arbitrary or capricious.

The public can, and often comment on the RIA, which is part of the public record and can even provide an alternative RIA that the agency must consider. Besides the usual special interest groups, we now have a very active set of think tanks in university-based centres that regularly comment on RIAs for major

regulations from an economic efficiency and good government perspective. As mentioned, the public record is used by the courts in settling any challenges to the regulations brought by the effect of the public. In many cases, although not all, depending upon the underlying statute, the courts play close attention to the RIA.

A recent law article concluded that when congress says it not unambiguously prohibited consideration of costs, Federal law now deflects a kind of default principle that cost benefits analysis should be considered. Our oversight job at OMB cannot work well if the RIA itself is not transparent. We must understand how agencies arrive at their estimates of costs and benefits. Our guidelines require that the RIA be transparent, and all reasonable alternatives must be examined and all important assumptions stated. If there are reasonable alternative assumptions, sensitivity analysis must be performed using these assumptions. The goal is that outside parties should be able to replicate the RIA results, the universal test for good science.

Let me conclude. Many observers believe that one of the explanations for the amazing growth in United States real GDPs since 1983 and our rapid 10-year expansion is our pro competition and market oriented repertory reform program. To sum up, our experience indicates that defective regulatory form should have an RIA requirement that promotes economic efficiency, has a strong accountability component and is transparent and open to the public. Economic efficiency implies market-based pro competition reforms that are non-discriminatory. Accountability is required because special interests are especially powerful in regulatory matters. Transparency and openness are required to maintain the public support for the program.

Finally, it almost goes without saying that a firm and enduring commitment from the president is a necessary condition for a successful program. Regulatory reform most often must weather periods of short-term costs before long-term benefits appear. For those of you that are interested in more detail, the documents I have mentioned are on our website, which is *whitehouse.gov\omb*. If you have any questions or need additional information please email me at *jmorrall@omb.eop.l*. Thank you again.

CHAIRMAN: We thank the United States Government for sending the video. It would have been much better to have them here in person, but, as was explained, they were unable to come at this time. Would anyone like to comment on the video?

Mr MOLOM: I think it is common knowledge that in Africa we are short of resources—financial resources, capital resources and technological resources—and that sometimes we have an abundance of natural resources but we lack the technology to exploit those resources efficiently. The result of that is that people from outside, mainly from the developed world, come to Africa and exploit these resources for us, and create jobs and industry. But the fact of the matter is that, at the end of the day, they control the economy. We are worried that this might lead to another era of colonisation, in this case economic colonisation. Therefore, when we talk about competition and regulations, we are in a dilemma as to whether we should overregulate in order to protect ourselves or be liberal in our

regulations, with the result that then our countries are taken over by people from outside.

I wonder whether people in this room could provide some solution to this problem. If we do not allow investment to come into Africa, we will remain behind. If we do not take part in globalisation and we become liberal in the conduct of our economic management, we will remain behind. At the same time, if we become free and liberal, and let everybody come in and exploit our resources, we are going to be subjugated again by people from outside—from Britain, New Zealand and Australia—with capital and technical know-how.

CHAIRMAN: Thank you for your comments. I am sure that anyone who has a view about how we can help South Africa will, over the next couple of days, approach you and have a private discussion. We certainly wish you all the very best for the future. I now call on Senator Barney Cooney to chair the next session, in place of Steve Balch, who could not be here.

CHAIRMAN (Senator Barney COONEY): I should say that Steve Balch, who was supposed to chair this session, has very good reasons for staying in the Northern Territory. An election is about to be declared, and, as we all know, that is competition that really concentrates the mind. Someone recently substituted for me as chair, in similar circumstances. One of my colleagues said to me, "Did you chair that meeting?" I said, "No, I couldn't get there; somebody else chaired it for me." My colleague said, "Oh, that explains it." I said, "What do you mean?" He said, "Somebody at the meeting said that a good-looking, young man chaired the session. I couldn't quite work it out." I have received a message which asks me, as chair, to announce that the title of Senator Coonan's workshop paper is "Scrutiny of Delegated Legislation—the Australian Senate", and to assure the meeting that if there is no magic in the title, there will be magic in the talk.

Mr David Mundell is a member of the Subordinate Legislation Committee of the Scottish Parliament and is also Conservative Deputy Spokesperson on Education, Arts, Culture and Sport, as well as a member of the Enterprise and Lifelong Learning Committee. Mr Mundell studied at Edinburgh University, where he gained an honours degree in law and a diploma in legal practice. He is a member of the Law Society of Scotland, a writer to Her Majesty's signet, and a member of the Law Society of England and Wales. He was admitted as a solicitor in Scotland. At the time of his election, Mr Mundell was British Telecom's Head of National Affairs.

Mr David MUNDELL: As Peter Pike said, the weather earlier this morning would have been regarded as a very good summer's day in Burnley. The weather as we were having our mid-morning break would be regarded as a very good summer's day in Scotland. So my colleague Alasdair Rankin, who is the clerk to our committee, and our legal adviser, Margaret MacDonald, feel very at home here in Sydney in these weather conditions. Just in case anyone from the *News of the World*— which is a tabloid newspaper circulating in Scotland which was rather uncomplimentary about our coming out here—is listening, I have not been able to get my shorts out yet, which is a disappointment. And I am extremely concerned now that I have seen that participants from the United States were able to do so by video—which no doubt could be put down as costing about $5 compared to our own call on the public purse. So I call on you to enter into a vow of silence that it was possible to participate in this conference via video cassette.

It is a great pleasure to address the conference and to have the opportunity to tell you something about our relatively short experience of scrutiny in the Scottish Parliament and about how our thinking is developing. On behalf of Margaret, Alasdair and myself, I am particularly grateful to Peter Nagle and the Regulation Review Committee of this Parliament for their work in pulling this event together and their kind invitation for us to attend. The Scottish Parliament has just completed its second full parliamentary year. Over that period the Parliament has passed 19 bills and considered more than 500 statutory instruments. These are, nevertheless, no more than headline measures of activity, and cannot themselves be regarded as measures of success, although I think achievements can certainly be claimed.

Before going on to describe our experience of scrutiny, I think I should provide some context and say a little about the powers, structure and operation of the Parliament, as it is quite different from the Welsh Assembly—as I am sure Mick Bates will refer to when he speaks to you on Friday—and the Northern Ireland Assembly. The establishment of these bodies has not been accompanied by the development of any form of overall Federal framework. Naturally, as Peter Pike indicated earlier, that creates a degree of uncertainty and requires all of us getting used to the new situation.

The Parliament was established, after a referendum in 1997, by statute, the Scotland Act 1998, with the formal granting of legislative power following on 1 July 1999. The Parliament has the powers and duties provided for in that Act. The essential division is between devolved powers and those that remain reserved to the Westminster Parliament. The slide lists the main areas in which the Scottish Parliament has competence to make primary legislation. There is also a power, as yet unused, to vary the basic rate of income tax by three pence in the pound. We will be very careful to keep our travel arrangements in hand, so as not to require that power to be used. In addition, the Act provides that anything not explicitly reserved is indeed devolved.

The reserved powers are principally those indicated in the slide. The Scotland Act provides for powers to be added to, or indeed taken from, the list by affirmative statutory instrument at Westminster. Also, there are statutory mechanisms to ensure that the Parliament does not legislate outwith its competence. The Parliament is a single Chamber with 129 members elected under a system combining single-member constituencies and regional lists to produce a proportional result. At the moment, there are few advocates of a second Chamber. There are eight mandatory committees—of which my committee, the Subordinate Legislation Committee, is one—which the Parliament has been required to establish under standing orders. There are nine subject committees with terms of reference similar to those of departmental Ministers.

There is no functional division between standing and select committees on the Westminster model. Instead, the committees combine the different roles of scrutiny, inquiry and the legislative. Several more committees have been established than were originally envisaged, and they have met more often than initially was supposed. The committees are still finding their feet, and in my view they will need advocates among their own members if they are to develop further. The committees are often considered to be one of the most successful features of the Parliament. In addition to their regular workload, some have met in venues far away from Edinburgh to enable them to consider issues of importance to a particular area and to take evidence in their own locality from those directly involved. Committee members have also visited many European legislatures, the European Commission and the Westminster Parliament to establish contacts, to learn and to compare experiences with European colleagues. And others have naturally come to us, not least a delegation from our hosts today, the Regulation Review Committee of the New South Wales Parliament.

The Scottish Parliament has adopted four basic principles set out by a Constitutional Steering Group ahead of the Parliament's formal establishment.

The principles are set out in the slide as being openness, sharing the power, accountability and equal opportunities. Nevertheless, it is a common view in the Scottish Parliament that we are there are not only to bring government closer to home but to try to do things a little better. On the one hand, simply having the legislative time gives us the opportunity to do that. It is most unlikely that Westminster would have found the parliamentary time for the number of bills that the Scottish Parliament has been able to pass in the last two years, some of them addressing longstanding issues such as the abolition of feudal tenure.

However, there have also been a good number of procedural innovations. Committees have a power to initiate legislation, and a number of committee bills are now before the Parliament. All bills have a pre-legislative scrutiny phase before their introduction, allowing the lead committee for the bill and individual members to consider the principles and overall shape of the bill. We have also a Public Petitions Committee. I was very interested to hear of the experience in New Zealand, not in relation to the specifics of any subordinate legislation or regulation but regarding a general petitions committee.

Our committee already has considered 381 petitions from members of the public in the last year alone. I have to let delegates in on a little secret: half the petitions have come from one individual, a Mr Frank Harvey, who seems to be a reader of the popular press, with the issue of the moment becoming the subject of a petition. I was particularly attracted to the petition to keep caravans off the road during hours of daylight. It is a new and evolving process, and we are learning to segregated petitions on issues of real public concern from those of individuals. Petitions are passed to other committees, and some have led to changes in the law and to commitments by the Executive to bring forward legislation. I think they have greatly increased scrutiny of what are known as qangos, or non-departmental or non-government bodies that have been the subject of quite a number of those petitions.

At a more technical level, as regards statutory instruments to be considered by committees, a requirement has been placed on the Executive from the beginning that it will normally produced what we have called an executive note to accompany each instrument. The main things that a note must do are to provide the policy background and intention of the instrument and to say how it affects existing legislation. The notes are particularly useful for members of the lead committees that are considering the policy of the instrument, but also have a valuable role for our Subordinate Legislation Committee in its scrutinising of those notes.

My committee has also developed the practice of, from time to time, inviting senior policy and legal officials from the Executive to informal meetings as a means of discussing matters of interest to the committee and of putting across aspects of its thinking. The officials have also had an opportunity to put forward the Executive's point of view on matters beyond the issues raised by legislation before the committee at that point. A particular issue that we have tried to take forward from the committee is consolidation of legislation, particularly of subordinate legislation, when it comes before the committee and it is quite clear that it is the twenty-ninth amendment on existing regulations, and it is also quite

clear that it is good practice to ensure consolidation into a new order, rather than constant amendment of an existing order.

In other, perhaps less immediately obvious ways, there has been an emphasis on openness and practicality. The language of standing orders and of parliamentary procedure is kept as straightforward and as transparent as possible, although, as we are members of the European Union and required to implement EU legislation, that is not always possible. I was quite taken by one piece of legislation that had a six-paragraph definition of what constituted a sheep. So it is not always as straightforward as we would wish. One other substantial innovation bearing directly on the scrutiny work of committees is the designation of a lead committee for statutory instruments subject to either the annulment or the approval procedure. The designation of a lead committee to consider and report with recommendations on the policy of an instrument is built into the Parliament's procedures and is intended to address the perceived pre-devolution limitations of the scrutiny system for statutory instruments at Westminster.

There are, in the case of instruments subject to annulment—as various speakers have noted—it is often not possible for those who object to them to secure a debate. Debates on the great majority of instruments subject to parliamentary approval are held in standing committee—but only on a motion, not subject to amendment, that the committee has considered them. The great degree to which control of these procedures lies in the hands of the government, and the consequences for scrutiny, are matters to which the Westminster Parliament has returned on a good number of occasions—a matter to which Peter Pike alluded earlier. I will mention their relevance for the Scottish Parliament shortly.

Under the Scottish Parliament's scrutiny procedures, any instrument subject either to annulment or approval procedure will be considered first by the Subordinate Legislation Committee for technical form and vires. Most instruments are subject to procedure for 40 days. The committee reports to the lead committee and the Parliament on its findings within 20 days. The lead committee may consider the instrument, invite witnesses or a Minister to give evidence if it wishes, and once it has the report of any other committee considering the instrument it has the remaining time in which to reach its recommendations. It is open to any member of the Parliament to lodge a motion that the lead committee recommends that the Parliament either annul or not approve an instrument, as the case may be. The motion is then debated at the next meeting of the lead committee, with the Minister in charge of the instrument being entitled to attend.

In the case of instruments subject to annulment, if a motion recommending annulment is carried in committee a motion proposing the annulment must be taken on the floor of the Parliament. Where a motion is passed in committee recommending that an instrument subject to approval be not approved, the instrument falls at that point. Although no motion against an instrument debated in committee has so far been carried, this is probably, in good part, because the lead committee has usually secured the clarification or assurances it was looking for from the Minister concerned. This has included undertakings to lay amending instruments before the Parliament to remedy the perceived shortcomings. Lead committees have also taken up points made by the Subordinate Legislation

Committee and invited the Executive to offer further explanation or to say what action it intends. I am pleased to say that the Scottish Executive regularly and constructively engages with the committees in these ways.

As a new Parliament putting into practice the scrutiny procedures that I have outlined, it would be disappointing if there was little interest in developing them and looking at the usefulness of scrutiny procedures further afield. The Parliament, perhaps necessarily, has begun with procedures that must seem broadly familiar within the context of the Westminster Parliament. But it is quite free to develop and innovate procedurally, and I think there is good reason to think that it will. The Scottish Parliament is, firstly, a different kind of institution, with its own internal dynamics and outlook. I hope the presence of the Scottish Parliament delegation at this conference, in a country with a deserved reputation as a leader in the areas of direct concern to our Subordinate Legislation Committee, can be taken as an indication that the Parliament regards its present scrutiny procedures as a starting point rather than as a given.

Also, in several respects, the circumstances of the Parliament suggest that changes may not be too far off. There is little weight of history and precedent to overcome. Perhaps, too, the fact that so many are in their first term as members of Parliament has had consequences for their attitude to precedent. In addition, the balance of the parties in our proportional system seems unlikely often to produce, in particular, a single-party Executive with a position of such dominance in the Parliament that it could routinely expect to defeat calls for change. At any rate, it is not difficult to find members who want to see more than the "take-it-or-leave-it" option, which is all, to the disappointment of some, that they have with subordinate legislation. They would like to see arrangements that address their perception of a "democratic deficit" in subordinate legislation procedures. Moreover, it is one of the responsibilities of the Subordinate Legislation Committee to consider and to set out ways in which such concerns might be addressed and how better scrutiny and regulation may be achieved. The first opportunity to put the Parliament's own stamp on such matters will arise in the consideration of a replacement for a Westminster transitional order that provides our present procedures between the Parliament and the Executive for the form and handling of statutory instruments.

Let me now say something of the Subordinate Legislation Committee's scrutiny of delegated powers provisions in bills and its present thinking. In its first report on the National Parks (Scotland) Bill my committee noted the framework nature of the bill and recommended that orders under the bill to establish a national park to be known as designation orders, should be subject to "super-affirmative" procedure. As Lord Mayhew mentioned on Monday, the procedure provides for significantly more demanding parliamentary scrutiny and, in the case of some orders, makes additional public consultation compulsory before and during the parliamentary process. My Committee considered that there was a case for a framework structure in the case of that bill as opposed to separate Acts to establish each new park. However, we considered that Parliament should be able to do more than simply accept or reject the range of substantial provisions that any designation order would necessarily have to contain.

Greater provision for public scrutiny was also necessary. In the event, the Scottish Executive moved closer to the Committee's position, enhancing the consultation provisions but leaving out the additional parliamentary scrutiny. However, this may prove to have been a significant moment in the development of Parliament's procedures as it brought home to many members of the Parliament early in its life some of the scrutiny possibilities. That point was made again during the passage of the Convention Rights (Compliance) (Scotland) Bill this year. It contained, from introduction, the super affirmative procedure for remedial orders to bring Scottish legislation in line—when it may not already be so—with the European Convention for the Protection of Rights and Fundamental Freedoms.

As to bills with inadequate specification of delegated powers, the Committee commented that they should not generally state but clearly indicate the substance of the powers envisaged as well as specifying the level of parliamentary control. Unfortunately, the Committee has had limited success in this respect in a fairly skeletal education bill, as the Executive insisted upon the need for flexibility—which is never defined. However, the Executive can be in no doubt about the Committee's view when similar bills are contemplated. Such flexibility will not be easily accepted in the future. We have found so far that it is usually not difficult to enlist the support of the lead committee for the bill to strengthen the case that we put to Parliament and the Scottish Executive.

In general, the Executive has been responsive. The Committee has been particularly pleased when, following its first consideration of a bill, officials appearing before the Committee to give evidence take the opportunity to say what amendments will be brought forward at the next stage to meet the Committee's recommendations. The Committee has also—picking up on a development at Westminster—occasionally recommended that parliamentary procedure for a delegated power be affirmative the first time it is exercised and negative thereafter. This allows for a sensible degree of flexibility when there is agreement that the less onerous procedure will be sufficient once the first set of regulations has been subject to scrutiny and report in Parliament. Another possibility that the Committee is beginning to consider is the time limiting, or sunsetting, of regulations as occurs in the New South Wales Parliament. Our initial soundings with the Executive suggest a wariness about the additional work that such a rule would involve, but I think this is something that we can work on. There may also be reason to look at provision for the approval of instruments in part only.

In conclusion, there can be no doubt of the effectiveness of the Scottish Parliament's committees in holding the Scottish Executive to account and in improving the quality of primary and secondary legislation in an open and accessible manner. Indeed, the Scottish Executive often acknowledges the positive contribution of our Committee and others in this respect. On behalf of other Committee members in Scotland, I point out that it is not likely that we will be content with meeting our scrutiny responsibilities under existing procedures alone. We have begun turning our minds to the part that we will play in developing the legislative procedures of our new Parliament. We are also keen to make a contribution when opportunities such as this conference arise and to learn from others who have a little more than only two years experience behind them. Therefore, I am particularly pleased to have listened to the contributions of delegates from a diverse range of backgrounds and to understand the common

threads running through this conference thus far. It has been a particularly useful experience from which we will take a great deal back to Scotland to discuss with our colleagues there and to play a part in developing our own procedures within the Scottish Parliament. I will be very happy to answer any questions from the floor. Copies of most of my comments and the slides are available from the registration office.

CHAIRMAN: Thank you, David. Are there any comments or questions?

Mr ANYONA: I am interested in public petitions. The procedures of the Kenyan Parliament make provision for the receipt of petitions—in fact, our daily orders of the day make this provision—but that mechanism is hardly ever used. I think part of the problem is that the system is derived from the House of Commons and there are no elaborate guidelines as to how it should be used. I am interested to hear how the Scottish Parliament deals with petitions. Is the process exactly the same as in the House of Commons or has the Scottish Parliament made some useful innovations? I think petitions are an important aspect of public life.

Mr MUNDELL: I think the principal difference between the procedure in the Scottish Parliament and that in Westminster—my Westminster colleagues will correct me if I am wrong—is that petitions that come to the Scottish Parliament are required to go before the Petitions Committee to be formally discussed in public even if they are later dismissed. There are certain criteria that filter out a petition about a personal dispute between a person and his or her next-door neighbour, for example, before it gets to the Committee. However, providing they meet certain other criteria, all petitions must be discussed in public by the Petitions Committee, which then decides where to refer them—petitions may be referred to another committee of the Parliament or to an outside governmental body. The Committee may also instigate an initial discussion about a petition.

I think this process is very important in cementing public accessibility to Parliament so that people feel they have a fairly easily accessible conduit into Parliament. Some very important issues that are not headline-grabbing—they are not particularly sexy issues—gain entry to the parliamentary process in this way. Although we are a new Parliament and have more time on our hands, politicians—as others have suggested—inevitably want to do things that attract attention and for which they might receive plaudits. Sorting out some long-running legal peculiarities do not necessarily fall into that category. The Petitions Committee has worked very well to bring those sorts of matters into the political process.

Mr PIKE: I was very interested and encouraged to hear the remarks of our friend from Scotland because Westminster has given the Scottish Parliament many good things among its devolved powers. Members of the House of Commons can present a petition on any day. This can be done in two ways. First, petitions may be formally presented at the end of government business before the adjournment debate, and members are allowed to speak to their petitions for about one minute. Those petitions are then put in the green bag that hangs behind the Speaker's chair—which, as I am sure you all know, was presented to the House of Commons by Australia. Secondly, if a member of Parliament does

not agree with a petition that he or she gets from his constituency, that member puts it in the bag—which is where we get the saying "It's in the bag." Whichever way they are presented, the Government may respond to or totally ignore petitions. Any government responses to petitions are printed, but petitions are never debated on the floor of the House. Nothing very much happens with them. The House of Commons receives petitions about all kinds of things, and that is how we deal with them.

Mr NAGLE: I have a housekeeping matter. It appears that this conference has attracted some controversy. The media comment this morning is that our British cousins are on the Great Barrier Reef enjoying yourselves. The media did not even know that you are attending this conference. I have been approached by a journalist from the *Daily Telegraph* who wishes to photograph the conference in session. I have agreed to her request, so she will take that photograph in a few moments. I encourage delegates to remain for the group photograph. I would like to meet our British cousins following the photograph and talk to them about the mean-spirited activities of an ABC journalist. I spoke to the show's producer this morning and assured him that the British delegates are not on the Great Barrier Reef but attending a conference in State Parliament. I was informed that the show had contacted the office of the Premier of New South Wales and was told that it did not know anything about any members of Parliament from overseas attending a conference. When I asked why it would be alleged that British delegates were on the Great Barrier Reef, the response was, "It was only a joke! Can't you take a joke?" I replied that they are our guests. I think we should clarify that point and the *Daily Telegraph* will do a story about the conference—if we can trust the media.

The conference adjourned at 12. 17 p.m.

WORKSHOP ONE

CHAIR (Mr David MUNDELL): I would like to welcome you to this workshop. I am David Mundell MSP, from the Scottish Parliament and I am going to chair this session. I would like to open this session by welcoming Senator Helen Coonan. Senator Coonan is a barrister, admitted in both New York and here in Australia. She was elected to Federal Parliament as member for New South Wales in 1996. She was appointed Deputy Whip in 1998, she was chairman of regulations and ordinance and is a member of the Standing Committee on Treaties. She has also served on the Select Committee into the Impact of Competition which is very relevant to our discussions this afternoon.

Senator COONAN: Thank you very much. It is great to be here this afternoon. We have got many distinguished guests and it is fabulous to have you here. Welcome to all our visitors and I acknowledge my Parliamentary colleagues, fellow Committee members and formal legal advisers here and our fantastic staff from our secretariat, Neil Bessell and Janice Paull. I want, of course, to remind you that we are not on the Great Barrier Reef and for those of you who thought we were I am sure you have had a big reality check. I understand it has been said, of course, very kindly by our guests that Australian Regulation Review has served as the model for others and, indeed, we have very many fine examples from other jurisdictions and we can all learn of course from each other.

However, I must confess that as the Chair of what might probably be the oldest Committee as ours was formed and has been continuously operating since 1932, even age and experience does not always say this as legislators and draftsmen from some comical, and at times even absurd outcomes and I thought I might just share a couple with you. The first is a Queensland instrument. It deals with the Cunnamulla Conservation Plan for lizard races. This plan was promulgated in 1995 and for those of you who are visitors, I should say that Cunnamulla is several hundred kilometres from Brisbane and nowhere near the Great Barrier Reef. In any event, these regulations are something I just wanted to share with you.

The objectives of this plan are to ensure that the taking, use and keeping of lizards for racing during the Cunnamulla Festival is ecologically sustainable and the taking, handling, housing and release of the lizards is conducted in accordance with acceptable standards of humane treatment. What then takes your attention is section 10, which says:

> Stimulants and depressants must not be used … a person must not use a stimulant or depressant on a lizard before or during a race.

It is a serious matter because there is a penalty of 165 penalty units, and you would then of course—as anyone looking at regulations would—want to know what is a stimulant. The definition of a stimulant means anything that temporarily quickens a vital process or the functional activity of an organ or part of a lizard

and includes an alcoholic beverage and an instrument used to prod. It also includes kerosene, methylated spirits or turpentine or any other similar substance that may be applied to a lizard. Sadly, there is no definition of a depressant. That would be something that we would write to the Minister and ask for an explanation as to why there wasn't any definition of a depressant in this legislation.

In any event, in case you think I am being a parochial having a go at Queensland, I am not. I will just share with you one other one. It is a famous example, I think, of creative regulation drafting from the Commonwealth jurisdiction. This is a story well and truly against ourselves. It is: the Nuts Unground Other Than Ground Nuts Order made under the Customs Act. This is what it says:

> In the nuts unground other than nuts order the expression "nuts" shall have reference to such nuts other than ground nuts as would, but for this amending order, not qualify as nuts, unground other than ground nuts by reason of their being nuts unground.

Of course in Australia, thousands of instruments of delegated legislation are made every year and most of them with a very serious purpose indeed and they virtually affect every aspect of an individual's life, which is why it is so important and why we do gather together to try and make sure that we do it well. They have as great an impact as primary legislation which is something that unless you are involved in this, you probably do not think about and, of course, they have the same force in law. Generally speaking, about half of the law of the Commonwealth of Australia by volume consists of delegated legislation rather than Acts of Parliament. It is certainly a growing field.

It is not surprising that there should be no less accountability and information for legislation made pursuant to delegated powers than is available for primary legislation. Therefore, there does need to be a strong mechanism in holding the Government primarily responsible in their use of delegated legislation. I consider that a very specific challenge in the new millennium for the Australian Parliament and that is to ensure that Commonwealth delegated legislation is consistent, acceptable, clear and subject to appropriate Parliamentary scrutiny. In other words, I do agree with the words of the Chief Justice in that I do think that we need an institutional contradictor. It is a role I think that our scrutiny committees play very well.

Before addressing our challenge I would, first of all, like to just review with you our current procedures for Parliamentary control of delegated legislation and in particular the work of our Senate Standing Committee on Regulations and Ordinances. At an early stage in our Parliamentary history the Parliament recognised the need for direct control over delegated legislation. The Acts Interpretation Act 1904 included the basic framework for handling delegated legislation, namely, notification in the Gazette and tabling in each House within 15 sitting days. A vital component of that framework was the capacity for a Senator or member to move within 15 sitting days of tabling, that a regulation be disallowed.

In the early years of our Federal Parliament delegated legislation was not subjected to active scrutiny and it was in 1932 that the Senate resolved to incorporate into its standing orders a requirement that a standing committee on regulations and ordinances be appointed at the commencement of each session

of Parliament. Only the House of Lords had previously acted in this field when it created a Committee in 1925 to examine regulations requiring an affirmative resolution to become law. So we think we do have a long and distinguished record. In the Australian Senate we are proud of this—pretty much a pioneering role and that our example is now being followed by other Parliaments.

For nearly 70 years we have scrutinised delegated legislation tabled in the Senate and we have got a strict set of scrutiny criteria, which is set down in the standing orders. These are fairly familiar to you and ours include that each instrument will be within power or within accordance with the governing statute. We look very carefully to make sure that peoples rights are not unduly trespassed upon. Rights and liberties are regarded and that we do not unduly make citizens rights and liberties dependent on administrative decisions, which cannot be reviewed on their merits by judicial or other independent tribunal.

I was particularly interested today to hear the New Zealand example of the right of a citizen to actually approach the scrutiny committee to make a complaint. And also, our criteria include that it does not contain a matter more appropriate for primary legislation and of course, that is when it strays into areas of policy and when it should be perhaps subject to the usual scrutiny and Parliamentary debate. In keeping with the approach that was adopted in 1933, the Committee considers that questions involving Government policy in regulations and ordinances fall outside its scope.

We are in fact a technical committee, not a policy committee. We do not consider issues of policy that arise under delegated legislation and we still however, on some appropriate occasions, recommend disallowance simply on the basis that they reflect Government policy. So, what is our procedure? All regulations and disallowable instruments of legislative character stand referred to the committee. Each week, instruments lodged for tabling in the Senate are sent to the committee‘s legal adviser who makes a formal written report on each instrument. The Secretariat also scrutinises and provides the legal adviser with comments on the instruments. We think this is a terribly important part because we sort of have a double filter before it even gets to the members of the committee to have a look at. The committee then considers the instruments as well as the legal adviser’s report at meetings held each Senate sitting week.

If an instrument causes the committee concern, usually we will resolve that I will write to the responsible Minister seeking an explanation. The Minister’s response is considered by the committee and in most instances, it will be a satisfactory response. Something has been overlooked or some explanation provided that makes us understand it better, or indeed, by giving of a ministerial undertaking to amend the instrument to meet the committee’s concerns. If the Minister does not provide a satisfactory response we can write again, repeating our concerns or else raising other ones. Sometimes you miss things on the first time around and something else becomes apparent.

In recent years, the committee has exercised its power to call officials or witnesses before it to provide further information where there are continuing difficulties with an instrument. I think this was an innovation that commenced since I took over the chair of this committee, simply because it seemed to me that

endlessly writing letters sometimes did not hit it on the head or there was an issue that could be resolved if officials came and you shared your views and concerns. We have had about four or five occasions where we have been assisted by calling in the officials to share with us what was in their mind at the time that this was put together.

An example that I put in my paper, which I think is quite a good one, and it was a terribly important issue, particularly at the time of the Olympics that were, of course, staged in Australia late last year. We supplemented our usual scrutiny by questioning officials of the Australian Sports Drug Agency, when it established a single drug-testing scheme. We were pretty concerned about the administrative framework—and you can appreciate how important this was—for the collection and sampling of drug tests performed on competitors in sport. The aim of the scheme is to ensure that the agency has a high quality antidoping program that deters athletes from banned doping practices. The scheme also provides surety that important athletes rights are maintained throughout this testing process.

This aspect was of particular interest to the committee in order to ensure that natural justice was provided to the athletes, subject to the requirements of antidoping programs provided by the agency. We had raised pages and pages of concerns with the Minister for Sport and Tourism and most of the responses we got back were okay. However, we were not satisfied with some of the aspects of the regulations including delegation of powers and functions to drug control officials and chaperones, that is, just who actually had authority, whether or not they were accountable. The definition of a secure place for the holding of a sample, the safe arrival of samples—because they had to be transported from where they were taken, to be tested—and standards and procedures adopted by other countries and organisations.

The meeting with officers of the agency proved invaluable as specific concerns were discussed and resolved. This has happened again, of course, with lots of other things. Another interesting example was some amendments to the regulations that impact on the Great Barrier Reef. I will mention that because it is such a topical issue today. Those regulations were of concern mainly because they were strained towards policy because changing the size of fishermen's nets and their ability to catch fish in a particular part of the marine park did affect livelihoods, and it was very important that it was seen to be within power that it could be done by regulation and that it was not something that otherwise should have been the subject of legislative amendment.

If the matter has now been resolved within 15 sitting days of tabling, what I usually do is give notice of motion to disallow the instrument in the Senate, thereby protecting our options and giving the committee and the Minister a further 15 sitting days to resolve any outstanding issues. We will withdraw the notice of motion to disallow when we receive a satisfactory response or ministerial undertaking. In the past this breathing space has gone down to the wire where the committee and a Minister have resolved matters within an hour or two of the matter being brought on for debate in the Senate. It is important to note that the committee adopts a non-partisan approach to its work.

I personally think that it probably is one of the most valuable underpinnings of this Committee and indeed, Senator Cooney's Scrutiny of Bills Committee. It is also complemented by the fact that certainly we receive both a co-operative and helpful response usually from the Ministers. The success of these arrangements is reflected in the fact that the Senate, at the instigation of the Committee, last disallowed an instrument in 1988. It does give you a very good overview of just how effective this scrutiny system is, that we do not have to disallow, at least on the terms of reference of the Committee, most instruments. We can get them sorted out. The Committee has long held the view that a disallowance initiated by the Committee, instead of being a victory, has been a failure.

Over the last 16 years the type and volume of delegated legislation has increased hugely and I know other speakers have talked about that as well. I have put a table in my paper which you can go to, but 16 years ago the Senate Regulations and Ordinances Committee scrutinised 855 instruments of delegated legislation. In 2000-01, the Committee scrutinised 1,859 instruments. That is, 16 years has seen the doubling of the number of instruments tabled in the Parliament and subject to Parliamentary scrutiny. Other statistics that I have put in the paper indicate the increasing vigilance of the Committee, when scrutinising delegated legislation. In recent years the Committee raised concerns with Ministers on 100 to 180 instruments annually.

Last year however, the Committee raised concerns with over 260 instruments. For a variety of reasons it gave a notice of motion to disallow 70 of these instruments, but did not proceed further because its concerns were addressed or ministerial undertakings were given to amend the regulations. However, we can have disallowance by individual Senators, which is a very powerful thing to be able to do indeed. The individual Senators are entitled to initiate disallowance and this is usually on policy grounds rather than on the technical grounds that I have outlined. Over the years Senators have been mindful that disallowance can be a very sharp instrument of Parliamentary control. A disallowed instrument ceases to have effect and an instrument the same in substance cannot be remade within a period of six months unless the disallowance motion is rescinded.

This action is only to be undertaken with considerable thought and certainly would not be done lightly. It has significant ramifications for the administration of Government programs that were the subject of the disallowed instrument. Nevertheless, the Senate in 1998 voted to disallow four instruments and in 1999 it disallowed seven instruments and in 2000 it disallowed 14 instruments, which included a package of seven similar instruments. So, disallowance is not unheard of in the Senate, it is just that it is not usually instigated as one of the guidelines of the Committee, or for the Committee reasons, but individual Senators for other reasons do seek to disallow.

What have been some recent initiatives taken by our Committee? Its mode of operation has remained fairly constant over the last 70 years, but there has been a few innovations with information technology and in recent years, we have been mindful of two particular challenges. Firstly, the need to make delegated legislation—the great wad of it, especially disallowable instruments—accessible and secondly, that the Committee conducts its affairs in an open and transparent

way. The inconsistency in publication and difficulty in accessing delegated legislation—particularly disallowable instruments—has been a problem for many years in Australia.

The Commonwealth regulations made under the Statutory Rules Publication Act 1903 are really easy to identify and access, as they are numbered consecutively by year, and published in a statutory rules series. However, they account for only approximately 400 of the 1,700 disallowable instruments of delegated legislation made each year, and the majority of these instruments are subject to the Acts Interpretation Act that require them to be gazetted, but they are not printed and made available like the statutory rules. So, what to do? We tried to sit down and think of a way to make the maze a bit more comprehensible and we have introduced three publications to improve the awareness of and accessibility to the instruments of delegated legislation made by the Commonwealth and to highlight the work of the Committee.

This has been a Committee that has been a bit behind the scenes and we even had a little show on television about it—goodness, we are really getting modern. The first of ours is the delegated legislation monitor. It was introduced in 1989 and at that time there was no information on the number, types and subject of delegated legislation being made by the Commonwealth. The monitor is still "the only" single reference source for all disallowable instruments of delegated legislation tabled in the Australian Parliament.

It sets out every disallowable instrument tabled, including the parent Act under which the instrument was made, the date it was made, the date it was tabled in the Senate and the House of Representatives and a short summary of its subject matter. It has become a significant research and procedural tool by use of a wide range of people within and outside Parliament. Interestingly in 1999, it was added to our website and it has now become the most popular document accessed from our site.

The next innovation is the disallowance alert. Ever year, the regulations and ordinances committee and other Senators give numerous notices to disallow delegated legislation. To first be aware that a notice was given and then to track its progress, a person is required to continually refer to the Senate notice paper and the journals of the Senate and this is very cumbersome. In January last year, we introduced the Disallowance Alert to assist the Parliament, government agencies and the community to track the progress and outcome of these notices. It identifies the instrument as the subject of a notice, who gave it, the date it was given, the progress of the notice and indeed, the final outcome.

The information is updated each sitting day enabling any person to determine the status of a notice at any given time. In particular, the Disallowance Alert identifies those instruments that have been disallowed and no longer have any force of law. This is useful as you would appreciate to Government offices who have prime carriage of the instrument and, of course, you have always got your community groups who want to know what is going on—the legal profession and so on—and it is also on our website.

Thirdly, the Scrutiny of Regulations Alert. This is only a very new innovation and it is going very well. At the beginning of this year the Committee introduced Scrutiny of Regulations Alert and that is maintained pretty much by Janice. The document lists the instruments on which the Committee has agreed to write to relevant Ministers seeking information on concerns it has with those instruments. Through our website, Government agencies and other interested parties are made aware that the Committee has a concern with a particular instrument at the beginning of the scrutiny process, rather than waiting until the Committee either gives a notice of intention to disallow that instrument or tables its correspondence.

That might seem to you to be so blindingly obvious, but it only really occurred to us that this was useful for people to know, instead of having to make verbal inquiries about what the Committee had decided. There it all is, for everyone to see. In accordance with the standing orders under which it is established, the Committee conducts all its deliberations in private. Now, that is an interesting thing of course because other scrutiny committees operate differently, but as a consequence of this order, the Committee has historically kept private, most of its correspondence with Ministers. Recently however, we reviewed this practice because we thought that that no longer should stand. It was concerned that what we did was not open and transparent and also concerned that the instructive and useful responses by Ministers to Committee concerns with an instrument, were not available to the public and in particular, those with an interest in the specific regulation.

Often, as no doubt most of you will have found, people do confuse the fact that we are not a policy committee and so, we often do get policy type inquiries. It is very useful, I think, for this sort of correspondence to be publicly available because you can see what the Committee does and how it systematically goes through our criteria. That has worked pretty well and the Ministers have all been very happy with it, but there is provision if there is something that is particularly confidential for the Minister to be able to bring that to our attention, then it would be a decision of the Committee as to whether or not that correspondence was published. Once again, the logic behind this was: If you actually seek to disallow an instrument you table the correspondence. If something is not working, it is tabled. Why not show—when the Committee really has done its work particularly well, and Ministers have responded—the good work of the Committee. We have found as we have got further into our stewardship of this Committee—with the current Committee members—that a lot of what we now do is ensuring that standards are complied with and some of the really difficult substantive things we used to see are not as prevalent.

I was going to mention that we were particularly disappointed that we have not yet been successful in getting a legislative instruments bill through our Parliament. I can talk a bit about that if anyone is interested. I have put something in my paper and also, the introduction of regulation impact statements. Another speaker will speak about that. A critical part of what we do and how we carry out our function, is to go to the regulation impact statement. In conclusion, I just wanted to say that we are extremely proud of our pioneering role in the scrutiny of delegated legislation and you do feel rather special, I think, if you have got a tradition of assiduously scrutinising delegated legislation to ensure that it complies with our principles of personal rights and Parliamentary propriety and we are

conscious that we can always do better and that is why we are constantly looking at how we can be more accountable and more transparent. We did get a nice little tick, I think, in assessing the Committee's achievements from Professor Gordon Reid who observed that the Committee had established itself as bipartisan in all of its work and that we had maintained our working momentum whichever political party has been in power. I cannot think of a better way to describe the role of a scrutiny committee.

CHAIR: Thank you very much Senator Coonan. I think, given where we are in the time scale, we will take questions for you as well after the break. I am going to ask Paul Bek to speak to us now, ahead of our break. Once Paul has finished his presentation, we will break for afternoon tea and then when we come back, Paul's colleague Jennifer Bryant is going to speak to us immediately after the break. I welcome Paul Bek from the Office of Regulation Review, Productivity Commission, to address us.

Mr BEK: I would just like to mention that the Office of Regulation Review consists of 18 staff and we hang off the Productivity Commission. We have Chinese walls between the two of us, because the Productivity Commission deals with longer term inquiries, whereas we deal with matters going to Cabinet every day and it is not appropriate for us to freely swap information. Our major role is to ensure that the Government's regulatory best practice requirements are put in place. We are actually described as the Government's watchdog over the process, and that is what we do.

What we are hoping to do in this session is to give participants an understanding of three things: outlining the Commonwealth Government's requirements; going through the essential elements of a regulation impact statement (my colleague, Jennifer Bryant, will do that); then, we thought it might be interesting to apply the regulation impact statement process to a couple of examples that we have. My example is genetically modified food labelling, which I think everyone is an amateur expert on, and Jennifer's is on spectrum auctions. I for one do not know much about that.

This is the framework diagram for the Commonwealth's regulatory best practice approach. It came out of the policy statement called "More Time for Business" issued by the Prime Minister in 1997. It made regulation impact statements mandatory for all departments and agencies. It is basically the departments and agencies that are developing policy that leads to regulatory proposals that actually have to prepare the regulation impact statements, but what we do as an Office is that we provide advice as to when they should be prepared and we act as the contradictor, I guess, in relation to developing drafts to improve their quality.

The legislative review program is also part of the regulatory best practice framework. It was what Graham Samuel was talking about this morning. Basically, our Office has an input over the terms of reference. We ensure that the terms of reference actually match what is demanded by national competition policy requirements. We also check the committees out to make sure that they have a fair degree of independence from the vested interests involved.

We have a Minister as well. We have the Assistant Treasurer. We have found that that has been quite handy, particularly bedding down the process. If departments and agencies wheeled out their ministerial cannon, we had a ministerial cannon to wheel out against them, so it has proved to be quite good.

We have the Legislative Instruments Bill that has been waiting in the wings for some time and we do not know whether to increase our staff resources or not, because it makes compulsory regulation impact statements over a wide range of legislative instruments. It is in Parliament, but it has not been passed yet.

This is the Regulation Impact Statement. We describe this as a structured approach to policy development. Basically, people should be going through this sort of development process regardless of this structure. It just formalises the process. These are the seven elements to it, and these are the seven elements that Jennifer will be talking about. We have taken a very broad view of regulation. I was interested to hear Senator Coonan say that the ratio between primary legislation and subordinate was about one to one. We think it is even closer—one to nine. So for every primary piece of legislation there are nine subordinate pieces. This definition also gets us into the area of what we describe as quasi regulation and that has been quite a find. It covers things like codes of practice, guidelines, accreditation principles, and names that are still being invented. The definition catches quasi-regulation by including 'rules by which Government attempts to influence the way people behave'. For example, there may be a Government committee that helps an industry association to formulate a code of practice. There might be Government funding or there even might be a ministerial press statement that says that 'industry has announced that it is following an industry code of practice; if it does not, we are going to legislate in the area'. We think that that is quite a heavy influence there and that the Government must take some responsibility for that code of practice.

Because the genesis of Regulation Impact Statements came out of complaints from business towards the end of 1995 and through 1996 and was the product of the Bell report, the Small Business Deregulation Taskforce report, Regulation Impact Statements are directed towards business. They have a business flavour to them and so, for example, social security measures, those that change pensions et cetera, are not caught up in the process. It is those regulatory proposals that directly affect business, have a significant indirect effect, or restrict competition, and they normally do all three, where Regulation Impact Statements are required.

There are limited exceptions and these are part of the formal requirements. The one most used and the one we argue about on a day-to-day basis with departments and agencies is the first one: whether something is minor or machinery or not and does not substantially alter existing arrangements. What we have found is that there is a great swathe of legislative amendments that goes through that might marginally change an interest rate or affect a committee structure and it is those types of things where we agree that they are probably minor or machinery, and do not alter existing arrangements. We run into the difficulty that people have the perception that if they are only changing a few words in a piece of legislation—"we are only changing a few words"—they really

fail to look at what we are interested in, which are the real world impacts—the outcomes. That is what our focus is on.

The other ones that we have had a little bit to do with are emergency cases. The most recent one is that the Government is developing a regulatory framework to protect us from BSE or mad cow disease. They are fast tracking it and we think that that is probably a case for the emergency provisions to apply. A Regulation Impact Statement needs to be prepared after the regulation is put into place.

This is a schematic diagram of the decision-making process, which includes a Regulation Impact Statement. A department or agency that is bringing forward a regulatory proposal must bring with it a Regulation Impact Statement.

The normal decision-making points are either Cabinet for major regulatory proposals, the Prime Minister or an individual Minister, but there are also boards. I recall Senator Coonan mentioning the fishing situation. Fishing management boards actually control parts of the ocean, how much you can fish et cetera. They are the decision-making point and so they really need to have Regulation Impact Statements to assist the decisions of the fishing board.

For every Regulation Impact Statement that goes to Cabinet or to one of the other decision-making points, we have to advise the decision-maker as to whether the level of analysis in the Regulation Impact Statement is adequate or not. Normally that can be quite easy because we might have spent maybe four iterations with an individual department, pointing out the flaws in their drafts and they providing us with new drafts, et cetera until we both agree that it has reached a stage of adequacy, and really it is just a rubber stamp then. Where we have difficulty with providing our adequacy stamp is when everything is in a real rush. They might provide a draft to us that is not very good and then suggest, "Oh no, it is going to Cabinet tomorrow". Technically where a Regulation Impact Statement has not been prepared at all, we actually call it "inadequate", because it is really a reference to the policy development process and if they have not done a Regulation Impact Statement, then obviously the level of analysis is inadequate.

We also think that it is very important for Regulation Impact Statements to be made public, because that acts as a quality control mechanism on the drafters. We also think it is important that Parliament be informed of the content of Regulation Impact Statements. It is basically an aid to decision-making and Parliament is the ultimate decision-making body, so it should have available to it Regulation Impact Statements as well. They go with the explanatory material when a Bill is introduced into Parliament. So behind the explanatory memorandum will sit the Regulation Impact Statement and for subordinate legislation behind the explanatory statement will sit the Regulation Impact Statement.

These are some of our big sticks. If you recall Gary Banks' speech earlier in the week, we are getting about an 80 per cent success rate at the decision-making level and roughly a 90 per cent success rate at the tabling for Parliament level. We have only been going for two and a bit years, so we think we are going not too badly, although it is a frustrating and difficult job getting everyone to do Regulation Impact Statements. Possibly the biggest stick up there is that we

report annually on compliance with the requirements by department and agency. Our first report was in the aggregate, but departments and agencies really took an interest when we started disaggregating and reporting how each individual department or agency has done.

We have not really used the Assistant Treasurer to withdraw a Cabinet Submission from Cabinet for want of an adequate Regulation Impact Statement, but we do have that power. Interestingly, we have not come across the situation where Cabinet itself has decided to waive the Regulation Impact Statement process. I might just mention the left-hand corner with Senator Coonan in the room. The scrutiny committees also act as a check and balance as well in this process, and if they do not see a Regulation Impact Statement and believe that one is necessary, then I think your Committee makes noises as well.

I have got two slides just on what is regulatory best practice regulation. I think it is a little bit long to put up given the time, but it was in Gary Banks' speech as well which will be handed out to participants. The bottom line is that every regulatory proposal has to demonstrate that it produces a net benefit to the community and is the most cost-effective way of doing it.

I have touched on what we actually do. We ask departments and agencies to come to us early about whether or not they need to prepare Regulation Impact Statements. That is a hard message to get across. We are really there testing whether the real world impacts of their regulatory proposals are more than minor, particularly in respect of how they affect business. We have started to disaggregate that a little bit. Basically, there are two ways of looking at this. Is the impact very broad across the economy, but fairly minor? That still might trigger a Regulation Impact Statement. It might be quite deep too, where it affects a particular subsector or sector or even individual companies if there is a major effect and that also might trigger the Regulation Impact Statement process.

As I suggested, we act as the contradictor, and we advise the decision-maker as to whether the Regulation Impact Statement is adequate or not. I hope that just gives you a brief feel for the Commonwealth regulatory best practice requirements. After the break, Jennifer is going to go through the seven essential elements and exactly what they mean. We have got two examples that you might find interesting.

CHAIR: Thank you very much Paul. We will break now and return at 3.50 p.m. for the continuation of Paul and Jennifer's presentation.

(Short adjournment)

CHAIR: During the break, I noticed a couple of specific questions people wanted to raise with Paul, and I think that this would be a good point just to do this at this moment, before Jennifer continues with the presentation.

Mr BAYNE: Suppose there is a process whereby a regulation impact statement accompanies a proposal of the law and then that law and proposal are considered by a Parliamentary committee. I know this happens in some jurisdictions in Australia. It may happen informally in the Commonwealth, but the

Commonwealth committee has got no formal role in relation to that regulation impact statement, other than take it on board as a piece of information. Let us suppose that there is a proposal that a Parliamentary committee does something, having got a regulation impact statement accompanying a law. What can it do? That is the question.

It seems to me that there is a very distinct and professional function in that process. What can a Parliamentary committee do? Under the classic terms of reference of Parliamentary committees, they look at whether the law trespasses on rights, whether it continues to appropriate Government legislative power, all those sorts of things, so lawyers can say something about that and so can politicians. When an regulation impact statement, behind which is a body of learning and understanding which is perhaps not so well achieved by lawyers and politicians, but written by a columnist and the like, what can they actually do about it?

Mr BEK: Could I just clarify for a second. It is basically an aid to decision-making, so it contains information for the decision-maker. A proposed law gets to Parliament, and are you suggesting that the committee wants to change the legislation, so therefore the—

Mr BAYNE: Under the plastic terms of reference, what a sweeping committee does is look at the terms of reference and say, "This bill or this subordinate law doesn't measure up in some respect" and the formula differ, but it is really suggesting to Parliament that it is going to have to pass the law, the bill or it has the power to sort out a regulation. It is really saying to that body, "Look, you shouldn't pass this bill or you should disallow this regulation, because we think it in some respect falls under our terms of reference. It is inadequate." How can these committees perform that function when what they are presented with is a regulation impact statement? It seems to me that by that stage, what it can really do—other than simply check that the regulation impact statement has been adequately prepared—perhaps a line of advice and knowledge like yours and say, "Well, do it again". It seems to me the function of these committees when it is looking at regulation impact statements is crucially different when it is looking at laws within the classic terms of reference. I think people of New South Wales do this. Maybe the people from those committees do look at regulation impact statements and do say something about them.

Mr BEK: I will confine my comments to the Commonwealth level. Basically, a regulation impact statement is a Government document and it is treated the same as an explanatory memorandum and it goes into Parliament. This issue about whether the regulation impact statement can be changed afterwards has really only come up for us in terms of Parliament altering the Bill. Should the cost benefit analysis supporting a slightly different version of that bill then be changed in some way to support the amended bill? We say no. Basically it is the Government's "best effort" to support what it has put in Parliament and so it is a Government document.

I think for scrutiny committees, you could signal that you do not think that the regulation impact statement is up to scratch for various reasons and signal that back to the relevant Minister. That would actually assist us although in the

first instance, it would get us into some sort of trouble, because we would have had to have given it an adequacy tick. If parliamentarians are starting to say that the level of analysis is inadequate that will help us over the longer term to get the quality of the analysis in regulation impact statements up.

Ms BRYANT: This afternoon we are going to have a look at the seven sections of the regulation impact statement in a little more detail. It would be appropriate to go through them one section at a time. I think that will be a little easier to do, but before doing that we might specify each one. The first section identifies a problem; the second one looks at the objective to address the problem; the third section looks at the various options, regulatory and non-regulatory to achieve your objective. The Regulation Impact Statement then looks at the impact analysis on the options that are chosen to be examined. It looks at the public consultation process and that is to be detailed in the Regulation Impact Statement. The Regulation Impact Statement has a conclusion and recommendation section and it also looks at strategies to implement and review.

Looking at the first section, I think when all of us are faced with problems we want to know exactly what that problem is. When we are faced with a problem and we want to design a regulatory solution, it is obvious that we need to be fairly clear about the nature of that problem. It may well be that the problem affects only a small section of the industry, for instance, but nevertheless it may have a big impact on that section or the problem might result in a broader range of impacts and affect a wider range of industry sectors. We need to know the scope and nature of the problem to be able to design a solution to it. One of the reasons why regulation is used to remedy a situation is where there is a market failure. Before considering regulation for this reason, one should ask the question whether the market can self adjust? Another question that should be addressed is whether a regulation is already in existence to address the problem but perhaps it is not being used efficiently? Market failure may result for instance from imperfect competition or a monopoly market.

Obviously, when we are looking at a problem, we wonder what is the outcome we are looking for? Generally speaking in the regulation impact statement, we are looking for a broad statement objective. It is not appropriate to include an objective in a Regulation Impact Statement that predetermines the path of the solution.

For instance, in terms of an aviation issue, we might have as objectives, improved safety for passengers and crew, decreasing the incident of accidents in a particular area, encouraging high levels of aviation participation while ensuring that safety standards do not unnecessarily impede the aviation industry. Another objective might be to harmonise Australian standards with international standards.

In terms of, say, spectrum allocation, we might be looking at balancing needs to maximise efficient allocation of the spectrum, maximising competition in the provision of services, providing fair and reasonable treatment of incumbent licensees and perhaps the desirability of limiting administrative costs, because that may sometimes be a factor in the communications area. These are the types of things we are looking for in objectives. A this point the Regulation Impact Statement should identify options to achieve the objectives. The Regulation

Impact Statement should consider a broad range of options, as the slide suggests.

It might well be, as I mentioned before, that you might not even need to provide for a regulatory solution to the problem. You may already have adequate arrangements in the legislation that are not being followed. Are there appropriate audit processes that could address the issue of concern. Could we increase the number of audits without having to change the regulation.

A non-regulatory option was adopted by the New South Wales Government a few years ago to address loss of life in marine incidents. It used a media campaign to stress the desirability of following the existing laws requiring the wearing of lifejackets when at sea. If such a campaign has proven to be unsuccessful, one option available might be to increase the penalties for not wearing your lifejacket.

Another example of a non-regulatory option was the non-smoking campaign adopted by the Commonwealth Government a few years ago. The States have adopted different ways of dealing with the same problem. Some of the States have banned smoking in public places. The Regulation Impact Statement should identify the different ways to deal with the problem at hand. Factors that may influence the options examined may include the significance of the problem, the scope of the problem and the nature of the problem. In requesting that the Regulation Impact Statement examine a broad range of options, we do not expect non viable options to be examined. For instance, there may be technical or legal reasons that would preclude some options from being considered.

Again, it might well be that the existing trade practices law is going to cover the problem that you have before you. It might be for instance, that you have a dominant player in the market, they might be going to acquire spectrum, which is regarded as an acquisition of property under the Trade Practices Act and it might well be that instead of instituting specific competition limits, you might just use the Trade Practices Act to address the issue that you have. You need to look at what is out there already and see if it can be addressed in that way.

There are various ways of actually implementing legislation or ways in which you can embody the solution. You might look at which range of regulatory instruments might best address your problem. Paul Bek was talking before about quasi regulation earlier. This type of regulation includes codes of practice, for instance telecommunications codes and the proposed privacy codes. Following the identification of options in the Regulation Impact Statement, the next step is to assess the effectiveness of those options in addressing the problem. This is done through a cost benefit analysis. The purpose of the assessment is to identify the costs and benefits on each group affected by the option. These groups might include consumers, business and government. There may be various sub groups within each group – for example small businesses may be affected differently from larger businesses and consumers may be affected in varied ways.

Paul Bek is going to look at a GM food issue shortly and he will provide you with some examples of impacts. At the very least the Regulation Impact Statement should address in detail the effects on each group affected by each option. Wherever possible this assessment should quantify those impacts. For instance there may be safety reasons for regulating in relation to the communications equipment that may be connected to the telecommunications network. It may be that certain specified requirements in relation to designs might impose a greater cost on the manufacturers than others, industry might be delayed in implementing new services because of those design changes, consumers might suffer from a reduction in services and choice of services. The Regulation Impact Statement should provide detail of these impacts. Government may incur costs through administration, safety bodies incur costs in doing their audits, maintenance et cetera. The Regulation Impact Statement should explain how they are going to recover those costs, if they do. The community may benefit from safer flying conditions, a healthier environment and higher employment opportunities. Consumers may benefit from a better range of services at lower prices and of higher quality.

The slides provide an indication of the types of impacts across the various groups.

The Regulation Impact Statement is to undertake an impact analysis of each option and to rank each option according to its net benefits. Through this process the Regulation Impact Statement will show the most effective and efficient option to address an objective. If the option with the most net benefits is not selected to address the problem, the Regulation Impact Statement should justify why that other option has been chosen.

In terms of assessing the adequacy of a Regulation Impact Statement, the Office of Regulation Review employs the "proportionality principle" - the level of analysis in the Regulation Impact Statement should be commensurate with the level of significance of the issue. Over time the Office has been trying to increase the level of analysis in statements. That has been fairly difficult because a lot of decisions are made within tight timeframes. It is quite often the case that the Office of Regulation Review is advised late in the process and that is something that we are always trying to correct.

While consulting with the Office of Regulation Review early in the policy development stages is important, it is critical that policy makers consult those likely to be affected by the proposed regulation. I think we all know that if you have a comprehensive understanding of the problem you are dealing with, then you have a much better opportunity of addressing it. Consultation assists in providing that depth of information on the impacts of regulatory action.

Many Government agencies are extremely competent in this area. They widely distribute comprehensive discussion papers, examining issues is considerable depth and asking for comment. The Office of Regulation Review would promote all departments and agencies across the Commonwealth to adopt an approach that incorporates the use of discussion papers, wherever possible, to seek comments on proposals. It is difficult for agencies to assess impacts without

feed back from affected parties. Often, responses to discussion papers will result in a change of policy.

Although the trigger for a Regulation Impact Statement is its effect on business, that does not mean that businesses are the only group that should be consulted. Consultation should be as wide as possible, with the general public being made aware of the issues. It is best practice to place discussion papers on the relevant website and to advertise in the media. The Regulation Impact Statement requires that departments and agencies should consult widely, and a Regulation Impact Statement may be failed because of inadequate consultation.

The consultation section of the Regulation Impact Statement should detail who has been consulted and the views of those consulted. This should be provided in summary form - it is not expected that there should be 70 pages listing those consulted attached to every Regulation Impact Statement. Where views are expressed that are critical of the policy proposed, the statement should address why the proposal is going ahead and how those criticisms will be addressed or why changes are not being made to address the comments. . Where consultation has not been undertaken, the Regulation Impact Statement should explain why. Consultation may not be possible due to an emergency situation.

The sixth section of the regulation impact statement deals with the conclusion and recommended adoption. This is fairly straightforward. The section states the preferred option, and explains why this was chosen and other options not chosen. Generally that is not a very large section in the regulation impact statement. The seventh section concerns implementation and review issues. I think some people—a bit like all of us—have run out of steam by the time we get to the seventh section of the regulation impact statement and we think, "Oh, it's nearly over, it's almost past the line". But there can be some quite significant implementation and review issues in terms of the regulation. It is in this stage of the statement that ways of reducing the compliance burden should be examined. Is there anything that can be done in the implementation stages that will minimise the compliance burden?

It may be that advisory guidelines would assist industry to understand the new regulation and this may reduce compliance burden. Further it is unlikely that a correction made now is likely to be effective for the next five or 10 years, without having to be amended. The Regulation Impact Statement process encourages departments and agencies to consider an internal or external review of the proposed regulation.

We were intending to give you a couple of examples of how a Regulation Impact Statement actually works. Paul was going to look at food labelling and I was going to have a look at spectrum auctions. I think we are going to run out of time to do both, so we have both nominated Paul to do food, because I think that is probably the more interesting issue. I will now hand over to Paul.

Mr BEK: I want everyone to put two hats on: one, that they are a department advising their Minister and secondly, that they are the Minister making the decision at the end. The scenario is that a Minister is approached by a number of lobby groups saying that we either want a complete ban on genetically modified food or at the very minimum, a comprehensive warning label against genetically

modified food. You are the department, what have you got to do? Basically, you are following the regulation impact statement process. The first thing you do, of course, is to go out and consult the various interest groups involved and you get a sense of what their problems are.

In relation to the environment, it might be contamination of traditional crops, the fear of escape. We do not want another rabbit plague in Australia, or a possum plague in New Zealand. We do not want cane toads. People are concerned about their public health and safety. If they eat genetically modified food, will they be turned into Frankenstein? There are religious and ethical objections: people believe that if you play around with the basic building blocks of life that it is against their religious views. Ethics: people do not believe that you should put a pig gene in a tomato. So there are ethical concerns there.

There are the anarchists' and anti-globalists' objections and Monsanto protesters, and you find the lobby is funded by the organic farmers and the traditional farmers are giving money. You are starting to build up a picture of what the problem might be. On the business side, the business lobby says, "Look, it is too costly. We are already using genetically modified ingredients in our processes. To get rid of them would be hugely expensive. It is really difficult to separate out genetically modify ingredients. We are also concerned from our surveys that 30 per cent of Australians say that they are not going to eat anything labelled GM."

So you apply the market failure test. Is the market failing in this regard? Jennifer has run through the market failure test. Basically, we are looking probably at an information asymmetry. Business has the information and it will not provide it to consumers. It is probably an information asymmetry. There is also a good economic reason to provide information into a market. Markets work better the more information that is provided. There are others that describe this as, "consumers have a right to know". What comes into that is not so much a right, because you have to weigh up that right against the costs that it is going to generate. For example, no-one can deny that men have a right to use Viagra, but how much assistance they need from everyone else is relevant. You have to weigh up the costs as well.

We also know—having looked around now—consulting early - that the environment and the ethical concerns are already taken care of by a major new Government policy introduced through gene technology regulation. They have been putting in place a licensing system, a gate keeping role. They have major ethics committees, they have scientific committees and consumer representation as well. So they are dealing with the environmental issues and the ethical concerns about the pig genes in tomatoes issues. Also, we have the Australia New Zealand Food Authority who "hand on heart" say that they have a world-class system in place that looks at the public health and safety aspects of genetically modified food and they will not release onto the market any food that has a public health and safety risk to it.

We still have not covered the right to know style of argument or the religious views. Perhaps people remain sceptical about the public health and safety thing. We need to really explore this further. Just skip the objectives at this stage, because your objectives really are unclear. You are still trying to find out

what the problem is and to weigh up the various options and the costs et cetera. Start setting down some possible options. There is the current food standard and that is basically that if the characteristics or property of a food are modified by the gene technology process, you must label. That is the current standard, although we are being a bit fictional because the Ministerial Council on Food has already decided to go with a new standard, but we will get to that.

We could go for a ban. Just ban genetically modified food completely. We could go for the warning label. We are still working through the issues. It is probably being a little bit unreasonable, but we might need to come back to those options. We have identified an information asymmetry, so a direct approach would be to provide more information through a Government education campaign, selling the worth of the gene technology regulator and selling the worth of the ANZFA public health and safety role, or, we could even go, "Well, maybe the market can". If there is an advantage in selling genetically modified free food, then why are the organic farmers et cetera not coming out and labelling their products "GM free". That provides information to consumers as well and provides those who want to avoid GM food with the option of buying non-GM food. That is an option as well.

Realistically, it is probably somewhere around a mandatory advisory statement. You could go for a comprehensive one that covers all ingredients or sub-ingredients, processing aids, additives, flavourings, highly refined oils et cetera, or you could start to be a little bit selective - a more light-handed advisory statement - where you would exclude inadvertent contamination up to a point. You would exclude processing aids. Processing aids are basically undetectable in the final food. Highly refined oils: they basically take out all the DNA material from highly refined oils, so that the possibility of there being something genetically modified in a highly refined oil is very low. You could even have a rule that if there are ingredients that are not materially different from their non-GM equivalent, you could exclude them. So, you have to look at those sorts of things.

The affected parties - as Jennifer was saying— are consumers, business and Government. You have got to untie that package and have a look inside. Consumers are a diverse group actually, and we often hear that consumers want something when it might actually be 10 per cent of consumers want it, 90 per cent do not care or there are different proportions. You need to have a good think about that. I will come back to that as well.

There are also different types of businesses that you have got to have a look at the impacts on. There are probably differences of impact between small businesses and large businesses, on farmers, manufacturers, retailers, exporters and importers. There are also three levels of Government affected in food. Local government basically have the food inspectors. Some States also inspect food. States also have overall control over food inspections et cetera, and then at the Commonwealth level or at an interjurisdictional level we have ANZFA that administers the food standards codes. Each one will be impacted upon and you need to tease this out.

We have got a bit of a conundrum because the benefits to consumers are the right to know and they are intangible, which is a fancy word for "very difficult to

quantify". So basically you think to yourself, "Okay, we need an intuitive test. Let's work out how much it will cost business", and really the benefits to consumers will have to exceed that cost at least. Let's say, for example, we found the cost to business will increase the cost of food in Australia by 1 per cent. You might need to explore that a bit more. I looked up the ABS statistics, the household expenditure survey. An average household of 2.6 people spends about $7,500 a year on food, a 1 per cent increase in that would be an additional $75.

Let us have a look at the likely costs. Everyone speed read the type of costs that might apply as direct costs to food businesses. Then you need to look at the indirect costs. We can potentially breach the World Trade Organisation agreements and could have penalty action taken against us. If we do not align with overseas standards, we will get costs back here. We could affect our food exports. Domestic market shares could go all over the place. There is an increased upwards risk to the cost of our food imports.

The biggest impact will be on low-income earners. They spend 35 per cent on food, high-income earners spend about 5 per cent. Do you need something in there that will compensate pensioners for the additional costs that you have placed on them through food? On costs to Government, which are basically enforcement, you start to work out your enforcement regime and there are three different — from sort of light touch to heavy touch - enforcement regimes.

I want you to put your Ministers hats on now and see whether this information is actually helpful to you or not. Basically it affects about $41 billion worth of food in Australia a year. There is no international standard, but the United States of America and Canada do not have any mandatory labelling. If we went to the EU standard, it would cost us less than a comprehensive scheme. If we went to the Japanese standard, it would cost us even less.

We will place some of our export markets at risk. Costs to consumers will range on a product-to-product basis. If all costs are passed onto consumers, then the cost of food generally will increase. The cost of the current ANZFA standard on business is estimated to be quite low. A totally watertight system where you have a certification system coming up from the farm gate and an audit system going back down to the farm gate, and food testing every batch, would be very high. The cost to the Government depends on what sort of enforcement regime is chosen.

I just want you to think to yourselves - with your Minister's hat on—is that the sort of information, together with quantifying the estimated amounts involved, the type of information that the decision-maker needs when he is deciding which way to go?

CHAIR: Thank you Paul and thank you Jennifer. Can we also thank Senator Coonan for her earlier presentation? I have one piece of housekeeping information before we conclude this session and that is for those people who are due to attend a meeting of Australian chairs and deputy-chairs. That has been postponed from today until 1.00 p.m. tomorrow.

(THE WORKSHOP ADJOURNED AT 4.30 P.M.)

WORKSHOP TWO

THE ROLE OF PARLIAMENT IN ENSURING THE QUALITY OF LAW AND REGULATION—AN IN-DEPTH PERSPECTIVE

CHAIRMAN: My name is Don Harwin. I am a member of the Legislative Council of the New South Wales Parliament and a member of the Regulation Review Committee. This session is a workshop on the paper that was presented to us by Sue Holmes, who is the administrator for the Regulatory Management and Reform Division of the Public Management Directorate [PUMA] of the OECD. PUMA studies how governments organise and manage the public sector, and identifies emerging challenges that governments are likely to face. Prior to holding this position, Sue worked in the Australian Commonwealth Office of Regulation Review and the Productivity Commission. In addition, she assisted Nugget Coombs while he was writing his biography. Nugget Coombs is one of our icons in Australia and contributed to many areas of the public service, including post-war reconstruction, Governor of the Reserve Bank, and was a friend of the arts and of Aborigines.

Ms HOLMES: I propose to give a five-minute summary of what I talked about yesterday and then take questions or points raised. Yesterday I outlined the many benefits associated with regulation reform, including increases in output, reductions in consumer prices and greater flexibility in adapting to change. Then I talked about Parliament's main roles as they affect quality of legal instruments: passing new laws, reviewing the stock of existing laws, a scrutiny role with some categories of delegated legislation—that scrutiny role varies quite a bit across parliaments—sometimes an overview role of either independent regulators or the regulations they make, and ratifying international treaties.

The OECD recommends two broad strategies for assuring regulatory quality: (1) actually looking at the elements of the regulation impact analysis: What questions do you ask before you choose a regulation, what do you want to know about its impacts, and what are the different ways you could tackle a problem.

(2) Once you have agreed on the form of the regulatory impact assessment [RIA], the next question is: How do you embed it into the law-making process? Which institutions prepare the RIA, which institutions check its quality and which ones use it? Which decision maker or decision makers use it.

With regard to the RIA questions, the OECD check list has 10 elements. The first element concerns identifying the problem and objective. The remaining elements are the following questions: Is Government action justified? Is regulation the best form? Is there a legal basis for the regulation? What is the appropriate

level of government? Do the benefits justify the costs? What are the distribution effects of the proposal? Is the regulation clear, consistent, comprehensible and accessible? Have all interested parties had a say? How will compliance be achieved?

I then pointed out that in Australia the RIA list of questions are very much related to the OECD check list, including the requirement to look at: the problem; the objective; the options for addressing the problem; identification of which groups will be affected and how (in other words, the costs and benefits); who is consulted; stating the recommendation, and finally, stating how the proposal will be implemented and reviewed. I also mentioned the United Kingdom list, and there are a few variations. The "purpose" and "effect" in the UK list is a variation on the "problem" and "objective", and indicates a perceived greater role for government, larger than fixing problems. The requirement to assess the risks is quite a specific item that is not used in some other countries. Then there is the typical requirement to identify the benefits and the costs, and the options. The UK also includes specifically impacts on small business. Then there is the requirement to report on consultation; and to provide for monitoring and evaluation, and finally the recommendations.

I then addressed some particular issues central to regulation impact analysis. Firstly, asking about which impacts are assessed, pointing out that costs and benefits can cover all impacts on all groups, so it is a very comprehensive concept. But some countries choose instead to look at particular impacts. I argued that while that is very useful and informative to identify impacts on particular groups, it is important not to lose a prime contribution of the RIA, namely to bring all impacts together, so the decision-makers know all the costs and benefits to be weighed up in making their decision.

There was also a question about quantification. The OECD recommends it as a very useful thing to do, but you have to use it wisely. Usually, costs are easier to measure than benefits. Some things are just intrinsically impossible to measure, such as justice, quality, freedom and some of the things that we value most in society. It is important not to conclude that if you cannot measure something that it does not have value. While the quantities provide useful information, they should always be treated as partial information. I then referred to a quote from the OECD, which points out that it is in the act of questioning and analysing, looking at your assumptions and exploring the impact of a regulation that you get the real value out of the process of preparing a RIA.

Another question is who to consult with. Typically, business and employees are consulted. Sometimes—and it is a growing occurrence—other groups are consulted, such as consumers, and those interested in the environment. Probably less frequently consulted are taxpayers. Increasingly, any group that wants to be consulted is given the opportunity to have its say. The benefits of consultation are that it lets policy-makers test their assumptions, it gets ownership of outcomes and it prepares people for what is coming. I then mentioned three concerns: "consultation fatigue" where people who you want to hear from get asked too often and do not want to be asked any more or do not have the resources to reply. Another concern arises over democratic representation with the problem that some groups who are consulted expect to have their advice followed. In fact, it is

a subtle but important point to make: to thank a group for its contribution and say that you will go away and think about it. However, ultimately, it is the role of the democratically elected representatives to make the final decision, after weighing up all options and considerations. Then there is the question of duplication. If the Executive is consulting extensively to get right what it proposes to the Parliament, how much extra consultation does Parliament want or need to do?

I also talked about different sources of law. In terms of Australia, the important ones are government-initiated, parliament-initiated and changes on the floor of the House. As well as the elements of the RIA and embedding RIA into the process, I talked about the areas that are important to the success of RIA: (1) maximising political commitment to the RIA, (2) allocating responsibilities for RIA carefully so you know who is responsible for what, and (3) integrating RIA with policy making processes and recommending that it begin as early as possible. I then mentioned the other best practices which I think are either covered or less relevant to this debate.

To assist this discussion I have four slides of potential problems or challenges. Perhaps the way to go is to take any questions or comments, and then turn to this list of challenges and questions, if necessary.

CHAIRMAN: Thank you, Sue. Does anyone have any specific questions or comments at this time before we move on to talk about the issues you have mentioned subsequently?

DELEGATE (from Kenya): Is there any consultation with government carried out in the formulation of any of these regulations? As far as I know, the Parliament does not consult either, so in some situations we are talking about a vacuum.

Ms HOLMES: Are you asking whether consultation always takes place?

DELEGATE: Yes. In our circumstances I cannot think of any consultations the Government or the Parliament makes before the formulation of regulations. What form of consultations would take place, if they ever took place?

Ms HOLMES: I guess 10 or more years ago, consultation was very limited—not a lot took place in most countries. Sometimes particular groups had access to the ear of government. However, it was not a standard process to say, "Who wants to have a say". I think there has been a big change in a number of countries over the past 10 years. One of the places I used to work, the Productivity Commission, has held public hearings for decades. It usually holds year-long inquiries into particular industries or areas. It talks to all interested parties and then it holds public hearings, takes evidence, assesses it, writes it up and gives out a draft report. It then gets everyone's reaction to the draft report, and then writes up the final report, which is then tabled in parliament. But that is very much at the far end of policy making in that it comes up with recommendations that may or may not end up with a proposal before Parliament for a change to legislation, and there can be a long gap between. However, I would say, partly because of the success of the process, other parts of government in Australia, have adopted the approach of consulting widely.

However, it is not just Australia, but other counties as well which have been steadily increasing the amount of consultation which takes place. For example, Canada has undergone a similar widening of consultation undertaken for RIA over the last 10 to 15 years.

In Australia and in other countries there is more and more consultation. There is quite a bit of diversity across departments or ministries as to how they do it. They could hold meetings, put information on the Internet and ask for responses, or specifically contact all the groups that will be affected and say, "Please assess this. Please give us your comments." It certainly happens in the Executive and has been increased to a variable extent Parliaments hold meetings and committees hear evidence and people turn up and give their point of view. I do not know whether anyone wants to add to that.

Mr HOGG: Just to clarify that point, I think New South Wales takes the review of regulatory impact statements [RIS] further than any other Parliament in Australia, I think the book by Professor Pearce on delegated legislation in Australia makes that point. Some committees look at them to some degree, just to see whether there has been formal compliance in terms of notification in the press and a proper consultation program, but we look at the actual costs and benefits. We see whether there has been a proper assessment of options. I remember that the late Professor Whelan of the Senate regarded it as rather anathema that a committee should get into that kind of detail because he saw it as trespassing on the policy area. This committee has always taken a different view. What do you think the proper balance is?

Ms HOLMES: As Dr Philippa Tudor said yesterday, "Consultation, consultation, consultation". I think the issue is to ensure that it is used appropriately so that it provides information, more than pressure to do what the groups say. The prime purpose of consultation is to help in fully studying impacts, to give a better assessment of all costs and benefits. As well consulted groups can give new ideas about how to tackle a problem, that is they can add to the list of options. I think we are still feeling our way on what is the proper balance - how much consultation. I think it is a question we all need to explore. With regard top the issue of trespassing on policy, I think the important distinction is to provide information that will assist or better inform the policy decision without actually making the decision.

Mr REDFED: I am interested to hear your comments about the regulatory impact statement assessing costs or doing a cost-benefit analysis because it is a subjective process. In the experience of my committee it puts us fairly and squarely into the middle of the policy debate that may or may not take place, either within the Executive or on the floor of the Parliament in a general sense. So as a parliamentary review committee we only look for whether or not the Executive has actually done it, because the minute we engage in assessing and making judgments we then get into the area of policy. One great tradition of these parliamentary committees is that as a rule they operate in a very bipartisan way—they are unique in the parliamentary community system. I would be interested to hear your comments as to how we can maintain this level of consensus within our parliamentary committee system of regulation review and at the same time

embark on some of these risk cost assessments without necessarily intruding into areas of policy.

Ms HOLMES: I do not think you can avoid intruding into areas of policy in that the advice must inform the policy. The important thing is not to be deciding policy. I think that is the balance. Inevitably, you are providing information that should be informing that decision. So I do not think you can say that it is not policy related. It is just that in making that final decision that, everything considered. This is the only way to go. It is saying that this is the evidence, these are the reasons why you might go with option A, and these are the problems or advantages of options B and C. In the end our decision makers make that choice. But I do not think you can avoid influencing policy because in some ways that is what it is about. It is about informing the policy choice. It is just not making the final decision.

It is important to target the RIA because it is a lot of work if you do a lot of cost-benefit analyses. It is important to have some criteria by which you say, "Okay, these are the things we are going to do a lot work on and these are choices; they are either obvious or they do not need a lot of work". The Australian Senate standing committee on regulations and ordinances has stated in Hansard how helpful the RIA from the Executive is in doing its job because it immediately gets a statement of problems and objectives and what else might have been put on the table.

Mr GILCHRIST: My question concerns the extent to which the OECD looks on the issue of consultation and precisely on where the continuum of the development of an idea the OECD would expect a Government to consult. We heard from the previous questioner that when a bipartisan committee is involved obviously that would add a degree of complexity. In our situation where it is only Government numbers that are involved in the Red Tape commission we are privy to certain information about the development of new regulations and new legislation long before any Opposition member, hopefully, gets wind of it. And for good reason. So at one level I agree with you. It only behoves us as parliamentarians to know the mood of the electorate and to judge the real need and how better to do that than by consulting the likely affected groups. However, to what extent would the OECD expect you to tip your hand and suggest what it is you are precisely looking for feedback on? When you measure a country that has passed muster with you in terms of the RIA, when it comes to consultation is it simply going out and soliciting information up front about, for example, the possible deregulation of the dairy industry, or would you expect the Government or some agency to go out and actually test the specific solutions to the problem by showing proposed regulations or legislation to the group and asking for its opinion with that degree of specificity?

Ms HOLMES: In general, the OECD says the more and wider the consultation the better. It has not specifically said make it general or make it specific. In line with its general position it would, I think, probably prefer both. However, I think we are now pushing up against the limits of consultation, and as we start to make choices about what we consult on then maybe we will get clear about the best ways to allocate that effort in consultation. In principal, the OECD would favour looking at the specific options as well as the general issues. This is

because consultation, that works well, will identify impacts of proposals that the policy-maker had not anticipated and also ideas for better ways to address the problem. In this, timing is important - the earlier the better if you really want new options.

Dr KERNOHAN: There are many things that are absolutely brilliant in theory. One of them is consultation. Theoretically, one should consult widely, one should listen and one should take on board those things that are worthwhile, useful and truthful. How does the OECD actually assess consultation, because the amount of hypocrisy that is involved in it, where there is wide consultation and Executive Government takes no notice whatsoever of what is said to it, and yet it has consulted widely and is considered to have done the right thing? How do you access its actual activity in this situation?

Ms HOLMES: I agree with you that some consultations are better than others. I think the answer is that it is better to have done it than not. And in the end Government and Parliament is judged on the reasons given for the choices made. So if it has information and evidence that are in strong contradiction to the choice it is making—you hope it has done battle with those arguments and is very clear in its own mind, and hopefully it has stated publicly the reason why it is doing X and not Y—it will always be the case that you cannot follow all the advice you get because there are always conflicts; you must make trade-offs. The thing you hope to get out of this process is a clear statement of why the particular trade-off or choice was made. It also helps if government is clear about the limits of the consultation exercise beforehand.

Dr KERNOHAN: I have a supplementary question. Your answer was very fair and correct. What concerns me is the cost involved in monetary terms to the State, and the cost to the public in terms of their presentations and their expectations. Everybody knows that nothing is going to happen and I believe that sometimes, without hypocrisy, it should be said "No, we are not going to consult, we have decided to do that". If that is what it is going to do, that is all.

Mr BATES: First, I do not share the Dr Kernohan's cynicism about the process of consultation. In fact, I would like to hear Sue's views on any evidence you may have gathered to suggest that the people who run the process of creating the RIA are actually more independent from the Executive. It appears to me that that independence is good value for the general public, despite previous views on consultation. Do you have evidence that the removal of the process from the Executive gives us better regulation? Secondly, it is all very well to undertake that process, but there has to be some considerable evaluation and monitoring of the actual regulation so that we have a good understanding of what we have done as people who build these regulations. To what extent has any form of government developed a system of evaluation and monitoring which would obviously help people to get rid of bad regulation or improve it?

Ms HOLMES: That is two questions.

Mr BATES: Value for money.

Ms HOLMES: I have worked at the Office of Regulation Review, which is an independent body. We had a specific requirement to ask public servants to address all the elements of the RIA. When we got to the point of consultation we would have to ask them who they consulted, so that would be reported to Government and then to Parliament. We would then ask, "What were their opinions?" So we would not want pages but we would want a paragraph on each group. At some point they would have to say that this group does not like it for the following reasons. I guess being independent and not being in the department writing the regulation meant that we did that job better, because we made sure that groups that were not necessarily sympathetic with the proposal were consulted. So I think being independent is important. It would be interesting if Parliament set up its own checking point on RIAs, and once all the parties had a say and the whole range of questions had been asked, it would be interesting to see what difference this would make to the RIA, because it would have been taken one step further in insisting on certain issues being covered. In Norway, for example, Parliament checks that the executive has consulted with everyone but does not repeat the exercise.

In terms of monitoring a regulation, the OECD criteria say at the end, "Tell us about compliance". The Australian RIA specifically says set a review date to go back and look at the particular regulation. Usually the amount of enforcement and monitoring is very specific to the particular regulation because sometimes it is extremely important that you do not get things wrong. For example, you do not want a nuclear meltdown in uranium plants. However, on other ones it is not so important to monitor and put the resources behind it. But to have a statement about what sort of monitoring and enforcement is being applied to each regulation is important.

There is also a question of whether at some point you take stock of all your regulations and laws or some subsection of them. In its country reviews, the OECD strongly recommends that governments review existing regulations. Australia has had experience of that with its competition principles agreement, going back and looking at all of the laws and regulation which impact on competition. It has not always been the most popular exercise, but it is actually a world leader in setting up such a process. In a few years, it will be useful to make an assessment of whether that was a good way to go. I believe, once the dust has settled, there will have been some big gains made from the exercise.

DELEGATE: How do you convince a community, which already believes that the Government does what it wants, regardless of the community's view, that you are taking what it has said into consideration?

Ms HOLMES: You cannot please all of the people all of the time. However, you can demonstrate that you have gone through good process. Some groups will ever be happy no matter what you do. The fact that you have talked to them and in some ways acknowledged their point of view and given them a reason why you are not following it, even if they are not 100 per cent happy the rest of the population may be satisfied with the explanation you give. That will always be an issue. I do not think there is ever going to be a solution to that. It is just a question of due process and good management. It is the best you can do.

Dr TUDOR: I have two points on consultation, one of which is partially in response to Dr Kernohan. From the United Kingdom's historical perspective, and I am first and foremost a historian, those governments—as a clerk I have to be apolitical and say "governments" plural—which have failed in the long term to take heed of consultation and public opinion on the big issues have ultimately fallen. Increasingly in the United Kingdom we are developing single-issue policy politics, and individual members are gaining or losing their seats on the basis of not being in touch with public opinion. As an historian, that is how I see it. My second point relates to one of Sue's slides on e-government. I am a keen advocate of e-parliament but it is only as a partial solution.

I love the Internet I was one of the key designers at the House of Lords Internet site back in 1996. That is why it is such rubbish in terms of design because all I had on my own PC was one logo. But there are limits to e-parliament. Again going back to 1996, for the first time on the back of a different committee's report I had my committee's e-mail address for comments on the report, and one student, who I ended up thinking was very lonely, emailed me. I think that you have to be aware that there are limits to both e-government, on which there are now quite a few academic studies—governments generally are interested in quantifying e-government—and e-parliament which is in its infancy.

Ms HOLMES: Consultation helps to put parliamentarians in touch with public opinion and the Internet can help in this. I would agree there are limits to e-government as a consultation tool, although it can be used to provide information and collect responses if the public is motivated. If they are not or do not have the resources or skills to use the Internet, then more traditional approaches will be required. There is usually a need to integrate the new information and communication technologies with the traditional tools of consultation. With electronic discussion groups, you cannot just set them up and let it roll. There must be somebody who manages it and responds and sets questions going. So it can be relatively resource intensive, and I think some of us underestimate that, including me.

Mr REDFORD: My experience with consultation is that it varies from agency to agency. It does not matter on which side of the political fence you might be; it depends a lot on the individuals involved. One of the problems we are constantly confronted with is that when a Minister or Executive embarks upon the process of consultation they are largely met with an apathetic response. So they go through this enormous effort to consult and get absolutely nothing. They bring in the regulation and in my State it is more common that the regulation is in force by the time we get to deal with it. We probably have an advantage because we get to consult the people who are actually living under the new regulation, whereas the Executive is attempting to consult prior to its promulgation. The bigger problem seems to be apathy, the number of times I have rung a Minister and said, "What happened here? This is what these people are saying." The Minister will say, quite honestly, "I've sent them a draft saying this is what we intend to do, what do you think, and they didn't respond." That is quite common.

Ms HOLMES: Last week in Paris at the meeting of our Working Party on Regulation Management and Reform, I heard exactly the same criticism. A delegate said that they provide all the facilities and no-one turns up and people do

not take the proposal seriously until it really is law and then they get the complaints. Again, all you can do is say, "Well, I gave you the opportunity", and the government is in a much better position than if it had not provided the opportunity. It is interesting that business and other groups decide not to take it seriously, and maybe from their point of view it is a rational choice of resources; they will only complain when it is serious. However, it is not a very effective way to do things from government's point of view. It may be useful to ask why no-one turns up and see if there are any steps that can be taken to improve involvement, such as packaging the information better and trialing different formats for consultation.

Mr HOGG: On the follow-up program to the consultation that was raised earlier, in New South Wales when an RIS is done a draft regulation goes out with that RIS and the public comments come to the Committee after the regulation is ultimately implemented in New South Wales. Not only do we have the original draft RIS; we have the final regulation and we have the public comments on the draft. So it was set up to ask, "Minister, you got significant comments on this particular aspect. The draft said such and such. The regulation that has been implemented is exactly the same. Therefore, what did you consider in respect of these comments?" So that is where New South Wales is perfectly set up to have a review program of the effectiveness of consultation.

Ms HOLMES: After you have seen comments a few times, does that change how you look at RIAs and draft regulations? Do you ask a different set of questions?

Mr HOGG: Yes. For one thing those comments tend to concentrate the issue before the Committee. It cuts to the chase; we know the practical issue that is on the ground that is effecting the people, rather than theoretical legal issues which might come to mind when we are actually looking at the regulation just as a document. That is most important. When we are considering the limitation of parliamentary time, you really have to apply your resources to those issues that have been identified in the community as most important. To revert to the issue about people being asked to comment on legislation and getting no responses, very often that is the case in New South Wales because people have been consulted on the general principles of an Act that might have gone through a few months beforehand and they feel that the major issues have been resolved but in fact very often the detail is more important. We have just seen that in the case of the New South Wales workers compensation legislation which is essentially a shell Act in many respects. A lot of the detail has been left to regulations and the upper House has appointed a Committee to look at those regulations when they come through. Of course, it is a point of debate as to whether the Regulation Review Committee should also look at those regulations.

Ms HOLMES: Will they have RIAs attached?

Mr HOGG: Yes. Of course, they will be principle regulations. In New South Wales if it is a principle statutory rule it will require an RIS or an RIA.

(Short adjournment)

DELEGATE: When parliamentary committees take evidence on a particular problem, would you consider that a form of consultation? In our circumstances it has become a forum where the politics is played out between the Opposition, the Government and people who do not agree. It is also for those who may appear before the committees to bring up issues that have nothing to do with the regulation and things like that. What is the ideal form of consultation by parliamentary committees?

Ms HOLMES: There is an OECD publication and policy brief "Engaging Citizens: Information Consultation and Participation in Policy Making" - see PUMA/OECD's website - which is coming out soon. It addresses some of those questions. I do not think we have an ideal form. It may be partly because it depends on your country, what is the best way to get answers in your country. Sometimes if you go out to the villages people will turn up. It is no good saying that in the big city we have this meeting if the cattle farmers who will be most affected do not turn up. In Canada the consultation requirement says to use the most effective means to consult with all the affected groups. It does not say hold a meeting in this room at this time; it says look at the best ways to make the people you want to talk to feel comfortable about turning up and talking. In some ways that it is the answer.

Mr PIKE: Beyond consultation, what always worries me is how to ensure that you get genuine consultation and not an organised lobby or a view of those most vociferous. For example, we had consultation on Sunday dancing because in the United Kingdom it was illegal to dance on a Sunday. This was one of the things that we were deregulating. It was a great importance to the nation. I am sure Philippa would agree because I am sure that in the House of Lords, as in the House of Commons, 95 per cent of the letters sent in were almost identical, because it was a very well organised lobby. You do not know whether you are getting a genuine view and that is on so many things. Even when you go out into the community the people who turn up are always the people who are opposed to something. For example, we were talking to different people outside about the fifth terminal at Heathrow. The ones who were opposed to a fifth terminal at Heathrow will be the ones who opposed it, just as the ones who opposed another Sydney airport will be the ones who will make their views known.

Ms HOLMES: I think there are two answers to that. It is numbers times force of feeling that is what parliamentarians are most sensitive to: how strongly does this group feel, and does it mean that that whole group will never vote for me again? But you also have to have a framework that says, "Okay, I hear your argument and I give it due weight but I do not give it all weight; I have other factors that I am balancing it with." It seems to me that you know whether the group is representing a large group of people or not, things like all using the same words, or you know it is a very active small group or a very vocal large group. In a way, consultation is about hearing all the arguments but not just saying, "Well, I have weighed up the numbers that have expressed a different point of view and came to a conclusion." You also need to go away and think about it and say, "From my principles and my view of the world, I will now take all of that into account and come up with my recommendation." Consultation and strong feelings should not be the only factor that influences your decision. It is just one very important factor that you take into account.

Mr PIKE: You cannot make a decision just on the weight of what is said.

CHAIRMAN: Otherwise it is policy making by virtue of paperwork.

Mr BATES: I appreciate what Peter is saying about the problems of consultation. One of the problems I always face is a lack of data to help us make a full decision. Often it is easy to get hold of economic data which would help in any assessment, but the difficulty comes when you have environmental factors or social factors which you wish to bring to the equation. I think that while that is how decisions politicians now call at the end of the day, the development of the index of economic welfare is an attempt to give a value to economic and social matters which would then give us a more objective mechanism in order to appreciate a particular case. In fact, you could have arguments that counterbalance your weighty postbag about environmental impact, because you could provide assessments based on data which would give you an objective weight to form a conclusion. Until we have a full process of good data evaluation on the situation, it is very difficult to make a call which is increasingly objective. It will always be subjective.

Ms HOLMES: In the list of OECD best practices; the third one is "Develop and Implement Data Collection Strategies". The more objective hard evidence you can get, the better, though obviously some of that data is very expensive to get. Someone has to do analysis of the cost and benefits of collecting more information. If you really want to know the risk of something you need experts to tell you.

Dr TUDOR: If I could just share one of the good things about our deregulation order-making process, which is now becoming our regulatory reform order-making process, the Government is required to summarise for the two parliamentary committees the results of its consultation exercise. That is obviously separate from the committee's own consultation exercise. Sadly, in two cases the Government's summary just has not been trustworthy. One of those two cases was the Sunday dancing. For reasons best known to itself, the Government wanted to deregulate Sunday dancing. One then had to go to the hundreds of documents behind that. It is helpful if you can get governments to give a fair summary. Just as a point to Mr Pike, it is fair to say that about a quarter or one-third of the responses the committees received were on a standard form which has obviously been emailed. Those were all from nightclub owners. I did not get to see those responses because the chairman of my Committee thought the pictures on the side were unsuitable for me to see. We did have a number of different responses—and they were all individual—from people who had religious objections. I was fascinated that almost all of them quoted different parts of the *Bible*, and almost a majority of them, using different words, would end their letter to the chairman saying, "And I am praying for you".

Mr REFORD: We just did a prostitution bill and I have never been prayed for so much in my life. Can you expand on what you mean by the term "use a consistent but flexible analytical method"?

Ms HOLMES: That is an indirect reference to cost-benefit analysis. In fact, there is a whole range of innovative techniques that you can use and cost-benefit analysis is probably the most sophisticated, the most preferred and probably the most costly to do. There are others like cost-effective analysis, risk analysis and risk-risk analysis. It is about using a technique or framework, such as cost-benefit analysis, that you can apply in a whole lot of different situations that will give you useful and standard information across the range of estimates that you do. That is what it is referring to. In terms of flexible, as I said yesterday, cost-benefit analysis suits some situations extremely well and is very difficult to apply in other situations. When it is hard to apply, acknowledge it—say it can give us answers to half the impacts but the other half are very much things that cannot be measured and require somebody to make the judgement about what value you place on environmental protection, justice or whatever it is that in the end a regulation is purporting to achieve. Of course, even if it is not possible to quantify some things, the framework is still useful - weighing all costs and benefits, some of which are measurable and others which are not.

With regard to Philippa's comments, it highlights that unresolved question of the extent to which Parliament should cross-check the information provided by the Executive.

I will go through the list of questions to see if there is anything that has not been covered. We have talked about e-government and consultation. Keeping RIA an even-handed assessment is an interesting question because it is meant to look at all impacts and weigh them up equally. The closer we get to Parliament especially, people divide and have strong opinions about which way policy should go. So it gets very hard to keep RIA that even-handed document, especially if Parliament took on a role of gate keeping and said wether or not the RIA is adequate for its purposes. Perhaps a lot of the heat on an issue would get focused on the RIA rather than the debate. If this becomes more important to Parliament will have to be managed well.

Another big issue is ensuring that all sources of law with the same impact have the same degree of analysis. Some delegated legislation can have a lot more impact than the act itself, and the devil is in the detail. There are things in regulations that the skeleton laws do not give any inkling of what that is going to be. Then there are the sources of law that are not from government but are Parliament initiated. As well as all the changes on the floor of the House. In Australia, for example, it is was considered that the responsibility of the Office of Regulation Review is to get a good quality RIA to the door of Parliament and then their responsibility is over; as long as an adequate RIA is attached to the explanatory material then their job is over. Subsequent changes are not covered by RIA unless there are such big changes that they are sent back to the Executive and another RIA is written.

Another challenge is that all costs and benefits should look at all impacts. In fact, some governments have chosen to focus on particular things. The thing that is consistently assessed in about 70 per cent of cases is the impact on budget. In general budget has a much tighter and well-established procedure in terms of criteria and accountability. In some ways this entire focus on RIA is about

establishing the same degree of tightness of test and analysis on regulation as the budget currently gets.

Impacts that can be addressed include impact on business—that is another fairly common one—consumers, household, citizens, environment, small and medium-size enterprises, income distribution, regional impact—that is often a very important thing especially to elected representatives because it is their job to know how it will affect their electorates.

Then there is quite often the impact on administration. One I have not included is competition, which people clearing RIAs are sometimes asked to look at; make sure that the effect on competition is covered or make sure the effect on small or medium-size enterprises is covered. Sometimes you only get an impact statement covering one of those things. I think it is important that they all get put together, even if some of them are particularly identified. I guess environment is another one: make sure the impact on the environment has been ticked off. I do not know whether anyone has an opinion about what should be covered or not covered in an impact statement.

Mr PIKE: Certainly in my Committee we make sure we look at the impact on workers. We have a duty to protect them. We would certainly talk to the union representative about terms and conditions and other things are acceptable to the workers.

Ms HOLMES: Usually, workers are on there. In fact, the two groups most commonly consulted are business and workers, employers and employees, and the question of impacts is covered.

Mr HOGG: One issue that has emerged in Australia is that of captured consultation. A group that has been appointed by a Minister as a consultative group might have five principal representatives from different areas such as environment, industry, et cetera. They have worked out their arrangements over a number of years and have come to a compromise on how they operate. That is usually passed off as adequate consultation—it is tentatively passed off in New South Wales as adequate consultation. Of course, that was recognised long ago as inadequate. We must consult as widely as possible with all those groups. What is your response to dealing with that kind of captured consultation?

Ms HOLMES: That is a hard one to call because if you are told that this group represents all the workers or all the environmental interests, usually people clearing RIAs do not have the time to go and check up on that. I think maybe that is why in general we prefer consultation that is self selecting, advertise as widely as possible and then let groups and individuals choose to turn up and give their opinions. It is risky to designate a particular group as the group you always consult, because you are not hearing all the opinions. I do not know how you check it out, except maybe ask, "Who do they represent? Who is on it?". One approach would be to use of mix of consultation methods: ongoing expert advisory bodies (which are liable to capture) plus occasional broadly based public consultations. We have talked about covering all sources of law and treaties. I guess one question is: How would Parliament ensure compliance with RIA requirements? Do you think it would ever be seriously taken on that Parliament

would be the gatekeeper, not just accepting what Government delivered to Parliament?

DELEGATE: I am concerned that at conferences like this we spend all our time looking at regulatory impact statements and not at the actual regulation. It would probably work better than it did three years ago. I think I saw a member of Parliament with the actual regulation. Sometimes the regulatory impact statement does not bear any relationship to the regulation. Under our environmental protection legislation, if we want a power generator it must comply with certain environmental standards. We received a four-page document explaining that there was a shortage of power generators in the world, because of what is happening in California and in other parts of the world. Any generator that has been built since 1995 complies with the rules and any generator built prior to that does not.

The Government proposed to allow the installation of the generator that was made in 1992, and in a five-year period, with modifications to the generator, they would be able to bring it up to current environmental standards and they were seeking an exemption. On the face of it, if you simply looked at the regulatory impact statement you could not have argued with it. But if you picked up the regulation, it exempted all generators in all country areas for ever. In the absence of having the actual regulation, you can do your constituents or, indeed, the primary legislation a great deal of injustice. I am intrigued, having watched the Victorian industry, that that sort of thing can happen quite regularly. Even when you talk to some staff members in this country, the primary attention is on the regulatory impact statement or assessment, when it is the actual regulation that impacts on our communities. There is a risk.

Ms HOLMES: It is a particular risk if the RIAs is not representing what is in the draft. That is a real worry.

DELEGATE: There is a real risk that we spend all our time looking at process and the actual assessment, not at the actual regulation.

Dr KERNOHAN: When I first went on the Regulation Review Committee that seemed to be exactly what happened, everybody just read the reports. Bearing in mind that we get extremely lucid and good reports that are based on law and on how good the regulatory impact assessment is and whether it fulfils all the criteria, our officers are not meant to tell us whether the regulation is any good or not. I only got interested in regulatory review when I started to read some of the regulations and the rubbish that was behind what we were meant to look at. I had great fun doing that. I have had some success in getting regulations changed by proving just how stupid they were—duplicating other things, et cetera. It is up to the individuals on the committee. They should be not simply reading the officers' reports but also looking at the regulations. One perfect examples is for everybody to try to describe in words the difference between a semi-trailer and a B-double, which are the very big trucks, and I will tell you how regulations can be meaningless.

DELEGATE: There have been examples where RIAs have dealt with an entirely different piece of legislation, not just a regulation. I remember once case

where we had the swimming pool regulation; they actually assessed the Act under which the regulation was made, rather than the regulation itself. They came up with all kinds of alternatives to the provisions, which had already been debated in Parliament. Obviously, if the RIS does not address the regulation, it is a bad RIS. You send it back.

Ms HOLMES: Absolutely. I think we are focusing on RIAs partly because we are saying that the two issues in instituting good process that hopefully result in good quality regulation are the RIA and the process by which it is enforced. Those are the two parts of the OECD recommendation broadly. That is why the focus is on the RIA. But a lot of RIAs go along with the draft so let us hope people do read the draft and see if the analyses are consistent. I also draw your attention to two things on the OECD check list of 10 items. The fourth one is whether there is a legal basis for the regulation. Another one is whether the regulation is clear, consistent, comprehensible and accessible to users. In the OECD's ideal form that issue itself should be addressed; an assessment of the draft should be included. In the Australian RIA and, I think, in the United Kingdom, these criteria are not included. Perhaps also distinct legal advice should be there as well as this analytical advice that comes on the RIA.

DELEGATE: We have had our Crown Solicitor's advice given to us by Ministers from time to time.

DELEGATE: Only if it supports them.

DELEGATE: No. Indeed, I recall that on the Aboriginal land rights regulation the department argued that it did not have to do a full RIS. It put that to the Crown Solicitor, and it agreed to give us the advice when it came. The Minister agreed to give us the advice. In fact, the advice supported us all the way down the line, so the full RIS had to be done. From time to time we get the argument that because the changes being made are only additional changes to a regulation, you roll it over, you sunset it and make a new regulation. Because you are only making minor changes to the regulation you do not have to do a full RIS with a base cost assessment. All you have to do is assess the minor drafting changes to see what impact they have. Of course, that is a totally specious argument. Every time you do an RIS you have to go back to square one and look at the base case of no regulation at all, and compare it with all the other options available. The Aboriginal land rights regulation was a case in point. The Crown Solicitor looked at the New South Wales legislation Act and said that that is wrong, you have to go back and look at the totality of options, including the no regulation option.

Ms HOLMES: Another part of the check list on the RIA is whether that is the way to go, to assess whether the no regulation option is the best.

Mr GILCHRIST: Angus posed a question about the relationship between parliament and government in terms of ultimate responsibility as the overseers of the RIA. Again perhaps we did not know any better in Ontario and by coming up with the design that we have I cannot envisage a problem in reconciling the role of parliament and the role of government. We expect the ministries to design the regulatory impact test. It is then sent to the secretariat staff who are all civil servants seconded to the six members of Parliament, but they are specialists in

their field. Quite frankly, they have also proved themselves to be very adroit in identifying any shortcomings in submissions that have come from other ministries. Their loyalty truly seems to be to the commission and not to their brethren and sisters in the civil service, as it should be. When we get the regulatory impact test and the regulation we get a critique from this arms length group comprised of lawyers and other people who have been seconded from various ministries.

We really have three pieces of opinion: the opinion of legislative council, the opinion of the ministry justifying it and then the opinion of our own staff saying whether there is a justification between the two. The final test, which answers Sue's question, is that if it passes muster with us, six parliamentarians, it stands to reason—drawn at random from the ranks of the Government benches, admittedly, but still a cross-section of rural and urban, very different backgrounds in our personal lives before we became members of Parliament—that it does not strike us as likely being the case that it would not pass muster with our colleagues more widely. I guess the one problem you would have with our system is if you had a minority government, in which case I think you would need to invite members from more than one party to sit on the commission. But since the Government will obviously win any vote, if it comes to a vote in the Legislature, we have at least put in the checks and balances to make sure that there is a test being submitted to everything that a Cabinet Minister, or more likely the bureaucrats within a Cabinet ministry, has suggested is a good idea. I do not know whether this is unique or whether you see a role for elected officials being in some way involved in overseeing the RIA before it comes to the floor of the Legislature itself or whether that would be a worthy addition to some of the other jurisdictions we have looked at.

Ms HOLMES: I think that is a useful role. The question of whether it should be just governmental or whether it should be inter-party is interesting. I am not sure. It is common to have parliamentary committees representing all parties that do a lot of debating. Sometimes they are the source themselves of laws they write and then submit to the chambers. I do not know the answer as to how widely that could apply. It would be interesting to look in more detail at your particular example and see how it works.

Mr ANYONA: The references I have had tend to avoid the question of policy like the plague. In a lot of our circumstances the problem would be policy rather than the regulations. Is there a rule that parliamentary committees should not scrutinise policy? Some of our provisions and rules are that committees are supposed to scrutinise policy. Some rules tend to make it a prisoner of government to decide policy.

Ms HOLMES: Earlier I said that it is impossible to separate policy from impact analysis in that any assessment you do of impacts must inform the policy decision, but on the other hand it is the role of public servants not to make policy decisions but to give the best advice and leave the final decision to the decision makers, that is, the Minister in a department, the Cabinet for the Government, and the Parliament for the people. In some ways it is all policy related but it is not final policy decision, and that is the important distinction.

CHAIRMAN: I ask delegates to join me in thanking Sue for being with us again this afternoon and for what has been a very interesting discussion.

THURSDAY 12 JULY 2001

CHAIRMAN (Mr McLean): I am sponsored to attend this conference by Public Services International which represents about 20 million public sector workers worldwide. In real-life I am the Assistant National Secretary of the Australian Services Union. Today it is my pleasure to introduce to you the Hon. Norman George, Deputy Prime Minister of the Cook Islands. I have a script about the Cook Islands, but I could probably ignore a little bit of that for a moment because I had the privilege to be in the Cook Islands early this year. It is truly a wonderful place. If there is ever an opportunity for you to visit the Cook Islands it is a magnificent place where you can feel truly relaxed and safe. You can wander around to your heart's content, do very little and a really get stuck into those books that you have been put off reading for a fair while, and put your feet up under the sun. The island is a tropical paradise and is somewhere that I would recommend you to attend.

I point out that the Cook Islands enjoys a special relationship New Zealand. Although not a separate sovereign state, the Cook Islands enjoys full self government and free association with New Zealand. The legislative autonomy of the Cook Islands assemblies means that New Zealand has no unilateral power with the Cook Islands to pass laws or to make regulations for the Cook Islands. The Cook Islands may move into full independence at any time by unilateral Act. The legal system in the Cook Islands is based on New Zealand law and English Common Law. The Head of State is Her Majesty the Queen of England. The Parliament of the Cook Islands is unicameral and there are 25 seats. Members are elected by popular vote to serve five-year terms. In addition, the House of Arikis—the chiefs—advises on traditional matters, but has no legislative powers. As Deputy Prime Minister, Mr George oversees the ministries of health, police, natural disaster management, Attorney General, broadcasting and communications, Telecom Cook Islands, information division of Crown Law, environmental services and the Cook Islands natural heritage project.

Mr Norman GEORGE: This presentation is different: It is the morning after our great dinner last night. I have no great experience to speak about because we do not roll-out regulations as other Parliaments do. We are a much smaller Parliament and our legislative activity is not as vigorous as many of yours, so therefore I will appeal to you that if you are extending this session to learn something, take a break! I will tell you a little bit about other things. Yes, the Cook Islands are about 3½ hours flight time from Auckland and about six hours from Sydney via Auckland. We are named after Captain James Cook, a great British navigator of the eighteenth century responsible for preparing Australia and New Zealand for settlement by British subjects. We are self governing, in free association with New Zealand by choice. We share a common citizenship with New Zealand and, under our Constitution, New Zealand is responsible for our defence and foreign affairs. On 11 June we celebrated 100 years of constitutional

relations with New Zealand. We also have close ethnic ties with the Maoris of New Zealand going back to more than 1,000 years.

As stated earlier, our Parliament is unicameral with 25 members of Parliament. We have a Cabinet made up of a Prime Minister and six Cabinet Ministers. As indicated, we have the right to pass and make our own laws, and New Zealand laws have no jurisdiction in the Cook Islands. The Common Law plays a major role in our legal system and we generally follow New Zealand High Court and Court of Appeal precedents, as well as House of Lords precedents. Our final court of appeal remains with the House of Lords, although with the huge costs involved it is generally a non-fly zone to the average Cook Islander. As with New Zealand, our Head of State is Her Majesty the Queen represented in the Cook Islands by a person called the Queen's representative [QR]. The QR assents to all of our Acts of Parliament, regulations and by-laws.

We have a written constitution which is left to the High Court from time to time to interpret. Our judiciary is manned by New Zealand High Court and Court of Appeal judges, but at the lower courts we have justices of the peace. My observations at this very important and enlightening conference is that we compare, relative to our parliamentary system, closely with the Australian Capital Territory and perhaps Scotland, but I need to remind you that we have been at it longer than you have. We have been going since 1965 with our unicameral system. There is no subordinate legislature except the local outer Islands government. They make their own laws which we call by-laws. The Cook Islands are spread over 2 million kilometres of ocean and in between you can see little spots of islands, so each island has its own local government with a mayor and counsellors to administer the islands as well as make their own laws. However, when they do recommend a by-law we have a system where they then submit it to the Executive Council which is based on the main island of Rarotonga. The Executive Council then ratifies the by-law. It does not become law until that ratification. Royal assent is then given by the Queen's Representative before it becomes law.

That helps us keep an eye on local activity. Some of these islands are hundreds of miles away and with the ocean in between they are very isolated and there can be a tendency to have some runaway activities from central government. Every now and again we have to make sure that they are still part of us, because of the distances. We are unable to keep an eye on things by bringing the main by-laws back to the central government for assent. It works very well. The procedures for passing of regulations first begins with an enabling Act which makes provisions for regulations to cover the details of implementation. When by-laws are made there is no guarantee of debate. After they are passed by the Executive Council, as with other regulations passed by the Executive Council, they have to be tabled in Parliament within a month. It lays in there. It appears on the order paper.

There will be certain days when the Government has very little business to do and then those papers will be called. You have got to be sharp and alert if you are in Opposition because when the papers are called, and Government members have no wish to debate it, it is just officially received by the House and disappears into oblivion. However, an alert Opposition will always stand up and speak on the

paper and that is the time it is debated. Many times the Government usually does not have time or does not encourage debate on these papers, so it is really up to the Opposition to force a debate. Many of those by-laws and regulations can easily be received and filed in the House without debate.

How often does our Parliament sit? I can tell you that we sit when there is a need to legislate, so it is by necessity rather than by a set table. We are like the Toyota motor company assembly-line—you put things together when there is a need. We do not stockpile it. But there is a time when we have to sit and that for the passing of the national budget which has to be done in July. We plan to table ours towards the last week of this month so I had better get back soon. It has got to be completed by September. That is the only compulsory sitting of Parliament to pass the national budget and all other times are by necessity.

Our parliamentary procedures are a lot simpler, for obvious reasons. We do not vigorously legislate on an intensive basis so that you could expect legislation to be tabled for the first reading, second reading, committee stages and third reading on the one-day or one week, it depends how interesting it is. All those readings can actually be accomplished. We do not have select committees, as I notice the New Zealand Parliament has 13 or 15 of them to look at different things. Because we are small and transparent there are really no complicated issues to be thrashed out—our newspaper does all that for us, unfavourably most of the time! We do refer some bills to a select committee if it is controversial. An example is the banning of liquor and cigarette advertising on television and on the media had to go to a select committee. From time to time, depending on the subject, it will be referred to a select committee but the roles of select committees are limited.

But I am very grateful for my experience at this conference this week because it has given me some ideas about interesting changes. For example, up until this conference I had never heard of Henry VIII powers, scrutiny committees, regulation review committees, motions of disallowance or review impact assessments. They are all something that I have picked up from here which we do not have or do not practise, so I am very grateful for that. I also am happy to discover some hidden sources of law making, that is, tertiary regulators. It has been happening but I have never actually focused on it until this conference. I will give you an example of the kind of experience we have. The examples I will highlight are the court fees, registration of mortgages, stamp duties and costs of filing court actions. For many years the charges were rather low and then all of a sudden the court registrar got together and put in a submission to Cabinet and ultimately to the Executive Council, without going through a select committee or Parliament.

I gathered from this that this was initiated—and it is usually initiated this way in my country—by the heads of ministries, government departments. The end result is that the new increases were passed by the Executive Council and put into effect before the regulation was filed a month later in the House, where it sat without debate.

My presence at this conference highlights that this is probably what you mean by tertiary regulation and tertiary law making. It has been sneaked past us

so many times and thanks to this conference I am now able to say, "Oh, well". It is also a money bill to a regulated level—charging fees, charging the public. So that escapes scrutiny without debate and that is not to be encouraged. My first observation is that that kind of thing should be stopped. The experience of attending the conference has made me aware that this goes on all the time without realisation that there is another branch of regulators emerging.

Another problem is that because of our small size our House is made up of 25 members of the Parliament. You start splitting them up into select committees and you just about use everybody, including Ministers. During this conference I have come to realise that there could be a role for retired members of Parliament, Speakers, Clerks and Clerk Assistants because of their experience and knowledge. We could utilise them to be our scrutinisers to review some of our regulations. We simply do not have the time, the government of the day, the people in government. You do not know—this might be the creation of jobs for all its MPs to be involved in reviews. Obviously, it is laborious and sometimes boring, and no active MP who is serving would want to be tied down with it. This could be something we look at but I certainly would like to see this as a potential recreational activity after serving in the House. Some of our regulations and by-laws are ancient, going back to 1914, so they need to be looked at. They need to be taken out.

Because we receive substantial outside aid assistance, we are facing pressure. It is not always international treaties. We in the Cook Islands have the ability, under our constitutional relationship with New Zealand, to enter into international treaties. I sense that some of these treaties can impose pressure on our own regulatory rights. I cite the particular example in the areas of intellectual property and copyright. If anything I have seen about the Treaty of Paris, it is about this thick and full of a myriad of things that have no direct relevance to our part of the world. It is a big pain to see how this all applies to us. So we suffer from that kind of pressure from international treaties. Although we support the principles of such treaties, sometimes the sheer volume of them can be cumbersome.

As a recipient of aid from donor countries and institutions—in our case, institutions like the Asian Development Bank, the IMF and World Bank—they pressure not only our regulatory powers and abilities but also policy. I will give you an example. About six years ago we were suffering very badly from an economic downturn and the end result is that we were under severe pressure to downsize our public service. That was done in rather a great hurry, and the result is that we reduced our public service by half. The ensuing result is that we lost about 25 per cent of our young population—young people who could not afford to keep up their mortgage payments. We lost 25 per cent altogether to New Zealand and Australia. They just had to leave; they could not continue.

Now that the economy has recovered we have huge worker shortages. We are now having to bring them from outside. So it has gone from one extreme to another. When I heard my friend from Botswana talk about investment taking the place of colonialism, perhaps in our case we can say that a new concept is coming into being, that is, donorism. Those who donate are pressuring policies and this is a new experience that is creeping in. While we accept that there is a

role for everybody, I think that that kind of pressure should be controlled, rather than allowed to interfere directly with our autonomy, our right to make our own regulations and laws. I simply want to convey that as part of our experience of the recent years.

Overall, this conference has given me firm ideas, interesting ideas. Although we can never emulate your problems and solutions, in a small way it gives us directions on how to improve our own system. Our parliamentary democracy is as vigorous as yours. We fight with the Opposition like cats and dogs, as does everywhere else. We have a very healthy, vigorous parliamentary system. That is all I want to say about my presence here. I simply wanted to share what little we have largely because we do not really have the same problems. However, we have some problems that are equivalent to yours but in smaller quantities.

In conclusion, it is a great honour for me to be here to exchange, to hear your presentations and your ideas. I especially thank Peter Nagle and his good team for the cheerful and warm reception they have given to us. To all the Australian members of Parliament, thank you for your hospitality, especially the members from New South Wales. To my friends from the Australian Capital Territory, you are great blokes, and to all of you thank you very much.

CHAIRMAN (Mr McLEAN): We still have a little time left so perhaps now is an opportunity to take questions. I was interested to hear your comments concerning the IMF and the World Bank and external pressures on forms. I wonder whether there may be a little more of that to touch on from an island of your size that is changed so much by those external pressures. You may wish to make a further comment on that.

Mr GEORGE: I do not think I should comment. I am here to make friends, not enemies. But it is there. I think we can handle them. We just wanted you to know about it.

Mr TURNER: You mentioned tobacco and alcohol and some regulations. One assumes that they are a form of income as far as excise is concerned. What other sources of income does the Government have in terms of taxes? Do you have more than one level of government? In New South Wales we have three levels of government.

Mr GEORGE: We only have the one level, that is, central government. We are everywhere. We impose levies on just about all imports. We are a high-intensive import country. We import most of our necessities from New Zealand and sometimes Australia, and we charge levies for these goods. I think we were the first Pacific country to introduce value-added tax—do not hold that against us—and we copied it from Hawaii. That was back in the late 1970s. Subsequently, New Zealand cottoned on to it with the GST. That is our main revenue system for imports and sales tax, but of course we have the normal business tax and income tax.

Lord MAYHEW: Who decides when it is necessary for Parliament to meet? Can the Opposition instigate, on its own motion, the sitting of Parliament?

Mr GEORGE: It is tough to be in Opposition there. The Government decides all the time. I was in Opposition for 10 years and I survived those indignities. Government calls the day whenever it wants.

Mr MARTIN: What would be the average number of sitting days in a year? Would it be 10 days or 20 days?

Mr GEORGE: Overall, I tried to assess that. I think we sit for about four months out of the year, all in different time slots. I may be exaggerating but we sit for three to four months altogether.

Mr PIKE: You indicated that you have difficulty finding members to go on your committees to scrutinise. Yesterday I was referring in the early part of my speech to the work of the modernisation committee and the liaison committee in wanting to add to the work of our select committees. You should not think that you are unique in respect of not having enough people to go on the committees. The Labour Party in our Parliament has plenty of people to go on committees but the Conservative Party struggles to find enough people to attend those meetings. In fact, we are supposed to be establishing the select committees this week but we do not know whether the Conservative Party will be able to produce enough names to be on all the committees. I was somewhat interested in your suggestion that we should bring in retired and former MPs. The more workload you create, the more difficult it is. As we are trying to increase the scrutiny role of select committees—and we are struggling already—our position may not be too dissimilar from your position.

Mr GEORGE: Thank you. It is comforting to know that we are not alone.

Mr HIRD: I have been on every committee in our Parliament. What is the population of the Cook Islands?

Mr GEORGE: That is a State secret. There are 100,000 Cook Islanders in the world: 53,000 live in New Zealand, between 25,000 and 30,000 live in Australia, and the rest live in the Cook Islands. We get about 70,000 tourists. Tourism is our biggest industry. In between, our population varies between 16,000 and 20,000, but the rest are abroad.

Shri KADIAN: What are your modes of communication and transport amongst these thousands of islanders?

Mr GEORGE: We have air links. Jumbo jets can land in the Cook Islands. We have ships. We have all the modern facilities. We have a good telecommunications network. I am the Minister responsible for telecommunications at home. As far as communications are concerned, we have all that, but I can tell you that isolation is very expensive. To manage to transport goods to the other islands, you go through some heavy seas all the time. It is rugged. They have difficulties of their own.

CHAIRMAN: My experience of the Cook Islands is that it has one main road and two buses, the clockwise bus and the anticlockwise bus, that go around

the island. As you get off the jumbo jet or the 767 after it lands at Rarotonga airport you stand in a queue to go through customs. The customs dogs sniff you. I have been told that if any inappropriate substances are found on you, they do not arrest you; they just put you on the plane and send you on to the next country and get the police to pick you up there, so the story goes. However, as you stand in the queue, someone plays the ukulele and sings tropical songs and you start to feel at home. As I said, it is a lovely place. The only danger you have walking back to your motel room of a night is falling coconuts. I thank Norman very much for the opportunity to introduce him today. The hospitality his Government showed me recently on my visit to the Cook Islands was nothing short of magnificent and the hospitality of its citizens is outstanding.

CHAIRMAN (Mr NKOMFE): Ladies and gentleman, this session will be presented by Professor John Braithwaite. He is the Chair of the Regulatory Institution Network in the Faculty of Law at the Australian National University in Canberra. Prior to holding this position Professor Braithwaite was Associate Commissioner of the Trade Practices Commission, which is now called the ACCC—Australian Competition and Consumer Commission—from 1985 to 1995. From 1983 to 1987 Professor Braithwaite was a member of the Economic Planning Advisory Committee. Professor Braithwaite recently published a book called *Global Business Regulation*, which was published by Cambridge University Press. I have pleasure in welcoming and inviting Professor Braithwaite to address us.

Professor BRAITHWAITE: It is a pleasure to be here. In my paper I am grappling with a rather narrow issue about how well rules work, that is, how certain they are in their application, how consistently they apply, how reliable they are, and how much reliance people can put on regulations. The conception of reliability here is the same as the conception of reliability in science. It does not mean that the standard is right; it means that it produces the same outcome each time. It does not mean the outcome is good; it just means that you get the same result each time you apply the standard. For example, if you have a ruler that is supposed to be 12 inches and it is miscalibrated as 13 inches, you will get the same result each time you use the ruler, but it will be wrong. So, it is limited to that consistency reliability issue.

The first five pages of the paper is about this distinction between rules and principles. I am not going to labour the legal philosophy on that. The summary conception I end up with is by Joseph Raz, who says "Rules prescribe relatively specific acts; Principals prescribe highly unspecific actions." So, the legal principle of environmental regulation like continuous improvement can imply an infinitely creative range of action possibilities while a rule preventing the dumping of chemical X relates only to that action. In 1997 Julia Black published a book called *Rules and Regulators*. The empirical part of the book is about financial services regulation in Britain. The history she tells certainly is of a field about which I know very little, so I shall recount a thumbnail sketch of the recent history of financial services regulation as she outlined in the United Kingdom.

It is one of starting basically with a self-regulatory approach to financial services that is very much based on principles. Industry is then saying, "We want more clarity and certainty in the law" and then moving to a much more highly specified regulatory regime of precisely defined rules. That situation then created all sorts of problems of the kind I shall address in the rest of this paper, that is, the pursuit of consistency producing a lot of inconsistencies, loopholes opening up, in the regulations all of the time with the rules becoming more complex over time. There was then a movement back to principles that had a binding status rather than a self-regulatory status complemented by a lot of rules, many of them self-regulatory rules which often had a non-binding status—sets of regulatory guidelines—and it is that history that traces the kind of choices we can make.

The picture Julia Black projects in the book is of more satisfaction of all parties to the regulatory gaining of that final outcome of finding principles with rules giving guidance as to how those legal principles might be implemented than the more rule-based regulatory regime that preceded it, or the almost totally self-regulatory regime that preceded it. Most lawyers see rules as less vague and more precise than principles and because of this they should therefore deliver more certainty into the law. I will argue that in a wide range of contexts that is wrong and in some contexts that is right. It is certainly true if we think about the things we do in the course of the day—we get up and have our breakfast, pour the milk on our Cornflakes and do a variety of other things—that it is easy to make a judgment about them that we have not broken any legal rule in the course of having our breakfast. I hope that was true of our breakfast this morning! We then might get into a car and might exceed the speed limit. It would then be equally clear to us that we had broken that road rule. So, the legal positive of us would say, "Well, that is the fundamental reality of our lives", that rules work very clearly and we get a bit obsessed when they do not work clearly. They are the cases that end up in conflicts of the court and we get things out of proportion by focusing on the things that become conflicts in the courts.

That is fine except it is also the case that most of the matters that are the stuff of regulatory disputes are not like having our breakfast; they are more complicated affairs. The greatest complication in most of the countries from which you come is that it ceased being the case in the course of the last century that most legal disputes were between individuals. That shift occurred in the 1920s in the appellate courts of New York where, for the first time, the majority of disputes were not between two individuals but on at least one side of the dispute was a corporation or some other organisational entity. That, more than anything, is what has introduced complexity into the challenges we face today.

On page 29 at the back of the paper there is a set of propositions which constitute this theory of legal certainty, which I submit for your consideration. The first proposition is that when a type of action to be regulated is simple, stable and does not involve huge economic interests, rules tend to regulate with greater certainty than principles. The second proposition is that when a type of action to be regulated is complex, changing and involves large economic interests, firstly, principles tend to regulate with greater certainty than rules, but then the paper argues that actually a mix of rules and principles can deliver greater certainty than principles alone. Secondly, binding principles back in non-binding rules tend to regulate with greater certainty than principles alone. Finally, binding principles back in non-binding rules are more certain still if they are embedded in institutions of regulatory conversation that foster shared sensibilities.

Robert Baldwin wrote an article 10 years ago in the *Modern Law Review* entitled "Why Rules Don't Work". His argument is that rules are drafted and argued in legal text without working through how compliance with them is secured in regulatory practice by police, regulatory agencies, private litigants and even courts. When flux is great it can be obvious that radically abandoning the position of rules can increase certainty. For example, Andrew Simpson, who is a Sydney lawyer with Gilbert and Tobin, has made the case that the regulation of transitional technologies like telecommunications requires redefinable terms in rules. What a telephone means today might be something quite different

tomorrow. In terms of the conclusion of my paper, so long as the principles that underpin the redefining of terms are clear, redefinable rules can regulate a transitional technology with more certainty than fixed rules.

A smorgasbord of rules engender a cat and mouse legal drafting culture of loophole closing and reopening by creative compliance. Moreover, it engenders a structurally inegalitarian form of uncertainty. The law becomes so complex that little people who cannot afford sophisticated legal advice cannot understand it, whereas wealthy people in large corporations actually exploit that certainty and build on it and actively create uncertainty that they can use to their interests. Legal entrepreneurship when economic stakes are high does not work simply by exploiting change and complexity that is inherent in our post-industrial societies; it works also by contriving change and complexity. When our Australian Government privatised Qantas on terms that were thought generous for the new shareholders, it wanted only Australian citizens to be able to buy those Qantas shares—people who had been paying for Qantas through their taxes—but then be Macquarie Bank responded by creating a new financial product called a QanMac to get around that rule. Therefore, foreign QanMac owners secured identical functional economic benefits to Australian owners of Qantas shares. Financial engineering to create new products that have never been conceived by our regulations is a growing phenomenon of particular importance to those areas of law that affect the top end of town.

Frederick Schauer has argued, "In many cases, indeed in most cases, the result indicated by applying a rule will be the same as the result indicated by directly applying the rule's background justifications"—the principles that underpin it. What I am arguing here is that that is true of, say, the law of fraud applied to welfare cheats but false for the law of fraud applied to top management of large corporations. Professor Schauer is a philosopher. As we non-philosophers put it, the best way to rob a bank is to own it. It is one thing to show that a legal positivist such as Professor Schauer is wrong for large and important areas of the law in action when he says that most commonly the application of a rule will be consistent with its justification; but it is quite another to show that you get consistency by direct application of the justificatory principles. When you first think about it, it seems implausible that it would: if you cannot secure consistency with precise rules, why would you secure it with vague background principles?

Let me tell you of an empirical case study that my research group has undertaken here in Australia on nursing home regulation—quality of care regulation. This is work we conducted from 1988 when there was a Commonwealth government takeover of State government regulation of nursing homes. There were 31 very broad, vague outcome standards—they fit the conception of principles in this paper—that replaced a lot of more specific State laws at that time. Some of them were very vague indeed. That arrangement was superseded in 1995 by an accreditation regime—more a self-regulation regime—that the current Commonwealth Government put in place. One of the standards that prevailed up until 1995 was that the nursing home should have a home-like environment. This is oriented to allowing the nursing home to be not like a hospital. You are going to spend the rest of your life in this institution. You should be able to put up pictures or perhaps have your pet cat visit you in nursing home. This is a very vague principle of nursing home regulation.

There are similar laws in the United States. There, in response to industry criticism that they were not really being told what they had to do to create a home-like environment, specific rules were issued. It was decided to count the number of pictures on the walls. That was one of the things they did in a number of US

States. In the regulatory game of cat and mouse, before the inspector came around staff would tear 30 pictures out of the same magazine and slap them up on the wall with sticky tape to get their count up. Another standard that applies in both Australia and the United States involves enabling residents to participate in activities programs. The response in the United States has been to wheel residents in wheelchairs who are sound asleep into a room where an activity is going on so that they can be counted as participating.

Most lawyers and parliamentarians would have no trouble with the conclusion that the reliance on the broad principles in the Australian regulatory model would result in substantially more effective regulation than the more precisely specified American rules would. But most of us would also have the intuition that the broad and vague Australian standards could not be enforced with any consistency. What did the evidence suggest? In both the United States and Australia we had two inspection teams at the same time raiding the nursing homes in terms of their compliance with the standards. On the Australian standards, over 90 per cent the time the inspectors gave the same result as to whether the standard was complied with or not. In terms of reliability coefficients—for those of you who have done any statistics—the correlation between the rating that one inspector was giving and the rating that another inspector was giving was between 0.93 and 0.96; whereas in the US in one study there was no correlation at all and in another a correlation of 0.15. The four US studies all had lower consistency in the application of the regulations than was the case with the broad and vague Australian principles.

One of the things going on was that the classic process of writing more and more specific rules over time to cover newly discovered loopholes or apparent inconsistencies made the whole body of the rules as a package less capable of consistent assessment. The pursuit of consistency of the part produces less consistency for the whole as a body of law. Our fieldwork suggested that US nursing-home inspectors, because the system was not clear and precise enough, needed to break vague rules into two more precise rules, allegedly to give businesses more certainty about the advice given by the regulations. Ultimately, this produced a process in most US States in which inspection teams at nursing homes were enforcing more than 1,000 regulations, compared with the 31 in Australia. That is one very important source of the greater inconsistency in ratings. The inspectors cope with the complexity by looking around the nursing homes, seeing something they do not like and then scampering through the rules to see whether they can find something to write showing that it is out of compliance to justify their intuition that something is not quite right.

Most of the standards are not checked. You cannot possibly, in a one or two-day inspection of a nursing home, check compliance with 1,000 different prescriptions; whereas with the 31 broad, vague Australian principles the inspection team was unable to sit down, by themselves and together with management and staff of the nursing home, to discuss how the facility was performing in terms of each one of the principles. It is this point about conversational regulation, about embedding how you do the regulatory work in deliberative conversational regulatory institutions as being what drives consistency, that I am leading to here.

Hand-in-hand with the paradox of consistency in nursing home regulation is a paradox of discretion. More and more specific rules are written by lawmakers in the misplaced belief that this narrows the discretion of inspectors. The opposite is the truth. The larger the smorgasbord of rules, the greater the discretion of regulators to pick and choose an enforcement cocktail tailored to meet their own objective. A proliferation of more specific laws is a resource to expand discretion, not a limitation upon it. I am arguing that when the type of action to be regulated is complex, changing, and involves large economic interests, principles or rules alone are less certain than a prudent mix of rules and principles.

The paper goes on to consider the two logical possibilities. If you are going to have a mix of rules and principles, is it better that the rules are binding and backed by non-binding justificatory principles that help you to interpret the rule or is it better to have non-binding rules that can be overridden by binding principles? I argue for the principles being binding for the reasons just given with the nursing home story. I mentioned Frederick Schauer before. Presumptive positivism is his position. You can be totally inflexible in the way that you enforce rules but you have a presumption that you expect the rules to be complied with. You have a rule that says that you are not allowed to drive at more than 100 kilometres an hour and you enforce that rule even in circumstances in which driving at 110 kilometres an hour is quite safe. So you are not actually enforcing it in a way that is faithful to the background justification of the rule but you are best to be presumptively positivist but in extremis you are able to override it. If you are going at more than 100 kilometres an hour because you are taking a sick person to hospital only in that more extreme situation are you allowed to strike down the presumption that the rule ought to be applied.

Much of the regulatory literature is about critiquing the fact that the law instructs people who are the subject of regulatory control to be presumptive positivists. For example, following the Three Mile Island nuclear accident in 1979 a commission investigated what went wrong. Basically, it found that operatives in nuclear power plants in the United States were behaving as presumptive positivists. They had been taught to be rule-following automatons. They had acquired no systemic wisdom about the safety system of the plant. So when something happened that was a bit out of the ordinary that was not covered by a specifically specified rule they did not have the wisdom to know what to do. So they moved to a more principle-based regulatory regime. There is evidence in Joe Rees's book of a dramatic improvement in nuclear safety in United States as measured by SCRAMS—automatic shutdown is of nuclear plants—which have decreased from seven per plant in the United States immediately after Three Mile Island to 0.1 today.

When we spoke to the nursing-home regulators in the United States, people who designed those regulations would say that there are some things that you just cannot do through regulation such as ensuring the courtesy of staff in the nursing homes or that rooms are tastefully decorated. Their view was that you cannot possibly achieve consistency of those things through regulation. Our reaction related to the Hyatt hotel chain. There is a kind of consistent quality about the decor of a Hyatt hotel. If you hire a room in a Hyatt hotel you basically know what to expect. They do not achieve that through decor rules; they achieved through shared sensibilities that arise from regulatory deliberation. That is what

delivers the consistency that we found in our research on the ratings of things such as the home-like environment.

Principles may be more important than rules for engendering legal certainty because they are simpler, shorter, fewer, and therefore can be better discussed from board meetings down to factory floor in drawing up the lessons from valued stories. They say that consistency in regulation comes from regulatory cultures being a storybook more than from regulatory cultures being a rulebook. Even if the theory that I outline in the paper is right, given the nature of creative compliance, it would be a naive to think that it could be implemented in practice in a way that would not be at least partially corrupted by those with an interest in contrived complexity.

The irony is that it is lobbying for business certainty from the top end of town that persistently causes principles to go the way of rules. There are always judges who will march beside business lobbyists under the banner of certainty, in a way that I have tried to argue that in practice creates uncertainty. In the messy business of making law, holding the line on principles that override rigid rules may never be achievable in any practical, political or judicial set of practices, but it may be achievable to greater or lesser degrees.

CHAIRMAN (Mr NKFOME): We are running late. I will take comments and questions first and the professor will respond if that is required.

Mr ANYORO: Professor, I would like to benefit from your knowledge. In the highest act of law how do you distinguish between regulations and rules? Sometimes there is confusion as to which has the most weight.

SENATOR COONEY: Perhaps the specification or enumeration of the rules is there to protect the sort of person that the authorities are going to examine. In other words, if you leave too much discretion to the authorities are the authorities going to be oppressive? Referring to an association or to a body that you were once associated with that is now associated with some other person, does it also allow people to use the media as a means of enforcing the law? Have you noticed that trend, which is either a good thing or a bad thing, where, because of the lack of resources or for some other reason, authorities are now resorting to the media in order to get a result? I think the end of that might come because, first of all, there is too broad a scope for that authority act in; and there is an absence of rules. It leads to the point where they could say, "You have done the wrong thing." Then, off to the press. That way they would get the results, probably good results. Would you care to comment on those two matters?

Professor BRAITHWATE: On the first question, it seems to me that regulations can take the form of either principles or rules. Indeed, you do not have to be married to this distinction. The whole of the analysis in my paper could be advanced through saying some regulations are broader, more general, more vague or apply to a range of unspecified situations and other regulations specify a particular action which you are required to do or required not to do. That is a continuum between broad, vague, general, and more specific regulation. Whether you are talking about regulation or law, or the highest forms of law and order—for example, the law of your Constitution—you have the same choice between

whether you are going to follow the path of rules all the path of principles. It is a choice that applies at all levels of rule and lawmaking, I want to argue.

Mr SQUIBB: Do you see both rules and regulations as being disallowable instruments?

Professor BRAITHWAITE: Yes. With regard to the media question, I am doubtful about having more and more specified standards to deal with the problem that Senator Cooney has posed. New South Wales criminal law is highly specified, but that does not seem to stop police Commissioner Ryan from acting in a lot of ways that are very similar to the way Professor Fowles acted. I would have thought that this pursuit of regulating discretion through specifying rules about has an enormous history of counter-productivity—not just of not working, but of actually handing over this resource; saying, "I can do this because here are these rules that say that this is a context in which I can do it." Powerful regulators can play the loophole-finding game just as effectively as powerful business organisations can. What you are looking for are deliberative processes of accountability. Regulatory conversations in Parliament as to whether trial by media is an appropriate way of proceeding is a more powerful remedy that writings some rules about when people can make statements, I would suggest.

CHAIRMAN (Mr NKOMFE): I thank professor Braithwaite for his inspiring input.

CHAIRMAN (Mr Steve GILCHRIST): It is my pleasure to chair the free-forum discussion we hope to have over the next couple of hours. As you have seen in your program, there is an opportunity for anyone who wishes to participate and give their views on regulatory reform to have up to 15 minutes to make a presentation. I already have a speakers list of 16. If anyone else has an interest in speaking, if they would be kind enough to give me their name I would be grateful. Our first speaker will be Mr Firoz Cachalia, a lawyer who was first elected to the Provincial Legislature in Gauteng in 1994. Mr Cachalie has served as the chairperson of the Positions Committee and Leader of the House, and is currently the Speaker.

Mr Firoz CACHALIA: When I was first asked whether we would like to make a presentation to the conference I said no, because we do not yet have in place a system of parliamentary review of delegated legislation; although we are in the process of setting one up, and for that reason this conference is particularly timely. Having listened to some of the contributions, and particularly the questions that have been raised in this conference, I thought perhaps it would be of some interest to share with you some of our experiences since setting up this new representative body in 1994. I was particularly interested in the observations of Mr David Mundell, the representative from Scotland, which contained many resonances that are relevant to our own experience.

I thought I should start by giving you some background information dealing briefly with the structure, powers and distribution of powers in our system. We have a national bicameral Parliament. The second House is called the National Council of Provinces, and it is structured in an interesting way. The provincial legislatures, of which there are nine, are directly represented in the National

Council of Provinces. So each time a particular class of national legislation is under consideration in the National Parliament, the nine provincial legislatures send what we call special delegates with specific provincial mandates to consider and then vote on legislation that is under consideration at the national level. We describe this system as a system of co-operative governance; it is really a mix of unitary and Federal features.

Powers are also allocated under our system of co-operative governance in an interesting way. Certain powers, such as taxation, foreign affairs, defence and justice, are national exclusive powers. At provincial level, it is quite extraordinary because it is exactly the same with one exception, and that is Scotland. Housing, education, welfare, agriculture, environment, local government, development and planning, and transport are provincial powers, but they are conceived of as concurrent powers. So the national and provincial governments have a constitutional authority to legislate in these areas. But under our system, at least as it is currently functioning, most regulatory activity occurs at national level. So the theory is that, instead of exercising your legislative authority independently at provincial level, in these concurrent areas you share legislative authority with the National Government as provinces through direct participation in the second House of the National Parliament.

When we drafted our new rules in 1994, we adopted an attitude to the drafting process which was unconstrained by tradition. We looked to draft our rules in an attempt to reflect our own aspirations and, if you like, modern conceptions of democracy. I will give you two examples. With respect to our legislative process, we abolished this conception of distinct readings, which I understand has its origins in a period in parliamentary history when parliamentarians were in fact illiterate. So we do not have readings. We have an introduction stage, a committee stage, which is supposed to be fairly intensive, and then a plenary stage. Our rules also require that upon introduction all legislation must be supported by a memorandum setting out the purpose of the bill, the financial and environmental impacts of it, processes of consultation, et cetera—in other words, basically a cost-benefit analysis.

I was very interested in the observations made by Ms Holmes in her contribution. I think our experience with the introduction of this conception of the memorandum, about seven years ago now, has been one of failure, largely because I think the departments do not have the capacity to comply with this requirement, and so their treatment of this provision in the rules has been largely perfunctory. The memorandum appears to be a product of an after-the-fact process; it is not really integrated into the policy-making process within departments.

There has been a lot of discussion throughout the conference on this issue of consultation and public participation. In this respect I think our experience has been somewhat interesting. We have taken the view that it is not sufficient to create formal opportunities to facilitate public participation, that there are in fact obstacles to participation by interest groups. There may be collective action problems, there may be problems that derive from class or gender-based inequalities, or even simply from the numerical size of a group in society. For instance, discrete and insular minorities that may have an interest in participating

in a political process may lack the resources to do so. Even an apparently simple matter that is generally taken for granted, like language or literacy, may be an impediment to public participation.

So it is necessary for a representative body to take positive steps to seek, within some obvious constraints, to overcome obstacles to participation. For that reason, we have set up a public participation office in the legislature, with a dedicated budget and staff whose specific mandate is to facilitate public participation. They have run public education programs reaching, over the period that our legislature has existed, about 68,000 people. For us, the main challenge now is not simply to educate the public in their system of government and civic responsibility, but to achieve effective levels of participation in the committee process.

For instance, on at least one occasion which was particularly successful, after the introduction of legislation the relevant portfolio committee ran an extensive series of workshops in communities on the content of the policy and the bill in question, to impart communities with the knowledge that was necessary for participation.

We found that the subsequent hearing process in the Committee stage was much more meaningful and successful.

We have introduced a system of petitions, borrowing somewhat from the German model of a parliamentary ombud, but developing unique features. Our system has strong similarities with the system that has evolved in Scotland. We have passed a petitions statute founding a right to petition and placing an obligation on the Executive to respond to petitions. We do not have a pink bag or a red bag in which petitions can be received, but avoided. We have established a petitions committee. Under our statute, individuals and groups have a right to petition with respect to government action, or inaction, and with respect to any regulatory instrument, program or policy.

As Richard Worth pointed out in his contribution, the petitions procedure provides a cheap form of administrative justice—an alternative, if you like, to judicial review—as well as a way of monitoring regulatory impacts. This instrument of petitions—which is across the board; it is not specifically related to subordinate legislation—has evolved in an interesting way. In our understanding, it is also an instrument for facilitating public participation. It is a way in which interested parties in the community can seek to influence directly the agenda of a parliamentary body. Under our system, members of the public may submit petitions to members directly; they do not require the intercession of a member to have their petitions considered. The outcomes of all petitions are reported to the House. A Minister who refuses to respond to a petition is subject to a political penalty for such conduct.

I might now say something about the powers of our committees. I think it is somewhat unusual to have the powers of committees set out in the detail in which they are in our fundamental law, in our Constitution. Under our Constitution, committees, for instance, have the power to subpoena witnesses or any persons and to call for papers. Under our system, therefore, it would not be appropriate for

a Minister to refuse to appear before any committee, even a scrutiny committee when that committee is set up.

We have paid particular attention to the committee system. We are trying to strengthen the oversight mechanism. Like Westminster, we are particularly interested in the issue of the balance between the Legislature and the Executive. This yet unresolved question is one of the key challenges facing our young democracy. I was very interested in the observation of Chief Justice Gleeson that some caution is warranted with respect to the application of new public management theories to government. We are exploring results orientation: for instance, how clear specification of outputs and outcomes could enhance the capacity of both Parliament and government to address issues such as poverty alleviation, which of course is one of the key challenges facing South Africa.

In conclusion, might I express my pleasure at being able to be at this conference. The debates have been very interesting and the contributions very rich. I would like to thank in particular the Chair of this conference for inviting us.

Mr PETER NAGLE: I will not address you on the paper under discussion. Rather, I would let you know about some housekeeping activities. Tomorrow, we will deal with the issue of resolutions. One of those resolutions relates to having this conference two years hence. I have become aware of some contenders to host the next conference. Anyone who wishes to discuss this matter will have the opportunity to do so tomorrow morning. This afternoon's session has been cancelled—unless there are objections. Tomorrow morning we will meet at 10 o'clock, with a new program. The chair will be Lord Mayhew, the speakers will be our colleagues from India Mr Chandre Gowda and Mr David Simeon, and the facilitator will be Janelle Saffin. Also, tomorrow the conference will be in the Legislative Council Chamber. Ladies and gentlemen, I hope you have enjoyed the conference so far.

Dr ELIZABETH KERNOHAN: I am going to talk about a very recent example of the interrelationship of the functions of the Regulation Review Committee. As delegates probably would be aware by now, the Regulation Review Committee of New South Wales was established under the Regulation Review Act of 1997.

As you are probably all by now aware the Regulation Review Committee of New South Wales was established under the Regulation Review Act 1987. Under section 9 of that Act the Committee is required to consider all regulations while they are subject to disallowance by Parliament to determine whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

(a) that the regulation trespasses unduly on personal rights and l berties

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

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

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

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

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

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

These functions of the Committee do not include the examination of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or where the matter has been specifically referred to the committee by a Minister of the Crown. The committee may make such reports to Parliament as it thinks desirable, including reports setting out its opinion that a regulation ought to be disallowed. In our sixteenth report to Parliament, which we tabled and debated only two weeks ago, we considered the University of Sydney Amendment By-law 2001 which was published in the Government Gazette on 1 June this year. To make it more interesting for our visitors, Australian universities are mainly public. They are federally funded but they were found it, constituted and function under State legislation. That is the irony.

The University of Sydney has a governing body called the Senate chaired by a highly respected and revered person known as the Chancellor and the Deputy Chancellor of the University of Sydney. There are 21 members on the University of Sydney Senate, two parliamentary, four appointed by the Minister for Education and Training, three official and 12 elected. That is a background which might make some of this sound more reasonable or interesting. The object of the bylaw is to provide the Chancellor and the Deputy Chancellor of the University of Sydney to hold office on condition that they retain the confidence of the Senate of the University.

Significantly the by-law applies to the present Chancellor and Deputy Chancellor and enables their current terms of office to be terminated by resolutions of the Senate. This contrasts with the approach taken when the principal Act was passed in 1989. Sections 10(2) and 11(2) enable the period and conditions of office of the Chancellor and Vice Chancellor to be prescribed by the by-laws. However, the exercise of these powers was qualified by a specific savings rovision protecting the rights of the existing Chancellor—there was no Deputy Chancellor at that time. The savings provision read as follows:

2.(1) The person who, immediately before the commencement of this clause, held office as the Chancellor of the University of Sydney:

(a) remains Chancellor of the University, and

(b) continues to hold office as such (unless he or she sooner resigns) for the residue of the term for which he or she was appointed as Chancellor.

(2) Section 10 (2) does not apply to or in respect of the Chancellor referred to in this clause.

I am not a lawyer, and that last clause worries me. In accordance with this approach a similar savings provision was made for the Chancellor and Deputy Chancellor when the by-laws themselves were remade in 1999 by the current Government. The approach since 1989 had therefore been on both occasions to save the term of office of an existing Chancellor whenever new provisions governing their appointment have been introduced. This fact immediately raised

the consideration of grounds (c), that the regulation may not have been within the general objects of the legislation under which it was made and (d) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made.

We could say on the first ground that sections 10(2) and 11(2) enabled the period and conditions of off ice of the current Chancellor and Vice Chancellor to be prescribed by the by-laws and thus the by-law was within the general objects of the Act. However on the second ground the committee considered that when the Act was passed in 1989 the spirit of it, in relation to the introduction of new provisions governing a Chancellors tenure, was to save vested rights. To that extent the amending by-law gazetted on 1 July 2001 although legally made departed from the spirit of that Act. This immediately raised consideration of ground (a) that the regulation trespasses unduly on personal rights and liberties. The committee noted that the principal Act was part of a package of university legislation passed in 1989 and that identical savings of the terms of off ice of the Chancellors of the University of New South Wales, the University of Wollongong and Macquarie University were made at that time.

No amendments of a similar nature to the present by-law had been made in respect of those Universities. Under other University by-laws Chancellors generally have a term of office of four years- and there are no provisions which enable them to be removed by no confidence resolutions of the respective Senates. The committee noted that a motion for disallowance of the by-law had been moved and defeated in the in the Legislative Council. That was before it came under discussion at our committee. This debate was basically on personalities, politics and the independence of universities. There was only a little response and reference to the legality of the situation. The committee noted that it had been argued in the debate that this by-law is an internal matter for the university alone to determine and that Parliament should not review it except to determine whether it was legally made.

The committee informed the Minister that this view is inconsistent with the Regulation Review Act, which enables the committee to draw the by-law to the attention of Parliament on any ground and the committee's powers in this regard are no more extensive than any individual member of Parliament. More importantly the committee said that the view that this is an internal matter for the university alone is inconsistent with the policy of the University of Sydney Act itself. That Act, together with the Acts of the other New South Universities, was amended in 1994 to deregulate certain aspects of university administration and to provide the universities with greater flexibility and autonomy. In her second reading speech on the University Legislation (Amendment) Bill the then Minister:

> Currently, the university Acts provide that each university may make by-laws in relation to various matters. The matters about which universities may make by-laws are listed throughout each of the Acts and vary from matters that are central to the operations of universities to matters that are minor in nature or best decided by the universities themselves because they are essentially academic or scholastic. Currently, the University Acts also provide that the universities may make rules in relation to any matter about which they are permitted to make by-laws. These provisions are aimed at ensuring that the universities are able to control and manage their affairs efficiently and to the benefit of the university as a whole. Unfortunately, the wording of the sections which provide this power is such that the universities have not had sufficient confidence in their ability to make rules.
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> The current rule-making powers do not provide the universities with anything l ke the reach and certainty of the by-law making powers. Consequently, essentially minor matters of university governance and administration are too often the subject of by laws requiring the services of several public sector institutions, including the universities themselves, and involving extensive public expense. The bill will clarify the capacity of a by-law to authorise the making of rules. This clarified rule-making provision will confirm the status of rules made by university governing bodies so that universities do not feel the need to involve the Government in the time consuming and expensive process of making by-laws.
>
> While this particular amendment will allow the universities to govern most aspects of their own administration and management, it will also exclude from the clarified rule-making provisions several significant matters considered crucial to the continued public accountability of the universities. The clarified rule-making provisions will not allow the universities to make rules about the classification of people within or associated with the universities as

> graduates, academic staff, general staff or students because of the impact this has on eligibility to vote in university elections; university elections; the tenure of elected members of university governing bodies; borrowing or investment of funds, designation of the financial year; and the filling of casual vacancies on university governing bodies.
>
> These matters will continue to be the subject of by-laws and will not be included in the rule-making powers. They are of central importance and should remain the subject of by-laws alone and thus subject to public scrutiny and disallowance. Section 37 of the Act expressly excludes the matters under section 10(2) from this rule-making power to reflect the policy of the Act that the tenure of elected members of university governing bodies is of central importance and should remain the subject of by-laws alone and thus subject to public scrutiny and disallowance.

Well that was fine but that was when the Act was originally amended in 1994, but what if the current Government wishes to change the policy which was agreed to in 1999, and exclude parliamentary scrutiny of these by-laws? We must remember the important caveat in section 9 of the Regulation Review Act that the functions of the committee do not include the examination of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or where the matter has been specifically referred to the committee by a Minister of the Crown.

Well, the committee took the view that if it was now Government policy that the tenure of elected members is a purely internal matter for the university, then section 37 would have to be amended to implement that policy by enabling rules to be made in respect of the matters under section 1O(2). If that Government policy was not implemented by such an amendment, then the committee would have to report in accordance with section 9 of the Regulation Review Act that any by-law under section 1O (2) fails to implement government policy and that in accordance with our review ground (e) above that the objective of the regulation could have been achieved by alternative and more effective means, that is, by amending the Act. The committee wrote to the Minister. The Minister sought advice of the Solicitor General. He did not think there were any relevant officers to talk to us. However, the New South Wales Government directory states that the higher education policy directorate under the Minister's administration has the function of consolidating the department's policy and planning functions in higher education.

The Minister also said that his department could locate no precedent for a lawfully made by-law having not been submitted for the Governor's assent. The committee considers that the absence or indeed the presence of a precedent is an unreliable basis for determining the extent of Ministerial and Parliamentary powers. Merely because a by-law or any other regulation of a particular kind has not been challenged in the past does not mean that this is not within the competence of the Minister or the Parliament if the relevant legislation permits it. However, you can see that under the Regulation Review Act a number of things are not right. The committee recommends that this by-law should not be used as a precedent in respect of other universities. Indeed, if it were to become policy it should be put into the principal Acts. Nothing has happened except the second vote of no confidence has not been made by the Senate because the Chancellor has agreed to resign at the end of the year.

It is all in abeyance and we still do not know exactly what will happen. It is interesting that things which are normally very dry become of great interest to the local media. It is a shame that an august body such as our oldest and most

prestigious university should be subject to such discussion and controversy in the media.

CHAIRMAN (Mr Gilchrist): The next speaker is the Hon. Malcolm Jones, another member of the New South Wales Parliament.

The Hon. MALCOLM JONES: I have never considered myself as a civil liberties campaigner. When I entered this Parliament two years ago I knew little of how government really works. Like many outside Parliament, I had an interest in politics, I was aware of issues and party positions on matters, and I thought, therefore—somewhat optimistically—that things would come together after a short while. I am an Independent in a party of one. I have no mentors, whips or guiding colleagues to assist. The overt and covert motivations of policy making have often been confusing and annoying, and sometimes pleasing.

However, I have enrolled as a member of this Parliament's Regulation Review Committee, and have benefited greatly from being exposed to the Committee's work. At first hand I can experience the effectiveness of Government's decisions on society, especially when the spotlight has been turned on issues which are of a very esoteric nature and which impact on the lives of the general public. You are all aware by now that New South Wales is a bicameral Parliament, and our Regulation Review Committee is a joint committee of both Houses. I see the benefits of good government through the eyes of one checking after the event to see if laws are as effective as they should be.

The New South Wales Regulation Review Committee has been in healthy dialogue with similar committees in other States for some time, and the dominant issue is invariably the value of and the problems associated with a scrutiny of bills committee. In New South Wales there is a healthy debate—although I cannot call it an energetic debate—about a bill of rights. The passing of the Human Rights Act in the United Kingdom has stimulated debate here. As I had become interested in this issue my research has led me to seek opinions on existing bills of rights, and the opinions generally fail to endorse the enthusiastic promises of those wishing to promote such legislation.

However, I have persisted in the interests of what I deem good government. Parliament should be focusing on passing legislation that is fair and just; it should not be in the practice of passing legislation that infringes upon human rights. There is little support in New South Wales for a bill of rights amongst the leaders of the major parties. Being a pragmatist, and in a move towards better government, I believe that consideration should be given either to a separate scrutiny of bills committee or to extending the current duties of the Regulation Review Committee to scrutinise bills for violations of human rights.

The terms of reference for these duties will naturally be hotly contested between the civil libertarians and the strong on law and order clique. As the Government and the Opposition are currently competing for the who is the strongest on law and order Oscar, the terms of reference, if they ever emerge, cannot be expected to deliver a Nobel Prize to anyone. The predicament for New South Wales, as I said, is not whether we should have a scrutiny of bills committee but whether it will be so emasculated by the limits imposed by the current Government and Opposition as to render it virtually impotent.

Australia does, however, have international obligations under treaties. As such treaties are not to the forefront of this Parliament's consciousness, a scrutiny of bills committee can alert members and Ministers to possible conflicts looming in yet to be introduced bills. An alert digest will naturally inform members of potential violations of human rights and discrimination which conflict with existing laws and possibly international obligations. The pre warning will, I am sure, fire debate in the House, which to me is the road to good government.

I turn now to the Australian Senate Scrutiny of Bills Committee which has been successfully operating since 1981. However, its establishment was by no means easy. It was seen as a radical proposal and initially met resistance from both the Government and the Opposition. I am sure my colleagues in the Senate will correct me if I am wrong. The Committee examines all bills which come before the Parliament. It comprises six Senators, three being members of the Government and three being from the Opposition or minor parties. The Senate Scrutiny of Bills Committee is governed by five principles or terms of reference under which it scrutinises upcoming legislation.

The Committee identifies bills which will, first, trespass unduly on personal rights and liberties; secondly, make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; thirdly, make rights, liberties or obligations unduly dependent upon non-reviewable decisions; fourthly, inappropriately delegate legislative powers; or, fifthly, insufficiently subject the exercise of legislative power to parliamentary scrutiny. The Committee produces two types of documents: an alert digest and a report. The alert digest contains a brief warning of any bill introduced into the Parliament which raises any of the above grounds, together with comments on any clauses of the bills which fall within the Committee's terms of reference or principles.

Ministers can respond to concerns raised in the digest; the Committee then produces a report that is presented to the Senate. Copies of digests and reports are provided to all Senators, Ministers, interested persons and institutions. Publications are then made on the Internet. The effectiveness of the Committee can be illustrated by the number of bills commented on, ministerial responses received and amendments moved. Professor David Kinley, Professor of Law and Director of the Castan Centre for Human Rights Law at Monash University in Melbourne, an expert in this field who gave evidence before the General Purpose Standing Committee on Law and Justice, noted the following characteristics of this Committee:

> The Federal model is a good start and has the potential to have a human rights forum but they have not used it. They do not really look at human rights issues, rather they deal more with a defined checklist. The Terms of Reference for this Committee have the potential to pursue human rights obligations but they don't go far enough.
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> The wording of the Terms of Reference such as "trespass unduly on personal rights and liberties" is not elaborated upon. However it is not necessary to articulate exactly what those rights are.

Professor Kinley goes on to say that "perhaps the Senate model is safe and the Terms of Reference should be general, with the capacity to expand". He feels that it would be beneficial to bolster the impact of the Committee by establishing some form of sanctioning power, for example, if bills could not receive their third Reading in the House in which they were introduced until the Committee had reported on them. This of course would need real political will. Once the right framework is in place, the benefits start to flow. Professor Kinley remarked on the "degree of understanding between the Committees and Government departments by way of the formal process of requests for explanations from Ministers in respect of provisions over which the Committee has expressed some initial concern."

A further dimension is added with the establishment, in 1989, of the Legislative Scrutiny Manual. This manual was designed for departmental use to further alert those responsible for the translation of policy into legislation to the responsibilities and expectations of the Committee. This exerts a degree of preventative control. Clearly, a joint House committee would be better; Parliament in its totality should be involved. Also, the Committee would perhaps have twice as long to consider bills without imposing significant delays on the Government's legislative program. The Senate Scrutiny of Bills Committee is a separate committee that looks at primary legislation only. Professor Kinley commented:

> The Senate Scrutiny of Bills Committee and Senate Standing Committee on Regulations and Ordinances have contributed to their respected and influential status within the parliamentary process, and which would advance the efficacy of the mooted scrutiny for compliance with human rights guarantees.

I will briefly look at Queensland's Scrutiny of Legislation Committee. Queensland has a unicameral Parliament. The Committee has seven members and employs four legal advisers. A particular feature of the Committee's terms of reference is the set of specified rights and liberties in respect of which the Committee must scrutinise both primary and secondary legislation for compliance. This has a mini bill of rights methodology. Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation:

a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

b) is consistent with the principles of natural justice; and

c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

e) confers power to enter premises and search for or seize documents or other property, only with a warrant issued by a judge or other official officer; and

f) provides appropriate protection against self-incrimination; and

g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

h) does not confer immunity from proceedings or prosecution without adequate justification; and

i) provides for the compulsory acquisition of property only with fair compensation; and

j) has sufficient regard to Aboriginal tradition and Island custom; and

k) is unambiguous and drafted in a sufficiently clear and precise way.

Some critics see these rights as being too specific and focused, perhaps to the detriment or exclusion of others. Like the Federal model, the Queensland Committee tables a report to Parliament, plus an alert digest, to provide information to the House in an effort to enhance debate on compliance of legislation with fundamental legislative principles. Unlike the Senate, the Queensland Committee looks at bills and regulations. In the Senate there are two separate committees.

The Victorians have a joint Scrutiny of Acts and Regulations Committee. The Committee is a joint House committee that was established in 1992. It has nine members and is bipartisan in nature. Its role is to scrutinise bills and regulations, and review redundant, unclear or ambiguous legislation. It reviews primary and secondary legislation, and it publishes an alert digest. The Committee's terms of reference do not include any detailed set of human rights against which to measure the compliance of bills. Rather, they simply adopt the

five broad principles used by the Commonwealth's Senate Scrutiny of Bills Committee. I am sure my colleague Mary Gillette, the Chairman of the Committee, can inform us as to the Committee's current work.

We have a very active Regulation Review Committee in New South Wales. Initially at least it is likely that the Regulation Review Committee could handle the workload to scrutinise bills. However, eventually the secretariat would need assistance. A professional external legal adviser would need to be employed. Provision would have to be made for a retained legal adviser to promptly scrutinise draft legislation and to report to the scrutiny of bills committee. One committee for regulation review and scrutiny of bills, on a joint House basis, would be the ideal. Cost-benefit analysis would need to be investigated, preferably once the scrutiny of bills committee supplement has been incorporated into the Regulation Review Committee. The very existence of this conference will help draw attention to the problems and benefits of the topics raised. The theme of the conference, its overwhelming interest and, therefore, support for this work, will help carry the above arguments to our Executive.

Mr R. W. TURNER: It is certainly a pleasure to be here. As a relatively new committee member for just over two years, this certainly has been a valuable week for me in understanding my role on the New South Wales Regulation Review Committee. I suppose I am just starting to see that some regulations are working and some are not, how the whole system works with support staff and also to some extent the respect the committee has from other members of Parliament. I understand that some members of Parliament would be hardly aware that we exist, while others certainly are very aware of our existence. The Subordinate Legislation Act might be asking too much of our departmental officers. Our committee from time to time has conducted a review on the level of compliance by government departments with the procedural aspects relating to the making of regulations. There continues to be a high failure rate in the majority of regulatory impact statements [RIS] to measure up to all the requirements of the New South Wales Subordinate Legislation Act.

It is common knowledge that when the Act started in 1989 the procedural requirements were a lot simpler. The Act has not materially changed but its impact requirements have been overlaid by a very bureaucratic manual, which has acted as a powerful disincentive to those officers in the public service faced with the task of preparing regulatory impact statements. Mr Scott Jacobs, who was until recently the principal administrator of the public management service of the OECD, commented to our committee that our Act may be asking too much of departmental staff. He suggested that it may be more productive to concentrate on absolutely essential requirements, and that seems to be sound advice.

We have the need for government officers to receive more training in the RIS process. Some years ago the New South Wales committee recommended to Parliament that a regulatory impact training scheme be put in place including follow-up workshops to ensure an improvement in the quality of regulatory impact statements and that funds should be provided for this purpose. I think this was about six or seven years ago, but unfortunately no action has been taken to date. The poor quality of regulatory impact statements to some extent can be blamed

on lack of training. One difficult aspect is the relative mobility of officers within the public service: you train people and then they move to other areas.

An OECD report on New South Wales regulatory controls suggested that the possible provision of assistance in impact assessment preparation, including on-call availability of specialists and analytical resources, was necessary. The OECD report mentioned the practice in the Netherlands of providing a government help desk, and that this was proving an effective and low-cost way of responding to concerns over the lack of regulatory impact analyst expertise. We also have sunsetting on the tenth anniversary of regulations; New South Wales laws provide for the sunsetting of regulations on the fifth anniversary. When the committee initially made recommendations to Parliament relating to these laws it suggested a seven-year rather than five-year period. However, the shorter period was adopted. This may now be proving to be a mistake as the general feeling is that either a seven-year or 10-year anniversary may be preferable in view of the heavy workload involved in reviewing a large body of regulations each five years. The longer period has been endorsed in recommendations by the OECD.

Do we have adequate consultation? Many deficiencies in a formal review process by a government department on a regulatory proposal can be overlooked if there has been adequate consultation with relevant interest groups. Our committee frequently draws together at an informal meeting all of the main interest groups so as to permit adequate discussion of those areas where there is material conflict. We have found that this produces good results. I shall mention one practical exercise out of three we have undertaken in the last 12 months. The committee travelled to my electorate of Orange to review the regulations concerning school bus safety relating to zones and speeds at which the public are allowed to travel around school buses. I mentioned this to Steve Gilchrist the other day. Generally, within so many metres of a school we have a speed limit of 40 kilometres per hour. That speed limit is respected around schools and is enforced by the police.

We have also a regulation that when a school bus stops to either drop off or pick up schoolchildren cars travelling in the same direction are allowed to proceed past the school bus only at 40 kilometres per hour. Steve said that in Canada vehicles are not allowed to proceed past the bus at all. He said that he felt that if they tried to bring in a regulation allowing vehicles to travel at 40 kilometres per hour past a stationary school bus that it might bring down the Government! Anyway, in Australia vehicles travelling in the same direction as the bus are allowed to travel at 40 kilometres per hour past the bus. Vehicles on the opposite side of the road are subject to the normal speed limits, whether that is 40 kilometres per hour, 60 kilometres per hour or 100 kilometres per hour. In rural areas school bus operators are all private contractors and we discussed with them the situation that, technically, drivers are allowed to proceed past a school bus only at 40 kilometres per hour but that the law enforcement officers, highway patrol policeman, considered that it was unenforceable.

The committee boarded a school bus at 7.15 a.m. on a frosty Orange winter's morning. We are still hearing from our chairman about the wonderful commitment he had made! We then wandered along a typical Australian rural school bus route travelling down lanes to pick up one or two children at different households and others at endorsed bus stops. We then proceeded onto the highway where the general speed limit was 100 kilometres per hour for cars and large heavy transport. We found that when the school bus stopped vehicles travelling behind the bus proceeded past at the normal 100 kilometres per hour speed. We have discovered that no safety risk was involved because generally in

rural areas, to my knowledge, there is no record of a child being killed getting on or off the school bus, although Accidents may have happened after the bus had driven off.

The committee generally felt that this regulation was not being supported by the police or by the general public. It was highlighted that perhaps there was more risk in having the regulation than by not having it. I put to you this scenario: Someone is travelling at 105 kilometres per hour in a 100 kilometres per hour speed zone and suddenly sees a school bus with its lights flashing indicating to the driver of the vehicle that, under the regulation, the speed should be reduced to 40 kilometres per hour. The driver hits the anchors rather hard. Immediately travelling behind that vehicle is what we call a B-double carrying a gross weight of 62 tonnes at 105 kilometres per hour that rams into the back of the first vehicle. The truck jackknifes and slams into the side of the bus resulting in multiple fatalities as result of a driver complying with this 40 kilometre per hour regulation that was not serving any purpose in rural areas as no accidents or fatalities had been recorded prior to the regulation being made.

The committee has not concluded its inquiry and has not made a recommendation to the Parliament at this point. However, I hope it will make a recommendation that in rural areas the present regulation requiring vehicles to reduce their speed to a 40 kilometres per hour speed limit when passing school buses be abolished. The regulation would remain for traffic in built-up areas but would not apply in rural areas where it does not appear to be necessary. We will find out the result of the Government's decision if that recommendation is proposed. They are some of the practical things our Regulation Review Committee undertakes. We have also examined the harness racing industry to see whether better regulations can be made to enable it to work on a national basis. We have even investigated environmental impacts on oyster farming in some of our coastal estuaries. We undertake some practical exercises as well as the more mundane in looking at regulations within the New South Wales Parliament. I find it to be a practical and interesting committee, which is probably one of the better committees within this Government.

Ms SALIBA: I am a member of the New South Wales Regulation Review Committee. It is a pleasure to participate in the discussions of the conference centring on regulatory reform. I support better regulation, not deregulation. I support the United Kingdom move to put the accent on quality of legislation rather than on its repeal. Quality controls in themselves remove unnecessary regulations and this is shown by the 46 per cent reduction in the bulk of New South Wales regulations since the Subordinate Legislation Act commenced in 1989. Parliamentary committees are a valuable source of review, but we need a more dedicated examination of regulatory proposals at the time they are made rather than after they have commenced operation. Committees can disallow regulations or part of regulations, but they have no power to rewrite them. When our committee criticises regulations we are frequently told by government departments that they agree with the criticism and that they will address the issue the next time. Under a staged repeal program, that next time is five years away, and possibly 10 years away with deferments.

We need better commitment by the public service to regulatory quality. How do we achieve a higher level of commitment at departmental level? My view, gained from my experience and the past work of the New South Wales Regulation Review Committee, is that evaluation by government departments of regulatory proposals often only serves to justify the contents of a regulation that has been determined in advance of the impact statement. Of course, these impact statements are meant to test the merits of regulatory proposals and to assist in a decision on the most appropriate option. Departments have been known to seek the assistance of our committee for the preparation of an impact statement when the text of the regulation has already been signed off by Parliamentary Counsel. It is my understanding also that the New South Wales Parliamentary Counsel does not even receive a copy of the impact statement prior to preparation of the draft regulation.

These two documents are prepared for public comment, and it would seem essential that the Parliamentary Counsel be at least as well-informed as a member of the public on the background and options of the regulatory proposal. This situation strongly suggests to me that an RIS is only prepared to meet the requirements of the law and has little value in terms of real assessment of the regulatory proposal.

It seems to me that a reasonable solution to this predicament is to develop, through ministerial support at Government level, a more vigorous, bona fide, testing procedure. When the RIS is found to be inadequate suitable consequences should follow. One option is to provide for the automatic invalidation of any regulation that is not prepared in accordance with statutory requirements. For instance, if it could be demonstrated that the RIS did not comply with the Subordinate Legislation Act that regulation would be invalid. This option was not seen as practical when our Act was passed because it would potentially put in doubt any regulations, even safety regulations, if it could be shown there was even a minor departure, perhaps years earlier, from the procedural requirements governing the making of those regulations.

My preferred option is for the parliamentary review committee to make it a known policy that it will recommend disallowance of any regulation that does not substantially accord with procedural requirements, such as regulatory impact analysis and public consultation. A firm but not inflexible application of such a policy would cure many of the current problems in the Australian States relating to the question mark over the adequacy of regulatory proposals. In these brief comments I would also argue for the preparation annually by government of a report to parliament on the total cost and benefits of regulations. In my case this would be for the State of New South Wales. When this conference was in the course of preparation our chairman was hopeful of the attendance of John Morrall from the US Federal Office of Management and Budget [OMB]. Unfortunately, this did not eventuate. We were going to ask OMB to address the requirement imposed by Congress on OMB over the past three years to prepare annually a report to Congress on the total cost and benefits of Federal regulations.

This Congress directive now has a statutory basis as a result of the Regulatory Right-to-Know Act. This Act requires OMB to submit to Congress with the Federal budget each year an accounting statement and associated report containing: an estimate of the total annual costs and benefits of Federal regulatory programs in the aggregate, by agency and by major rule; an analysis of direct and

indirect impacts of Federal rules on Federal, State, local and tribal government, the private sector, small business, wages and economic growth; and recommendations to reform inefficient or ineffective regulatory programs. Before such statements and reports are submitted there must be public notice and an opportunity to comment and to consult with the Comptroller General. There has to be an appendix to the report addressing public and peer review comments.

Robert Hahn, Director of AEI-Brookings Centre for Regulatory Studies, says this legislation will improve regulatory accountability. Mr Hahn says that before the annual reports were required the American people had no idea of the cumulative impact of Federal regulatory activity. He said now people know that Federal regulation imposes costs in excess of $200 billion a year. A good reason for us all to examine such an initiative is in the concluding assessment of Mr Hahn in his testimony before the US Senate in April 1999 that there is potential to save billions of dollars. The Office of Management and Budget has opposed the Regulatory Right-to-Know Act. OMB argues that the existing data on regulatory impact is too uneven and limited to carry out the task imposed by the legislation. It says that there are many significant problems associated with aggregating estimates of cost and benefits of regulations. OMB believes that compliance with this new law will significantly divert the resources of agencies. This reservation by OMB regarding an annual assessment of cost and benefits of regulations shows us that we must all develop an adequate statistical database relating to regulatory matters.

The New South Wales committee has a large range of recorded data on the operation of the Regulation Review Act and the Subordinate Legislation Act and on the performance by government apartments in meeting the requirements of these Acts. However, it has not developed any professional database on the results of those records. This became apparent to our committee from the report of the Organisation for Economic Co-operation and Development [OECD] on the New South Wales regulatory impact system. I will conclude with some quotes from that report. At paragraphs 122 to 125 the OECD commented:

> High-quality data is essential to useful analysis. One of the most frequently heard criticisms of RIA is that the data requirements for the conduct of adequate analysis are unduly onerous. If this is not to be the case, methodological guidance on the collection of data, as well as its analysis, is required. An explicit policy should clarify quality standards for acceptable data and suggest strategies for collecting high-quality data at minimum cost within time constraints.

The OECD report advises that it has published a discussion on the range of data collection methods for regulatory impact analysis based largely on US experience with implementing regulatory impact analysis over 20 years. It also says that a number of member countries have recently implemented specific programs to improve their data collection for impact analysis. Any delegates interested in these matters should refer to the OECD publication entitled "Collecting and using Data for Regulatory Decision-Making" by Ivy E. Broder and John F. Morrall. Thank you very much for your attention.

CHAIRMAN (Mr Steve GILCHRIST]: Thank you very much, Marianne. There are three more speakers. The next speaker is Mr Andrew Homer.

Mr HOMER: I am from the great State of Victoria, which last week celebrated 150 years of separation from the great State of New South Wales. The

cultural difference is that Victoria was settled by free settlers, a fact that we are inordinately proud of. Victoria is of course the home of the Australian meat pie, real football and the first, second and third longest serving Prime Ministers—Menzies, Hawke and Fraser. I like to think that culturally much can be gained from the knowledge of where parliaments are built. In Victoria we built our Parliament next to the Treasury. Five months after separation gold was discovered in Victoria and briefly Melbourne was the richest city in the world. In New South Wales the Parliament was built in the Rum Hospital. Those of us who live in Melbourne know—I am sorry to issue a dissenting report, Malcolm—that the best shopping is in Melbourne. So come on down.

I will briefly speak about a problem that as a Federal State we have at the moment in regard to what we call national scheme legislation or uniform legislation. For our international guests, the problem is simply this: legislative power is split between the central government and the State and Territory governments. However, there are some aspects of regulation law making that governments agree ought to be handled through uniform legislation. Therefore, ministerial councils enter into agreements to bring in uniform legislation. This might be model, mirror or template legislation. An agreement is made at a ministerial council. Part of the agreement usually provides that one of the participating jurisdictions will introduce legislation to its parliament. Often other States and Territories do not know that this is occurring, certainly not the content of it, until it becomes a bill introduced into one of the jurisdictions. In the case of template legislation, I think Angus will tell us that it is usually introduced in South Australia and the agreement then is that the other States and Territories will follow suit and introduce uniform or fairly identical legislation or counterpart legislation.

Mr REDFORD: They just adopt it.

Mr HOMER: They just adopt it as their own domestic legislation. For those of us with scrutiny committees it presents a problem. By the time it comes around in my jurisdiction in Victoria it is already enacted in South Australia. We may have a particular problem with one of the provisions in it—for example, a modification of the privilege against self-incrimination or some other provision that might affect rights and freedoms. We may write to the Minister. We could just about write the Minister's response. It simply goes along the lines, "I am sorry but this is already subject to a ministerial agreement at the Executive level and I cannot do anything about it." Essentially, it is a question of parliamentary supremacy. Our British colleagues here will tell us that the course of parliamentary supremacy never did run smooth. This is one area where we find it difficult wearing our parliamentary hats to insist on an opportunity to have a say in the form and content of legislation.

The problem is more acute if the introducing jurisdiction does not have a scrutiny of bills committee, because then the bill has not been scrutinised under the heads of power that have been mentioned here today, the major one being in relation to infringing or unduly trespassing on rights and freedoms. So for a long time now States and Territories and the central government have grappled with how we can overcome this. In November last year we held a working group meeting in Melbourne where we introduced a draft bill as an attempt—it is not a perfect attempt by any means—to overcome this difficulty and to allow

parliaments to have a window of opportunity to scrutinise national scheme legislation. The content of the bill is fairly simple: each of the nine jurisdictions would have two representatives, one from the government and one from the opposition, thus ensuring pretty much absolute political neutrality no matter what the complexion of the Australian parliaments were at any particular time.

The agreement would provide that whichever jurisdiction introduced a national scheme bill first would adjourn that bill and allow the national scrutiny committee to examine it, produce an alert digest and table that in each jurisdiction. There would be room, as in most scrutiny committee bills or legislation or standing orders that establish those committees, for dissenting opinions to be published and contained. However, I think those people serving on scrutiny of bills committees will tell you that the overwhelming work of scrutiny committees is by consensus. In the three years that I have acted as legal adviser to the Victorian committee we have looked at over 400 bills and the committee has divided on party lines only once. In the previous five years there was only one other division—on a public employment bill where agreement could not be achieved because there was undue trespass on rights and freedoms.

Now we have progressed to the next stage. Once we bed down a draft bill we will take it to our Executive governments or to a ministerial council, which will be difficult. In Australia at the moment two States—Victoria and Queensland—have scrutiny of bills committees—and there is one in the Australian Capital Territory. Then there is the original scrutiny of bills committee, being the Senate. So we are by no means there in convincing our brothers and sisters in the other States and in the Northern Territory to follow us and introduce a scrutiny of bills committee to scrutinise prime legislation. All Australian jurisdictions have scrutiny of delegation committees but only those few jurisdictions go that extra way and scrutinise primary legislation. Other members may want to say something about where we are at. Obviously, we have a long way to go. It is a very difficult problem but one that hopefully will allow parliamentary supremacy to take a step forward rather than backward.

Mr ANGUS REDFORD: I am Chair of the South Australian Legislative Review Committee, which position I have occupied for 3¾ years. In Australia we have four-year terms at State level is a rule. Normally there is a change of chair following each election. I am probably one of the more experienced chairs of legislative review committees in this country. That does not necessarily mean that there is any quality that accompanies that claim to fame. Members of the Legislative Council do not have time limits imposed on the speeches that they make. I intended to speak for only about two minutes, but I note that 14minutes is available to me. I considered whether I might take up the time, but decided I will not.

I want to raise two issues, one of which was touched upon briefly earlier today. The other was touched on briefly yesterday. The conferences that I have attended over the years have examined the basic principles on which various committees scrutinise regulations. One aspect that has caught my attention—but that is about it—has been the clause commonly adopted in Australia and, I suspect, other jurisdictions, that the objective of the regulation could have been achieved by alternate and more effective means. It is something that I think we, as

a group, should explore. In my experience, committees tend to get very much bogged down in looking at the regulation and deciding whether it is the most appropriate regulation, as opposed to dealing with the question of whether or not we need a regulation all and whether or not it is appropriate for Parliament to be making or endorsing that regulation.

A classic comparison of that might be to look at the Australian experience with trade standards. Most Australian trade standards are developed through a legislative or parliamentary process, whereas in the United States of America, other than in the area of health, most trade standards are developed by industry bodies. In my view, we, as a group, ought to be considering whether that might or might not be a more appropriate process. The other aspect that I consider to be important is the aspect of compliance review. An earlier speaker touched on that aspect. It has always intrigued me that many of us in Parliament are armed with great enthusiasm that if we pass a law human behaviour will change. As we spend more and more time in politics we come to understand that the simple enactment law does not necessarily mean that we are going to get a change in human behaviour.

Indeed, I have read papers although I cannot say from whom about the time between proposing a change in our society and the time at which our society generally accepts that change. One example that springs to mind relates to the compulsory wearing of seatbelts. I think that issue was first raised in Australia in 1960 but only became a substantial compliance issue in about 1970—about a 10-year time frame to achieve that. How can we, as leaders in our respective communities, condense that time? How can we better understand? This might be unique to South Australia, but many of my colleagues seem to think that by merely passing a law or regulation we will change human behaviour. My general experience would suggest that that simply is not the case. I am not here to provide you with answers. I have asked those two questions and I would be interested to have some discussion about those important issues at future conferences.

CHAIRMAN: The Hon. Don Harwin was proposing to speak, but he has been called away to a meeting. I invite other delegates who may care to do so to share a few comments with us.

Mr SQUIBB: I am Geoff Squibb from the Tasmanian Legislative Council. I want to raise a couple of matters. One is a housekeeping matter to some extent. Delegates from Australian States and Territories would be aware that last February Tasmania proposed to host the biennial conference. Because of a number of stages of elections around those jurisdictions, that conference was not held. One matter that the chairs and deputy chairs will be discussing later today relates to the timing of the next conference. I have been made aware that New Zealand has kindly offered to host a conference during 2003. I would like overseas delegates, as well as those from the various Australian jurisdictions, to provide us with some indication as to the time of year that will be most suitable for such a conference. Obviously, we want to hold it at a time suitable to most delegates.

We would be interested to receive items and topics for discussion at the conference. There are a couple I would like to toss in. They are of a procedural nature and relate to the setting of fees by regulation and also the matter of bypassing parliamentary scrutiny by use of instruments other than regulations and bylaws. I do not want to get into debate or in-depth discussion on those issues but we, as a committee, have some difficulty in coming to terms with what is a charge for service and what is a tax. It is generally accepted, and certainly the courts

have upheld the principle, that regulations cannot impose a tax; they can only be a charge for the service. We have some difficulty coming to terms with what is a fair charge for the service, bearing in mind that most departments receive an appropriation in the budget each year to run the department. One of the functions of departments is to issue permits and licences. We want to know just how far one can go in breaking up those costs. We would be interested in hearing about experiences in other jurisdictions, in that regard.

Also, we would like to hear of your experiences—both of a negative nature and a positive nature, from the point of view of positive solutions—as to where scrutiny of subordinate legislation has been bypassed. How do you overcome governments of the day using instruments other than regulations and those that may be mentioned in the principle Act to bypass the scrutiny of Parliament? Wendy Pettel, who is known to most of you, and other members of our committee would be interested in items or topics for discussion, together with your comments about when would be the appropriate time to assemble again for a biennial conference.

Dr Philippa TUDOR: I am Philippa Tudor from Westminster. Just a housekeeping point. I think I am the only delegate to have attended the Commonwealth Fifth Parliamentary Conference on Delegated Legislation in Harare in October of last year. At that conference it was agreed that South Africa, who were very enthusiastic attenders at the conference, would host the sixth Parliamentary Conference on Delegated Legislation in 2003. Given that Cape Town is not represented at this conference, someone might telephone them because it looks as though 2003 is going to be a fascinatingly busy year for delegated legislation conferences. If there are potentially three conferences bidding for the same slot people are going to have a very busy time, or it may hurt the South Africans who are so keen to host that conference.

Mr Greg McLEAN: I am the Assistant National Secondary of the Australian Services Union. We represent people in many of the utility sectors, airlines and a variety of other areas. In addition I was asked to attend this week by Public Services International, which represents approximately 20 million public sector workers worldwide. Thank you for the opportunity to make a very brief comment. I was pleased when first asked to attend this meeting to have a look at some of the issues that would be discussed. Primarily I have done some work in Australia as a result of regulation reform that has taken place here in the utility sector, but increasingly overseas—Malaysia, Pakistani and other places throughout the Asia-Pacific.

We are seeing industry is a deregulated by away of moving out of government control or government services into a more predominant role for private sector all business initiatives, multinationals and the list goes on. Some delegates touched upon the aspect of the World Bank, World Trade Organisation and other issues. I was pleased to note that discussion is now taking place more broadly on how governments come to grips with the regulatory reforms, when areas and issues that were previously basically controlled as government departments—for example, electricity and water—are freed up. New South Wales, where corporatised entities have been established at arm's-length from government and regulated on a daily basis or a business basis by independent

authorities, such as the Independent Pricing and Regulatory Tribunal [IPART], we feel as though there is a role for those organisations.

I hope that in the course of your further deliberations at future meetings as part of your consideration in establishing frameworks there will be an opportunity for broad consultation with community groups and organisations that represent a broad spectrum. In addition to that I hope that further meetings of this organisation would build upon that by trying to create bridges to people that are going to be affected by considerations of regulatory reform in your individual countries. I thank you for the opportunity to be with you today.

Mr Ray MOLOMO: I am Ray Molomo from Botswana, not South Africa—Botswana, in southern Africa! The point may have been made and I may possibly have missed it. I want to know whether there is any global approach towards regulation making in your federation. If so, should there be a united approaching your regulation activities or diversity? How would such an approach keep you together as Australians, irrespective of what that approach is? Is there any supervisory mechanism by the Federal Government in respect of the way you make regulations with regard to whether those regulations infringe on individual group rights? Does the Federal Government keep an eye on you? Do any conflicts arise between regulations formulated by the various States and those formulated by the Federal Government? If such conflicts arise, how do you resolve them?

Senator Barney COONEY: That is extremely pertinent question, particular given the matters raised by Philippa Tudor. Firstly, regarding the Commonwealth and the States, the Commonwealth cannot tell the States what to do within the States' jurisdiction, and the States cannot tell the Commonwealth what to do.

We have tried to reach a situation where the Commonwealth and the States can work together in some sort of sensible fashion. That does not mean that we are antagonistic towards each other, but it is very difficult to get people to agree on certain matters. A recent example would be the Corporations Law, and people from Australia know what I mean by that.

The reason why I mentioned what Philippa Tudor had to say is this. I think the way in which laws are supervised by parliamentary committees is a very important area of government. However, it does seem to have become pretty untidy. I had not realised that the conference in Harare went on. We tried to get in touch with them several times, and were ready to go to Harare, but it simply seemed to fall apart. I do not know whether others had the same experience. We now learn that people are wanting to have a conference in Cape Town, which I understand is a very beautiful city. We simply do not feel that we are in the same loop as that. Perhaps tomorrow we can talk about how we can get some sort of combination that goes around the world and is effective. Ray Molomo raised a very important question about the need for some people to assist others, and for those people to give assistance in return. I think it is all pretty loose. Perhaps something can be done about it tomorrow, although I am not too sure what.

I also wanted to speak about the representatives from the ASU, who made some good points. Perhaps tomorrow we can also talk about the relationship

between the ACTU, other union movements around the world, confederations of business, and so on. It seems that we have got into a situation where it is all pretty loose and there do not seem to be any rules or any authoritative body that people can go to in order to learn all about this. I do not know what we can do about it. One suggestion might be to leave it all up to the Commonwealth Parliament of Australia, where all wisdom lies.

Mr Peter PIKE: May I make a point about the use of words. We in the UK would not have known that you refer to the Canberra Parliament as the Commonwealth. Rightly or wrongly, we would have referred to it as the Federation Parliament, or whatever you want to call it, but we certainly would never have referred to it as the Commonwealth. When we talk about the Commonwealth, we talk about what used to be, when I was at school, the British Empire and then the British Commonwealth. We have now dropped, quite rightly, the name "British" from the Commonwealth. We are talking about something quite different. So, from the proceedings of this conference in *Hansard*, we want to make sure that if we are talking about Canberra we are talking about Canberra, and if we are talking about the Commonwealth we are talking about something far wider than just something here in Australia.

CHAIRMAN (Mr Steve GILCHRIST): Thank you, Peter. Given the latent Republican feeling, it is a dangerous admission that you did not know that, fuelling that sense of alienation. All kidding aside, I think you have made an excellent point.

Mr Angus REDFORD: The word "Commonwealth" is used quite broadly in Australia. I suppose those who came up with that name thought that the British would understand that the word could be used in a number of different ways. We obviously underestimated their capacity to deal with that.

On a serious note, most of the great nations of this world—and there are some major exceptions—for example, the United States, Germany, Australia, Canada, to name just a few, in the development of their history started off as small provinces, states or colonies, and in coming together transferred powers, in different degrees, to the central or Federal or Commonwealth Government. The Canadian system transferred more powers than did the Australian system. That generally happened through the course of the nineteenth century. Ever since then, there has been a great tension between the sovereignty of the centralised national governments and parliaments and the provincial or State parliaments, and there are always problems associated with that tension.

Some might argue that States are closer to their people, and as such are better able to reflect their aims and aspirations. On the other hand, you are always met with the argument that uniformity is something that we all ought to aspire to, that we all ought to be the same. I suspect that we in this room will all be dead before there will be any resolution of those issues. But, generally speaking, even in a Federal-State situation they are dynamic; there are waxes and wanes just as we have in the political system. At the moment I think in this country the demand for uniformity is probably at its zenith or just past its zenith, and I think we are starting to see a move back towards more local control by local people involved in local decision making. I suspect that that will last for a period of time, and then the

pendulum will move back again. I hope that that helps you to understand our rather unique system of government in this country.

Mr John HARGREAVES: For the benefit of our overseas visitors I thought I would try to clear up the confusion that arises when we talk about "Canberra did this or Canberra did that". We have all heard that Washington has done this and London is guilty of all sorts of terrible things. So, too, is Canberra. But, in fact, Canberra is home to 310,000-odd people—notice I did not say 310,000 odd people. We have our own territory, and indeed I pick up the word that Angus used, the "sovereignty". It is something we have discovered since 1989, when the Federal Government generously bestowed self-government upon us.

But alongside that pride and sovereignty we also developed a hatred of the words "Canberra did this and Canberra did that". In fact, predominantly, when they say, "those politicians from Canberra" they actually refer to our highest-paid tourists. They actually live somewhere else, and come in and have a very gloriously pitched tent right in the middle of our Territory. Our approach to legislative reform, I think, is patented a little on the work from the glorious Senator Barney Cooney, the doyen of our approach to regulatory reform.

For those of you who do not know, the ACT has a 17-member Assembly. It has a minority government. It has a standing and select committee system. One of the standing committees, of which I am the deputy chair, is that of Justice and Community Safety. Occasionally it masquerades as the Standing Committee on the Scrutiny of Bills and Subordinate Legislation. We do both, with the able assistance of the legal adviser, Mr Peter Bain, who is sitting amongst you.

I wanted to quickly pick up on something that Andrew Homer referred to when speaking about national scheme legislation. As a group we need to consider how we go about doing this. We need to be careful about not picking up things like template legislation. What we have in the ACT is an Act which is called the Administration Interstate Agreements Act, which requires Ministers to advise all members of the House before they sign off on any interstate agreements which will end up in such model or template legislation. That works, because we can actually have a debate on the peculiarities of our Territory long before the Minister signs off on it. So there was a certain amount of goodwill when that Act was passed. It was passed some time ago, and it was due to the committee that I serve on and its actions with the Ministers that we dragged them, kicking and screaming, to the altar of compliance.

I am pleased to say that now we have probably 60 per cent compliance with the Government advising of these things going on. So we are actually moving apace in the direction of this sort of scrutiny. I would welcome anyone who wants to get a copy of that Act for their own reading to talk to Mr Peter Bain or Tom Duncan, our esteemed secretary, who I am sure will arrange a copy for you. But there is a great distinction between the ACT and the tourists from elsewhere in the country.

CHAIRMAN (Steve GILCHRIST): I thank Peter Nagle and all the people involved in the presentation of the conference. It is a testament to those involved in this conference that they have given everyone an opportunity to share their

views and bring many different perspectives forward. Speaking for myself, but I hope for all of us, I have certainly gained an awful lot by hearing from jurisdictions as small as the Cook Islands, as remote as South Africa, and as well advanced as the United Kingdom and Australia.

The conference adjourned at 12.57 p m.

FRIDAY 13 JULY 2001

CHAIRMAN (Lord MAYHEW): I am Patrick Mayhew from Westminster and I have the honour to be the chairman for the first half-hour of the proceedings today. We will be addressed first by our colleague from India, Mr Chandra Gowda, who is an advocate and coffee planter as well as Minister for Law and Parliamentary Affairs in the Government of Karnataka, India, and who will take up the greater part of this slot. Mr David Simeon, who has a distinguished role in the Karnataka Legislative Council, will speak for five minutes or so at the conclusion of Mr Gowda's address.

Mr Chandra Gowda was a member of the lower House of Parliament in the Federal Parliament of India from 1971. He was elected for a second term in 1976. He was a member of the upper House in 1986. In 1978 he was elected to the State Legislative Council of Karnataka as Leader of the Opposition and then became a Speaker of the Assembly in 1983. He was again elected to the State Assembly in 1989. He was Opposition Leader until 1994 and elected again in 1999 to the State Assembly. He is now a Cabinet Minister of Law and Parliamentary Affairs. He will speak to us on the "Scrutiny of Legislation as an aspect of Constitutional Supremacy—The Indian Experiment". We are very fortunate.

Mr Chandra GOWDA: Distinguished delegates, ladies and gentlemen: I know that we are short of time. I am overwhelmed to be invited to this august conference which has been organised to discuss re-engineering regulations and scrutiny of legislation for the twenty-first century, hosted on this international platform of study and understanding. As the Minister in charge of Law and Parliamentary Affairs of a State within the federal polity of India, I have a natural interest in taking part in this event and in sharing with the governments of the world the experience of my own country as well as in carrying back home the illumination from this conference.

I desire to dwell upon the subject of the scrutiny of legislation in India in its aspect of constitutional supremacy which seems to pose a live issue of debate against the backdrop of Indian political history. I may not escape referring incidentally to the development of governmental organisation in the United Kingdom as well is in the United States, the experiences of which have profusely contributed to the making up of the Indian Constitution. The constitution of a country universally represents that body of basic rules which indicate the structure and functions of political institutions of that country and the principles of operation. Where ought to rest the supreme political power among the different organisations is, therefore, the essence of constitutionalism.

The supremacy of Parliament and the procedure for amending constitutional law has been the core of legal controversy. The British claim of absolute supremacy of its Parliament is justified and considerations like, to quote from Munro, "Legislators come from the people; they think and feel as the people

do; they are saturated with the same hopes and fears; they are creatures of the same habits and when habits solidify into tradition or usage they are stronger than laws, they are stronger than the provisions of a written Constitution". On the contrary, the American society seems to pin its hopes more on an independent judiciary rather than on the representatives of the people. Although the Senate and House of Representatives, making the national legislative of the Congress of United States, are vested with the legislative power, the Congress is not just the law-making body; it also has non-legislative functions based on the system of checks and balances.

The Congress is not, in a very real sense, a national representative body. It is an assemblage of state delegations. The Congress is, as Professor Laski points out, the Legislature of a continent, and a member of Congress is expected to think in terms of sectional interests. This regional attitude of the Congress has given it a position of backwardness. The Americans consider the presidency as the pivot of national solidarity. Although the Executive and the Legislature in America are co-equal partners in working the governmental machinery, there is no cohesiveness between them since the parties which bind the Executive and the legislative departments are too flimsy for an integrated policy as obtainable in Britain and in other countries with parliamentary systems of government. The American stress is therefore on the United States Supreme Court which is given undeterred power of judicial review of legislation.

This controversy reminds me of Simon De Montfort, the accredited father of the House of Commons, because of the representative complexion he gave to his Parliament. The truth that his Parliament was a partisan assembly packed with his own supporters sitting in debate with the ostensible object of raising revenue to meet his needs breeds contempt for parliamentarianism as an institution. Indeed, this controversy about the true and ostensible faces of parliamentary functioning has set the dilemma the world over whether or not the Parliament is allowed supremacy. India has a constitution that is known to be the longest and most elaborate in the world. It has been drawn up and given by a constituent assembly consisting of the representatives of the people of the country in the wake of the country coming out of centuries of foreign dominance. It is, unlike America, not the handiwork of a legislature; nor is it, as in England, dictated by conventions. It has been the product of history and the result of evolution.

While the rule of law which was in-built in the English system obviated the need for a written constitution, compulsion of colonial existence and people migrating from various parts of the world designed the conservative, yet compact, Constitution of the United States. It had to define the common interests of the people and make them available while at the same time allowing for flexibility to meet the growing needs of a society that was basically heterogeneous. It sought to put more weight on the wisdom of senators than on the House of Representatives in the matter of legislative sanctions. That is how George Washington said, "We pour legislation into the senatorial saucer to cool it". It is said that in the course of time, in order to meet the exigencies of political organisation, the Senate—which in the beginning was known to be conservative—has grown liberal.

India in its turns shares a history that is uniquely fraught with exploits of foreign invaders, time and again, which has left the original fabric of its culture and tradition destroyed. While on the one hand it is striving to catch up with modernity braking its traditional fervour, on the other hand it is struggling to come out of the shackles of its cultural and religious diversities. The task of the Constitution makers was preconditioned by inescapable factors of previous regimes and politico-economic set-up of the vast subcontinent. Highly divergent units had to be welded together and units widely differing from one another were to be brought together in an organic unification.

The Constitution makers of independent India were in no doubt that the large new state, faced with the problem of establishing a central authority which was strong enough to govern a vast area inhabited by millions of people with different historical and linguistic backgrounds and interests, must inevitably be some form of federal structure. Politically there were two Indias—the British India and the princely states. To hold them together was a problem of statesmanship and, again, holding them together was simply not sufficient. In the words of Sandar Patel, the question was not of "an alliance between democracies and dynasties, but a reunion of people built upon the basic concept of the sovereign people".

The diversified domains were integrated in the Indian union in a unique way on the foundation of co-operative enterprise. Indian federation is therefore essentially a co-operative federation. As Ernest Griffith puts it, "traditional advantages of federalism—experiments, diffusion, political education and power—still have great opportunities for expression". This advantage, to a great degree, is not there in a unitary set-up. In terms of governmental functions it cannot be denied that the federal government assumes inconceivable powers. As a result of influences of conflicting interests, governance in India betrayed an admixture of values. The Constitution makers, in their wisdom, induced by experiences from history chose for the country a parliamentary system of governance, the hallmark of which is supremacy of Parliament with a Cabinet accountable to the people through the Legislature.

Yet, unlike Britain, India shared a federal set-up like in America. The British Constitution is essentially unitary. The local areas as they exist in Britain can be enlarged or restricted at any time, and they derive power from the Acts of Parliament. All authority flows from the central government downward and there is no case for distribution of power among local areas. In a federal set-up, the Executive and the Legislature cannot be built into one single system. There is a separation of power and regulation against encroachment. America in its credo set up a supreme judiciary, which often dictates policy, though spoken in terms of constitutional supremacy. In India, too, we speak of constitutional supremacy, even as we enjoy the benefit of local leadership and a native culture, be it in all its diversity.

But the question of allocation between the Parliament, which is a body of elected representatives of people, and the judiciary, which is the custodian of civil liberties, seems to have remained indeterminate in India. The concept of constitutional supremacy implies in itself the power of courts to interpret the constitution and secure its supremacy. This eventually is devised into the concept

of judicial review. No doubt neither the Constitution of the United States nor our own Constitution declares anywhere in express terms that the Constitution should be the supreme law of the land. But such declaration is felt to be superfluous when all organisations of the government owe their origin to the Constitution and derive powers therefrom. Again the Constitution itself cannot be altered except in the manner specifically laid down in it. Given that the Constitution reflects the will of the people, who is the true spokesperson of the people—the majority in Parliament, or the majority in the judiciary?

The questions of judicial review and amendment of the Constitution thus assume significance under the Constitution which provides for a government of defined and limited powers. There is no system of judicial review in Britain. The British Parliament is supreme and it is beyond the competence of courts to declare the law made by the Parliament ultra vires. The courts simply look at the words of any statute but do not concern themselves with the intent. In the absence of a written constitution there is no standard by which the English courts can declare a statute beyond competence. There is yet liberty in Britain, not by virtue of any constitutional rights but by virtue of the rule of law which means that it is the law of Britain that governs, not the arbitrary will of any individual. There is a sense in which Parliament is itself subject of the rule of law. Laws in Britain are passed to promote liberty and not to restrict it.

As for America, its Federal Constitution declares, "The constitution and the laws of the United States shall be the supreme law of the land", which plainly means that the Federal Constitution is paramount over all forms of law—State or national. State laws that conflict with national laws may be declared unconstitutional. Also, Acts of Congress must be in accordance with and in conformity with the Constitution. The Supreme Court of the United States is a tribunal of last resort in deciding constitutional issues. Federal courts interpret the Constitution and decide the competency of Acts of Congress and State legislators. If in the opinion of courts the particular Act is beyond the authority given to Congress or the State legislators, or seeks to deny or abridge civil liberties, such is declared unconstitutional and ultra vires.

The position obtaining in India is similar. The Supreme Court at the centre and the High Court in the States have been vested with the power of judicial review. The courts have devised criteria for declaring any statute void on the ground of ultra vires the Constitution. Scrutiny of legislation in the wider perspective includes review of ordinary law and subordinate legislation too. It also means parliamentary scrutiny of legislation. But these are areas that have not posed any difficulty in practice. Judicial review by the criteria of unconstitutionality in relation to statute law, of ultra vires of the statute, and unreasonable and colourable exercise of power in relation to delegated legislation has proved inadequate in practice.

Parliament and State legislators also do scrutiny of legislation through its legislative departments and house committees and this is also found effective. But when it comes to changing the Constitution with the times with them to encounter difficulty, especially when the States at the unit level have no initiation in, and the people of India are at no stage associated with, the Constitution-amending process. The dilemma has manifested in the course of growth of democracy in the

country, which I have attempted to trace here in this paper as the Indian experiment. The philosophy of judicial review is rooted in the principle that the Constitution is the fundamental law. As the Constitution is primarily an instrument to distribute political power, it is hard to escape the necessity of some body with authority to declare when the prescribed distribution has been disturbed.

The Supreme Court is expressly given the power to interpret the Constitution, declare the law and enforce the limitations of the rule of distribution of legislative powers between Parliament and State legislators and other constitutional limitations—for instance, the prohibition against enactment of laws in derogation of fundamental rights. It is the duty of judges to uphold the Constitution and owe "true faith and allegiance to the Constitution of India". When a contradiction between the Constitution and enacted law is alleged to exist and is proving the cause of judicial proceedings, it is the duty of judges to resolve the contradiction. If it cannot be harmonised and violates the Constitution, the enactment should be declared void and consequently unconstitutional, thereby rendering it inoperative. Justice Das, in *A. K. Gopalan v The State of Madras*, observed:

> … in so far as there is any limitation on the legislative power the court must, on a complaint being made to it, scrutinize and ascertain whether such limitation has been transgressed, and if there has been any transgression the court is bound by its oath to uphold the Constitution.

In India there had prevailed, till 1967, the doctrine of legislative supremacy, subject to constitutional limitations. The Supreme Court declared an Act void where it was in clear contravention of the constitutional limitations, but it did not question the policy involved in the legislation. The Supreme Court itself defined its role in *A. K. Gopalan v The State of Madras.* It was observed that in India the position of the judiciary:

> … is somewhere between the Courts in England and the United States … no scope in India to play the role of the Supreme Court in the United States.

The authority of the court was to be exercised in such a manner that neither Parliament nor the Executive should exceed the limits set on them by the Constitution or if they ever did the court had the power to halt it. But the majority judgment in the *Golak Nath* case disturbed the balance hitherto maintained. In 1951 the Supreme Court rejected the argument that the amending power of Parliament under Article 368 did not extend to fundamental rights. The decision was unanimous. The same argument was again rejected in 1964 but by a majority of three judges to two. It was raised again in 1967 and this time the court accepted the argument by a majority of six to five. Chief Justice Rao defined fundamental rights as primordial, transcendental and immutable and, therefore, beyond the reach of Parliament and the amending power of Article 368.

Two important results flowed from the majority judgment in the *Golak Nath* case. First, it placed a permanent restraint on the power of Parliament to pass an amendment of the Constitution, which had the effect of taking away or abridging fundamental rights. Second, the directive principles of State policy should be enforced without amending fundamental rights. Thus the delicate and difficult problem of adjusting the fundamental rights and restrictions thereon to the ever-changing and unforeseen social demands became the sole responsibility of the judiciary and, consequently, ultimate supremacy under the Constitution came to

be vested neither in the people nor in their representatives in Parliament but in what at any given moment was the majority opinion of the Supreme Court.

This assertion of judicial power led to furious controversy and parliamentarians repudiated it through the twenty-fourth amendment of the Constitution, which restored to Parliament the power to amend the Constitution, including fundamental rights. The twenty-fifth amendment inserted a new immunity clause, clause 31-C, which provided that no law seeking to enforce the directive principles under clauses (b) and (c) of Article 39 shall be invalid on the ground that it violated some fundamental rights in Articles 14, 19 or 31. Both these constitutional amendments were challenged in the Supreme Court, which reversed its earlier decision in the *Golak Nath* case and uphold the power of Parliament to amend by way of addition, variation or repeal any provision of the Constitution provided it did not alter the basic structure of the Constitution.

But there was a considerable difference of opinion among the judges delivering the majority judgment in the *Kesavananda Bharati* case on the concept of basic structure or framework of the Constitution. As the concept remained undefined, the last word with respect to what exactly did it mean and consequently Parliament's power to amend the Constitution still rested with the Supreme Court. The validity of the thirty-ninth amendment ousting the jurisdiction of the Supreme Court to decide disputes relating to the election of the President, the Vice-President, the Prime Minister and the Speaker of the House of the People was questioned in Mrs Indira Gandhi's election appeal against the judgment of the Allahabad High Court disqualifying her for a period of six years, on the ground that it evaded the authority of the Supreme Court, which was at the apex of the judiciary, and therefore altered the basic structure of the Constitution. The majority of the judges answered in the affirmative.

Public debate on amending the Constitution followed. Addressing the All-India Lawyers Conference at Chandigarh on 29 December 1975, Prime Minister Indira Gandhi said that the Constitution must subserve the purpose and the spirit in which it was drafted and, if need be, be changed so that India remained a living democracy. She sought the guidance of lawyers on this issue. The conference adopted a resolution urging that the Constitution was not immutable and it must change with the change of times to subserve the national interest. The tone of the conference was set by the Union Law Minister, who noted that judicial review of parliamentary enactment need not be considered an inextricable feature of the Constitution, and added that, according to eminent jurists in the United States, Britain and India, such a judicial review was undemocratic since "the people are sovereign and Parliament is supreme in a parliamentary democracy".

The All-India Congress committee in a resolution passed at its session on 1 January 1976 called for a "thorough re-examination" of the Constitution and "adequate alterations" to it so that it may continue as a "living, effectively responding" document, "responding to the current needs of the people and the demands of the present". It emphasised that the Constitution must itself serve as an instrument of change and be capable of being altered whenever necessary to give "fuller expression to the democratic and egalitarian aspirations of the people". In pursuance of this resolution a 10-member committee was constituted. The committee submitted its report to the congress working committee and

recommended, inter alia, that a new clause be added to Article 368 to the effect that any amendment of the Constitution shall not be called in question in any court on any ground. On the powers of judicial review, the committee's view was that the constitutional validity of any legislation should be decided by a bench of the Supreme Court consisting of a minimum number of seven judges and any decision declaring the law invalid must have the support of not less than two-thirds of the bench.

The committee also suggested amendment of Article 31-C so that its scope is widened to cover legislation in respect of all or any of the directive principles of State policy and legislation made in pursuance thereof should not be called in question on the ground of infringement of the fundamental rights contained in part III, provided that no more affected the special safeguards or rights conferred on the minorities or the scheduled castes, the scheduled tribes or other backward classes under the Constitution. No writ jurisdiction under Article 32 of the Supreme Court or Article 226 of the High Court shall lie to any matter concerning the revenue or concerning any act ordered and done in the collection thereof; any matter relating to land reforms and procurement and distribution of grants; and election matters.

The Constitution Act 1976 incorporated for the most part the recommendations of this committee. In the vital field of judicial review of constitutional amendments the Supreme Court was denied the jurisdiction to go into the validity of any amendment passed by Parliament in accordance with the procedure laid down in Article 368 and the power of Parliament to amend any provision of the Constitution was without any limitation whatsoever. The role of the Supreme Court as protector of fundamental rights was reduced first by making the directive principles supersede the fundamental rights and then circumventing the jurisdiction of the courts under Article 368 (4) to question the validity of any amendment. The Supreme Court alone could examine the validity of any central law, but he could not be declared invalid unless two-thirds of the judges of a seven-member bench declared it to.

The validity of the forty-second amendment was questioned in the *Minerva Mills* case, and the Supreme Court struck down these two clauses. Likewise, Article 31-C, which provided that all laws which have a nexus with any directive principles of State policy "shall be deemed to be void" on the ground that they are "inconsistent with, or take away or abridge any of the rights conferred by any provision" of the chapter on fundamental rights was also struck down. The court held that to abrogate the fundamental rights while purporting to give effect to the directive principles is to destroy the essential feature of the Constitution.

The Constitution Act 1976 was intended to answer that the sovereignty and supremacy of Parliament, especially with regard to its power to amend the Constitution. The need for such an amendment had arisen because the Supreme Court's decision in the *Keshavananda Bharati* case laid down by a majority that Parliament has no power to alter the basic features of the Constitution without defining what those basic features are. Replying to the three-day general discussion, the Union Law Minister, H. R. Gokhale, said in the House of the People that the bill was intended to make clear that the Supreme Court would have no jurisdiction whatsoever to entertain, much less decide, any question

relating to the validity of the constitutional changes. Gokhale expressed the hope that the judiciary would understand the position that there was "something more supreme than the Supreme Court, and that is Parliament where the elected representatives of the people sit".

It is worth examining what precisely is involved in the concept of parliamentary sovereignty. Dicey in his *Law of the Constitution* claimed for the British Parliament an amplitude of the sovereignty which cannot be claimed for any legislative body in the world brought into existence by a written Constitution, more so within a Federal structure. It is impossible to determine exactly where does sovereignty reside in a federation—whether it is in the Constitution itself or in the authority competent to amend the Constitution. The quest for location of sovereignty is such a baffling and futile exercise that Harold Laski concluded more than half a century ago that "it would be to the lasting good of political science if the whole concept of sovereignty is abandoned".

The preamble to the Constitution declares the broad and enduring purposes it was expected to serve. In seeking these purposes the Constitution may be amended from time to time. But these purposes embodied the aspirations of the entire people, who gave the Constitution to themselves, and not to the transient and changing objects of a particular party. It is therefore the supremacy of the Constitution and it cannot be made the object of the vagaries of the fluctuating majorities. The crucial point is that the people in India are at no stage associated with the Constitution-amending process. One of the senior advocates, Palkivala, says, "This factor is decisive in determining the ambit of the amending power". In many other countries, in contrast, an amendment of the Constitution is subject to the approval of the people at a referendum or at a convention summoned specifically for this purpose or otherwise. For purposes of constitutional amendment the will of Parliament, which is the will of the majority party, is certainly not the will of the people. The electorate elect their representatives periodically on issues fundamentally different from those involved in a constitutional amendment and while choosing them a vast number of factors intervene in their choice.

At a referendum the people express their will in approving or disapproving the proposed amendment, and the factors influencing their decision stand on a different pedestal as compared with the voting pattern and electoral behaviour at periodic elections of Parliament. They are obviously more patent and conspicuous in a plural society like India. The experience of the countries where the people's will is ascertained at a referendum held upon Parliament's proposal to amend the Constitution is that it is generally negative. It has been found that under this procedure "the Constitution is hardly amended half a dozen times in a hundred years". Indian federalism is thus in a quandary where neither Parliament nor the judiciary seems to reflect adequately the will of the people. At the same time, resorting to public referendum seems to hold no promise, especially so in the complex structure of Indian society that is held together by the slender thread of nationality. On behalf of the multitude of Indian nationals I look forward to taking plausible cues from experiences of the countries gathered here on this international platform with the pledge of carrying the systems and regulations through to the twenty-first century. Thank you very much.

CHAIRMAN: Mr Gowda, thank you for that fascinating insight into the unique problems of constitutionality in India. We have only two or three minutes left. I invite Mr David Simeon to make some brief comments and then we will take some questions from the floor.

Mr David SIMEON: Respected Chair of this session, Lord Mayhew of Twysden, and respected delegates, I will quickly outline one important aspect of my speech. One area of critical concern for legislators in India has been the fiscal accountability of the Executive to the legislature. In a parliamentary system of government where the legislature has the power to discuss, debate and approve the financial proposals of the Government, it has been found that these deliberations do not permit a detailed scrutiny of the budgetary proposals of the Government. More often than not significant portions of the Government's fiscal proposals are passed without any discussion. To remedy the situation the Presiding Officers of the legislative bodies in India proposed in 1978 the establishment of department-related subject committees. It was felt that these committees would permit a more detailed scrutiny of the budgetary proposals of the Government. This new system was viewed as a critical aspect of the parliamentary reform program aimed at strengthening public involvement and public scrutiny.

This new committee system came into force in the Indian Parliament in 1993, and was also continued in the Karnataka legislature in 1994. The functions of the committees are essentially fourfold: First, to consider demands for grants of the concerned ministry and submit a report on the same to the legislature; secondly, to examine bills that are referred to a committee by the Presiding Officers; thirdly, to examine the annual reports of the ministries and submit to the legislature a report in this regard; and, lastly, to scrutinise long-term policy documents presented to the House and forwarded to it by the Presiding Officers. The department-related standing committees are an interesting example of how regulatory mechanisms move in the direction of their desired goal.

In my state of Karnataka, after a few years of experimenting with the committees, it was resolved to abolish the system during 1998 as it was not serving its purpose and the goals with which the committees had been constituted were not been realised. The committees did not have a clear idea of the nature of their responsibilities and unwittingly transgressed into areas that they were not meant to examine. As fiscal scrutiny is essentially time bound, a reference to the time schedule was crucial and, for a wide range of reasons, the committees were not in a position to keep to the time schedule for submitting reports. The bureaucracy was also unhappy with the new form of instrument of scrutiny, and worked towards settling the new initiatives. I am happy to report that, as a result of the pressure applied by the Presiding Officers and legislators, it was decided in March this year to revise the subject committee system in Karnataka. It is hoped that this important regulatory mechanism will, in light of previous experience, work effectively towards realising its goals. Karnataka's experience shows how a potential instrument of effective regulation can be scuttled by extraneous factors and how a very noble and important objective effecting meaningful legislative scrutiny of governmental expenditure can be defeated. If the political will of the Government is paramount, something will be done.

CHAIRMAN: That is an heroic example of how a very interesting speech may be shortened due to time constraints. Are there any questions or comments for either of our two distinguished speakers from India?

Mr ANYONA: The Minister's designation is Minister for Law and Parliamentary Affairs, and he referred in his presentation to the separation of powers. I do not understand what a Minister of government has to do with parliamentary affairs. How does that relate to the role of the Attorney-General?

Mr GOWDA: We have separate systems: there is the law-enforcing authority on one side and the parliamentary system of democracy is determined by the other side. There is a ministry to co-ordinate the two. The Parliamentary Affairs Minister is in charge of practical co-ordination between the two Houses if there is a bi-cameral system. The second aspect is that bills presented either by the Government or by a private member are co-ordinated by the Minister, who will be in charge of the bill. He must also be responsible for answering any questions raised—whether a matter is referred to a joint select committee or a select committee. I realise that there are different practices even inside India—some States have no Law Minister. However, we have combined the law and parliamentary affairs ministries and that Minister looks after the legal aspects of the law that is laid down or the provisions of the bill and takes care of that bill on the floor of the House.

CHAIRMAN: We are over time and I am afraid that we must keep to the timetable. I am sure that delegates would like to take up many matters privately with both speakers later. On behalf of all our colleagues, I thank you both very much for your presentations this morning.

CHAIR (The Hon. Janelle Saffin): It is my pleasure to welcome formally Mick Bates from the National Assembly for Wales and to call upon him to give us the Welsh perspective on regulatory reform. I do not have Mick's curriculum vitae, but I know that, like me, he comes from a working-class background and that he ended up in politics partly by design and partly by accident—also like me. He is also a farmer and he chairs the Legislation Committee.

Mr Mick BATES: Cadeirydd bore da gyfeillion a chyfarchion o Gymru i chi yn Ne Cymru Newydd, which means good morning and greetings from your homeland of Wales to our cousins in New South Wales. Chair, thank you for your opening remarks. It is a great honour and a privilege to be here and to address this company. I echo the views of many others and place on record my sincere thanks and congratulations to Peter Nagle and his team for organising this international conference. It is quite clear that Peter's vision and enthusiasm has been responsible for a massive increase in the understanding of both regulatory form and Australian cuisine. Having digested the delights of crocodile, buffalo, emu and kangaroo, I now feel like a fully-fledged wallaby. However, this morning when I jumped out of bed I wondered which part of the kangaroo I had eaten. Last night I was more than privileged to take part in an international didgeridoo competition. I congratulate the winner of that competition who is from South Africa. He performed absolutely magnificently, but I am afraid that my efforts were appalling.

Turning to my presentation, I will address in this paper the particular position of the National Assembly for Wales under the Regulatory Reform Act 2001. However, before embarking upon a consideration of this Act, I should first explain the nature of devolved government in Wales. The essential point is that, unlike the parliaments of Scotland and Northern Ireland, the National Assembly for Wales does not have primary legislative powers. It is essentially an elected corporate body, exercising functions that, prior to devolution, were exercised by the Secretary of State for Wales, who is a member of the United Kingdom Cabinet. The reasons for this are largely historical. Separate laws for Wales were abolished in 1536 and since then Wales and England have constituted a combined legal jurisdiction. Therefore, the United Kingdom comprises three legal jurisdictions: England and Wales, Scotland, and Northern Ireland. Separate parliaments existed in Scotland and Northern Ireland until 1707 and 1801 respectively. Additionally, Northern Ireland had a Parliament for some 50 years from 1921 onwards.

Thus when devolution was planned for the United Kingdom it was accepted that Scotland and Northern Ireland would acquire legislatures with the power to enact primary legislation, which reflected their status as separate legal jurisdictions, and that, in certain spheres, the Westminster Parliament would continue to enact separate primary legislation for those countries. Of course there was also a political context to that decision. I am a member of the Liberal Democrats, a party that for more than 100 years has been committed to devolution for Wales. We argue that Wales should be treated in the same way as Scotland, with primary law-making powers. The Nationalist Party in Wales is making the same case at the moment and, more interestingly, Assembly members in other parties are often privately supportive of giving the Assembly

more powers. Their conversion results from their experience of the Assembly in action or, rather, frustration at the way its action is continually restrained by its limited powers.

As you can see on the slide, the Assembly has 60 members elected by a system of proportional representation. That administration is led by a First Minister—who has visited New South Wales since he came into that post—and a cabinet of eight Assembly Ministers. Business is undertaken by seven subject committees, six standing committees and four regional committees and the Assembly also sits in plenary session twice a week. With only 60 members, and constituency work to carry out, you can understand that we are very busy. The legislation committee meets every week. The other day when I heard a rumour about 25 members of Parliament in this country, and they came here to look for them, and there are five members here of devolved institutions in Britain, I thought they had got their proportion of workload about right. It takes five members of Parliament for every one of those devolved members. Of course, in Westminster, Mr Pike, it is quite different.

The functions of the Assembly, as you can see, are wide-ranging from agriculture to education et cetera, and the budget is about $10 billion a year. The fundamental principles which underpin the Assembly's work are of some significance. Even before the Human Rights Act came into force in the rest of the United Kingdom, the Assembly was under a specific statutory responsibility not to act incompatibly with the European Convention on Human Rights. When secondary legislation is brought forward there is a requirement to state whether it complies with the human rights obligations as well as European Union law, and other relevant international obligations.

The Government of Wales Act introduces a requirement for the Assembly to act in such a way that promotes sustainable development and equality of opportunity—two very important principles. It also requires the Assembly to have regard to the interests of business and the voluntary sector and to ensure that they are consulted on relevant proposals. Finally, the Act requires that the Welsh and English languages be accorded equal status. Thus, unlike many of the jurisdictions represented at this conference, the vast majority of the Assembly's secondary legislation and guidance is produced in a bilingual form. If anyone is interested in seeing an example of a bilingual statutory instrument we have an example available.

This week a number of speakers have referred to the democratic deficit, and the need for systems to be in place to ensure that adequate scrutiny of secondary legislation takes place. Lord Mayhew and Philippa Tudor have spoken of the wish of Parliament to be careful in granting framework powers where the way in which the powers can be exercised is insufficiently precise, or Henry VIII powers which allow primary legislation to be amended or repealed. The Assembly is a young institution and the United Kingdom Parliament has so far been understandably cautious in the way in which it has bestowed further power on the Assembly in recent bills. The Assembly is, however, a democratically elected body with a comprehensive scrutiny procedure, and there is certainly an argument that a democratic deficit in Wales has been overcome. However, as a nation, I must tell you, we do lack confidence and I hope that during the years that will

build up. One might ask, why should the Assembly not be granted more powers without more detailed provisions than that? The Assembly will need to prove to Parliament as it matures that the legislators can be given such broad powers with confidence in the knowledge that adequate scrutiny is being conducted by democratically elected institutions—only time will tell whether we will get those powers.

I thought it would be helpful for delegates for me to give you a brief overview of the Assembly's procedure for dealing with subordinate legislation. The great majority of the Assembly regulations and orders are made by statutory instrument and most are bilingual. The Assembly has produced detailed standing orders which govern its procedure. There is provision for a range of scrutiny from what I will call full scrutiny, to standard procedure and in a small number of cases there is provision for urgency procedures. The full scrutiny procedure entails full consultation as to the legislative proposals with elected members, the public, business and voluntary sector interests as required, including a regulatory appraisal which assesses the likely costs and benefits of the proposals.

Once the proposed instrument has been drafted, it is posted on the Assembly's intranet to allow members the opportunity to make representations as to whether it should be considered in detail by one of our subject committees. The proposal is then considered by the Business Committee which is responsible for programming the Assembly's business and the further stages of scrutiny are set. They can involve formal consideration by a Subject Committee which reports on the instrument to the plenary session of the Assembly. There is also detailed technical scrutiny by the Legislation Committee, of which I am currently the Chair, and ultimately the instrument is considered at a meeting of the Assembly in plenary session. Significantly, it is possible for members to seek amendments to the instrument before it is finally made.

Under the urgency procedures—you will be aware that we have had to cope with a serious outbreak of foot and mouth disease in the United Kingdom in recent months—the legislative procedure of the Assembly allows for the orders and regulations to be made in cases of urgency. For example, where movement of livestock has to be controlled very urgently. In some cases this has meant that an order has had to be made in a matter of hours. Clearly there is very little opportunity for scrutiny of instruments before they are made. They must, however, be submitted to the Legislation Committee after they are made, and published, and the members of the Assembly will hold the administration to account when it is considered necessary. They are subject to a negative resolution procedure after they are made, but continue to have effect until such time as they are voted down.

As I explained, there is a requirement in the Government of Wales Act and in the Assembly's standing orders for the likely costs and benefit of secondary legislation to be carried out. Having listened to a number of speakers in this conference, I am sure we have much to learn from the experience of others in this area and we will need to consider what lessons can be learnt when we return home to Wales. It does appear to me, fellow delegates, that there is a massive business that is going to grow out of regulatory impact assessment. If anybody has got an eye for a new consultancy in this world, I suggest that may be one.

Before I return to the Regulatory Reform Act and its impact in Wales, I will refer you briefly to the terms of reference for the Assembly's Legislation Committee. As you can see, they are very similar to the United Kingdom Joint Committee on Statutory Instruments. In particular, you will note, that we do not consider the policy merits of instruments nor do we consider such issues as the extent to which the legislation affects the rights or liberties of the citizen. Those matters are covered to different degrees by the scrutiny process which I have outlined. That is not to say, however, that these arrangements cannot be improved and, of course, there is much food for thought there.

Separate primary legislation for Wales has been very limited. Indeed, at one stage it was doubted whether it was proper for Parliament to legislate separately for Wales. This line of thinking did not, however, develop and in the latter part of the nineteenth century we see a few Wales-only Acts of Parliament. In fact, the first was the Sunday Closing Act 1881 which resulted in public houses in Wales being closed on Sundays. For those of you who do not know what a public house is, it is a bar—a pub in colloquial terms. I will return to this subject later in the context of the current Regulatory Reform Act. The deregulation provisions of the Deregulation and Contracting Out Act 1994 were the predecessor provisions of the present Regulatory Reform Act. As the 1994 Act was thus in force at the time when it was being determined what functions should be transferred to the National Assembly for Wales.

Logically one might have thought that since the National Assembly for Wales was to acquire the functions of the Secretary of State for Wales, including functions of making subordinate legislation, order making under the 1994 Act would have transferred. Matters were not so simple, however. Whilst it was acknowledged that the Secretary of State for Wales would have had the power to make orders under the 1994 Act in relation to specifically Welsh matters, there were other factors which worked against transferring those functions to the Assembly. Principal amongst those was the fact that such orders were subject to a specific regime of parliamentary control. To transfer the order making power to the National Assembly for Wales would have either resulted in that parliamentary control being relinquished or, alternatively, would have introduced an element of Assembly action being subject to parliamentary control.

Those responsible for formulating devolution policy did not consider either possibility to be acceptable. Personally, I would have been happy for Parliament to relinquish control! Additionally, there was a line of thinking that because the Assembly was not being given primary law-making powers it should not be given the power to amend primary legislation through the medium of secondary legislation. Incidentally, this proposition was the cause of a number of discussions in relation to the transfer of specific order-making functions to the Assembly, some of which we lost and some of which we won. In the case of deregulation, however, the wide-ranging nature of the power made it unsuitable for devolution in Wales. In consequence, the deregulation functions under the 1994 Act were not transferred to the Assembly. The question of suitability, of course, is a matter of subjective judgment on which not all politicians agree!

When the current Regulatory Reform Act came to be drafted, the precedent of the 1994 Act was followed with regard to the principal issue of who should have

the order-making function in Wales. Accordingly, the section 1 power—power by order to make provision reforming law which imposes burdens—is vested in a Minister of the Crown. This means a Minister of the United Kingdom Government. For Scotland, however, subsection (2) excludes from the ambit of legislation which may be reformed, anything which would be within the legislative competence of the Scottish Parliament. Thus a Minister in the United Kingdom Government cannot amend legislation which falls within the realm of Scottish devolution. But the National Assembly for Wales is not entirely forgotten. Subsection (5) of section 1 provides that an order:

> … which removes or modifies as any function of the National Assembly for Wales may be made only with the agreement of the Assembly.

I have provided a lot of notes in my speech about further provisions in the Regulatory Reform Act 2001 concerning Wales which I will leave in case there are questions and move on for the through my address. I have attempted to explain the Welsh dimension of the Regulatory Reform Act based on the historical perspective and by reference to the particular provisions within it relating to the National Assembly for Wales. You will be forgiven for being confused. The devolution settlement in Wales was not designed to enable clarity about the way government works in Wales. In the recent British General Election, even some political parties got it wrong! There were parties—not mine, of course—who made promises in their manifestoes that could not be delivered by members of Parliament. If the political parties cannot understand the settlement, how can the electorate? I am sure all countries suffer from that. So I have described regulatory reform from the perspective of an imperfectly devolved Assembly. It would have been so different had I been from Scotland, but then again I do not suppose the Parliament would have allowed both David and I to attend this conference.

I will provide one final story to show that everything is not so simple in Wales. I referred earlier to the 1881 Act of Parliament which provided for the Sunday closing of public houses in Wales, and promised to come back to it as I am doing. The context of this is interesting. By the 1950s social and religious attitudes had changed and the comprehensive Sunday closing requirement was reviewed. At that time, however, attitudes had not changed sufficiently for it to be considered appropriate simply to remove the requirement altogether. Thus a solution was devised whereby the inhabitants of each county in Wales would be given the opportunity to vote in a referendum for opening to be allowed or not, as the case might be, in their county. Legislation was accordingly passed, whereby such referendums could, on the basis of local petition, be called every seven years. Incidentally, this of itself was quite an innovation as referendums had not hitherto been part of the British way of doing things. As I am sure you are all following, we are looking forward to the next referendum in Britain about our entry into the Euro.

Although some of you may wonder why it has taken so long, the result of this has been that at the last referendum the one remaining Sunday closing area voted to move from being a "dry" area to a "wet" area. The legislation still remains on the statute book, however, and could thus be invoked when the next referendum is due since the provisions are not exclusively for movement from "dry" to "wet" but could theoretically sanction a move in the other direction. Accordingly, the repeal of this legislation is currently being considered as a

candidate for inclusion under the Regulatory Reform Act. In conclusion, and looking towards the future, after this week I feel that there are several interesting questions. For example, how do we have a more effective regulatory impact analysis? In a discussion this week I heard people tell me that it was a very expensive procedure. In fact, for my own part I would like to see a regulatory watchdog. Of course, this has deep resource implications. But I remind the people that it is very difficult to argue that some things like this are just too expensive, and I remind them of the great saying: if you think education is expensive, try ignorance. I think the same thing applies in the development of a full regulatory impact assessment system throughout the world.

It is on this note that I conclude my paper. I trust that it has given you some insight into the rather special and some would say limited form of devolution which we have in Wales, as can be seen from the particular context of regulatory reform. In my conversations back to Wales this week, and slightly induced by my nervousness about the game on Saturday, I have asked that preparations take place for certain regulations which will limit the power of Australian sports people in Wales. On those remarks I conclude.

CHAIR: Thank you. That was wonderfully informative. Hearing you talk about your autonomous arrangements, where you have 60 members and you still manage to have seven subject committees, six standing committees and four regional committees, I was thinking of our friend from the Cook Islands who said that they would find it difficult to have committees. Out of 60 members, you have done quite well, and presumably there are more arrangements that we do not know about.

Mr BATES: As I said, we do work very hard, but the public does not believe it.

CHAIR: I now invite questions.

Mr BATES: While people are thinking of questions I should like to introduce my two colleagues from Wales, one of whom you would have seen in the chair on Wednesday. That is Dylan Hughes, who is our legal adviser, and Mark Patridge, who is from our legal department within the Assembly.

Mr Jim JEFFERIS: Your Regulatory Reform Act seems to be very similar to the measure that Mr Pike discussed on Wednesday, the Westminster Regulatory Reform Act.

Mr BATES: It is the same bill.

Mr JEFFERIS: Which was the precedent for the other?

Mr BATES: The 1994 Act was the precedent for the 2000 Act.

Mr JEFFERIS: You are following the Westminster model. They both allow the Executive to amend an Act of Parliament.

Mr BATES: The part of my address which I missed out details functions which are devolved to our Assembly in Wales. Basically, they mean that it has to be done by agreement with the Minister. If that provision is taken up, for example over a code of practice, then the full Assembly would also have to agree to that adjustment. I have put the details in the draft, but essentially it is the same bill.

Mr ANYONA: It sounds to me like a contradiction. You say that you are not allowed to make legislation, yet you have powers to make regulations on those subjects. What is the reason for that? How do you practice? Who has the power to veto the other?

Mr BATES: There is a whole series of agreements between the devolved powers based on concordance. So at first in our life there was a lot of disagreement between various departments, because there are agreements written for each department in Whitehall. So there have been moments of contradiction already, and that is why in my emphasis I said that we must move towards a primary legislative base in the Assembly in Wales. But you have to remember that the agreement that was written for our devolution is essentially a corporate body and as such it is very difficult for us at the moment to distinguish between our Executive and the corporate body as a whole. This is partly borne by the fact that there is a certain political instability which has caused us in Britain to have a coalition. Coalition politics are not familiar to the people of Britain at all. Of course, a coalition exists in both Scotland and Wales in order to provide some stability to the form of government. If we were to have greater stability, we would find that we would erase the contradiction that you have identified and enable primary legislative powers to be brought eventually to the Welsh Assembly.

Lord THOMAS: Do you approve of the goods and services tax in this country that funds the State parliaments as a replacement for the Barnett formula for financing the Welsh Assembly?

Mr BATES: What a good question! As a little bit of explanation, the Barnett formula in Britain is a mechanism—

Mr Peter PIKE: We are going to change it.

Mr BATES: Thank you, as long as it is to our advantage. The Barnett formula was written some time ago to apportion funds to Scotland and to Wales. The Scots, very cannily, took full advantage of this and it has worked very much in their favour. However, for us in Wales, we have always felt that there is an underfunding to Wales. Although I am not fully familiar with the services Act, I am sure it operates in a fairer way. I would like to see a reform of the Barnett formula which operates on the basis of need. Some of you may know that Wales is amongst the poorest territory in Europe and, as I said, I think it needs investment which would bring it up to the standard of the rest of the United Kingdom. So I look forward to the reform of the Barnett formula and perhaps some of the lessons will be taken back by our parliamentarians here to make sure that Wales receives its just desserts.

Mr PIKE: We now feel that there is a democratic deficit in England. Certainly, as Wales wants more power and more finance, we in England want that

democratic deficit filled, and the call is for regional assemblies in England. We must have that in the north west because the north west is much more deprived than Wales.

Mr BATES: So Parliament has failed yet again to redistribute money.

Mr Danny KENNEDY: Now I must put forward the case for Northern Ireland. We want and require urgent attention with the Barnett formula and seek the help and assistance of Mr Pike and his parliamentary colleagues.

CHAIR: I think you can continue that debate back home. I shall pick up on a few points that Mick made. One is that anything you do to deal with democracy or a democratic deficit is not cheap. There is always a cost to bear but the cost of not doing it is also a cost that the community must bear. If anybody is a consultant, there is a great business waiting to be had in regulatory impact analysis, cost-benefit analysis and RISs. Mick talked about the lack of confidence in Wales. It is not obvious to us as outsiders, but I think that confidence will come in the exercise of your own sphere of autonomous arrangements. I have a publication upstairs which details 34 autonomous arrangements around the world but Wales is not yet included. I will make sure that Wales gets in the publication. I ask delegates to join me in thanking Mick.

(Short adjournment)

CHAIRMAN (Mr Gerard MARTIN): It is my pleasure to introduce Professor Margaret Allars, who is a Professor in the Faculty of Law at the University of Sydney, New South Wales. Professor Allars is the author of *Introduction to Administrative Law, Administrative Law: Cases and Commentary* and the Administrative Law title in *Halsbury's Laws of Australia*, as well as numerous other articles and book chapters. Appointed acting head of the Department of Law at the University of Sydney during 1997, Professor Allars is a fellow of the Academy of Social Sciences of Australia as well as a member of the Rules Committee of the Administrative Decisions Tribunal in New South Wales. Professor Allars teaches undergraduate and postgraduate courses in administrative law and constitutional law as well as the postgraduate course in government regulation, health policy and ethics in the master of health law degree. Professor Allars is also the co-ordinator of the master of administrative law and policy degree, which commenced at the University of Sydney in 1996. I ask delegates to welcome her to the podium.

Professor Margaret ALLARS: Thank you. It is a pleasure to be here and to have the opportunity to speak at this conference. My paper begins by recognising that internationalisation of the world economy has placed pressures on various sectors in Australia, in particular finance and economic sectors, to meet international standards and regulations. In a federation such as Australia these international pressures exert a secondary pressure: that is, a pressure for co-operation between national government and State and Territory governments in order to achieve harmonisation of laws in those areas where there is a need for uniform regulation. The result has been an increase in Australia of the use of various constitutional techniques for achieving harmonisation of laws. Uniformity has been sought not only of primary legislation but also of delegated legislation and policy.

Ministerial councils implementing intergovernmental agreements have provided the focus for determining the content of these laws and policies. There is a consequent concern in Australia as to the accountability of ministerial councils to both courts and parliaments. Indeed, it is the parliamentary scrutiny committees, deprived of their role of reporting to parliament on the form and content of legislative provisions, that have raised the alarm as to the shift in law-making power from the legislative branch to an ill-defined executive amalgam of Ministers representing the interests of various governments around Australia.

Citizen participation, which you will see in the title to my paper, is a theme that we have been familiar with from the 1970s, which were characterised by social and political movements demanding increased participation by citizens in government decision making. The impetus for reform of delegated law-making procedures in Australia can be traced back to 1984 when the legal and constitutional committee in Victoria recommended that a particular bill be enacted that provided for regulatory impact assessment and consultation with public interest groups before delegated legislation was made. That committee was influenced primarily by arguments for deregulation rather than the democratic arguments that fuelled the social movements of the 1970s. Nonetheless, the report of the Legal and Constitutional Committee in 1984 did place significant

importance on public consultation with public interest groups and other interested parties in the formulation of delegated legislation.

The report was influenced by United States models of rule-making by regulatory agencies, although the committee was not convinced that this could provide a blueprint for Victoria. Significantly, the committee recommended requirements for consultative processes when the delegated legislation was drafted, including even exploring the provision of government funding to enable public interest groups to participate.

The similar reform for regulatory impact assessment and consultation in New South Wales was introduced by the enactment of the Regulation Review Act in 1987 and the Subordinate Legislation Act in 1989. This was more emphatically driven by the deregulation objective. The report on small business that preceded this reform was very much interested in addressing concerns about red tape and outdated and cumbersome regulations. These concerns are still reflected in one of the criteria applied by the Regulation Review Committee, namely, whether delegated legislation has an adverse impact upon the business community.

Since the reforms began in Australia in the 1980s the democratic rationale for the package of regulatory impact assessment and consultation has become muted.

The competition principles agreement introduced in 1996 nationally mandated review by the year 2000 of all primary and delegated legislation that significantly restricted competition unless it was demonstrated to be in the public interest. This agreement was driven by national competition policy.

Both the agreement and the report that we received in 1999 by the OECD Public Management Service looking at the impact of the New South Wales Act on regulatory impact assessment provided further eloquent testimony of a trend towards giving maximum importance to the process of regulatory impact assessment but having very little regard for public consultation within that process. Indeed, it seems that public consultation is seen only as something of instrumental value to providing information which will assist in the regulatory impact assessment.

The ethos of economic rationalism, with the bipartisan appeal it enjoys in Australia, supplies an unquestioned legitimacy to regulatory impact assessment. The consultation procedures which were initially part of the package receive little attention, and there is a danger that they may be diluted or even ultimately entirely neglected. The problems posed by national scheme legislation and the proposed solutions to these problems do not augur well for the future of consultation as a form of accountability of government, or for participatory democracy as a fundamental rationale for regulatory impact assessment procedures.

In my paper I pursue this argument by looking first at the nature of national scheme legislation in Australia. I consider the techniques from a constitutional point of view by which harmonisation can be achieved.

These are found firstly in the reference power under the Commonwealth Constitution, section 51 (xxxvi), which allows the States to refer power to the Commonwealth to enable legislation to be enacted for a national scheme. This is illustrated by the mutual recognition scheme establishing a uniform national approach to standards for goods and recognition of qualifications in occupations.

Another technique that is used is tied grants. Under section 96 of the Commonwealth Constitution the Commonwealth can make financial grants to the States with conditions attached. The States are free to except the financial grants but they must comply with the conditions.

Thirdly, and speaking more generally, there are techniques that can be grouped together under the idea of co-operative federalism. These schemes involve a mix of Federal and State legislation. As Justice Gaudron warned when part of the system of cross-vesting of Federal and State jurisdiction in the courts was struck down, co-operative federalism is a political slogan; it is not a criterion of constitutional validity or power. However, it is still true to say that there is no express provision in the Commonwealth Constitution to prevent the Commonwealth and the States from acting in co-operation so that each in its own field supplies the deficiencies in the powers of the other so as to achieve objects that could be achieved by neither government acting alone.

The most interesting and problematic area within which we see co-operative federalism operating is the area of template schemes for putting in place national scheme legislation. There are three general versions of the template schemes. In the first version the Commonwealth supplies the template, often relying on the Territories power under section 122 of the Commonwealth Constitution. The Commonwealth enacts a law that provides a template for the States, which pass legislation adopting the law. The second version involves another State supplying the template. In this version a "code" or "law" is set out in a schedule to another State's Act. The local State Act applies the law or the code by passing its own Act, which provides that the other State's Act and regulations apply. These Acts are usually silent as to whether tabling, notification and publication procedures for delegated legislation apply. The local Act is also usually silent as to the application of scrutiny criteria, or regulatory impact assessment or consultation procedures.

A third version of the template scheme involves nothing more than a requirement of some code of practice as an essential shared requirement in legislation passed around Australia.

There are, of course, hybrid versions of these three template schemes. The hybrid versions usually allow the local State Act to contain variations from the adopted Commonwealth or the adopted State Act or regulation. This allows for the State Act to accommodate local political concerns or the particular features of the State's legal system. There are even sub-varieties within each of these three versions of the template schemes.

Let me turn to the question of accountability, with which I began. Accountability for the decisions of the executive branch of government may be sought through reactive mechanisms, like judicial review by courts. Alternatively,

we can seek accountability through proactive mechanisms, such as regulatory impact assessment, publication of information, consultation with the public, or duties to give reasons.

Courts have accepted that it is not their proper function to intervene in the executive decision-making which precedes entry by a government into an intergovernmental agreement. Indeed, the decision of a government to enter into an intergovernmental agreement has been held to be not justiciable—that is, not reviewable by a court. Decisions taken pursuant to intergovernmental agreements are probably also not justiciable. However, it is of course possible to have judicial review of an Act to ensure its constitutional validity and to obtain judicial review of delegated legislation to ensure both that it is constitutionally valid and that it is valid and within the scope of the empowering Act under which it is made.

Delegated legislation made pursuant to national scheme legislation is also, in principle, subject to judicial review. However, the scope for arguing various grounds of review may be narrower where delegated legislation of another jurisdiction is simply adopted by virtue of a provision in an Act. Indeed, this delegated legislation is not made by a Governor or a responsible Minister in the usual way. When it is adopted, it may be labelled, for example, as a New South Wales regulation, yet its adoption within the primary legislation appears to give it a different status. There seems to be no scope for asking whether the delegated legislation is within the Act itself; that is, whether there is an excess of power. Thus delegated legislation made under national scheme legislation is not truly delegated legislation, because it is not made by a non-parliamentary body.

Let me turn to Parliament, rather than courts, as a possible avenue for securing accountability of the bills, Acts and delegated legislation made pursuant to national scheme legislation. Of course, potentially, Parliament can always review an Act by amendment or repeal. However, there are practical and political constraints which deter governments from departing from intergovernmental agreements. Furthermore, committees for the scrutiny of bills are deprived of their normal function in relation to national scheme legislation. When a bill adopts a template Act from another State, it often does not include the text of the law which is scheduled to the template Act. Although this law has the status of primary legislation in the jurisdiction, its omission from the text of the bill enables it to escape scrutiny by the scrutiny of bills committee.

I quote in my paper, which is available to delegates, an example raised by the Scrutiny of Legislation Committee in Queensland of the Electricity National Scheme (Queensland) Bill, which raised these kinds of concerns. In fact, the Queensland committee was more successful than many other committees around Australia because it managed to secure an amendment to the Queensland bill. As a result, the Queensland Act provides that future amendments of the national electricity law, as it applies in Queensland, or the regulations made under the law, as they apply in Queensland, have to be tabled in the Queensland Parliament. This is so even though the template Act is an Act of the South Australian Parliament, and normally simply could be amended and indirectly affect Queensland law without this being brought to the notice of the Queensland Parliament. This Queensland Act is, therefore, a hybrid of the second version of

the template scheme. It is indeed unusual in that it contains specific provision to secure accountability.

Parliament is, of course, the pre-eminent avenue of review for decisions of the executive branch making delegated legislation. It is not only a proactive avenue of review. It is also a more stringent avenue of review than the courts. The criteria applied by scrutiny committees around Australia range well beyond issues of excess of power in the making of the delegated legislation. They include criteria as to whether the delegated legislation trespasses unduly upon individual rights; in New South Wales there is the criterion as to whether it adversely affects the business community; and in Queensland there is a criterion as to whether the delegated legislation pays sufficient regard to Aboriginal tradition and Island custom. Sun setting also ensures that there is regular review by parliamentary committees.

Reports of the committees, of course, provide a trigger for disallowance of delegated legislation. In jurisdictions where regulatory impact assessment has been introduced, delegated legislation may however be exempted from regulatory impact assessment procedures. Thus, in New South Wales, if the responsible Minister certifies that the proposed statutory rule contains matters arising under national scheme legislation, then the responsible Minister has no duty to prepare a regulatory impact statement or to engage in consultation procedures.

We are seeing emerging here problems with national scheme legislation in terms of circumventing accountability to Parliament. I outline in my paper the various ways in which this circumventing of parliamentary scrutiny occurs. I refer also to the practical impediments to finding solutions to this problem. A partial solution has been found in the Council of Australian Governments (COAG) Principles and Guidelines for National Standards Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies, which was put in place in 1997. As I will outline in a moment, those principles and guidelines are directed towards regulatory impact assessment.

A number of other practical impediments that we can note are the various differences in the scrutiny criteria in the jurisdictions around Australia; the possibility that a particular state may not even have a scrutiny of bills committee; the fact that some classes of delegated legislation are not subject to scrutiny in some States, that is, there are different classes of delegated legislation identified for scrutiny; and the broader question of whether, if we had a national scrutiny committee of some kind, within what kind of parliamentary context it would provide a report, and to whom it would report, given that it would be a committee comprised of representatives of various legislative bodies around Australia.

The final practical concern is that scrutiny may slow down the legislative process for implementing intergovernmental agreements. Strict timetables usually accompany national scheme legislation – timetables often imposed by the Commonwealth to meet international obligations.

There have been proposals and concerns with regard to national scheme legislation since the 1980s. In fact, the 1984 Legal and Constitutional Committee report in Victoria highlighted those concerns. The most important contribution to

date has been found, firstly, in the establishment in Western Australia of a Standing Committee on Uniform Legislation and Intergovernmental Agreements, a committee which has produced a large number of very useful reports in this area. Secondly, the establishment prior to 1996 of a working party of representatives of scrutiny of legislation committees, which produced and published a position paper in 1996 which identified two options, one of which is the establishment of a national scrutiny committee.

I outline the reasoning process set out in that working paper, then I move to what is the current state of play. The current state of play is that the scrutiny committees around Australia have before them a proposed bill which has been drafted in Victoria, the Scrutiny of National Scheme of Legislation Bill. In a rather ironic twist, this bill itself seeks to use a template scheme in what is perhaps best described as a hybrid of the second version of the template schemes. That is, an intergovernmental agreement would be entered into by the various governments around Australia; template legislation would be enacted in one State, possibly Victoria; and other States would adopt that template legislation.

The intergovernmental agreement, which is in draft and scheduled to this bill, provides for the establishment of a scrutiny of national schemes of legislation committee to consist of representatives from each jurisdiction. Let me first note that there is no provision in the bill for scrutiny of delegated legislation. There is a very interesting definition of "national scheme legislation" in the agreement and in the substantive provisions of the bill. Also, there is a procedure in the bill for identifying national scheme legislation. Criteria to be applied by this national committee are set out. They are consistent with the criteria currently applied by the Victorian committee, and they are criteria which also are generally speaking shared by the committees around Australia, despite the differences that I have mentioned.

It is also to be noted that this bill contains provisions which are special to Victoria. That is why I have called it a hybrid of the second version. It is one of those template schemes which involves departures in the legislation enacted in each State. The special provisions set out in clause 13 allow not just removal of bills from the Victorian scrutiny committee which are uniform bills implementing national scheme legislation but also retention by the Victorian committee of national scheme legislation which affect either one of two issues. The first is the jurisdiction of the Supreme Court of Victoria, which is always a delicate issue in Victoria. The second is issues of personal privacy under the Victorian Information Privacy Act.

Clause 13 of this proposed bill therefore can be seen in one sense as diminishing the sovereignty of the Victorian Parliament in that it removes jurisdiction from the Victorian scrutiny committee. On the other hand it stresses that the Victorian Parliament is retaining plenary power to preserve the jurisdiction of its own scrutiny committee where a national scheme really raises an issue which is seen to be important to the Victorian Parliament. The two issues identified are issues about maintaining relationships between the branches of government in Victoria and protection of a particular human right, that is, the right to privacy.

Let me return to the theme with which I began and which can be seen in the title to my paper, that is, citizen participation. The 1984 Victorian Legal and Constitutional Committee, as I said, highlighted the importance of consultation and identified national scheme legislation as being problematic in this regard. The new Victorian bill which proposes a solution to scrutiny of national scheme legislation makes no provision for consultation prior to this proposed national scheme committee making a report. Perhaps it was thought that this was not necessary because the Council of Australian Governments [COAG] Principles and Guidelines already provide for regulatory impact assessment.

When those Principles and Guidelines are looked at closely, it can be seen that they refer to consultation of the public as one of the principles of good regulation. However, in my view, the references made in the COAG principles and guidelines are inadequate. These references to public consultation are very minimal and take a very poor last place to issues of cost-benefit analysis, cost effectiveness and risk analysis. The accountability provisions for failure to engage in effective consultation are also minimal. Indeed, consultation would take place in a void. There is no objective behind the COAG principles and guidelines at which consultation would be directed. Consultation would occur in a void without reference to criteria: It would be a very different kind of consultation from what we see under the New South Wales Subordinate Legislation Act, for example.

In conclusion, expressions of concern about national scheme legislation, as I have identified them in many reports from delegated legislation committees around Australia, have certainly invoked democratic values as being at stake. But the concern that has been articulated has been about diminution of the role of Parliament which is by-passed by decisions made by ministerial councils that have no responsibility to any particular Parliament and that are not accountable to courts. The complaints have failed to explicitly extend their concern to the question of loss of citizen participation. The peculiar feature of delegated legislation in national scheme legislation is that it is made by statutory provision which is in the local Act which in turn adopts regulations made in another State. This provides no legitimate excuse for excluding consultation before delegated legislation is made, if that is normally provided in the State which adopts the template legislation.

I have discussed partial and proposed solutions. These may restore to some extent the roles of parliaments but they neglect to restore the roles of citizens as participants in the scrutiny process. As citizens threaten to withdraw electoral support from political parties which are slavishly committed to competition policy and economic rationalism and as the negative impact of internationalisation becomes the subject of political protests about globalisation, it may be prudent for governments to focus more sharply upon the participatory component of scrutiny of bills and delegated legislation.

CHAIRMAN: I thank you, Professor. Delegates, there are copies of the professor's paper on the table. We are about 15 minutes late but that is not the professor's fault—it is our fault. We have the liberty of being able to intrude into the lunch break. Are there any pressing questions that anyone would like to ask?

Senator Barney COONEY: I feel that I can ask this question because if it intrudes on anyone's speech, it will intrude on mine. I thought—and I am sure that everybody would agree with me—that I would say to the professor that that was the most seminal speech I have ever heard in Australia. The speech brought together the types of issues that we have been struggling with, so I thank Professor Allars for it. I also thank her for being an academic who is prepared to come down and get outside the university. That is what academics ought to do more and more often. In relation to the whole issue of scrutiny, have you ever thought about working out what is proper for a parliamentary group and what is proper for courts? We have conferences such as this one to which parliamentarians come along, and then the courts and lawyers have their own conferences, but never do the two meet. The academics are the ones who can bring them together. Have you ever thought about that? Thank you very much for your speech.

Professor ALLARS: I think I mentioned that scrutiny criteria applied by the scrutiny committees are much more extensive than are the criteria applied by the courts. Courts are restricted to issues of excess or abuse of power by the delegated law maker.

Senator COONEY: What I am asking is about getting together. We have conferences, but never do the two groups meet.

Professor ALLARS: You never actually discuss the way in which courts review delegated legislation.

Senator COONEY: They do not discuss it like we do.

Professor ALLARS: There is reasonable scope for courts to strike down delegated legislation. I have mentioned just a couple of cases in a footnote in my paper—for example, a rule is made for an improper purpose. There is a very famous case of *The Queen v. Toohey* where a regulation was made under planning legislation for the improper purpose of defeating Aboriginal land right claims around the Darwin area. There can be quite powerful bases for review. What academics find interesting is the persistent claim by members of delegated legislation committees that they do not look at the policy behind the rule that they scrutinise, because when we look at the criteria which are applied and we see issues such as "Does it unduly trespass on individual rights and liberties?", to an academic that sounds like human rights. It sounds very much like a matter of substance rather than a matter of procedure. That is why we see the scrutiny criteria being really quite powerful and interesting ones. It would be nice to see a little bit more interchange and exposure of the criteria applied in each arena.

Mr ANYONA: Professor, I notice that your presentation is based largely on the Australian system. I would like to invite you to consider a situation in other jurisdictions where the citizens' participation does not necessarily involve the people. In your circumstances, there are members of the organised groups, lobby groups and business people but in areas from which we come the people themselves have no capacity to assess either the Executive or the Legislature to be able to influence the legislative process. What do you have to say about situations like that?

Professor ALLARS: Obviously, I would recommend our system. The danger of the system in which there is no settled statutory procedure which people can utilise in order to have a say or make a submission is the problem of lobbying which is not transparent and which allows powerful interest groups to sway policy making in their own interests. This leaves other interest groups without any influence upon government. I am sure everyone will be very well aware of that. Of course that still happens in systems where there are statutory schemes for consultation. You still have informal lobbying which goes on but the statutory schemes provide some adjustment and balancing of that problem.

CHAIRMAN: I will have to terminate question time there but delegates will have the opportunity to approach Professor Allars individually with any other questions. We once again thank Professor Allars for a very comprehensive paper.

CHAIRMAN (Mr Peter COLLINS): My name is Peter Collins. I am a member of the lower House of this Parliament. I welcome you to the session entitled, "The Spirit of Scrutiny: Wisdom is the Way". I am aware that we are about 20 minutes behind the scheduled time. We will try to get members to lunch at the set time. I issue the usual edict about ensuring that mobile phones are turned off during the session. I suspect that has already been done and I congratulate members on that. I will first introduce the facilitator for this session, Dr Liz Kernohan the member for Camden in the Legislative Assembly of New South Wales. Senator Barney Cooney is our speaker for this session.

Senator Cooney it is the Chair of the Senate Standing Committee on the Scrutiny of bills in the Parliament of Australia. Since first being elected to the Australian Senate in 1984, Senator Cooney has served on numerous Senate and joint committees, including the Committee on Constitutional and Legal Affairs, the References Committee and the Privileges Committee. Senator Cooney served as a barrister prior to entering Parliament. I now ask Senator Cooney to address us.

Senator COONEY: It is nice to have a person with such a distinguished career as Mr Peter Collins chairing my session. I think that James Warmenhoven ought to come up to the lectern as well because James helped me—indeed, he wrote the paper I suppose in lots of ways— and for that reason, I may even stick to it! Professor Davis is a man who has inspired our committee over a lengthy period. He is a good Australian, a good New Zealander and a good Englishman. Is that not right? That sums up practically everyone.

Mr BATES: And a Welshman.

Senator COONEY: Professor Davis is also accused of being a Welshman.

Professor DAVIS: Yes.

Senator COONEY: Well, there we are. I thought Professor Allars' speech was great. It leads on to what I want to talk about, namely: Why have scrutiny at all and what is it all about? At the federal level we scrutinise on the basis of a fairly vague comment which is fundamentally whether a particular bill trespasses unduly on personal rights and liberties. It is a very wide statement. We do not have any bills of rights which say that people are not to enter and search without a warrant and that people are not to do this and are not to do that. We leave it pretty much to what we think is right and what we think is wrong.

There are six members of the committee. Only one member comes from a northern State, Queensland, and there is a Northern Territory representative who follows the right football team. We sit round and work out whether to us a piece of legislation is right or wrong. We have used the word "wisdom" and we might have used the word "conscience". We go ahead on the basis that it is possible for parliamentarians and those who advise them to have a conscience. We believe that there is such a thing as a moral imperative in the scrutiny of legislation and, indeed, in scrutinising what government does generally.

I will come to the examples in our paper in a minute, but if I can give a little illustration that struck me last week when a constituent came in. To a certain extent I think this sums up what we should be about when we are dealing with the scrutiny of legislation, the scrutiny of regulations and scrutiny of parliamentarians. This person had been an Iranian citizen until about six years ago, when he came to Australia and became an Australian citizen. He came to see me about what had happened to his sister and a niece and nephew who had left Iran and had last been heard of in Indonesia. For those who may not know the Australian scene, a lot of people, unauthorised entrants or illegal immigrants, come through Indonesia and land on the northern shores of Australia. This upsets many Australians.

These three people had last been heard of in Indonesia. My constituent wanted to know where they had gone after being in Indonesia. He said he had rung the department and it could not tell him. I rang the department while he was there and got onto someone. I said that my constituent wants to know what happened to the family since they left Indonesia. The public servant on the phone said, "Why do you know they left Indonesia?" He was really asking had this person being in collusion with his family to bring them to Australia illegally, the threat being that he was aiding and abetting people smugglers. He said he was not going to tell me until their status has been determined but that in the meantime they will be locked up. Our immigration Act says that people have to be locked up until their status is decided upon, even though about 70 per cent or 80 per cent are ultimately found to the refugees. We looked at amendments to that legislation and I hope we recommended the right way.

There are real problems with legislation that prevents an Australian citizen from finding out whether his family is in Australia and, if it is, where and for how long it has been here. It is the legislators fault for having that sort of law on the books. In this case it was the public servant's fault for administering the law with enthusiasm. The person on the end of the phone obviously administered the law with some enthusiasm. I would have hoped he could have said, "It is your fault, you are a legislator, you should not have legislated this, and I hate doing this work". He did not say that, he seemed to think that this was reasonable.

It seems to me that if we were scrutinising that Act and any regulations made under it and looking at that conduct, we should have done something about it, if not in Parliament then at least in the party room. As you know, a lot of these things are decided in the party room. We have not looked enough during this conference and others at the party room and what we should be doing in the party room. A lot of things get through that should not. All sorts of poor legislation then comes back to haunt us. I will never know why New South Wales passed the Independent Commission Against Corruption bill, but it has come back to haunt you in a big way. It is another example of how parliaments fail properly to scrutinise some issues. If we approach our task with—we call it wisdom in our paper—some sort of conscience and sensitivity, a lot of this would not get through. No matter what jurisdiction one comes from, that is universal. There is a need to look at things with a conscience, with wisdom, so that our legislation is good.

That is the sort of thing the United Nations has tried to do with various conventions—the International Covenant on Civil and Political Rights, the

Convention on the Rights of the Child and the convention on the elimination of all forms of discrimination against women. They are universal. They are matters of conscience, the way you assess your legislation and your system. Once you lose that keenness of mind and keenness of conscience, we are in real trouble. That is how our Scrutiny of Bills Committee goes about its task. Whether we are right is another matter but at least we try to assess legislation in that way and I think it has been reasonably effective.

I will go through a couple of examples. One thing that has come up recently and we are still discussing is the issue of voting. The electoral committee proposed that voting be taken away altogether from prisoners. Currently the Commonwealth Electoral Act provides that prisoners serving sentences of five years or longer are not entitled to vote. In 1997 the Joint Standing Committee on Electoral Matters said that this should extend to all prisoners. That was contrary to another committee which said the vote should be granted to all prisoners. In our paper we said:

> We noted this ongoing debate and drew the attention of the Senate to the various views that had informed it. We also noted that, under the proposal in the bill, people might be imprisoned (perhaps on weekend detention) for relatively minor offences such as failing to provide information, or for traffic infringements, and, as a consequence, might end up being denied a vote. Under the amendment which could have the exquisite irony of Albert Langer being imprisoned for, in effect, advocating optional preferential voting, and then being denied a vote at all because he was in prison.

In Australia one is obliged to vote, otherwise one commits an offence. Albert Langer was on what I would have thought was the wrong path of saying that people ought to be able to not vote. I think that is a very bad system, but that is what he was advocating. One way he got over that was to fill out the form in such a way that it was a non-vote. For that he got into all sorts of trouble. We are saying there that that sort of trouble might have disabled him from voting. In other words, if prisoners were not entitled to vote he would have achieved his purpose in a rather dramatic fashion.

While on the issue of voting, the committee also looked this year at a bill that proposed to prevent candidates from enrolling under names that the Australian Electoral Commission considered to be contrary to the public interest. Something that is contrary to the public interest has always been a danger because that means something contrary to what someone decides is in the public interest or is contrary to the public interest. The reason behind that was that people were changing their names to "Mr Justice Abolish Child Support and Family Court" or "Abolish the British and Irish Lions Football Team" and things like that and people were saying that this ought to be stopped. What did we decide about that?

Mr James WARMENHOVEN: The bill went through, but we said there ought to be guidelines.

SENATOR COONEY: We said there ought to be guidelines and guidelines were issued. Last year the committee looked at legislation that sought to remove the right of defendants in criminal proceedings to seek an administrative review of certain decisions. Somebody would be charged with a crime or there would be an investigation of a crime by a body such as the National Crime Authority, which is entitled to ask people questions in certain circumstances. Those investigations would be taken before the Federal Court although the matter would be brought on

in a State court. So, it was said that the Federal Court was intervening in matters that would end up in a State court. The bill proposed that that procedure be stopped. The committee objected. It was pointed out that people could still complain about the sorts of things they were going to the Federal Court to complain about but they would have to go now to the court that was going to try them. In the end, we were convinced that that was all right.

On another occasion we were not convinced. We had recently been looking at a number of bills that disqualified people from participating in various activities, for example working in a nursing home, if they had been convicted of an indictable offence at any time. So, anyone convicted of an offence could not get any job that was prescribed in the legislation. An indictable offence was defined in the bill as one punishable by imprisonment for 12 months. According to the definition illegal fishing is an indictable offence—perhaps it should be—so is possessing unlawful whale products. A person convicted of either of these offences at any time would be permanently disqualified from working in a key position in a nursing home. Influencing the vote of a nursing home resident is not an indictable offence and would not disqualify somebody from working there.

We thought that was fairly strange because it meant someone caught out on the seas fishing away would be stopped from working in a senior position at a nursing home but someone working in a nursing home who influenced somebody to vote in a particular way—particularly against the proper party—could stay there to do the same thing next year. The Committee was concerned that, if the offence is not relevant to the activity, it should not be taken into account. It said it was arbitrary to take account of convictions that had occurred at any time, which is well and truly beyond the bounds of decency. I think we are still debating this matter. Our Committee writes to the Minister to explain the problem and he replies. There is then an exchange of letters. I think we will win the day because reason is on our side in this instance.

Another interesting issue is the increased use of strict liability offences. The Government denies that these offences have proliferated and says that it is simply drawing our attention to the fact that they exist. The Government claims that it is making us aware of strict liability offences rather than our investigations discovering a preponderance of such offences. We have asked what criteria are used to determine a strict liability offence. I do not think anyone knows the answer to that question—perhaps delegates can inform us of the principle and rationale for determining strict liability offences. The departmental explanation suggests that various criteria are used to evaluate existing offences. This begs the question: What criteria are used to determine whether new offences should be offences of strict liability? In the last sitting fortnight the Senate considered a series of offences in a bill amending the Customs Act and removed strict liability from 10 offences. This convergence of activity led the Committee to ask the Senate for a specific reference on the issue in much the same way as a rash of search and entry provisions in 1999 saw the Committee investigate the matter.

I wish to turn now to another matter and to embarrass the subject of my remarks. I think we all have dark and light sides to our natures, and Peter Nagle is no exception. However, in his case I think the light side predominates. Peter, thank you for organising this highly successful conference. You have expended

an enormous amount of effort to bring it about. On behalf of the Commonwealth delegation, and hopefully on the part of all other delegates, I thank you for this conference. I note that your long career began on 19 March 1998 and was renewed in elections on 25 May 1991, 25 March 1995—the date that my oldest son was born—and 27 March 1999. It is clear that the people of Auburn, for which electorate you are the member of Parliament, love you dearly as they returned you on those many occasions. I know that you have worked not only on the scrutiny of legislation but in many different areas. We all thank you for your efforts with regard to this conference.

CHAIRMAN: Thank you very much, Senator Cooney.

Lord MAYHEW: I second Senator Cooney's words of thanks by making a few comments with which those from countries other than Australia may be able to identify. The United Kingdom delegation came to this conference wanting to say thank you to Australia, at both Commonwealth and State levels, for the pioneering lead that it has taken in this important field. We are now leaving with very much more to say thank you for, and we associate ourselves very warmly with Senator Cooney's words of gratitude to Peter Nagle.

First, we must express our thanks for the extraordinary quality of the immaculate organisation of this conference. We have heard the most stimulating speeches from two justices of the High Court of Australia and the Chief Justice of the Supreme Court of New South Wales. We have also had the opportunity to learn from the experience and thinking of participants from many other countries. Secondly, the hospitality showered upon us has been overwhelming. I think none of us will forget—for a very long time at any rate—the voyage around a large part of Sydney Harbour on Monday and the lunch we enjoyed on that occasion, the gala dinner on Wednesday and the speeches that I have mentioned already. Throughout this conference the Parliament of New South Wales has extended to us the most wonderful welcome and hospitality through Peter—who has been the endlessly genial provider of it. We thank him for that. This has been an enormously important conference for my point of view and we go away feeling much wiser about this critical field with which we all deal as legislators, officials or participants in public life in one way or another. We also go away brimming with gratitude.

CHAIRMAN: On behalf of Peter Nagle, I thank you for those generous comments, Lord Mayhew. I take it that the words of thanks to Mr Nagle for his organisation of the conference have been noted with acclamation. Before I hand over to Peter, are there any questions about Senator Cooney's comments? There being no questions, it is a great pleasure to welcome back to the chair the organiser of the conference, Peter Nagle, who will exercise his right of reply.

CHAIRMAN (Mr Nagle): I am sure you all know that modesty is not one of my virtues, but thank you very much for your kind words. I must also thank the parliamentary organising committee for the conference comprising Jim Jefferis, Greg Hogg, Don Beattie, Rachel Dart and her predecessor, Susannah Dale, and Patricia. I am also grateful for the support that we have received from the Speaker of the Legislative Assembly, the Hon. John Murray, and the President of the Legislative Council, the Hon. Dr Meredith Burgmann. The conference has gone

extremely well and we are as pleased with it as you seem to be. I think conferences such as this should continue into the future. I invite your comments as to whether the conference should be held in some other jurisdiction in order to carry on the important work that has been done here. That would enable us to meet again and continue to discuss the issues of regulatory reform and management and scrutiny of legislation. Does anyone wish to speak on that matter or on any other topic? Steve Gilchrist as volunteered Ontario as a prospective conference venue and David Mundell has volunteered Scotland. Would you like to comment on whether you would like to host this conference two years hence?

Mr Steve GILCHRIST: Building on the extraordinary foundations that you have provided for us here—like Lord Mayhew, I leave this conference very impressed at the range of thoughts expressed and the extraordinary degree to which certain other jurisdictions such as ours will have to play catch-up—and looking down the road two years from now, I wonder whether changing the venue will provide an opportunity to expose the ideas that we have heard at this conference to an even wider audience, certainly in North America and South America. I would like to think Ontario is also relatively convenient to many other parts of the globe. Toronto is wonderful at this time of year—not that Sydney's weather has not been much above the standard that I had expected for winter.

CHAIRMAN: The sun is shining.

Mr GILCHRIST: Indeed. It is a glorious day. We would be quite prepared to play host to the conference. I honestly believe by having a conference venue in North America we might be able to shame, to some extent, our colleagues in other Provinces and States who heretofore have not seen the light and embarked upon a similar form of regulatory review—at least in an organised fashion. If delegates share our belief that biennial conferences might provide the appropriate timing, I am more than happy to offer the Legislative Assembly in the Province of Ontario as a conference venue in 2003.

CHAIRMAN: Thank you, Steve. I call David Mundell from Scotland.

Mr David MUNDELL: I know that in Australia you are used to cities competing against each other and seeing one come out on top, so I do not want to play Beijing to Steve's Sydney. As I explained during my speech, the Scottish Parliament is still evolving. I will take back to Scotland the proposition that, if it is determined that the conference should proceed on a biennial basis, Scotland would be an appropriate conference venue in four years. Perhaps we will have completed our Parliament building by then. I think that would be a more appropriate time in our electoral cycle as it would be in the middle rather than at the start of that cycle. We in Scotland would be very pleased to host the conference if a venue within the United Kingdom and Europe were considered appropriate. If delegates attending this conference can attend future conferences, we shall see whether we have learned anything from the events of this week and put what we have learned into practice. I am very happy to proceed on that basis.

CHAIRMAN: Thank you, David. I call Geoff Squibb from Tasmania.

Mr Geoff SQUIBB: I do not want to pour cold water on the idea of holding these conferences in the future because I think this is a marvellous forum. However, I have two questions. First, will we create a crowded situation so far as forums of this nature are concerned? My second question—which is more important as far as I am concerned—goes to the suggested timing of the conference. Australian delegates will be aware that, but for a change to the date of our Australasian biennial conference, we would have been meeting in Tasmania at this moment. The Australian jurisdictions agreed to change the 2001 biennial conference date from July to February. As most Australians will know, there was an influx of elections around the country at that time.

CHAIRMAN: It is called democracy.

Mr SQUIBB: It was apparent that we were not going to get the numbers for our conference so it has been put off. The proposal now is that Australasian Biennial conference will be held most likely in Tasmania but even possibly in New Zealand in February 2003. I say that, particularly for those of us in Australia, that we have got the Australasian Biennial Conference, we have the Commonwealth conferences and now we are speaking about an international conference. I am concerned that not only are we speaking about those three conferences, but we are also speaking about conducting all three in 2003. I am interested to hear what other Australasian members say about those obligations.

CHAIRMAN: Is your conference next year?

Mr SQUIBB: It has not been decided but there is a fair chance that if we do not hold it next year—

CHAIRMAN: New Zealand will taken it on?

Mr SQUIBB: There is some doubt as to whether it will be held before 1 July next year because of the need for jurisdictions to budget to enable delegates to attend, but it looks fairly definite that either New Zealand or Hobart will be conducting a conference in 2003.

Senator COONEY: Following on from what Mr Squibb said, in addition there was a conference in Zimbabwe earlier this year or last year. I am concerned not to leave Africa out. Does anyone know what happened?

Mr SQUIBB: About 40 people attended.

Senator COONEY: That followed a conference in New Zealand. Jonathan Hunt held one. Arising from that conference it was decided to have one in Canada or Zimbabwe, and Zimbabwean won the day. I do not want to leave Africa out of the loop. Is there any correlation between the various groups?

Mr Greg McLEAN: My remarks go to keeping the momentum alive with issues such as this. I notice that the New South Wales Government has a web site available for the development of the program. Are papers available electronically? Have they been placed on the web site? In keeping the momentum alive, and realising the costs of secretariats and other background issues, and as

e-mail addresses are probably already known, could an e-mail network be established so that all participants have a full list of all other contacts' e-mail addresses? If issues develop in their regions that information could be passed on and it would also allow those who attended to pass information onto others back home via the cheapest means possible. In other words, the redistribution of information. Could those things be taken on board by the secretariat that has assisted in developing this conference?

CHAIRMAN: We have looked at and examined that and the papers will be on the web site and each participant will receive a CD-ROM about the work done at this conference. The idea about the addresses, I do not think I will be speaking out of line by saying that the secretariat will send to all participants names, addresses, phone numbers and e-mail addresses so that they can keep in contact with one another. Africa and India are important players and we should very seriously look at working out venues. We will ascertain who might want to do it. If Toronto, South Africa or India are willing then we can talk about it can see where we will go. We need to set up the organisation. We do not want a Zimbabwean situation where we could not communicate and the next thing is the guy who took the delegation, Dougie Kidd, ran the show. That can happen here or in other places but everything needs to be considered.

Mr GILCHRIST: Loath as I am to spend money indiscriminately, I wonder if there is any sense around the room of the need, instead of biennially if 2003 is a problem, for even an annual attempt to continue to raise this issue, but in different venues. Is that worthwhile? To that end, I must admit one of the reasons for wanting to come to this conference to see exactly what would be involved, is that our Government has already allocated a significant amount of money to the budget of the of the Red Tape Commission to host a major conference. My fellow parliamentarians, knowing that it is in this year's budget does not necessarily suggest that it would be carried over in the future, but I was originally going on your suggestion that biennial might be better timing, but in deference to Geoff Squibb, or anyone who thinks 2003 might pose a problem, if late in the summer of next year would be an option? I can tell you that we would prepared to do it in that timeframe as well.

Mr BATES: For some institutions resources are a problem, and I am concerned that when I hear about all these other conferences that there is an element of duplication and an unnecessary strain on resources. I wonder if it is not possible to create some kind of institution that would enable the co-ordination of these international or regional conferences to take place in order to avoid that duplication and unnecessary strain on resources? I would be happy if someone in this room could advise me if there is such an organisation because it seems necessary if we are to proceed in an ordered way so that we all learn from the process rather than get fatigued by the process itself.

Mr ANYONA: I am not going to participate in this discussion simply because, as you notice, throughout this conference we from Kenya, and I believe my other colleagues from the African continent, are disadvantaged in the sense that we are behind in this process. We have come very much to listen and learn. On behalf of my colleagues from Africa I thank the chair, the committee, the secretariat and the people of Australia most sincerely for according us this most

extraordinary welcome in this part of the world. We apologise in a way because we are under represented. If this does not appear to be an important part of democracies in our countries, that is not the case. There are many problems of resources and other things.

That is the only reason why only South Africa Botswana and Kenya are represented. We have been left behind with global technology and other things and we believe that this is an essential area where we should be brought on board. When you finally consider which venue, we would like to be accorded special consideration for African institutions to participate such as we have. We from Kenya are going back home to embark on a process of putting in place mechanisms such as we have learnt that can compare with the various delegations. Thank you for being patient with us and for allowing us to take part in this conference.

Mr Robert REECE: I draw the attention of delegates that we all consider this particular subject very important. We have found very diversified activities in jurisdictions and I would have thought that given globalisation, particularly in Australia with the advent of Ministerial Councils which are growing more and more powerful everyday, there is a real need for an organisation or a structure with a reference of a conference like this. I would ask, given the importance of many international conferences, perhaps a segment of one of these conferences could include this subject as part of that, if it has not got the ability on final jurisdictions to stand in its own right. We all attend international conferences and I am quite sure that many of them do not carry, during a period of globalisation, the importance that this committee might well have to influence those things.

Mr SIMEON: Mr Chair, honourable members of both Houses of this Parliament and distinguished guests, clearly I am delighted to be here. You have done a wonderful and immense job. I was delighted I had good exposure. It will be an historical conference. I call it an historical conference because this is the first one that is being arranged by this State. Also one morning I got up and, to my surprise, in the *Sunday Telegraph* a news items appeared. The caption was "Australia second best place to live". The United Nations ranks Norway as the first. So it is a beautiful clean country and the people are very loving really. It was a great opportunity for us to be here. The hospitality was excellent. The staff at the registration section were very helpful, guiding properly and the participants' enthusiasm was really nice. They did very good homework I must say—representations from different participants was really excellent. I must congratulate all of them.

I must congratulate Mr Nagle and his entire team for making this conference successful and for their vision. I, along with other friends, share the idea that we need to have a definite periodical conference, at least every year or so. The five delegates from India who are here are all really thankful and grateful for all the arrangements that have been made. This conference is an historical one. This is the beginning of the century, in 2001, and many more such conferences will be held. In the next few years when we allow biennial conferences, New South Wales has done it. I once again congratulate you and your entire team who have struggled very hard, along with the other legislators of

the upper House and the lower House of this State, thank you very much and congratulations.

Dr Philippa TUDOR: As the only member of this conference who was at Zimbabwe, I wonder whether I could suggest a way out of what seems to be an impasse, because obviously one does not want to hurt the feelings of the South African delegation—I sense a great feeling of that here—but also the very generous and definite offer of Mr Gilchrist to host the conference in Ontario. In answer to Mick Bates, as far as I know there is not an umbrella structure. I have, but I do not have here with me, the e-mail address of the South African Clerk. Back in Zimbabwe the only real thing that the conference resolved was in principle to meet again in roughly October 2003 and to do so in South Africa, but no definite date was fixed.

Also, for reasons which I think it is not politically correct for me to go into, the Zimbabweans have not yet published— and perhaps they never will publish—the proceedings of the conference, although they were being recorded by Hansard. It is inappropriate for me to say any more on that. Through your organisation I wonder whether I could have your e-mail addresses. I have my own e-mail address—*tudorfp@parliament.uk*—but will only be live for a month because a month today I move on to the Scottish office. But I can guarantee that provided I have your e-mail addresses I will be able to e-mail you to say what is the status of the South African conference and to get a date, or maybe not a date. Perhaps that will enable the 2003 Toronto conference to go ahead.

CHAIRMAN: To sum up, I simply want to say to Sue: That is a generous offer. In particular, I liked the bit about the money. That was a very good point. If you have the money to run the conference, you may be the cab off the rank. We will keep in contact, and everyone will keep in contact with us. We will work out a date that is suitable to you. Unfortunately for the rest of you, you will be suffering my face at these conferences for years to come. Ladies and gentlemen, if there is nothing further, we will now adjourn.

(Conference adjourned at 1.02 p.m.)

CONFERENCE RESOLUTION

Subject to advice from Dr Tudor as to the holding of the next Commonwealth Conference in South Africa in October 2003, that Ontario will hold the next International Conference on Regulation Reform Management and Scrutiny of Legislation in July 2002.