SEVENTH AUSTRALASIAN AND PACIFIC CONFERENCE ON DELEGATED LEGISLATION

AND

FOURTH AUSTRALASIAN AND PACIFIC CONFERENCE ON THE SCRUTINY OF BILLS

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At Sydney on Wednesday 21 July 1999

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The Conference convened at 9.00 a.m.

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WELCOME

CHAIR (Mr Nagle): Colleagues, distinguished guests, ladies and gentlemen, welcome to Sydney, the city of the year 2000 Olympic Games, and welcome to the Seventh Australasian and Pacific Conference on Delegated Legislation and Fourth Australasian and Pacific Conference on the Scrutiny of Bills . His Honour the Chief Justice of the High Court of Australia, the Hon. Murray Gleeson, AC, will open our conference. I thank you, Judge, for your immediate acceptance of our invitation. I know that the demands on your time must be frightening, to say the least.

Mr Scott Jacobs, Head of Program on Regulatory Reform, Public Management Service, Organisation for Economic Co-operation and Development, andMr Rex Deighton-Smith, Administrator of the Public Management Service, OECD, have taken time out of their busy schedules to address us on the future challenges of regulatory reform facing OECD countries. They will also touch upon the systematic approach to assure regulatory quality. As in previous years, we are ably assisted by some well-qualified academic colleagues. For example, Professor Allars will critically analyse the terms of reference of committees and Professor Pearce of the Australian National University will discuss the policy limitations on our deliberations.

In addition, Dr Bernadette Tobin, Director of the Plunkett Centre for Ethics, will give us a perspective on ethics and the law, and Stephen Argument will take upon himself the sensitive task of evaluating the comparative performance of our respective parliamentary committees. Mr Siafausa Mulitalo, Deputy Speaker of the Samoan Parliament, has joined us. I welcome him to the conference. Professor Dennis Pearce and Stephen Argument have written the leading text which has been useful for me in my preparation for this conference. Con Mitsolas from Butterworths has copies available for anyone who wishes to purchase one.

I am grateful for the support that the Chairs, Deputy Chairs and members of the various parliamentary committees have given to this conference. Their participation has given the conference panache and status both by their attendance and the papers they will present over the next three days. I express my appreciation also for the strong participation in this conference by delegates from the Standing Joint Committee for the Scrutiny of Regulations of the Parliament of Canada. Our Canadian colleagues bring with them a wealth of experience and expertise. I pray that each participant will have a satisfying, educational and enjoyable conference over the next few days. I now invite His Honour, the Chief Justice of Australia, the Hon. Murray Gleeson, to open our conference.

OFFICIAL OPENING OF CONFERENCE

CHIEF JUSTICE GLEESON (Chief Justice of the High Court of Australia): Mr Nagle, distinguished guests, ladies and gentlemen, I am delighted to have been given the opportunity to participate in the opening of your important conference. I have been given some of the papers to read in advance. It is obvious that you have substantial issues to discuss. It would be a pity if those issues were regarded as of concern only to specialists and to people with a highly developed understanding of public affairs. Whilst it would be unrealistic to expect that the subjects you will be talking about would ever be of wide popular interest, it is not unreasonable to hope that there could be more public awareness of the importance of such matters, and of some of the issues at stake, because they have a substantial bearing on the quality of life in our community.

To understand government is not necessarily to admire all of its ways. But we can hardly expect the community to value the work of government and the institutions on which our society is based unless two conditions are satisfied. First, there is a need to make the public more aware of the work of those institutions. Second, those involved in the various branches of government need to maintain what might be described as institutional self-respect.

The division of governmental powers into legislative, executive, and judicial provides a useful framework for the analysis of many problems, but as people have often pointed out, the separation is neither strict nor comprehensive. Important issues arise out of the tension that exists from time to time between branches of government. We have developed a degree of skill in addressing those issues. I want to raise for your consideration the opportunities that might exist for more productive co-operation between the three arms of government.

I sometimes wonder whether our commitment to an adversarial system of government and to the benefits of creative tension does not obscure other possibilities that are also worth consideration. Let me give a couple of examples—I have no doubt that many people here could think of others. You will not be surprised to hear that my examples relate to the interaction between the judiciary and the other branches of government.

Consider the question of court delays. The time a court takes to dispose of cases coming before it depends on a combination of three circumstances: first, the number of cases that come before the court; second, the resources, human and financial, that are made available to the court to handle its workload; and, third, the methods and procedures adopted by the court in dealing with its business.

The first and second of those matters are entirely outside the control of the judiciary. The third matter is virtually entirely within the control of the judiciary, subject to any valid legislation that Parliament might enact. As to the second matter, the matter of resources, it is the Executive Government which determines the resources that will be made available to courts, the most obvious example of which is the number of judges that will be appointed and, in so doing, the Government must wrestle with issues of priorities, having regard to other necessary avenues of expenditure and limitations on available funds. As to the first of the three matters mentioned—that is, the business that comes before the courts—Parliament has an important influence through legislation which is enacted from time to time. Let me give you an example. In the first year after the New South Wales Parliament enacted legislation concerning the availability of apprehended violence orders, 50,000 such applications were commenced in Local Courts. The implications for the capacity of the Local Courts to handle their workload within a reasonable time are obvious.

The interests of the public in reducing court delays can never be met if there is a stand-off between the three branches of government, none of which has the capacity, separately and individually, to solve the problem. If there is to be a realistic and credible commitment to reducing delays in dealing with cases, that must be a joint commitment to which all those who have the capacity to determine the outcome subscribe. I am not for a moment suggesting that Executive Government should surrender or compromise its capacity to decide what funds will be made available to courts—of course, Executive Government will never surrender the power of the purse; it has a public duty to maintain the power of the purse—any more than I am suggesting that the judiciary should surrender or compromise its capacity to determine what the requirements of justice dictate in relation to the disposition of cases.

Judges cannot force governments to provide them with resources, and governments cannot force judges to adopt procedures for the disposition of cases that are unjust. Even so, there must be an opportunity to work together to develop joint commitments that could operate for the benefit of the public. For years when I was Chief Justice of New South Wales people would ask, "Why don't you develop time standards for the disposition of cases in courts?" My response was, "I would be happy to develop time standards for the disposition of cases when Treasury becomes a party to those standards and to the public commitment involved in their publication."

One of the reasons for an absence of co-operation can be a form of mutual suspicion. People who have the responsibility of allocating scarce resources amongst competing and worthy demands, each with its own claim for priority, find it easy to persuade themselves that their problems are not really understood by special interest groups. They believe they see a big picture, of which other people have little understanding. A parliamentarian once responded to my complaints years ago about inadequate funding for the New South Wales court system by asserting that I was asking government to build a bigger sandpit for the lawyers to play in. Some people may regard hospitals as the sandpit for the doctors to play in. There is a political benefit in concentrating the attention on doctors and lawyers, because nobody will lose any sleep over them! But the problem becomes a little more awkward when attention is concentrated on patients and litigants; it is their position that has to be addressed.

But there is fault on the other side too. Judges sometimes tend to resign themselves to a cynical belief that there are no votes in courts, and to assume that any political commentary on inefficiencies in the justice system is an attempt to distract attention from a government's unwillingness to provide proper funding. Both of these respective attitudes are understandable, but they are both wrong. Much could be achieved by addressing both the real financial needs of the court system and the real opportunities that exist for improving efficiency in that court system. But these things cannot be done separately. No government will commit funds to a system that does not seek to apply them effectively. Judges are not going to sustain enthusiasm for a succession of temporary expedients aimed at compensating for a lack of proper resources. It is unrealistic and naive to expect the judiciary to engage in dialogue about improving the justice system if the question of resources is excluded from the agenda.

A related subject that provides another avenue for better co-operation is accountability. We now live in a managerial society committed to the concept of quantitative measurement as a basic instrument of accountability, suspicious of leaving anything to qualitative judgment, and dedicated to the primacy of outcomes over process. Attempts to standardise the disparate, and to measure the unmeasurable, are certain to be met with derision and, on occasion, even hostility. But there is room for better understanding on both sides. There are aspects of the performance of the justice system that ought to be capable of being measured. At the same time,

crude attempts to impose quantitative evaluation on what are essentially matters for qualitative assessment will get nowhere. Let me seek to demonstrate that point by giving an example that I trust will be uncontroversial because it is away from Australia.

The Supreme Court of the United States of America decides about 80 appeals each year. The court sits to hear argument on appeals on the mornings of 40 days each year. But, of course, the court does most of its work on the papers. Time for oral argument is limited to 30 minutes per side. The first case the High Court of Australia will hear in the August sittings of that court is listed to last for three days. The Cour de Cassation of France, the highest Court of Appeal, decides 22,000 cases a year, of which 16,000 are civil appeals cases. Its reasons for judgement rarely exceed three pages and virtually the whole of argument is in writing. No-one would suggest that a comparison of the performance of those two courts could seriously be made on the basis of the number of cases they hear or the number of days they sit. In fact, it is a constant source of puzzlement to me that people think judges are at work only when they sit in a court listening to people speak to them. It is like thinking that parliamentarians are at work only when Parliament is in session.

The performance of the Supreme Court of the United States of America is the subject of constant scrutiny, debate and assessment, much of it not at a high level, but some of it at a very high level of sophistication. No-one would ever be so foolish to suggest that a measure of the performance of the American Supreme Court is the number of cases it decides or the number of days on which it sits. Assessments that are made—and they are made often—of the performance of that court are qualitative assessments, an exercise that is no doubt frustrating to managerialists. But not everything in life, and not every aspect of government, can be assessed by an arithmetical process.

On the other hand, a trial court handling thousands of cases every year, most of which are relatively standardised, might well have its performance assessed at least in part on its capacity to process cases, provided that the extent of its workload and the resources made available to it enter into the process of assessment. If a court has long delays because it has a large workload and inadequate resources, whose performance is being assessed by saying that it takes a certain length of time to deal with its workload? Is it the performance of the judges, or is it the performance of the government that provides funds and judges for the court to handle its business? The delays may be a reflection on the funding performance of government, rather than on judicial and managerial performance of the court. An attempt to assess a court's performance by reference to time taken to process cases, without taking account of workload and resources, is absurd. To say that a particular court takes a certain time to dispose of its business means nothing unless you know the amount of business coming before the court and the number of judges in the court. It might be meaningful to say that, in a court, X judges deal with Y cases a year and it takes them Z months per case to do so. That might be a significant measure of performance or basis for comparison with the work of other institutions. However, simply to say that that court takes Z months to deal with its cases tells you nothing of significance, except that, for some reason that no-one is prepared to identify, people who invoke the jurisdiction of that court must wait an inordinate length of time to have their cases heard.

Another area for productive activity involving both the courts and Parliament is that of providing public information and education about the workings of government. I am sure that everyone who works in a government institution from time to time finds the lack of understanding of governmental arrangements demoralising.

For example, statements are often made about the judiciary in this State which indicate a belief that the Judicial Commission of New South Wales has the capacity to instruct judges on how to decide cases—to tell them to be more severe or more lenient when they impose sentences, to be more or less ready to grant adjournments or to make orders of certain kinds in favour of certain people. That may reflect a sense of frustration at the independence of the judiciary, but one aspect of the independence of the judiciary that people should understand better is that judges are independent of one another. If an organisation like the Judicial Commission sought to instruct judges to adopt a certain line in relation to making judicial decisions it would not only be acting beyond its capacity, it would also be acting corruptly.

At the same time there is room for a great deal of improvement in the understanding that most members of the community have for the workings of various aspects of the parliamentary system, in particular the committee system. One of the principal benefits of exploring avenues for greater co-operation between the three branches of government is that this would contribute to institutional self-esteem. We cannot expect the public to value the work we do if we do not appear to value it ourselves. I hope that your deliberations will be stimulating and fruitful, and I wish you a successful conference.

CHAIR: Thank you for a delightful paper. You have given us great status by opening the conference and we are indebted to you. His Honour has consented to remain with us for a while this morning to listen to some of the papers and some of our deliberations. I remind delegates that the official photograph will be taken on the steps of Parliament House at 12 o'clock. If all the participants could be in attendance it would be appreciated.

FUTURE CHALLENGES IN REGULATORY REFORMS FOR OECD COUNTRIES

Mr JACOBS (Organisation for Economic Co-operation and Development): Thank you Mr Nagle, members of the Regulation Review Committee, ladies and gentlemen, and not least Jim Jefferis for inviting me to this meeting. There is a tremendous amount of expertise in the room today about the contemporary issues of regulation and law. My task is not to look at contemporary problems but to look at future challenges for regulatory reform in OECD countries. I shall take a medium-term to long-term view of the issue, of the next 10 to 20 years, and identify what seem to be key challenges for our governments in facing the issues of regulation.

Since there is little hard data to chart the way forward I will use what Keynes called "an essay in persuasion". This elegant term allows me to proceed confidently with minimum empirical evidence. Let me start by taking off the table some projections that other people have made. Unlike those who see a strong backlash against market opening, I do not see this as a high risk. All of us are engaged in a multiyear process—even a multidecade process—of market-oriented reform that began 20 years ago in a handful of countries and now is a worldwide phenomenon affecting most countries and the lives of billions of people.

These reforms to the role of the State and the role of the market, in combination with technological advances and global opportunities, have generated enormous wealth and innovative techniques that are just beginning to change the structure of markets and methods of production around the globe. We have not seen the full benefits, or even a substantial fraction of the possible benefits, of this transformation. A recent series of thematic, sectoral and country studies of the OECD is examining the question of how important regulatory reform is to economic performance. Is it a residual—after everything else is done, we get to regulation? Is it a precondition? Is it a supply-side policy that significantly boosts the effectiveness of everything else?

The OECD work tends to support the latter. This is particularly the case since constraints on macro-economic policy are more and more to be found at the level of the real economy. To look at it through another lens, macro-economic policy is itself constrained in most countries, for example, in Europe through the shift to European institutions of exchange rate and monetary policy or in other countries through the reduced availability of financial stimulation. Regulatory reform is one of the few remaining tools for governments in achieving higher levels of sustainable growth with all that means for social progress, job creation and dealing with ageing societies. The reform process that is loosely called regulatory reform is likely to continue for another 30 to 40 years in successive ways before the gains become too small to justify political and social investment.

By that time market-oriented policies will become a normal part of how governments operate and what we today call ambitious reforms will become standard operating procedures. I see very few signs of reversal. Indeed, not even the market- oriented reforms in East Asia were reversed by the financial crisis of 1997; in fact, they were accelerated. This is good news for all of us in the regulatory reform industry because we have lifetime career opportunities.

Why am I confident that regulatory reform will not be reversed? The main reason is that there is a powerful logic to market reform that drives an expanding process. One reform exposes other problems and heightened pressures, and leads to further reform.

For example, tariff reforms in Australia in the 1960s, the 1970s and the 1980s led directly to structural reforms behind the borders in the 1990s as domestic producers fought to stay competitive. Telecommunications reform in America touched off a process of knowledge-based innovation through the whole of the economy, the results of which are still unfolding, and it is driving more intense competition. Financial market reforms in most countries are forcing more emphasis on return to capital so restructuring has begun in earnest. In fact, financial sector reforms are at the core of the marketisation of our economies. And reform creates new interests who push for more reform; consumer interests demand more choice, more quality at lower prices. Consumers today do not accept that these benefits should be seen in hamburgers but not in transport, telecommunications or public services.

But I am not complacent about the risks and costs of current regulatory reform. The fact that reform will continue does not mean that it will generate benefits. It may generate pain. It may generate pain without any benefits. It does not mean also that the general population will support it. We are all facing large unanswered questions as we strive to ensure that reform actually improves the quality of life. After all, that is the benchmark for success. The economic and social energies set in motion through reform are so vast and complex that it seems beyond the capacity of our governments to understand them, let alone influence them.

But governments can take positive actions now to increase the benefits and reduce the costs and risks of reform. I believe there are four challenges governments should face today that until now have been generally evaded. I think we have enough experience now—perhaps for the first time—to assess how to address these crucial challenges. The first challenge is how can markets be balanced with other collective interests; second, what new institutions are required to underpin the new relations between government and market; third, can the rule of law be sustained; and, fourth, how do we avoid changing one set of rigidities for a more advanced set of rigidities?

As to how can markets be balanced with other collective interests, we all recognise that markets cannot satisfy all of our needs and I will not go in to the reasons for that. In all countries we need regulation and intervention in areas such as environmental quality, safety and health, consumer protection and equity. These issues warrant government action, even given the considerable risk of government failure. The key is balance. In fact, we all know that regulation can be a substitute for good government. It is easier to adopt rules than to solve problems. Yet the key question is what role can the government play, particularly, what is its relationship with markets? Regulatory reform should be seen as part of the ongoing evolution of governance and relations between the states and markets in the capitalist democracies.

In each of eight countries reviewed by the OECD over the past two years the policy debates about regulatory reform went deeper than the policies at hand, and here the Chief Justice's admonition that regulatory reform is not a technical issue is particularly important. The discussion now is going to an examination of the role and shape of the State and the market in a civil society. In the review of Japan the OECD said, "The goals of regulatory reform in Japan are to complete the move"—the move began 120 years ago—"from a model of state-led growth to a model of the market-led growth." Yet today the lack of a coherent concept of the role of the State in a period of market-led growth has left regulatory interventions fragmented, incoherent and vulnerable to special interests.

A review of the Netherlands found that the move from a corporatist model in which power is shared between market interests and the State to a more neutral role of the State had changed the very nature of the State itself. In Mexico and Spain we found that an extraordinary overhaul of laws and regulations—up to 90 per cent of all Mexican laws had been eliminated or revised in the past six years—had profoundly changed decades and even centuries of intervention by the State and society. The issues here are fundamental not only to the market but to democratic values.

Current debates about the potential conflicts between market openness and national sovereignty are rooted in concerns that governments are losing too much power to the market and citizens are becoming only consumers. Food safety is one of the key issues that we face today and we have witnessed mad cow disease, dioxins in Belgian poultry and genetically modified organisms. The fights go on and on and yet short of protectionism there seems to be little effective way to prevent disaster. The experience of the OECD with the Multilateral Agreement on Investment [MAI] in which the OECD-brokered agreement between a number of countries failed because of an intense international campaign against what was perceived to be its rebalancing of interests away from the public and toward international investors is an example of the strength of these concerns and the need to deal with them honestly and forthrightly. I do not believe governments are doing this. In fact, governments are only now becoming aware of the impacts of global markets on their own capacities and I think parliaments are becoming aware of the impact of global markets on their own capacities.

My own view is that globalisation can empower governments to take more effective action in the interests of their citizens but who among our politicians understands how this can be done and who is making the case persuasively to the public? The key is achieving the right balance, a balance between deregulation and regulation. Market openness principles such as trade restrictiveness can deliver strong regulation that is also trade friendly. One final point is an issue that deserves much more contemplation, and that is the question of who bears risks in this new environment of marketisation. Efficiency requires that risks be shifted to investors and to consumers. But, in fact, even necessary government intervention creates moral hazard problems by suggesting that governments share the risk.

This is an important issue because so many moral hazard problems exist in our societies from past and current practices of government intervention. At the very worst these problems can create macroeconomic collapse—for example, I refer to the case of the Korean chaebol, who were considered too big to fail and hence not subject to market discipline. But our governments cannot simply walk away from moral hazard problems. The transition period may be too painful and it may be unfair to shift risks without compensation. Therefore, we now have what I call stranded moral hazards, which will be very difficult to deal with in the coming period.

The second major issue is what new institutions do we need to improve the new relations between government and market? Regulation should be understood here as the system for mediating social interest. Not only are there deep democratic values at stake; a change in regulatory policies can change the power relationships among groups in society. You know this better than anyone. Much of regulatory reform is a struggle by outsiders to gain the status of insiders and by insiders to protect their territory. Regulatory reform can be seen as a map of the changing interests and relations in society. Regulatory reform is not a technical problem of getting relations right; it is a task of building new capacities and institutions that underpin the new relations in society. It has considerable imperative for institution building in both the public sector and private sector in civil society.

The process today is not so much structural adjustment but cultural adjustment. What new institutions are needed? Again, we do not know. The analysis is just beginning but I have a private laundry list and the first one is transparency. Transparency is the buzz word of the decade and in fact all our governments are committed, through international obligations, to transparency, yet that of itself is non-transparent. How do you know it when you see it? In fact, transparency can be understood only in terms of the relationships between the State and society, which is to say the organisation of the way that the State projects power. Among all of the reforms now under way, an increase in transparency is likely to be the most fundamental and far reaching in changing cultural attitudes.

I want to tell you a simple story. Japan adopted its first administrative procedure Act in 1994. The next year an elderly gentleman who had been turned down several times in his request to build a new tank at a gas station in a small Japanese town was turned down again, again without any explanation. This time he went to the bureaucracy, sat down in front of the regulators and said, "I have a right to know why you said no." The regulator checked the Act and found out that he had to explain and he explained that it was a minor problem that could be easily fixed. The gentleman who told the story said, "For the first time in my life I felt equal to a bureaucrat." That is real change. I do not think we should tell ourselves that things are so different in other countries.

Transparency means, at bottom, that all regulated entities have equal access to regulatory processes and equally understand their regulatory obligations. This simply is not done in most OECD countries. We have documented 13 aspects of regulatory transparency, ranging from simple notification of the public that regulatory decisions have been made to broader organisation of the legal system through codification and central registration, to the use of public consultation and regulatory impact analysis. Our indicators of transparency show wide variation among countries, but, most importantly, the fact that almost all countries fall far short of what we consider good practice. There is a wide gap between the rhetoric and reality of transparency.

Transparency is important because it helps to cure many of the reasons for regulatory failure, capture and bias towards concentrated benefits, inadequate information in the public sector, rigidity, market uncertainty, inability to understand policy risk and lack of accountability. Moreover, transparency creates a virtuous circle. Consumers trust competition law because special interests have less power to manipulate government and markets. There are three or four other institutions that I think are important but rather than discuss them now I will list them and we may come back to them in the discussion phase.

One problem is inadequate control of regulatory powers delegated to non-governmental bodies—for example, public corporations and trade associations in Japan, standards setting bodies in the United States of America, producer boards in the Netherlands, and self-regulatory bodies everywhere. There is a whole complex of semi public and private bodies that have grown up over the years that share regulatory powers with the Government yet who is watching and who is ensuring that they serve public interests? Regulatory reform does not mean unleashing these bodies; rather, it means a new transparency regime that strengthens their incentives to work in the public interest.

The role of the courts is essential in conflict mediation. As decisions are shifted to the market there needs to be some procedure for resolving conflict between market players, and between market players and the government. Judiciary and public sector appeals procedures are often too slow, too non-transparent and too uncertain to establish a good environment for market confidence. On better international institutions, broad regulatory practices now under way

in Australia are not being implemented at international levels, even by my own organisation. Even worse, a dangerous democratic deficit is developing at international level as regulatory powers are shifted.

Who of us understands how ISO standards are set? And yet we depend on them every day to protect us as we buy products in the market. Diplomatic decision processes are generally not empirically based but instead are vulnerable to insider interests. I want to refer to some of the work by John Braithwaite at the Australian National University in Canberra who has written brilliantly on this topic and, as an international bureaucrat, I agree with him. There are a range of institutions that need to be constructed.

The third issue is: can the rule of law be sustained in the future? The greatest threat to the rule of law today is not regulatory reform; it is poor regulatory practices. The greatest threat of all is regulatory inflation, that seemingly unstoppable rise in the volume and quantity of regulations and laws across the globe. In most countries the volume of regulation has risen by 4 per cent to 10 per cent annually over the past two decades as they have constructed new regimes for environmental and consumer protection. The growth of regulation has far outstripped the capacities of private citizens to understand the law and the capacities of the public sector to apply the law.

The scale of this problem is only dimly understood but there are startling examples. In Sweden the famous guillotine approach led to the elimination of 90 per cent of regulations in some sectors, with no effect on the ability of the State to carry out its policies. In the United States President Clinton eliminated 13,000 pages of regulations and no-one noticed. Korea has just completed a task of cutting all government regulations by 50 per cent in three months. The commission that did this told me it was easy, since most regulations simply could not be justified in terms of meeting any current public policy.

What does the rule of law mean when so many laws and regulations on our books are simply irrelevant or damaging? The saving grace seems to be that regulators have tacitly decided not to apply regulations that are outdated or ineffective, but does this comport with our concept of the rule of law? It seems closer to arbitrary administration, and this is exactly what is happening in many countries. In Australia the average butcher faces a stack of regulations one metre high yet has only a third grade reading ability. What does the rule of law mean for him? What does the mean for the courts that apply the law?

One consequence is that compliance is suffering. We recently completed a report that will be published this fall on regulatory compliance in OECD countries that concluded that no country understands the level of compliance or whether compliance trends are rising or falling. Only a few countries even consider whether a regulation or law can be complied with before it is adopted. Budget cuts are reducing enforcement capacities—and we understand from this morning's discussion judicial capacities—of governments, and the capacity of governments to be effective rests primarily on compliance by the public. In a global economy, compliance has international implications.

The fourth and final issue is: How do we avoid changing one set of rigidities for another set of rigidities that reflect yet more insider interests? Many countries are only now changing laws and regulations that have been in place for decades or even centuries. We have forgotten why many laws exist. To give an example in my own family, my brother saw his wife preparing a ham to cook for Thanksgiving. When he saw her cut off the ends of the ham he asked, "Why do you cut off the ends of the ham?" She said, "My mother always cut off the ends

of the ham before she cooked it." The next time he saw his mother-in-law he asked her, "Why do you cut off the ends of the ham?" She said, "My mother always cut off the ends of the ham. That is just the way we do it." He finally saw the grandmother and said, "I am really curious. Why do you cut off the ends of the ham before you cook it?" She said, "So that it will fit in my oven."

Regulatory rigidities are enormously costly. Not only do they cause you to lose the ends of your ham but they slow innovations and force resources into less valuable uses. In Japan the failure to update regulations governing medical devices from only five years ago means that manufacturers around the world are retaining old production lines just to give the Japanese market lower quality products at higher prices. Countries that respond too slowly in the telecommunications sector simply lose new production, because the product cycle is six to eight months. Regulatory flexibility and adaptation over time seems to be as valuable as regulatory quality today. Regulation that adapts over time to changing conditions contributes more to economic and policy performance than does regulation that is optimally efficient today.

Technological change and globalisation will increasingly reward regulatory efficiency. How do we increase flexibility and adaptability in our governments? How can we initiate regulatory change against powerful interests? One element of the capacity for change is contestability of regulatory procedures. Contestability is driven by open processes, multiple actors and administrative, political and judicial channels for challenge. More intensive scrutiny procedures for existing regulations are needed. These characteristics are key assets for regulatory systems for the future, though they might lead to short-term costs. Australia has an advantage in its Federal system. The continued ferment of ideas and innovations at the State level contributes to regulatory flexibility at the national level.

To bring this essay in persuasion to a conclusion, I would like to note that these challenges—meeting collective interests in dynamic markets, building new institutions in the public and private sectors, redefining the role of law and increasing the responsiveness of our legal systems—are practical problems. We can face these problems. One of the values of the OECD is that by bringing together the lessons we have learned in Australia and the lessons other countries have learned, by pooling the information, we can all proceed with lower risks and with a greater understanding of what our neighbours are doing.

CHAIR (Mr Perton): Ladies and gentlemen, that was a terrific speech. A few days ago Rex Deighton-Smith told me that I really had to meet Scott Jacobs at this conference. Even meeting him at this distance, I am already intrigued. I am sorry that I arrived late. The Qantas mainframe computer in Sydney crashed overnight and every Qantas flight across Australia is delayed between one hour and an hour and a half.

To take up Scott's comment that a butcher in Australia has to comply with a set of regulations that is probably a metre high, the Premier of Victoria was recently given a demonstration of the power of our new business channel on the Internet. If you type in, "I want to open a butcher shop in the suburb of Boronia", something like 270 regulations are flashed up, exactly as Scott described. Had the regulations been published they would have been a metre high. Perhaps there could be one regulation that applies to that butcher shop which indicates what is required to run the business.

There are 40 minutes remaining. There are many experienced people here—people who have been coming to these conferences even longer than I have—and people with new and fresh ideas. With the 40 minutes remaining, we will run with both questions and comments.

Mr NAGLE (New South Wales): Scott, the matters you have outlined are good but are they really matters for government and not for the parliament? As a consequence, will they not involve us as members of Parliament in matters of government policy and, therefore, jeopardise our own committees' independence? That is, as we get involved in government policy, instead of looking at the regulation after it is completed we are interfering in government policy.

Mr JACOBS: I wonder if that question is not meant to be provocative. Clearly, there are major concerns for parliaments in this set of issues. Let me give you an example. One of the things I did not bring up was the whole question of the move from law to other instruments. The law is the only policy tool of government that actually has a whole profession built around it. There are really no such professions out there as economic instrumentalists or voluntary agreementers, but there are lots of lawyers. In fact, there is a whole institution of the legislature which is built around the law.

What happens when governments use other policy instruments, for example, economic incentives? What is the role of the parliament? When the European Commission proposed to take care of some of the environmental problems through voluntary agreements, which probably would be more efficient, it was blocked by the European Parliament. Why? Because it had no role to play. It saw it as a way to get out from under parliamentary scrutiny, to get the parliament out of the business of government.

The whole question of how parliaments relate to this set of ongoing reforms is critical in terms of maintaining the relevance of parliament. To give another example, governments will have to move to result-oriented administration and management. Result-oriented management means that there probably will have to be more flexibility in the executive and the administration. Yet how will parliaments maintain accountability? Parliaments themselves will have to become result oriented. In other words, rather than passing laws, parliaments may need to become evaluators of the effectiveness of public policy.

So there are very profound implications here for how parliaments behave, how they see their role and how they relate to society. One further example is the question of citizens versus consumers. Public consultation is occurring more and more, and we certainly support that. However, public consultation means that citizens relate directly to public administrations, not through representative bodies called parliaments, which was the old way to do it. What happens when citizens and administrations become their own democratic procedure? How do parliaments represent interests at that point?

This is a huge issue right now in Europe. A lot of the decision making in the European Commission is handled by negotiations and consultations with interest groups, without any involvement at all at the parliamentary level. So, again, the representation of social interests is changing away from the standard parliamentary procedures of debate and rule making. There are probably many more ways parliaments have to get involved but they are just a few.

Mr MINSON (Western Australia): Thank you for your address, I enjoyed it immensely. I have been grappling with the problem of increasing the quantity of regulation without removing the whole of the regulation before a new regulation is introduced. It was suggested a year or two ago at a seminar of this Parliament that perhaps it was time for us to introduce economic and social impact statements every time new regulations are brought forward. Do you have any experience of that? If not, what is your opinion? Do you think that it would lead to an increase in bureaucracy and extra paperwork to justify the regulations, or would it lead to a decrease in regulation or at the very least an increase in the quality of regulation?

Mr JACOBS: Mr Deighton-Smith will talk about regulatory impact analysis later. Impact assessments are very important, and I wholeheartedly support their use. One has to be careful because they can also become tools of special interests. Most countries that adopted procedures of regulatory impact analysis are seeing fragmentation. For example, there was a regulatory impact analysis on small business, then a federalism analysis, then in some countries a gender analysis, then an analysis of distribution effects and then a paperwork analysis. What do you get after all of that? I do not know. Perhaps you get a law that prefers the interests of small businesses over the interests of consumers or a law that reduces paperwork but increases inefficiencies elsewhere in the system.

Governments need to proceed with impact assessments on the basis of a very clear understanding of the policy objectives at stake. My preference would be to adopt at the beginning a benefit cost principle. A benefit cost principle should drive the impact analysis in the sense of establishing the role of analysis as articulating the negative and positive consequences of any particular decision and alternatives. That is a much better way to go forward than trying to do partial analyses based on particularly vocal subsectors of society. If you go that way the advantage is that your evaluation procedures after regulation is adopted are much easier because you have articulated right up front the most important issues you are trying to obtain.

So I support it, but I support it only if it is done on the basis of a clear benefit cost principle and if the actual analysis responds to articulated objectives which are complete, not partial. The only other matter I would add is that these empirical methods of decision making are supplemented legitimately by other decision-making techniques. One is political consensus building, which is very important. Another is international standards, which can simply replace decision making in some cases. So I would use it advisedly and carefully, but I would use it.

CHAIR: Kevin, Scott made the interesting point about the complete absence in Australia of post-making of the regulation analysis to see if it has actually met the objectives set in the regulatory impact statement. That is one of our great weaknesses at the moment.

Senator COONEY (Commonwealth): As I understand it, you said that the market has introduced new forces which we must apprehend. You mentioned the MAI—which I suppose was defeated in the end—and you asked where does the parliament come into all this. A treaty committee of the Australian Parliament which examined this matter heard submissions from many people around Australia who, if I could use this expression, with their hearts and souls were against what seemed to be driving the MAI, market forces. It seems to me that Parliament has got a role through its committee system and should have a role, in fact still does in Australia, to make powerful recommendations about treaties. It was rejected in the end; I think France stymied its advance. That treaty was brought through in Australia in a very secretive sort of way—I do not think by any intent but as a matter of fact. It was conducted through a particular department of Parliament rather than through the foreign affairs sector.

That is a quick sketch of what happens. A lot of what you are saying comes down to this: if market forces have such worldwide effect, people who come before our committee do not have any real say about things because of the efficiency of the world market. The outcomes you want do not allow them to do this; it must be done between governments. That may be right, but it seems to me to be a pessimistic analysis. I would like you to comment on the fact that we do have a committee system to which people here today will be very central. But what is wrong with a parliament that sets out a system of committees which hear directly from the people? What is wrong with a parliament rejecting a treaty like the MAI, even though the market forces are driving it?

Are you saying: Even though they want to reject it they cannot because market forces are so strong that they cannot do it? Or are you saying: It is not a good thing for governments? What is wrong with a parliament rejecting something even though it might not be in accordance with market forces? First, are you promoting market forces above any other matters? Second, I would like to hear your comments on what went wrong with parliaments responding to people, if they can, or do you think it is out of control? No matter how much we might want to transcend economic forces, nevertheless we cannot do that in a modern world.

CHAIR: An issue ran in the newspapers over the last couple of days concerning the banks paying talkback hosts to alter their editorial content. What you are talking about is moral hazard problems. Self-regulation requires moral and ethical underpinning. Perhaps the two run together. Would you like to respond to Senator Barney Cooney, but also examine this question of self-regulation and the moral and ethical underpinning of business.

Mr JACOBS: All I can say is I that am glad I am not subject to a question period. This is really quite instructive. Thank you Senator Cooney for raising that important issue. I want to be clear on this. The problem with the MAI was not too much discussion; it was too little discussion. The day has passed when we can reform by stealth. The OECD is recommending more vigorous public debate about reform. Our feeling is that reform will go faster in the long run and will be more effective if there are more vigorous debates at an early stage, considering the cost and benefits of reform and non-reform. We are recommending that parliaments play a larger role. We are recommending that governments be more forthright—administrations need to be more forthright—and they must produce clearer analyses of the consequences of decisions and non-decisions. We are recommending that society play a larger role—major stakeholders in particular from a larger range.

We do not believe, for example, that corporatist structures based on market interests, particularly labour and producer interests, are appropriate to a modern economy. We would like to see a much broader range of social interests brought in and, in some cases, that will require proaction by the administration and by the Parliament in building capacities within society. So we are not arguing that debate should be constrained; quite the opposite. Everybody learned a painful lessen from MAI. In fact, as you know, the MAI talks were closed for a long period. It was not an OECD secretariat decision; it was the request of governments participating in those talks. They were concerned that is was too early to bring the issues up. They were not prepared. And when the issues came up, they were not prepared; that was the problem.

As you mentioned, I support committee scrutiny of these issues. It is healthy, it is valuable, and it is necessary.

On the question of the ethical underpinnings of the private sector, I do not believe that the private sector has any ethical underpinnings. The changes that we have today in corporate governance and transparency are probably increasing pressures to get a higher return on capital. What is important here is government structuring of markets so that markets work in the public interest. For example, one of the enormously successful approaches to environmental hazards, in particular, leaks by producers, has been the compilation of public databases on where leaks are occurring and those databases being made available to the public. Several countries have done this. It is extremely effective, because suddenly local communities can see what has been released in the air around them and they mobilise themselves.

Then there is the reputation aspect. The private sector has a reputation. An investment in environmental protection is an investment in its own valuable asset—its reputation.

That is a much better approach than tight regulation, lots of enforcement and so forth. Structure the market. Let the market decide what the public interest is, but do not let it decide on its own. Structure the market so that it works for you. I think that will work better than trying to build on so-called ethics in the private sector.

This comes to self-regulation. I know we have some lawyers present. Lawyers tend to be self-regulated in most countries. We do not agree that lawyers are the best people to regulate themselves. Consumers tend to be hurt in a lot of cases. The costs of various small things seem to be very high in many countries. These kinds of entrenched interests we think are quite dangerous and quite cynical. We would prefer to see a much more transparent and market-oriented means of regulation. Sorry to step on your toes here, but I might as well be forthright about it.

Mr THOMPSON (Victoria): I appreciated a number of your remarks. I was interested in your comments that the number of regulations in Mexico and Korea had been significantly reviewed in recent years. From my experience in this field, I am aware that a reduction in the number of regulations does not necessarily mean that the volume of regulations is likewise reduced and, where there is a reduced number of regulations within a jurisdiction, whether they will actually relate to the immediate economic environment. Maybe there has not been an ongoing process of regulatory review which has seen the culling of the statute book over a period of time. Could you cast any light on whether the reduction in regulations in Mexico and in Korea may impact upon developing areas of economic activity, for example, telecommunications and transport? In addition, in light of your example earlier, might it be more cost effective for a Victorian butcher to set up shop in Korea or Mexico than, perhaps, in an Australian jurisdiction?

Mr JACOBS: I agree entirely with the precept of your question which is that the number of regulations is a very poor indicator of the effectiveness, efficiency, or cost of a regulatory system. I heard something quite cynical in Korea. We were there a couple of weeks ago looking at what the Koreans are doing. I was talking to an economist there who said that, when the President of Korea came out with this edict that regulations would be reduced by 50 per cent in six months, the economists were against it for the reasons you have mentioned. They said, "This is not really relevant to the major issues facing Korea." But it actually worked quite well. Why did it work? This economist said that the reason it worked was that the President chose 50 per cent rather than 30 per cent. If he had chosen 30 per cent he could have got rid of all the little regulations that had no impact anyway; but 50 per cent got into the real meat. The number was so large and so astonishing that it actually enabled them to get into the real substance of regulations. To me that was an indication of the lard that had built up over the years in the creation of a regulatory system.

I do not support these arbitrary quantitative measures on reform. You rapidly get into a vote-counting mentality because there is a large incentive for administrations to right a lot of little rules so that they can get rid of 50 per cent and keep the real 50 per cent. What we would prefer is what we call comprehensive reform. Comprehensive reform takes a look at a whole policy area or a whole sector. It looks not only at regulation but at other policies that impact on that policy objective or on that sector. For example, if you look at regulation without looking at corporate governance, taxation, industrial organisation policies such as subsidies, tariffs, or at relations between State and Federal governments, you probably will not accomplish much.

So what we would like to see is a diagnosis at the beginning of a related set of issues within a package of reforms that move forward on the basis of getting results. This has to

be accompanied obviously by a monitoring and assessment throughout the process because there will be surprises, things will need adjustment and, at the end, there will be an assessment at some period of what has happened. We think the result is more important than counting the number of regulations. We think that comprehensive approaches are more important than incremental approaches. That said, incremental approaches are better than nothing at all. So you pick your opportunities. You mentioned something about transport and telecommunications. I did not quite catch that part of your question.

Mr THOMPSON: When referring to jurisdictions that have had levels of radical reform has there has been an appreciable impact upon economic activity as a result of radical restructure or radical deregulation which could be a good role model, as opposed to purely culling the statute book of regulations that have been reviewed as a consequence of the lack of an ongoing review process? Are there any best practice models in, say, Mexico or Korea that a jurisdiction could look at?

Mr JACOBS: It is important that you understand that both Mexico and Korea have presidential systems and authoritarian traditions. So for the President of Korea to mandate a 50 per cent reduction over six months it means very little public consultation and transparency. Most OECD countries would not want to replicate that. It happened to be something that Korea could do because of those authoritarian traditions. It may be something that Korea can do now, but it probably will not be able to do it in 10 years time. Most OECD countries could not go that way. Likewise, in Mexico, as you know, a single party has held the presidency for 70-odd years. That builds up a kind of control over the system. If the President of Mexico wants something, it is pretty likely to happen. Again, is that replicable? Probably not. What is interesting from both the Korean and Mexican experiences is just how far they were able to go in regulatory reform without touching fundamental policies.

In both cases 80 or 90 per cent of the regulatory formats were probably not seen or felt by most people in their daily lives. Only a small fraction of what they actually did could be felt by the wider society. To me, this suggests that a clear understanding of the issue, and a targeting, should not be lost in the details. If it is the case that 80 per cent of regulations can be revised without people feeling any effect, then we should focus on the remaining 20 per cent. Which 20 per cent is that? There is really no way of knowing without a comprehensive assessment. That is the major lesson to be learned from those two countries, rather than the techniques that they use.

Mr TURNER (New South Wales): I am a new member of the Regulation Review Committee. Scott, you mentioned various regulations in different countries. Under the doctrine of separation of powers there are three separate elements of government in New South Wales and other Australian jurisdictions; the Legislature, the Executive and the judiciary. This morning we are honoured to have a highly regarded member of the judiciary with us. Each element of government has a separate responsibility and also acts as a check against abuse of power by the other elements. You mentioned also the relevant non-government statutory bodies. This parliamentary structure has its roots in the Westminster system of government which Australia inherited from its British colonial past. Do you envisage any special problems in implementing regulatory reform in our Westminster system?

Mr JACOBS: I am not sure that I am the best person to answer that question, because we have not done a detailed study of Australia. In fact, the Australian Government could ask the OECD to do that, and I understand that Canberra has considered it. We welcome that. What you call the Westminster system has some unique characteristics and, of course, there are

different Westminster systems. For example, New Zealand has a different type of system. Taken as a whole, the three major components—the judiciary, the Legislature and the Executive—can be found in most countries. Their roles are somewhat different but they do, by and large, provide checks and balances. This concept of checks and balances is interesting; it gets to the core of what I have been calling for, which is transparency and a more lively public debate.

Most regulations are embedded within a system of advantage. By that I mean that there are institutions and interests in the private sector which have a large stake in maintaining those interests. It is also true of the judiciary. There is a whole set of interests which can be changed only through a check and balance system. In most cases checks and balances are not working well, because there has been a large-scale shift towards technocratic regulations, which are so complex and based on expertise that they are simply not available to parliaments and, in most cases, not available to courts and politicians. It tends to be captured by the technocrats in bureaucracies at the international level.

A lot of what is seen at the WTO in debates is, for example, trade negotiations or discussions among policy networks that span countries. They do not represent country interests so much but, rather, interests of policy networks. Who are these policy networks? They are all of the people who make chemicals or automobiles, the people who understand exactly what it means when we change the regulations on tyres. In that situation what does a check and balance mean? It probably means that when a disaster occurs we get upset and ask why did we not anticipate that disaster. That is what happened in Belgium.

I spoke earlier about the wise use of impact assessment so that the consequences of decisions are clear; a more vigorous public debate which allows various aspects of the check and balance system to take a stronger role in oversight; a move to result orientation, which allows the public to understand whether results have been achieved without being forced to comment on the details of policy implementation or design. If all that is in place the various elements of the check and balance system will work much better. However, I am a little pessimistic; regulation is becoming more complex rather than less complex and regulations are becoming harder to understand rather than easier to understand. A vigorous cultural change needs to occur throughout government institutions to recreate the check and balance system.

Mr LEE (Canada): Earlier you touched on the marketisation of economies, the shift of economic risk from government to consumers and investors. I got the sense that you were talking about marketisation of governments. As an economist or a public administrator, your colleagues may apply a certain set of paradigms to measure efficiency and compliance with trade rules. What if an electorate politically does not want to marketise government but simply wants to do something that is economically inefficient? How does the OECD accommodate that stubborn, real, grass-roots, inefficient political assertion of non-market will? Is that a good thing or a bad thing? If the OECD thinks that country A is doing something terribly inefficient with health—but it is what country A wants to do because the electorate wants it, although it may be an economic—but it is a true reflection of the political desire of the electorate, how do you measure that? We have a problem with it.

CHAIR: Derek, do you assume that the electorate has full information and knows that what it is doing is not the optimal solution?

Mr LEE: I assume the electorate has all the information and I assume it has the trump card every time an election is held. There is the balance.

Mr JACOBS: I am not elected, so I am not really accountable. I remember when Queensland abolished its egg producer board a few years ago there was an interesting quotation in the press when one person was trying to persuade the Parliament to do that. The Parliament said, in effect, it is funny that you want to do that, and I want to do that too, but we do not see mothers marching down the street protesting in favour of cheaper eggs. Certainly egg producers march down the streets protesting against reform. It was certainly the case that the level of debate and the topics debated are important. To some extent parliaments have to protect the public interest, and I do not need to tell anyone that.

The OECD has two roles; one is to broker agreements between countries. We have regulations, which are signed, as part of international law, and Australia is party to them. Those are brokered agreements like any other international agreement. It is not the OECD secretariat's view on what is good or bad, it is the governments which, in their own self-interest, agree to certain behaviour.

To a large extent the regulatory framework starts on the basis of a policy objective of a government. We do not question the underlying policy goals. For example, Denmark has adopted a very high target for green energy, renewable energy. Denmark wants to move to 15 per cent of its total electricity to be supplied by renewables. That is much higher than the percentage required by the Kyoto agreement.

We would not question that, it is something that the Danish people wanted. We are vigorously questioning the way that the Danish Government chose to go about it, which was basically to build thousands of windmills of a particular design which are manufactured in Denmark. That is an old way to do it, but there is no reason why the government should invest in technology; there are so many new technologies that it is impossible to know which one is best. The Danish people will be penalised because they will pay higher electricity prices as a result of a poor decision.

We do not question the underlying policy objective. The role of the OECD is to bring to the attention of policy-makers the consequences of certain decisions: the costs, the benefits, the trade-offs, any better ways, the experience of other countries, and to provide a more thorough and useful policy debate. At the end of the day we are not accountable, we would gladly turn everything over to policy-makers to make those decisions. We can be very helpful in improving the quality of the debate and reducing the risk of policy failure.

Mr KATSAMBANIS (Victoria): Scott, thank you for your persuasions. I want to make two points and ask for your comments on them. They both relate to the reason that we are legislators, and that is sovereignty in a globalising world, and what role parliamentarians play in a State or nation. In your opening remarks you said macroeconomics are set sometimes beyond the province of a legislature. Europe is a great example of that. Therefore regulatory mechanisms become an important part of setting microeconomic parameters. What risk is there that the levers that any governments use in setting those regulatory patterns in place conflict with the broader macroeconomic settings, mainly with regard to trade liberalisation.

Recently in Europe they have been using food standards, which are very electorally sensitive, as almost non-tariff barriers. For instance, with United States of America beef the regulatory aspect seems to be in total conflict with a macroeconomic policy. That is that here and now. Taking a leap into the unknown, in a globalisation society one of the major risks is that nation states, governments and legislatures become regulation takers rather than regulation makers. Nowadays in the world economy global corporations can say, "We are above you." You

talked about sectional interests and special sectors. Will the global corporation become the new special sector of the twenty-first century that makes governments and legislatures be reactive rather than proactive in the case of regulatory reform?

Ms SWAN (Tasmania): My question is an extrapolation of previous questions from the Tasmanian Parliament, regarding compensation. It seems that a good deal of the vast changes we are now seeing globally are predicated on a view of justice being held by all parliaments and bodies complying with the new regime. What needs to be done to develop a higher level of compensation even at the level of the World Trade Organisation? Earlier you mentioned this was a somewhat nebulous and uncertain area that we were not moving into. What can be done to deliver some justice at the regional level where changes occur and there are indeed vast implications for small bodies that are electorally sensitive, as Canada has already suggested? There seems to be the need for some further development right at the top to assist people with the effect of changes to the regulatory regime. I am interested in hearing what role State parliaments, national parliaments and, indeed, the international body, the World Trade Organisation, can play in that area.

CHAIR: Denise's electorate covers salmon producers. It is a very ticklish issue here.

Mr JACOBS: These are important and difficult questions and I do not think I will satisfy you with the answers. On the question of whether parliaments are inevitably reactive rather than proactive, I think the answer in some cases is yes. Parliaments will be reactive rather than proactive. Let me amend that a bit. It is probably the case that parliaments in smaller countries will be reactive rather than proactive. Parliaments in a few of the larger countries continue to be quite proactive in exporting regulatory practices. So, the system is not proceeding symmetrically, there are many differences in how countries are affected, according to their size.

I am not sure that the size of overall gross product matters. It is really size in the market at issue. For example, if the salmon market is dominated by Australia or if Australia has an important role to play, I would imagine Australia would probably export its standards here. When that is not the case, which is true in most markets in most countries, there would be many cases when we are regulation takers. Does that mean we give up sovereignty? Does that mean we are forced, for example, to give up any control of our food standards because of trade issues? I do not think so. I do not think that is the right conclusion.

One conclusion is that by moving to international procedures or some global system we can make the world safer for consumers. In a world where we import food it is not just us who are affected by food standards; it is all the countries who are producing the food we are eating. So, a country like Australia that supports, subscribes to and participates in a global process—and Australia probably has higher standards than the global norms—is actually helping to export standards to other countries in protection of its own citizens. This is really what I meant by the fact that globalisation can make governments more effective, not less effective.

I think it is also the case that the current institutions in place at the national level are not well-suited to taking a more participatory role and a more watchdog role in the evolution of global standards. John Braithwaite has suggested a number of ways this could be resolved—regional groups of parliamentarians to oversee the WTO, for example, or some special committee to oversee the international standard setting. I think in the long run there will have to be a new power sharing at the international level between parliaments and executives. At the OECD we see parliamentarians very rarely. Some of you have visited the OECD—it is good to

see you again—and we welcome that. We would like to see parliamentarians, but parliamentarians have little role to play in what the OECD is doing. It is mostly governments that do that. I do not know what kind of role we can see for parliamentarians but we need something more: more transparency, more dialogue and more accountability to elected officials. I think this is the issue of the next 40 years.

President Chirac of France has just called for a new international body to regulate food safety. Is that the answer? Do we want to have these formal bodies to make it more transparent? I do not think that is the answer. We do not want to move everything to some sort of globalisation of governments. We can work quite well with the existing system but we need new institutions. I come back to the point of food standards and trade liberalisation because I think that is critical. Most food standards are set at the national or regional level. Not many food standards are set at the international level. Some are. An increasing number are. It is a very ad hoc process. The WTO has certain restrictions, what it calls phytosanitary standards. These restrictions are very loose. Basically what they require governments to do is just justify actions they have taken. They have to justify actions as necessary and as least trade restrictive.

This goes back to the point I made earlier. The international regime does not necessarily question policy decisions taken by you. It does not necessarily question the sovereignty of people to decide for themselves. But, as it is evolving now, it requires a higher level of proof, what we would call quality. More quality is demanded of you in your jobs. This is a positive thing. Again, this is an example of globalisation being an effective force to increase protections and the quality of law for people. Is that not what we are all about today? I would not be afraid of globalisation. I would look very creatively and very hard at new ways to participate in the global system. I invite any of you who come to Paris to visit the OECD, and we will set up a program to brief you on issues of interest to you—salmon fishing or whatever you like.

CHAIR: You will have the Canadians and Tasmanians at your door.

Mr JACOBS: We will be happy to start the dialogue.

CHAIR: Ladies and gentlemen, I believe that this is the best program we have had at one of these conferences. Peter and his team must be congratulated. We have the best representation of delegates I have ever seen at one of these conferences. Scott, you delivered one of the best first papers we have had. You talked about these international networks, and your colleague Rex Deighton-Smith emails half the people in this room at least twice a week. I hope we will all become a part of your policy network.

ASSURING REGULATORY QUALITY—A SYSTEMATIC APPROACH

CHAIR (Mr Carbone): Welcome to the second morning session. After a very brilliant first session, let us try to do our best also in the second one. We now proceed to consider in detail Assuring Regulatory Quality—a Systematic Approach. I will introduce myself by saying that as one who is responsible for regulation in the Italian Government, I am very interested in what is happening in New South Wales and in Australia generally. I immediately give the floor to Mr Rex Deighton-Smith, who is an administrator in the Public Management Service—OECD.

Mr DEIGHTON-SMITH (Organisation for Economic Co-operation and Development): I thank you, Mr Chairman, and our hosts for inviting me to speak. Victor Perton has reminded us of some of the perils of relying on technology, so I hope that my use of technology will add to rather than subtract from the value of the presentation. I begin by reminding the conference that regulation is one of the most widely used tools of government. There are widely varying estimates of its cost, but a number of them have been of the order of 10 per cent of gross domestic product [G.P.]. Other commentators have suggested that even that high proportion is too conservative because most of those estimates do not adequately take the dynamic costs into account.

We compare this with the average of approximately 40 per cent of G.P. that is represented by government fiscal budgets in most OECD countries. Clearly, regulatory costs represent a significant proportion of the government's total call on private resources. While the size of fiscal budgets is generally quite stable, the amount of regulation continues to grow, whether we measure it directly in terms of compliance costs—as is all too rarely done—or whether we measure it indirectly by a proxy, such as, the number of rules or the number of pages of rules, or the resources allocated to regulatory agencies.

Regulation is moving into new subject areas and it is also continuing to become more complex and more detailed. One probable reason for that lies in the very stark differences in scrutiny and control mechanisms placed on fiscal expenditures and on regulatory costs. The national budget processes set global fiscal limits in a wide range of specific areas on an annual basis, but no such control exists over regulatory costs. There is clearly an incentive to use regulation as a means of achieving policy objectives while keeping hidden the costs that are involved in doing so.

The increasing quantity and reach of regulation make it more and more important that governments assure its quality. My main message this morning is that high-quality regulation can only be assured systematically. A simple definition of "high-quality regulation" is that it serves the goal of maximizing social welfare; that is to say, all the things that society values, whether or not those things are quantifiable. To do this, regulation has to achieve more benefits than the cost that it imposes: but more than this, it has to be the most efficient and most effective solution available. That means that policy choices have to be systematic and rationally based.

The elements of a quality assurance system that I will discuss this morning are all aimed at serving this goal. The dynamic element of regulatory quality has to be emphasised as well. Some of the greatest losses of welfare owing to poor quality regulation are due to its inhibiting effects on innovation, entrepreneurialism and investment. We have seen this in the converse in the massive increases in productivity and new product development as well as in the reduction in prices in some industries such as the Telecoms where we have seen massive reform of regulatory structures in recent years.

What are the elements of regulatory quality? In 1995, the OECD's council adopted a recommendation on improving the quality of government regulation. This was the first international standard on regulatory quality. It was derived from the work of regulatory reform officials in the member countries who met under the auspices of the public management service. The recommendation identified four key aspects of regulatory quality. The first is its design quality. Regulations need to be consistent with each other. They should not overlap or be contradictory. They should also be flexible enough to be adapted to individual situations and new technologies or circumstances.

Second, there is analytical quality. Regulations obviously need to address a clearly defined objective. They need to yield more benefits than the costs they impose, but they also need to constitute the most effective option for meeting the objective that has been identified. Third, legal quality means that regulations need to be based on clear legal authority and should be drafted to encourage compliance and ensure enforceability. Fourth, user quality means that regulation needs to be accessible to those who must comply with it and those who are affected by it. This means that it should be easy to find the regulations that apply and to get copies of them. It also means that regulations have to be written in clear, plain language so that they are understandable. They should be brief and not numerous. The burden of compliance should not be unreasonable.

The regulatory quality recommendation includes a 10-point checklist which expresses those four dimensions of quality in terms of key questions of the regulators. It is probably a little difficult to see the overhead projection so I will highlight some of the characteristics of this checklist. First, the list covers the whole range of the regulatory process. In particular, it starts with the threshold issue of whether or not a regulation ought to be made at all, and that is covered by the first three questions. Those issues generally receive the least amount of attention in the regulatory process, yet the failure to consider objectively the true extent of the problem—whether this justifies government intervention—as well as the risks of government failure are at the root of much poor quality regulation.

Questions four and five examine the need to ensure the legitimacy of the regulation and ask whether there is adequate legal authority and whether the appropriate level of government is proposing to regulate. Question nine refers to consultation and is also closely related to legitimacy, as has already been discussed this morning. Questions six and seven relate to the question of analytical quality and whether benefits justify the costs, and ask about the distribution of benefits. This is probably the area in which regulatory quality assurance has made the largest steps forward in recent years, that is, through the spread of regulatory impact analysis and improved consultation procedures, although much clearly remains to be done.

Questions eight and 10 relate to the legal quality of regulations and to verifying whether regulations will be understood, available, and likely to be complied with. The recommendation on regulatory quality represented a point of departure in that it marked a shift from reform experts focusing on individual elements that contribute to high-quality regulation to looking at regulatory quality being the result of a system being applied to the problem of regulation making. This allows the importance of the interrelationships between the different system elements to come to the fore.

In the same year that the recommendation was adopted, work commenced within the OECD on what was called the horizontal program on regulatory reform which brings together five different directorates as well as the international energy agency. The first output of this was the 1997 OECD report on regulatory reform. It took the broadest possible perspective on

regulatory reform in member countries and considered the issue in both the thematic and sectoral perspective. It produced an integrated set of recommendations for implementing high-quality regulation and for conducting a program of regulatory reform.

Following acceptance of the report, as Scott Jacobs mentioned earlier this morning, there was a follow-up program of country reviews undertaken, which is now in its second year. This has very considerably increased the depth of knowledge we have about regulatory quality and about initiatives that have been undertaken to improve it in a wide range of member countries. It has been supplemented by a regulatory indicators database, some of the results of which I would like to share with the conference this morning.

I will focus on five elements of system design for high-quality regulation. As delegates can see, they embrace the mechanisms by which a new regulation is made and the process of keeping regulations up to date through targeting effective review and reform. The first is the policy and organisation commitment. We argue strongly that commitment to regulatory quality must begin at the political level. Governments need to make clear and very specific statements of policy on regulatory quality and regulatory reform. Support for reform and for principles of regulatory quality that is expressed in general terms risks evaporating against strong lobbying on specific issues.

A clear and specific set of policies is based on identified principles of reform—that is, principles specific enough to guide policy actions are needed to ensure consistency and coherence in pursuing reforms. Governments need also to ensure the necessary organisational structures exist. The establishment of a dedicated regulatory reform body is a key step because it ensures that reform activity is monitored and promoted, that expertise is made available within government, that training is provided and that adequate progress reporting occurs. About four-fifths of the OECD membership have now adopted explicit regulatory reform policies and allocate responsibility for co-ordinating and promoting reform to a specific body.

This graph summarises some of the most widely used elements of regulatory reform policy and supporting organisational arrangements. Each element is currently in use in a majority of the member countries. They are also used in regulatory reform programs at State and provincial levels in many of the Federal countries in the OECD membership. I should like to highlight one or two points. The last bar of the graph shows that the adoption of specific ministerial accountability is less widespread than the other elements, although this result tends to obscure the fact that ministerial committees have been established to guide reform in some countries.

Australia was among the earliest countries to adopt explicit regulatory reform policies and to establish a dedicated regulatory reform body. The Federal and Victorian governments took steps in the mid-1980s and New South Wales and Queensland followed suit towards the end of that decade. This morning you heard that the degree of openness in government is rapidly increasing in OECD countries and beyond. Technology has certainly facilitated this by allowing easier and quite cheap dissemination of laws, policy proposals and regulatory information. Transparency is increasingly seen as fundamental to democratic accountability and participation. But openness in the regulatory process makes direct contributions to regulatory quality in at least two ways. First, affected groups are a major source of information on the impact of regulations. Second, regulation that results from a process of dialogue is more likely to be accepted by regulated parties and so will be complied with to a greater extent.

We emphasise that high-quality regulation should be developed through open and transparent processes. That means particularly there should be extensive public consultation beginning as early as possible in the process. This next graph shows that consultation conducted prior to broad proposals being brought together is the least commonly used aspect or form of regulatory consultation prior to detailed proposals being finalised and then again after the detailed proposals have been made. Both of those used as consultation are much more common. In general, the message from this graph is that the use of consultation is a routine part of regulation making in virtually the entire OECD membership.

Consultation in Australia is largely ruled by government policy rather than by legislation, although laws governing regulatory impact assessment in many States incorporate specific consultation requirements, as do some of the specific Acts. Our recent report to the New South Wales Parliament noted that regulatory impact assessment laws are seen at least in some areas as having significantly increased the degree of consultation. I should add, the laws that require consultation in Australia invariably stipulate that it be open to the general public. That is a contrast to the more corporate approach followed in a number of the OECD countries.

The next graph shows the kinds of consultation being used. The specific mechanisms differ in their implications for different aspects of regulatory quality, particularly in their degree of openness to the public and the extent to which they allow sustained and in-depth discussion of the issues. With the exception of public meetings, public notice and comment is the least widely used on the different mechanisms in this graph. While 19 of our member countries tell us that notice and comment procedures are used, only 12 say that the public always or usually has the opportunity to participate in consultation. Consultation is still seen very often as a means of obtaining the views of experts or organised interest groups rather than as a contributor to the overall transparency of government decision making.

Interestingly, in the Netherlands there is an explicit recognition of these two different objectives for consultation and a conscious concern to ensure that there is a separation of expert advice on the one hand and interest group consultation on the other that consultative processes are being designed with a view to ensuring that both objectives are being achieved effectively. Consultation has to be supported by other openness measures. An increasingly widely used practice is the publication of regulatory plans alerting interested parties in advance of regulatory proposals—planning for the future. This has recently been implemented in Victoria and I understand is under development federally.

The next topic is the systematic choice of policy instruments. Decisions about whether to take policy action and, if so, what policy instruments should be used have to be made on a rational and systematic basis. The policy problem being addressed needs to be clearly defined and there has to be a realistic assessment of the ability of government action to address the problem, particularly given the likely costs of doing so. Choices about whether to regulate or to take alternative actions—such as an information campaign, voluntary industry-based agreements or the use of taxes or subsidies—have to be based on a sound understanding of the characteristics of these different instruments and their likely suitability to solving the particular kind of policy problem being considered.

A good understanding is needed also of the different forms of regulation that can be used. In addition to traditional command and control approaches, these include performance-based regulation that seeks to specify outcomes rather than inputs and thus allows the regulator to make choices about how they will apply, and technological change. We also have process regulation, which provides an effective means to regulate multiple risks by requiring companies

to implement overall process management strategies. As these questions are becoming more systematically addressed we are seeing an increasing use of both innovative forms of regulation and a range of alternatives to regulation. This can be seen in the next slide.

This graph shows the number of OECD countries reporting an increasing use of a range of different regulatory alternatives in the area of environmental policy, which we are finding is one of the most innovative areas in many countries. As you can see, it separates the alternatives into three broad categories. The first is market instruments. The second is innovative forms of regulation and the third category embraces things like education campaigns. The graph shows that the increasing use of non-traditional policy tools spans all three of those broad categories with more than half the alternatives being used increasingly in at least 10 of the 27 member countries that responded to our survey.

While this graph relates specifically to the environmental area, as I mentioned, there are broadly similar responses in relation to health and safety regulation and employment regulation. I should finish this section by saying that it is slightly misleading in fact to refer to alternatives as many countries are adopting sophisticated combinations of different instruments to achieve broad goals. So, non-traditional instruments are seen very often as complements to regulation rather than as alternatives.

I shall talk briefly now about regulatory impact analysis. To begin with its definition: it is a systematic process of identifying the likely costs and benefits of undertaking policy action. It is only through the use of regulatory impact analysis that policy makers systematically ensure that they are choosing the most effective and efficient pool. However, impact analysis can perform this function effectively only if a broad view of costs and benefits is taken, going beyond the narrowly economic impacts.

Impact analysis is often criticised because of the amount of information it requires and the fact that this seems infeasible to generate. It is also criticised because many important benefits are difficult to quantify or to put into monetary terms. These criticisms must be recognised if impact analysis is to be used effectively. On the one hand they show that it is essential that impact analysis and consultation be closely linked so that necessary information can be obtained from affected groups and impact analysis itself can be subjected to critical scrutiny.

Adequate training and expert support in impact analysis disciplines must be made available to regulators. However, even with the best impact analysis there will be important gaps and uncertainties, so we need to understand that it is an aid to decision making and not a substitute for it. Impact analysis will rarely give us a clear and determinate policy outcome but it can do much to focus discussion, narrow uncertainty and banish unsupported assumptions and poor reasoning.

Impact analysis can and should be applied to all regulation having a significant impact, whether it is laws, subordinate legislation or other legislative instruments, although the procedures may need to vary. Regulators need incentives to carry it out thoroughly and objectively, and to act on the results. Strong pressures to favour particular policy outcomes are often brought to bear so independent scrutiny and quality control over impact analysis are essential. In many countries this is the key role of the specialist regulatory review office within the administration.

As well as being integrated with consultation, impact analysis performance is closely linked to the ability to identify feasible alternatives since it is inherently a comparative

process. This is another area in which regulatory reform authorities need to take a leading role. The use of regulatory impact analysis [RIA] has expanded extremely rapidly among OECD countries. Between 1996 and 1998 the number of countries with some form of regulatory impact analysis requirement increased from 17 to 23 out of a total OECD membership of 29.

The movement is all in one direction. So far, no country has abandoned regulatory impact analysis requirements once adopted, but many countries have progressively increased the rigour and scope of their regulatory impact analysis requirements as experience is accumulated and expertise is being developed. I shall make a few points about what the graph is trying to tell us about regulatory impact analysis. The lower sections show the number of countries applying each requirement to all their regulations, while the next sections show the countries that use the requirements only for major regulation and those that use it only for particular policy areas.

First, the second and third bars tell us how many countries are using regulatory impact analysis for laws and subordinate legislation, so it is about equally widely used in those two different areas. Secondly, use of the benefit-cost principle is well-established. Ten countries are using it in all cases and eight countries are using it more selectively. That means that more than three-quarters of all countries have regulatory impact analysis programs. Interestingly, the programs have responded to the frequent criticism that benefit-cost analysis does not take distributional consequences into account. Fourteen countries require that these effects be made transparent in their RIA.

By contrast, some other quality assurance elements are not well-established. Only 11 countries require that the body independent of the regulator review the quality of the analysis, and only five require this in all cases. Even fewer countries, nine, require the release of impact analysis documents for consultation, and only five do that in all cases. Australia, federally and in most States, was an early adopter of impact analysis. There are now almost 15 years of experience with RIA in some jurisdictions. Benefit-cost analysis is being formally required from the beginning, although clearly quantification standards vary.

Interestingly, the Federal approach to impact analysis is focused mainly on primary legislation while the States have focused on lower level rules. Most States have integrated impact analysis with consultation to a higher degree, while independent quality control is being exercised either within the administration or by parliaments, or sometimes both. At the outset I mentioned that regulatory quality assurance is a dynamic concept. Even the best quality regulation becomes progressively less relevant as economic and social conditions change, technology develops and learning about the use of regulatory tools occurs. So sufficient resources need to be devoted to the task of reviewing and updating regulation while the review processes themselves must be effective.

This graph shows that OECD member countries have reported a surprisingly high degree of review activity. It also shows much variation between countries. It specifically shows the proportion of regulation in three major policy areas—environmental regulations, health, safety and consumer protection regulations and employment regulations—that have been subject to review over the previous five years. More than half of our respondent countries, including Australia, say that they have reviewed at least half of their legislation in each of these areas in the past five years, although a significant minority of countries say that they are undertaking little or no review activity in these areas.

While our data indicates that there is a great deal of review activity, it also

suggests that there are some serious methodological problems with many of these reviews, with a lack of methodological rigour, a lack of independent scrutiny of the results and a lack of public involvement being common problems. That means that the benefits of the reviews in terms of legislative improvement are often much smaller than they could be. Of course, effective review programs also require that the right strategic choices be made about what to review. Countries have adopted a number of different ways of making the choices.

Some countries have convened panels of business representatives to set priorities. Other countries have focused on the review of legislation with particular characteristics—Australia's national competition policy is a good example. Targeting of regulation relating to specific industries identified as being of strategic importance is also used. Another option being used increasingly is to require that all legislation be subject to review after it has been in force for a certain number of years. Few countries are following the approach used by most Australian States in providing for mandatory sunsetting of subordinate regulations, but there is a clear trend to greater use of mandatory review requirements, particularly as part of the text of individual laws.

One area of review of existing legislation that is receiving attention from many governments is that of reducing administrative burdens. It is recognised that improved technology, streamlined process requirements and better co-ordination can provide opportunities to reduce the regulatory costs associated with paperwork and reporting without compromising the regulatory objectives. Reducing licences and permits is a major focus of this effort, as is improving information and processing for licences. Efforts are often targeted at new start-ups, intending to encourage entrepreneurialism.

I shall take a quick look at some of the issues that are emerging as particularly important for future work on regulatory reform and that need to be considered and designed into regulatory quality assurance processes. First is the design of regulatory institutions. Increasingly, governments are establishing independent and semi-independent regulators, separating regulatory policy on the one hand from administration and enforcement on the other hand. There are various models for doing this which differ in their degree of independence from ministerial direction in reporting arrangements, appointments and the like.

Another area in which the institutional designs differ fundamentally is the choice between sector-specific regulators and overarching regulators which cover a range of sectors with related characteristics. A body of experience is now accumulating with these different approaches, and a closer look at the benefits and disadvantages of each approach is required to help guide us in future institutional design. There is a question about managing regulation at different levels of government. The regulatory landscape is becoming more complex.

International institutions are regulating in an increasing range of areas while in many countries decentralisation is increasing regulatory powers at regional and local levels. Non-governmental bodies are increasingly writing standards that form part of the regulatory structure as well. All these developments raise issues of co-ordinating regulatory standards, encouraging quality in supra-national institutions and ensuring that the appropriate level of government is regulating in each area. Compliance has already been mentioned briefly this morning. As the volume and complexity of regulation increases, voluntary compliance efforts can diminish while enforcement clearly becomes more difficult.

Until recently few countries had given specific attention to the compliance elements of regulation, but recent research conducted by the Public Management Service shows

that this picture is beginning to change. For example, five out of nine countries replying to a recent survey stated that they were in the process of designing some sort of compliance strategy. I shall emphasise a few key messages about regulatory reform. Probably the most important message is that successful reform requires support at the highest political levels. This must be sustained and it must be based on specific principles so that it can be maintained in the face of strong opposition on specific issues from vested interests.

Reform is a long-term process. Indeed, it should be a permanent part of government management. Many of the benefits are not attained, or at least are not visible, in the short term. Thus, benefits must be widely distributed while the goals and benefits of reform must be effectively communicated. Strong constituencies in favour of reform must be developed to counter the many and strong vested interests that will oppose reform. Reform should be based on the principle of maximising social welfare, rather than focus on improving the situation of specific sectors, as was often the case in early reform efforts that exclusively promoted reform as benefiting business, or even small business, and in doing so narrowed the support base for reform and skewed the nature of reform efforts.

Reform efforts must have organisational support within the administration. In particular, a Minister or Ministers should be accountable, and there should be a dedicated reform body. Reform needs to combine deregulation in relation to areas of economic regulation—setting prices, restricting entry and so on—reregulation to enhance the functioning of markets and improved regulatory quality. It needs to focus on alternative tools available to government, and governments need to make informed choices. Finally, achieving high-quality regulation requires a systematic effort that embraces the length of the policy-making process. The different elements of regulatory quality assurance are all mutually supportive and achieve their potential only if they are implemented together. As the scope and quantity of regulation continue to expand, the need to improve regulatory quality becomes ever more urgent.

CHAIR: That was a very interesting presentation. Before I give the floor to the two commentators you may be interested to know what is happening in Italy is a practical example of how we are trying to follow the OECD recommendation. In Italy better regulation means above all reshaping the role of primary legislation. Italy is a civil law country. Law regulates almost everything. We have more than 60,000 laws regulating all the fields of citizen and business life. A key to simplifying this regulatory system is an institution peculiar in OECD countries that deals with delegislation, not deregulation. We live by rules but we abandon the law in ruling that sector.

It works in this way. The parliament, with the law, gives the government the power to abolish laws that we no longer need and in doing so the government rewrites the rules of an administrative procedure, streamlining it. That is the delegislation model and the review of our delegislation program will concern more than 200 administrative procedures. This will involve every specific detail of an administrative procedure and the Government will abolish 400 primary laws, 50 per cent of them being older than 1960. Also, 75 per cent of the procedures involved in the program of delegislation and simplification relate to business.

As with many other countries we have several instruments to streamline procedures, such as, silence is consent, self-notification, self-declaration, fixed terms of conclusion of a procedure and the one-stop-shop. Our one-stop-shop for business, for example, is not limited to the provision of information and advice, as I have seen in the United Kingdom. The one-stop-shop in Italy must also provide all the administrative authorisations that are needed either for the location and the start-up of a new industrial plant or for widening, renovating or

restructuring an existing one. With a new one-stop-shop 42 different procedures are involved dealing with environmental and fire department authorisations. They are now being replaced by a unified one. This will considerably reduce the time a company must wait to receive the necessary authorisation, which is currently too long and unpredictable.

The one-stop-shop works in this way: It allows the city government, which is the authority responsible for the final decision, to convene the representative of different government bodies involved—for instance, the environment ministry, health care agencies, regions and fire departments—to reach a simultaneous decision instead of individual decisions made one after another. The one-stop-shop in the Italian version also ensures that a decision is taken anyway within a fixed limit the time, that is, 90 days in less complex cases and eight months in more complex cases. At the end, if there is no answer or if one of the representatives in that body does not give an answer, the answer is yes. If the administration says "No", we try to force it to say clearly and expressly, to motivate strongly why they say no, otherwise the answer is yes.

Returning to the theme of the session, which is ensuring regulatory quality, in Italy we have two bodies, one in the parliament and one in the government, to ensure regulatory quality. In the parliament there is a legislation committee that is quite similar to the one in New South Wales which controls the parliament's work in writing new laws. In order to review the enormous number of existing laws, we have recently created a central technical unit in the government directly allocated in the staff of the Prime Minister, and the Prime Minister's Office, supported by this new unit, will do mainly three things: control the regulatory impact analysis made by single ministries, lead the consultation—we have a double level consultation before and after the regulation is introduced—and, above all, undertake codification to try to include the 60,000 laws into some codes while streamlining the procedural aspects of this law.

Ensuring regulatory quality in Italy, as in many other countries, is becoming an autonomous public interest. It is an autonomous public interest in government and in parliament, different to other specific public interests such as competition, employment, the environment and health care. This relates solely to ensuring regulatory quality and it is represented by a specific body in the parliament, different from the other sectorial committees, and in the government. In my opinion this interest exists without taking account of the constitutional system in every country and even without taking account of the regulatory system. We have seen the OECD working with countries of civil and common law or even other exotic models such as in Japan or Korea. Every one of these countries is interested in ensuring quality of regulation and that is why I am happy to be here. I would now call on the first of our commentators, Professor Margaret Allars, Faculty of Law, University of Sydney.

Prof. ALLARS (University of Sydney): My comment is on the report by the Public Management Service of the OECD on regulatory impact assessment in New South Wales, but it touches in many ways upon the paper which Rex Deighton-Smith has just delivered on assessing regulatory quality. As he said, since 1984 Federal and State governments in Australia have taken steps towards a fundamental transformation of the processes of regulatory review. A consensus appears to have developed amongst Australian governments that regulatory impact assessment [RIA] is an appropriate basis for evaluation and determination of policy.

Despite the emergence of some kind of consensus, there is a real question as to whether in Australia we have reached what might be called a constitutional moment , a moment perhaps spanning a decade but representing a stage at which there is indeed a fundamental transformation in the processes of government. The OECD report suggests quite firmly that the answer is in the negative. While much has been achieved in Australia, there is much more to be

done. It is in this context that the authors of the OECD report have provided for a comprehensive and well-reasoned charter strengthening the process of RIA in New South Wales and, where applicable, in other jurisdictions in Australia.

In the report there are 10 principles from the OECD Best Practices which are systematically applied to reach findings about the process of RIA in Australia. It seems to me that those 10 principles can be usefully grouped together into three categories. The first category concerns political commitment, the second concerns the quality of data and its analysis and the third category concerns consultation. I want to make some brief comments about the first, political commitment, and the third, consultation.

Turning to political commitment, the OECD principle No. 1 is entitled "Political Commitment" but it seems to me that principles Nos 2, 3, 6, 7 and 10 as set out in the report are also about political commitment. This is because political commitment means more than just high-level policy statements as required by principle No. 1. It also requires a commitment which is genuine because of its practical implementation. The OECD report states that commitment has not been sustained over the longer term in New South Wales and that indeed it has waxed and waned. The report recommends that there be an expert body centrally located within the executive branch to oversight the RIA process in New South Wales.

I want to make three comments about the OECD report in this respect. The first comment concerns the statutory framework which we have in New South Wales for conducting RIA. I think that this framework should not be undervalued. Having an Act that places responsibilities upon regulators with regard to RIA creates a much stronger footing for the conduct of RIA than does a system where responsibilities are sourced purely in executive arrangements. The Act provides a clarity and a stability in the expression of those duties. Of course, to maintain political commitment such legislation needs to be kept under review. As recommended in the OECD report, review could include extension of RIA to amending statutory rules, to a broader class of legislative instruments, to incorporated material such as codes, and even to primary legislation, provided that this is targeted by means of a threshold test.

The second comment I want to make about political commitment concerns the institutional structure for ensuring regulatory reform. The report recommends an executive body centrally located to conduct oversight. The argument is based chiefly upon the concept of independence. I think that the argument for executive oversight becomes a stronger one if the proposal is for a truly independent statutory authority. There is indeed a need for a well-resourced body located close to the nucleus of executive power to wield the political clout needed for regulatory reform to be taken seriously in departments and agencies. Consideration does need to be given to that concept of independence.

The third comment I want to make concerns the role of the Parliament and disallowance. The OECD report does not seem to give a lot of attention to the unique nature of the contribution which a parliamentary committee can give to oversight of regulatory reform. The report does not say a lot about the power to disallow delegated legislation but it does note that this power does not seem to be exercised as much now as it was prior to 1993 in New South Wales. As well, the evolution in the use by committees in Australia of co-operative and negotiated arrangements for dealing with non-compliance with scrutiny criteria needs to be given further study. Such practices need to be exposed to scrutiny. The detail in reporting ministerial undertakings, and whether or not they are honoured, differs from one committee to another and yet this is a critical aspect of enforcement of RIA. It would, indeed, be useful to examine these aspects of RIA in greater detail.

Let me turn to the second area that I wish to consider—consultation. The OECD Best Practice principles set out in the report are principles Nos 8 and 9. The OECD report finds that the New South Wales RIA system does rank highly in relation to public consultation under principle No. 9. Only limited findings could be made about principle No. 8, which is concerned with open communication of RIA results to regulators. The comment I want to make here is that statutory duties to consult interest groups are a mechanism for legitimising discretionary power of delegated law makers. This form of accountability has its foundation in theories of participatory democracy. It is therefore curious that the OECD report and Best Practices have little to say about the role of RIA in protecting and promoting democratic values. It is said that it is essential that RIA and public consultation be closely linked, but the OECD Best Practices regard the ultimate value served by RIA as being maximisation of social welfare.

Rex Deighton-Smith has said that consultation is simply of instrumental value in achieving that goal. I would like to argue that there is a process value in consultation itself. Consultation is not simply instrumental to effective cost-benefit analysis by improving its information base. Consultation is essential to RIA, not just associated with it. From that point of view in New South Wales we need to commend the inclusion amongst the criteria applied by the committee the question of non-compliance with consultation requirements in the Subordinate Legislation Act. This reinforces the inherent value of the process of consultation with interest groups affected by delegated legislation.

The more recent initiative in New South Wales of tabling the regulatory impact statement in both Houses of Parliament adds another dimension of open democratic process, further encouraging public participation. We need to conclude that while the constitutional moment has so far eluded us in Australia, there is no reason why it might not arrive within the next decade. As the OECD report so cogently implies, this will require political commitment of a very practical kind. It will also require a much deeper understanding of the democratic value of consultation within RIA.

Mr BOOTH (New South Wales Cabinet Office): As a bureaucrat who has spent a great deal of time sitting on the advisory benches, I find it refreshing to step up to the table, although as a matter of habit I still find myself sitting back there. Part of my responsibilities as the Policy Manager within the New South Wales Cabinet Office cover regulatory reform. As the central policy agency within the bureaucracy, the New South Wales Cabinet Office has an overview role of regulation and implementation of policy.

To a large extent, Professor Margaret Allars has covered comments on the OECD's assessment of the New South Wales regulatory impact assessment process. I would like to provide comments on the OECD's quality framework that Rex spoke to from the perspective of a practitioner within a central policy agency, stating up front that the observations are my own. The OECD has developed an excellent framework, as represented in Rex's paper and the comments by Scott earlier, that can be used to try to move towards a higher quality outcome in regulations. In passing, a comment should be made about the value of the OECD's role in picking up best practice ideas from around the world, having the scope to look ahead and bringing these ideas to application.

The key issue that I would like to address is one that was raised in Rex's paper—that is, the need to have a high-quality regulatory review and reform process within government as one of the planks on which to get better quality regulation. From my perspective as a policy manager, the key question is: Where is the best place to allocate resources,

recognising the fact that resources do not come cost-free?

I ask you to imagine a very simplified policy cycle. Policy development is undertaken in most cases by regulatory agencies. The policy moves from the agencies through the Cabinet Office and government and finally through the regulatory review committees to the making of regulation. It then goes back to the agencies for implementation and then, hopefully, back through a monitoring and review process. With time, it then goes back to the policy development phase.

In the setting up of a process, and in looking at the key points within that cycle to try to ensure high-quality regulation, the temptation is to allocate resources at the making of the regulation stage and, to some extent, at the review phase. This represents the gatekeeper role. As people who are interested in good regulation—and what we are looking at is a regulatory problem in itself—perhaps we should be looking more closely at better ways of spreading or at least focussing our efforts. In that regard, I would like to pick up the comment by the OECD that we need balance throughout the whole regulatory system in our attempts to improve the quality of regulation.

My comments then focus on the policy development phase, which is where most policies are initiated, developed, analysed and then put up as proposals. An argument has been put that there may be a problem in this area in relation to regulation quality. Without wishing to give any credence to the argument, this problem may arise because of a number of reasons. To be charitable, there may not be full awareness at agency or responsible Minister level as to what is the current perspective on the role of government. It has been stated that there is potential for agencies to be too close to the action, as far as the bodies they are regulating are concerned, and there is the risk of capture. As well, in recent times, an argument has been put that agencies are starting to view regulation as a surrogate for their budgets. As their budgets are cut back they attempt to keep their influence through regulation.

If we want a culture shift as an outcome in this area, as the OECD put it, how do we go about it? I would argue that we should be looking at it as a regulatory problem and examining the three broad areas that are usually addressed in terms of regulatory management instruments—command and control regulation, economic instruments and education. For example, at the command and control regulatory end of the spectrum there are statutory review requirements in the Subordinate Legislation Act which apply to a great deal of regulation. Similarly, the Competition Principles Agreement contains the approach that has to be adopted for new and existing regulation, at least in the business area. We have been looking at the possibility of introducing regulatory flexibility and performance-based requirements in New South Wales. As a result of the OECD report we will be looking closely at the need to improve the operation of the Subordinate Legislation Act in New South Wales.

On the issue of education, New South Wales has a range of guidelines. Training courses have been run for agencies, although I am sure they can be improved in terms of getting a better appreciation of the role of government. The key area, which has been touched on in a few contexts today, is public participation, which is a lever on the agencies and can keep a close eye on what agencies are doing in their regulatory programs. NSW has consultation requirements, and guidelines on how participation processes are to be conducted. The key question is: To what extent in all areas is the public able to take advantage of these requirements? It comes at a cost to the agencies and to the public in terms of getting up to speed with the issues.

Currently, economic instruments are probably a more interesting approach. It is a matter of offering incentives for the managers of regulatory agencies and also the Ministers.

National Competition Policy payments provide a large financial incentive to State governments to improve regulatory quality. To what extent that transmits through to the managers of regulatory agencies is something that I deal with on a daily basis, and it is patchy. There are currently requirements for agencies to have regulatory plans. The extent to which they can be taken a step further and tied into the contracts of chief executive officers [CEOs] could be looked at. Probably the most interesting area is the possibility of tying regulatory costs into the fiscal process through regulatory accounting and budgeting. In that regard we are watching with interest the outcome of the current Commonwealth evaluation.

There is scope to look at using our skills as regulators to see if we can better tailor the system to come up with high-quality regulations. I note in the last paragraph of his paper Rex correctly said that it is a matter of being pragmatic, incremental and targeted. New South Wales has a commitment to continuous improvement. We wait with some interest for the further work being done by the OECD in the area of compliance and institutional arrangements as far as regulators are concerned, and particularly the exercise investigating the impact of differing levels of government on the quality of regulation. If you want some ideas of the issues, if not the answers, you can talk to us in New South Wales.

Senator COONEY (Commonwealth) Rex was talking about expert advice and independence. I would be interested to hear how they could be established. The Australian Institute of Judicial Administration has recently spoken about the disappointment of judges about the experts that are coming before the courts. The independents the new Government relies on are different from the independents that we relied on. The use of expert advice and independents is a great concept but how is it achieved. It seems to me that Rex needs to answer that because it is part of his propositions. As has just been said, the priority about where the money is allocated seems to be a political question. In the end, I do not think you can set aside a political decision made on certain values, other than the ones you are going to talk about.

Ms HOLMES (Western Australia): My question is to Mr Deighton-Smith. What is the OECD's definition of "social welfare" in relation to regulatory quality? How is it proposed to ensure that regulatory quality remains assured when the regulatory powers are delegated and shared by non-statutory bodies?

Mr PERTON (Victoria): I wish to make a comment rather than ask a question. In relation to Professor Allars' comment that we need to look at the social welfare impact and that public consultation is good in itself, one of the great problems in Australia is the quality of public consultation. Often we mistake campaigns by lobby groups as good public consultation. Time and time again we do not use the instruments that are available to us to obtain the opinions of the common people. An example with which I have bored a number of people in this room ad nauseam relates to environmental regulations that affect small business. Victoria has some prescribed premises regulations that affect take-away cafes.

If take-away cafe owners are sent a 32-page regulatory impact statement with a letter that states, "We are regulating your grease trap for the purposes of keeping the Yarra River and Port Philip Bay clean", they will not read it because they work from 6.00 a.m. until 11.00 p.m. If, on the other hand, they are sent three questions by way of fax, email or letter which ask: "Does your grease tap work appropriately? Is it costing you too much? Is there a better way to do it?", you will not get 1,500 replies but one or two of the replies may change the way you do business. I do not see that happening in New South Wales or Victoria. The great challenge to us is to make public consultation work by asking people questions that are relevant to their work and activity.

Mr DEIGHTON-SMITH: First, on the question of independence, obviously, there are many different definitions of independence. One interesting distinction I think is the question of independent advice, oversight, within the administration verses at the parliamentary level. I do not think the two are substitutes for each other; I think they perform complementary roles. When we talk about independent assessment, advice and oversight, we are generally focusing on that sort of assessment within the administration. That is certainly much more common in the member countries. We have done more research and we know more about it. The key point is that you need to have this advice, this oversight, independent of the body that is making the regulation. The reason that we emphasise the importance of this independent oversight body being at the centre of government is that a whole-of-government perspective needs to be taken.

The danger is always that individual regulating agencies respond to particular constituencies; they are too narrow and the broader view needs to be taken. What are we talking about when we emphasise the role of independent oversight bodies is some means of ensuring that the broader view is taken and that everyone's interests in society are being taken into account. That leads me to the other question: What is our definition of "social welfare"? The point that I think we need to emphasise is that people looking at the idea of regulatory impact analysis, looking at cost benefit analysis, see those things as economists' concepts, as being very narrow, and as being restricted to things that you can quantify or, even worse, that you can convert somehow into dollar terms. So their concern—a quite legitimate concern—is that important things get left out.

In the work that we have done, and in publications that we have produced on this issue, we have consistently tried to emphasise that our definition of "social welfare" is broader than that. From our point of view, regulatory impact assessment has to take into account all the things that we value, whether we can quantify them and whether or not we can put them into monetary terms. To take that broad view in a sense makes the impact analysis more difficult to grapple with; it makes it less elegant than it might be if we took a narrower perspective; but it also makes it more useful in providing an input into the political decision-making process. In a political decision-making process the question is: Can we improve the way in which it operates by providing more and better information for those decisions to be made?

There was also a question about how to assure quality where there is a delegation of regulatory powers, particularly to non-governmental bodies. This is extremely important. I think there is a long way to go in doing this, particularly because we see in many areas the extent of those delegation increasing. The tendency to make, as Scott mentioned, technocratic regulations that are detailed, based on highly arcane prescriptions, means that it is difficult to control that. Transparency, a theme that has loomed fairly large already this morning, is one part of the answer. But it needs to be clear what powers are being exercised by these non-governmental bodies, and how they are exercising them. The accountability needs to be maintained in that way. But we have a lot more to do in designing that system and making it work properly.

Prof. ALLARS: The benefit of the consultation requirements within RIA is that they address the problem of private lobbying of government, attempt to open up participation and reduce inequalities in access to government to attempt to influence policy. There can be practical

difficulties for many people in achieving that equality of access. I do not think that is an insurmountable problem. There are probably ways in which the process can be refined so that regulatory impact statements in some way can have easy access explanatory versions, particularly for those groups that do not have a well-organised association or umbrella group to represent their interests. This is something that is done in administrative tribunals where there are users guides to the tribunal. I think it is certainly something that needs to be addressed.

CHAIR: It is time for us to have the official photograph taken on the steps of Parliament House.

(Luncheon adjournment)

COMPETITION POLICY

CHAIR (Mr Loone): It is my pleasure to chair this segment. I am a member of the Subordinate Legislation Committee of Tasmania. It is my pleasure to introduce the Hon. Kevin Minson, Chairman of the Standing Committee on Uniform Legislation and Intergovernmental Agreements, Western Australia. Kevin was born on 5 May 1947 at Port Hedland, Western Australia, and was educated at Mingenew State School, Hale School, Perth, and the University of Western Australia. He was involved in the pastoral and farming industries prior to entering Parliament as the MLA for Greenough in 1989. He retains an interest in agriculture and is the managing partner in the family farming property east of Dongara in the mid-west of Western Australia. He has also practised as a dental surgeon.

Kevin was a member of the Opposition frontbench from 1989 to 1993 and was Deputy Leader of the Opposition from June 1992 May 1992. He was also a member of the select committee inquiring into the implementation of the recommendations of the Commonwealth white paper on HIV-AIDS from 1989 to 1990. When the Coalition came to Government in February 1993, he was made a member of Cabinet and during the following four years variously held the portfolios of environment, Aboriginal affairs, disability services, works, services, mines and corrections. Following the 1996 election, he was elected chairman of the Standing Committee on Uniform Legislation and Intergovernmental Agreements. It is my pleasure to ask Kevin to speak to us on the national competition policy.

Mr MINSON (Western Australia): I see a smile on the faces of my colleagues from Western Australia; I really must do something about my curriculum vitae, it has been circulating for too many years. I note that we have started a little late and that the most valued sessions are those following the delivery of speeches. I have somewhat curtailed my presentation, mainly because it has been circulated in full. This is a reversal for me; as all members of Parliament would know, what we say in Parliament is recorded in *Hansard* and is there for all to read. But what we mean to say never sees the light of day. However, today my presentation is unique; what I mean to say is being circulated and I hope that what I actually say will not reach print. It is with a pleasure that I address the subject of competition policy. Obviously in half an hour one cannot give a complete expose.

Recently the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements completed a report on competition policy that did not in any way pretend to be an exhaustive rundown. It was, rather, a window into competition policy as it was implemented in Western Australia, why it was being implemented and to get feedback from the public. The committee found that members of Parliament were being pressured from time to time by people who were ascribing all sorts of things to competition policy. My comments are directed to and around that report and in no way do I intend to address the complete area of competition policy; indeed, it would be foolish to do so. In summary, we found that competition policy had been used in general to positive effect in Western Australia but, unfortunately, it was often misused and abused. Most definitely we found that competition policy was very badly misunderstood by the general public and, unfortunately, within government.

Competition policy should be a positive tool, as it was designed to be. Unfortunately it has often been used as a holy grail and as a vehicle to disguise other things. The social cost must also be borne in mind when one considers competition policy. The committee found that governments are often blamed for using competition policy when, in fact, they had not used it at all. We found that in the area of privatisation—and this is common to virtually everyone in this room—governments over the past 10 years have accelerated the process of privatisation.

Usually privatisation is to restructure or retire debt, for one reason or another, often to cut interest payments and regain a higher credit rating so as to pay less interest on the money that is owed. Unfortunately, often the public perception is that privatisation is as a result of competition policy. Any government that blames privatisation on competition policy is being a tad mischievous and a little silly.

So what is competition policy? Basically it is the restructuring of markets and marketing service provision to see that the public gets the best result without sacrificing quality. It has a world-wide and Australian history. On the international scene globalisation has many factors. In the United States of America there was an economic force of a quarter of a billion people. In trying to compete with America we have seen other trading blocs begin to grow, and try to implement a competition policy to make themselves more efficient so that they can become more efficient traders. The obvious example that springs to mind is the European Economic Community which tried to get enough European nations together to reach that magic number of a quarter of a billion people. However, it has been confronted with huge barriers that were not confronted by America.

Competition policy, internationally, has often been driven because of economic imperatives to become more efficient so that it can simply compete in the global market. There is no question that globalisation is not only with us, but is with us to stay—and it has not finished yet. Travelling in the past quarter of a century has progressed to such an extent that going to another country is almost as easy as getting on a bus. Transportation of goods is so easy and efficient that crayfish, or lobsters, can be delivered live and kicking from the west coast of Australia to the tables of Japan. That was not possible a few years ago. Advances in communication have meant that the globe has shrunk. In the past five years the spread of the Internet has meant that relationships and interaction between corporations, civilisations and society is so easy and quick that globalisation is increasing at a remarkable rate. As that happens we must acknowledge that competition will also increase and competition policy is really directed at making sure that we are as efficient as we can be.

In Australia competition policy began with agreements between the various Australian governments. In 1991 the Council of Australian Governments [COAG] acknowledged that action needed to be taken with respect to competition policy—it is sobering to remember that that happened about nine years ago. In 1992 an independent committee of inquiry into national competition policy was appointed and was chaired by Professor Hilmer. The Hilmer report, which was released in 1993, was very important. It proposed to extend the Trade Practices Act 1974 to all government businesses, statutory marketing authorities and organisations and unincorporated associations which had not previously been affected by the Trade Practices Act. In a way it was a form of anti-trust legislation, but was not given that title. It also identified many government regulations and interventions that impede market forces. That is a problem in Australia, because of the barriers that existed for years between the States with respect to trade despite what our Constitution provides. I will refer to that later.

In August 1994 COAG agreed to a package of reform, and this is expressed in a policy arrangement that was agreed to on 1 July 1995. Those intergovernment agreements contained a number of things: code of conduct; a competition principles agreement that outlined work programs of the National Competition Council; and, finally, agreement to implement the reforms in return for financial payments to the States. They were in the form of incentives and in the form of compensation, because from time to time where a government had to opt out of a business or outsource a business in some form or other from time to time there was a need for compensation.

I want to address the matter of competition policy agreement reforms because I think they are particularly important. First of all, all governments agreed to competitive neutrality. In particular, that applies to government instrumentalities that are involved in business in some way and who therefore should have to pay to the Government a portion of their income. That would be the tax that one would expect the private sector to have to pay. They had to pay their debts, something they never had to deal with before. It was extremely sobering for a head of a government department who may have been in the bureaucracy for 20 years suddenly to have to deal with the matter of servicing debts and to include all costs.

A couple of good examples found in Western Australia were our ports. We do not have any private ports, but to bring them under a regime that would have to be confronted by a private port was quite sobering for the port authorities. In one portfolio area I had—environment—we had an arm of the Conservation and Land Management Department which had quite a large tree nursery and tree growing and plantation operation. I received a number of representations from the private sector saying there was just no way they could compete with us. I thought that was rather strange because government departments were supposed to be inefficient, but when we looked under the surface we found the departments used government vehicles that were not ascribed to the cost of running the operation, and telephone charges, transport charges, insurance and all those sorts of things that would normally be paid by a business and are paid by the private sector, were not factored into the cost of the end product produced by the particular arm of government. So, in agreeing to competitive neutrality, there has been quite a dramatic effect, at least in Western Australia.

There was also an agreement to structural reform and a need to separate often the regulatory function and the service functions and to separate out of a monopoly those contestable areas. For example, in electricity, the generation, the distribution, the billing, and so on, can be separated out and can be treated differently. That does not mean they cannot be provided by the same provider but at least they can be separated out and sold separately, let out separately or run by separate arms of government if that is necessary. Thirdly, an access regime was agreed to. That really guaranteed third party access to such facilities as gas lines, rail tracks, water lines, oil, ports and electricity.

The fourth point in that competition policy agreement reform procedure was an agreement to review regulatory legislation. It became necessary to see that legislation does not unreasonably restrict competition unless, first of all, the benefits outweigh the cost. I mentioned the matter of social costs before. We are finding in Western Australia that they are things we increasingly have to address. Secondly, the objects of the legislation could not be achieved unless there was the restriction giving a monopoly. Where those particular circumstances exist, I think it is probably a good idea to put a sunset clause on that monopoly so that from time to time it becomes compulsory for Parliament to review the monopoly it has given to make sure that the objectives of the legislation continue not to be able to be attained any other way.

I guess I could mention a couple of examples. One is rail. It is true in Western Australia we would have had a very poor rail network early in our career had it not been for a legislative monopoly. Of course, as time went by there was no further need for a monopoly and we had a good rail system before road transport was in place. Our monopoly situation grew up largely to protect rail from road. We have now had quite a process of change and upheaval in Western Australia to break down the monopoly that was at one time legislated for rail. There are other examples in Western Australia but time precludes me from going through those. I will talk a little later about the wheat industry.

Governments must also address other reforms associated with competition policy: competitive tendering, corporatisation, commercialisation and from time to time privatisation. I should say here, delegates, I have found and our committee has found that most of the misunderstanding arises at this point, and I allude once again to the comment I made in my opening remarks, that privatisation is not a requirement of competition policy. It may be, as a result of some inquiry of how best to deliver a service, that some government service or enterprise is sold but it is not a requirement of competition policy. I make the comment that governments should see that services are delivered but they do not necessarily have to provide them. Therefore, we can have a process of privatisation or competitive tendering or, indeed, benchmarking in areas where there is no competition to those service providers. In Western Australia—and I suspect in some other States also—service providers in very remote areas are not going to have an awful lot of competition but nevertheless they must subject themselves to benchmarking to see that their practices are up to date.

There was reform and competition and there was a need at times for uniform legislation. There has been a tacit agreement that national corporations should not be affected by conflicting regulatory regimes. It may come as a surprise to some delegates—for example those from New Zealand, which has never had States and has only one government—to realise that in Australia, which has a number of States and Territories, that from time to time we find our regulatory regimes are so conflicting that it really is a barrier for corporations that operate outside a particular State boundary. There was a need in Australia to look at reforming that situation. There was a requirement to progressively restructure those industries that have traditionally been government owned. Therefore, the production, sale and distribution of energy, water and rail have been dramatically affected right across Australia, and certainly that has been the case in Western Australia.

I would like to make some comments about some specific industry reforms, because we found in our deliberations and in our evidence taking—because we took a lot of evidence from the public—a lot of concern from various industry sectors. I will not go into great detail about the public sector, because I suspect most of you realise that the public sector has been quite dramatically affected by competition policy—probably more than any other industry sector, if I can call it an industry. Electricity reform is another area that has been difficult simply because when there is one legislated provider, then the generation, distribution, billing, marketing and regulation all tend to be in one basket and it was never designed to be separated. However, we have found by travelling about and taking evidence that it is quite possible to separate out many of these functions, to let them to separate companies, have them carried out by separate arms of corporatised government departments or treat them in some other way.

The first step, I would suspect, is to corporatise and the second, if it is deemed necessary, to privatise, but we in Western Australia are faced with a difficult situation simply because we only have one electricity generator. We only have one grid, and to convert a public monopoly to a private monopoly would not appear to be a terribly forward-looking step. However, I am sure there are ways to handle that. Western Australia cannot be a part of the national grid, simply because there are a couple of thousand kilometres of desert between the national grid on the south-east corner of Australia and the west coast. Until someone finds a very efficient way of transmitting electricity, I suspect Western Australia will always have to have its own particular grid. We are developing that quite efficiently. We now have a provision in Western Australia for third party generators but there is a difficulty at this stage because we only have one buyer, so the price which that buyer offers is the price whether you like it or not. We

have made the announcement and given the commitment that for various reasons Western Power—which is our corporatised government electricity provider—will not be sold for five years.

However, I can see a time when the distribution network, the generator and possibly the seller and biller of the electricity will be different people, perhaps different companies, or a mixture of the private and the public sector. In saying that, I also think it is necessary to understand that the Government perhaps ought to keep a regulatory role. We have proposed that a regulator general be put in place in Western Australia to take up that particular position. At the moment it is carried out by the Office of Energy which is somewhat separate to the government arm which generates and distributes electricity. Gas reform has been a big ticket item in Western Australia. In 1994, Western Australia committed itself to giving access to all Australia. A couple of years later in 1997, all Australian States committed to uniform regulation for third party access and to that end Western Australia sold its pipeline. We have a very large gas pipeline from the north of the State down to the populated south. There is a guarantee of reasonable third party access, but still the Office of Energy plays a role in terms of regulation to see that procedures remain fair and in accordance with the Act. There have been huge benefits from this, particularly to industry in Western Australia.

Water reform is not well advanced in Australia generally. It is certainly not well advanced in Western Australia, and we see some big difficulties with that, particularly because of examples such as Britain where considerable difficulties exist simply because of the high-cost infrastructure being underground and being unable to be checked. That is something with which we in Western Australia have decided to proceed with caution. The matter of road transport has been causing problems right across Australia. Licensing standards, road-use charges, design of heavy haulage vehicles and mass loading figures have all been agreed to since 1991. Light transport was added to that in 1992. The comment I wish to make about road transport in Western Australia is that heavy transport had considerable difficulty in moving from Western Australia to the eastern States and returning. In different States there were different laws with respect to axle loadings and so on. The truck could be legal on one side of the border and cross the border to suddenly find itself put off the road, and the driver and the operator being fined. That was something that needed to be addressed, and it has been done.

Rail reform similarly has been very difficult in Western Australia. There are large distances and small populations; consequently, the tendency has been for governments to control matters. In September 1997, Transport Ministers agreed to a series of reforms to reduce transport costs, to introduce standard practices, standard technologies and conditions. In November 1997, Western Australia was a signatory—along with Queensland, New South Wales, Victoria and South Australia—to the National Track Authority. I think that benefits will be seen to flow from that in a few years time.

I briefly mention the matter of agricultural statutory marketing. There has been much debate about this in Western Australia in particular because we in Western Australia export most of our grain as opposed to the eastern States where much of it is used in the domestic market. I think it is true to say that the Australian Wheat Board, the Grain Pool of Western Australia and Co-operative Bulk Handling of Western Australia are regarded as holy grails, icons and things that just must not to be fiddled with. I have some sympathy with that view simply because I have been a farmer for so much of my life. However, they will be reviewed and must be reviewed under competition policy law.

Those organisations will continue to exist only so long as they satisfy the public interest test, that is, there is a real benefit and the objects of having those particular legislated organisations in place continues to provide the service in a way that could not be provided unless the legislation was in place. It is becoming obvious that many of those organisations were necessary historically but now need to be brought under the microscope. They are matters that are probably not as important on the east coast of Australia as they are in Western Australia. Nevertheless, we found in evidence that they were very important in Western Australia and Western Australian farmers in particular put greater store in those statutory bodies than is perhaps put in them by farmers on the east coast.

In conclusion I reiterate that there is a lot of misunderstanding about competition policy in both government and in the public. As a committee, we proposed that our Government undertake a public education exercise to educate people on what competition policy is about and what its advantages are. The advantages are not well understood and certainly we found that the disadvantages were greatly exaggerated in the evidence that we took. The factors that are sometimes ascribed to competition policy are often not related to competition policy. I would like to say that our standing committee came to the conclusion that it supports competition policy but stresses that it is not an end in itself. It is not the holy grail. It should be approached with caution and with a balanced view as to the outcome.

Most certainly it is not to be used as a licence to withdraw services from rural and remote areas. Those who have looked at a map of Western Australia will realise that rural and remote areas constitute most of Western Australia. Unfortunately, various people both in and out of government have used competition policy as a licence to scale down and withdraw services from rural and remote areas. That is something that is not supportable. We can achieve the same outcomes by benchmarking. I thank the conference for the opportunity to speak. I have said what I felt like saying and not what I was meant to say. Those who want to read what I was meant to say will find it in a paper that has been circulated. If I can answer any questions, I will be pleased to do so.

CHAIR: I certainly agree with that part of the conclusion of Mr Minson's report which states that a lot of uncertainty and distress is created by people not knowing enough about change. I think that probably all areas of government fall down many times because people do not know enough about what is going to happen. I am very conscious of the time and will now open the conference to questions. I ask delegates to state their name and position for the sake of Hansard, who are having some difficulty in identifying people who speak.

Mr REDFORD (South Australia): First, I agree—and I am sure, Mr Chairman, you agree—that we should extend competition policy, particularly the AFL against the non-Victorians, to create a level playing field. You referred to your standing committee's view that transparency of competition policy applies to discrete government enterprises, but I increasingly find situations where government agencies—such as the Tourism Commission or the Convention Authority—are engaging in a small and discreet way in activity which impinges upon private commercial activity. For example, the Tourism Commission puts out brochures to market tourism and they are now going into the marketplace looking for sponsors. While promotion is not part of the Tourism Commission's overall structure, it is doing that in competition with private entrepreneurs who are engaged in that sort of activity. Has the standing committee looked at discrete activities of government agencies that are not in a competitive commercial environment but engage in activity that has an impact on small businesses? If so, what did the committee discover and learn as a consequence of that?

Mr MINSON: The short answer to that is that we did not look at the matter in that detail. I am aware, purely and simply because of circumstances that arose during my ministerial career, that that sort of thing happens from time to time. To use an example that is similar to the one you gave, we had a State printing business. It was always very difficult to fix an accurate cost on the production of tourism pamphlets, or pamphlets for any other area of government for that matter. It was difficult to know whether or not they were being produced at lower than cost because the proper costs were not ascribed to the production of the documents. That was resolved when we closed down the government printing works. The short answer is that, no, we have not looked at the issue in that sort of detail. Our particular inquiry was not meant to look at the matter in such depth. Rather, we were interested in what the public thought the broad effect was and we tried to pick up an overall impression of whether competition policy was (a) being administered properly, (b) was working properly and, I guess most importantly (c) whether it was delivering the benefits that it was supposed to deliver.

Mr DEIGHTON-SMITH (Organisation for Economic Co-operation and Development): This is something that is between a comment and a question. I am slightly surprised by the characterisation of privatisation having little to do with competition policy and its being more to do with debt reduction. As a Victorian, I can certainly understand the debt reduction argument in favour of privatisation but I guess my concern would be that if privatisation is a one-off response to debt reduction, it perhaps becomes a substitute for business consolidation and for the adoption of sound fiscal policy. My perception is that among the OECD countries that have adopted privatisation in various areas the idea of creating high level competition has often been prominent in their thinking, particularly in terms of networking industries where the issue has been separating out areas that can become competitive from those that cannot. I guess the extent to which this is a question is that I would be very interested to hear the views of other participants as to their perceptions.

Mr MINSON: What I was really trying to say was that we found a perception, particularly among the public, that competition policy meant or dictated that something had to be privatised. What we are saying is that that is not necessarily so; although we have to face the reality that if you open up something to competition, it is probable that a private sector operator with private sector inducements of efficiency and profit making would lead to an end result of privatisation. That is not necessarily something that is dictated by competition policy. I make the following statement about privatisation and debt reduction: In Western Australia, I would have to admit that the big ticket items that we have sold─Bankwest, for example, would have to be a good illustration of that and our gas pipeline which we are hoping to sell, provided that it is approved by the Parliament─are prime examples of where the prime motive was not competition policy.

The prime motive was to reduce State debt so that our annual repayments were of such a percentage of our Gross State Product that our credit rating was increased. We went from a AA rating to a AAA rating and our interest rate fell. Also, of course, the amount of debt that we owed decreased and the debt that we were paying interest on was decreased. Because I was a member of Cabinet at the time, I have to say that that was the primary motivation. It just so happened that it also satisfied competition policy. I am not sure that the Premier would like me to say that, but that happens to be the fact.

Mr BEK (Office of Regulation Review): There is a bit of nomenclature here. National competition policy describes a discrete set of inter-governmental agreements, as described by Mr Minson. Competition policy is much broader. Recently the Productivity Commission conducted an inquiry entitled "Competition in the Bush". The commission found that

there were a lot of furphies about what national competition policy made people do. Indeed, the message from the bush was that people from Perth, Sydney and Melbourne were making them do things in the name of national competition policy which did not fit within the intergovernmental agreement.

Mr MINSON: If you happen to be at the coalface and you have to go to a government service provider in a country town, it gives a great deal of comfort if you can find someone to blame it on. There is a great deal of truth in the Chinese proverb, "He who smiles in the face of adversity has usually found someone to blame it on." The reason the competition policy is misused in this way—and I think it is misused—is that the people who are given the task of saying that a service in a country town will be closed and will be provided from the next regional centre, which may be 70 or 200 kilometres away, find it difficult to do that so they think of a number of reasons to justify what they have been sent to do. Unfortunately, they have blamed the competition policy.

Mr NAGLE (New South Wales): Under the national competition policy the Australian Competition and Consumer Commission is accountable only to the Commonwealth and the States are consulted only on appointments to the commission. Should the States have a greater role?

Mr MINSON: That is probably not a good question to ask a State member of Parliament, but I note that it was asked by a State member of Parliament and therefore is a friendly question. I would have preferred the States to have a greater role. However, given the relationship between the Commonwealth and State governments it was probably inevitable that it would be structured the way it was. Although the States are not represented on the Australian Competition and Consumer Commission, the commission must be transparent so that if it is misused in any way there are platforms on which those concerns can be raised and if it is not being conducted properly it can be exposed. I would prefer to see the States represented, but I suppose the other side of the argument must be that, because there are a number of States, how big can the body be. Should the States be represented on a population basis? Should all the States be represented or only those most affected? There are any number of models and questions. The most important thing is that it works. It seems to be working, but I would prefer to see some State representation.

Mr WIESE (Western Australia): In your paper you comment that the agreement to implement the national competition policy and related reforms set out the conditions of financial payments to the States in return for implementing competition policy reforms. That was certainly something that got up my nose when I was a Minister. Why did you not comment on that?

Mr MINSON: I was being kind when I used those words. It was probably more a matter of blackmail than anything else: "You will do this or else". With all due respect to the Commonwealth, it has used that tactic just about everywhere when it wants to achieve a particular outcome. That is a State member of Parliament's point of view. I said it was an incentive but it was probably a gun at the head: if you do not do it you will not get a particular payment. The other side of the coin was a compensation payment when that happened. Another problem is whether the payments filtered through to where they were supposed to go. That is another issue altogether.

Sometimes payments were received by State Governments to compensate affected groups, individuals and service providers that perhaps were not necessarily passed on and were not spent in the areas where they perhaps should have been. Fingers could be pointed at State governments for that. Having said that, I would have preferred State representation on the commission and, in having that representation, perhaps not have had the financial payments made in quite the same way because no matter how they were dressed up the Commonwealth used them as blackmail to a certain extent. But that is probably leading us down a track we do not want to go.

CHAIR: On behalf of those attending the conference I congratulate Kevin on the excellent paper he has delivered today. I thank the delegates for giving me the privilege of chairing this session.

A PROPOSAL FOR SCRUTINY OF NATIONAL SCHEMES OF LEGISLATION

CHAIR (Senator Payne): I am Marise Payne, a Liberal Senator for New South Wales and a member of the Senate Standing Committee on Regulations and Ordinances. I see on the bench my colleague Senator Cooney, the eminent chair of the Standing Committee for Scrutiny of Bills. This afternoon Senator Cooney and I are both absent without leave from the Senate Legal and Constitutional References Committee inquiry into refugee and humanitarian aspects of immigration so at least we can keep each other company. It is my great pleasure to introduce our next speaker, Mr Peter Ryan, MLA, Chair of the Scrutiny of Acts and Regulations Committee of the Victorian Parliament. Mr Ryan practised law for almost 20 years prior to entering Parliament in 1992. During that time he specialised in a very broad litigation practice representing people from all walks of life in what are described as a variety of legal forums. One can only imagine where that took him.

I am advised that his passion for politics grew out of his belief that everybody is entitled to a fair go—a factor fundamental to the way he conducted his legal practice. So it is no wonder Mr Ryan continues to fight for the rights of the Parliament in the processes under discussion today. Mr Ryan was elected as the National Party member of the Legislative Assembly for the Victorian parliamentary seat of Gippsland South in October 1992 and was re-elected in 1996. Since May 1996 he has been the Chairman of the parliamentary Scrutiny of Acts and Regulations Committee. I understand that with unnerving relevance to popular culture his speech this afternoon is entitled "National Scheme Legislation Episode One—The Phantom Menace".

Mr RYAN (Victoria): It is a great pleasure to be speaking at this forum amongst so many faces I recognise. The last occasion we gathered was in Adelaide which was very productive as well as a pleasurable couple of days. I am sure this event will be the same. On behalf of the Victorian delegation and, indeed, all of us, I thank the New South Wales contingent who are hosting us. It is wonderful to join you here in the Olympic city. We grow au fait about some of the things in which we as parliamentarians and those who work with us in the bureaucracy of Parliament are involved. First, we are in the oldest Chamber of any political forum in this nation. It is one of the oldest chambers in constant use in the world. It was built in 1842-43 as the Legislative Council Chamber and became the Assembly Chamber in 1856. It is a wonderful privilege to stand here and make this contribution and to be part of this forum. As Madam Chair has observed, my paper is entitled "National Scheme Legislation Episode One—The Phantom Menace". I am indebted to Andrew Homer and Tanya Coleman who worked so hard with us in the committee deliberations for their contribution to the paper and specifically the name accorded to it. In a discussion paper released at the 1995 Conference on Delegated Legislation and the Scrutiny of Bills we read:

> Many parties interested in a proposed inter-governmental agreement or proposed national uniform legislation are consulted. Parliaments are not. This omission would be rectified if a procedure were established to allow information relating to uniform laws to be brought before Parliaments . . . and be subject to scrutiny . . .

Senator Barney Cooney made this observation on the problem at the Fourth Commonwealth Conference on Delegated Legislation, held in Wellington, New Zealand, in February 1997:

> We heard Philip Pendal, Jon Sullivan, and Winston Crane talking yesterday about the difficulties we have with common legislation. It seems it is the same problem that people have in Europe and elsewhere. I have a couple of bills in my bag now that show that New Zealand and Australia are passing common legislation more and more. If we simply say: "That's too bad, let the Executive have its day" . . . then, of course, the courts are the only ones that are going to come in and check the liberties of all the people. I say this in all seriousness.

The Hon. Phillip Pendal, MLA, from Western Australia put it this way at a conference on the

topic in 1995:

> Our concern then . . . is the process by which parliaments are being excluded from the job that history and their constituents give them.

In the long-awaited and widely acclaimed second edition of Pearce and Argument's *Delegated Legislation in Australia* several pages are devoted to national scheme legislation. What national scheme legislation comprises is outlined and the problem of parliamentary scrutiny is succinctly put. Those of you who have been students of the scrutiny of primary and delegated legislation for a long time will no doubt know the problem well enough, but I outline it for those who are new to our gathering by reference to these comments of the Senate Standing Committee on Regulations and Ordinances:

> From a parliamentary scrutiny perspective, the difficulty posed by this type of legislation is that the various governments have agreed to put legislation through their respective Parliaments and the fact that the success of the whole approach is dependent on the legislatures of all the jurisdictions passing legislation in the form agreed. As a result, legislatures are told that they simply cannot amend the legislation because the legislation is in a form that has been agreed between the governments and amendment will undo that agreement. In the case of parliamentary review committees, they are told that for the same reasons, they cannot press their concerns about legislation. The end result is that "practically speaking, it is fair to say that there is effectively no parliamentary scrutiny of national scheme legislation".

National scheme legislation was first put on the agenda for discussion by our committees as a resolution at the fourth conference on delegated legislation and the first conference on the scrutiny of bills in Melbourne in July 1993, almost six years ago to the day. The year before, in May 1992, the Western Australian Parliament had been asked to adopt Queensland-drafted template legislation without even sighting that legislation. The proposed law was not even attached to the Western Australian adoption bill. As a result, the Western Australian Parliament established a select committee to look into how Parliament should deal with uniform legislation. It recommended the formation of a standing committee on uniform legislation and intergovernmental agreements. Some members and staff of that committee are with us today.

The committee's most recent report is its twenty-third report of May 1999 entitled "Financial System Reform". I will speak about that later. Also in 1992 the Queensland Parliament's role as a law-maker was bypassed when a request for amendment was made to the nationally adopted Mutual Recognition (Queensland) Act 1992 by notice published in the *Government Gazette*. This was the authorised procedure but as a Governor's notice in Queensland does not constitute subordinate legislation in Queensland neither Parliament as a whole nor a subordinate legislation committee of parliamentarians could scrutinise the notice.

The law as it affects Queenslanders was amended without any reference to the Parliament of Queensland. Both those examples were critical to the resolve of parliamentary scrutiny committees to seek out acceptable mechanisms for scrutiny of national scheme legislation. The committees are committed to scrutiny by elected representatives of the people and proper accountability of executive actions to Parliament. After the 1993 conference at which the resolution to which I referred was passed, chairs of scrutiny committees met and a great deal of work was done by the Queensland Parliament in particular. A discussion paper for circulation followed by a position paper were released in 1995 and 1996 respectively and I commend that to members who wish to know the background. We have had several one-day conferences, lots of talk and lots of paper.

Senior Ministers from some jurisdictions were supportive of our joint suggestions but overall the proposal for a national committee for the scrutiny of national schemes of legislation foundered: the phantom menace. But all is not lost. Today I want to reopen the discussion with another simplified version of a national scrutiny committee structure, the aim of which is to maintain parliamentary scrutiny by the executive sponsored national scheme proposals. This structure works for both primary and subordinate legislation. I wish to also comment about timing and to confirm my agreement with the positions adopted in the position paper to which I have referred already.

Before exploring the proposal I draw your attention yet gain to the continuing numbers of national scheme legislative [NSL] proposals that reach our respective parliaments year by year. In 1998 there were five proposals introduced into the Victorian Parliament. All were passed into law by the Victorian Parliament. So far in 1999 there have been four new proposals introduced and passed. One of these is the Financial Sector Reform (Victoria) Bill. This bill will have a significant impact on Victoria's financial sector. Our committee examined the bill and made three comments in our alert digest. First, we noted the divergence from the usually recommended commencement clause to commencement by proclamation, on this occasion because of the uncertainties of all parliaments having to pass the legislation by the projected target transfer date.

Second, we had practical concerns about staff transferred between the Victorian Financial Institutions Commission and the Australian Prudential Regulation Authority, a possible trespass upon rights or freedoms. Finally, we commented upon the deeming provision with respect to applications made to, but not yet decided by, the Australian Financial Institutions Appeals Tribunal, a possible trespass upon rights and freedoms. The committee wrote to the Minister about these concerns. The Minister responded as follows:

> This bill and the Commonwealth bill reflect an inter-governmental agreement between the Commonwealth and State/Territory Governments. The terms and conditions under which staff will transfer from the State regulators to the Commonwealth regulators are set out in that agreement.

I pause to say, "There she lay, waving her wooden leg."

> The effect of the agreement is that all staff of (Vic Fic) . . . will be transferred to (Apra or Asic) on terms and conditions no less favourable than their current terms and conditions.

The Minister's response also made it clear what the legislation proposed in respect to the situation on part-heard tribunal matters. The Victorian committee played a useful role in ensuring that the legislation was fully understood by the Victorian Parliament. Without a scrutiny committee of some sort, such understanding may be greatly diminished. In the context of this conference the question to be asked is: what happened nationally? What happened in your parliaments? What happened in the respective parliaments around Australia in the nature of that which we referred to in the course of the report we tabled? What did other Australian parliaments have before them when the legislation was tabled and debated in those parliaments?

Another example of the national scheme legislation was the Gas Pipelines Access (Victoria) Bill in 1998. The purpose of the bill was to adopt South Australia legislation as part of a national scheme of legislation, and coincidentally Kevin has referred to it in his contribution today. The committee again raised its concerns with the Minister, who made it clear that he was committed to the successful adoption of the legislation, which would result in significant benefits for the Victorian and national economies. He stated:

> The bill represents the culmination of a process that began in 1994 when the Council of Australian Governments agreed to general principles of competition policy reform and, as part of that commitment, agreed to more specific proposals for the development of free and fair trade in natural gas. It was envisaged then, and still is now, that the implementation of that agreement would result in significant benefits to the Victorian and national economies.
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> To achieve those benefits the governments of COAG have since agreed to the enactment of a uniform national legislative framework to apply for third party access to natural gas by way of an "application of laws" regime. Whilst such an approach gives rise to search and implementation issues, including the important matters raised by you, legislating an effective national law is an integral part of delivering the benefits of these aspects of the national competition policy agenda.

The Minister had two suggestions to make. The first was to get involved in the process leading up to the approval of the lead regulations, that is, at the draft stage. The second is for our scrutiny committee to seek a reference to pursue alternative methods for ensuring that the law to be applied is available for perusal and consideration as part of the parliamentary process. Again the question arises which I posed earlier in the context of our conference: What position was taken nationally by the other parliaments in Australia when this bill in all its forms came before those parliaments? It is with this background and to demonstrate that the path to national scrutiny by parliaments of national schemes of legislation is not an easy one that I wish to propose another structure which is simple and possibly more attractive. I refer to a diagram on this screen. Having sat at the back of the room where most members are sitting, I am confident it cannot be seen by them. Therefore, I will quickly talk you through it.

The heading is an example of structure. The top line comprises single government initiatives, and beside that COAG or other ministerial initiatives. That is intended to represent the area in which a particular policy initiative to be translated into legislation is actually initiated by a single government or COAG. It then passes down to the bigger box in blue, which is the originating jurisdiction for the national scheme legislation. This is intended to be the Parliament through which the legislation actually originates—the first Parliament in which it is tabled and dealt with. Immediately beneath that is an even bigger box, which is proposed to be the committee for scrutiny of national scheme legislation. Its participatory members are intended to be the nine little boxes around the big box representing all the States and Territories of the Commonwealth, and I will come to the actual function of that in a moment.

In essence this is how I would propose it would work. A proposal for national scheme legislation is developed by either an individual government or a collection of government decisions, as in the context of COAG or the Standing Committee of Attorneys-General [SCAG]. The NSL may be primary legislation or subordinate legislation. The national scheme is then introduced through a parliament—that originating jurisdiction—of the Federal, State or Territory Government. Upon the national scheme legislation being introduced into the Parliament of the originating jurisdiction, it is marked on its face, perhaps even as an element of its title, as being national scheme legislation. To take an example referred to earlier about gas, the bill would be referred to as the Gas Pipelines Access (Victoria) National Scheme Legislation Bill. After the national scheme legislation is second read in the originating jurisdiction, where it is immediately and automatically referred to the committee for the scrutiny of national scheme legislation—the big box—and I will term that the national committee for the purpose of my further comments. As is the normal course, further debate on the bill is adjourned in the originating Parliament for a reasonable period, say two or three weeks. This gives the national committee time to convene a meeting and time for legal advisers to prepare a draft report.

At a meeting of the national committee, the committee scrutinises the legislation and agrees on a report, perhaps in the form of an alert digest such as is presently prepared in the Senate, in Queensland and in Victoria. If any issue of concern arises from the report, the committee instructs the secretariat to prepare suitable correspondence to the Minister introducing the bill into that originating jurisdiction, seeks clarification on the issues of concern and otherwise deals with the matters in accordance with the usual scrutiny process that applies in all our jurisdictions. As the national scheme is introduced around the nation, the national committee's alert digest is then tabled in the parliaments of each of the nine jurisdictions and this represents the report to the respective parliaments upon that national scheme legislation. In the event of any future amendment to the NSL, the process as outlined above applies because the amending proposal is again scrutinised by the national committee in the same manner as the principal instrument.

By way of mechanics I propose that the national committee would comprise two parliamentary representatives from each of the six States, the two Territories and the Commonwealth, being nine jurisdictions in all, a total of 18 members. I suggest that two representatives from each jurisdiction be nominated to consist of a member from the Government and a member from the Opposition. That would give the national committee political neutrality regardless of the political complexion in our Federation at any point of time. The chair of the committee would be chosen on a rotational basis for the calendar year. The national committee would be established through Commonwealth legislation and then in tandem the States and Territories would introduce counterpart legislation. The national committee would have terms of reference permitting it to scrutinise both primary and subordinate legislation.

The terms of reference would be settled in due course. However, in an endeavour to move the proposal along I suggest as a common starting point that we consider the terms of reference adopted by the Senate which are already reflected in the Victorian committee's terms of reference. To enable all this to happen some jurisdictions such as that in Victoria would need to amend its domestic legislation to exclude the necessity to scrutinise national schemes of legislation by their respective scrutiny committees. That is of course in those jurisdictions where scrutiny of bills committees currently exist. States and Territories without scrutiny committees might consider the manner in which they would treat such an alert digest, such as the issue of formal tabling of the report by a Minister or a member serving on the national committee. The correspondence arising from the report, if any, and the ministerial response would be published in a follow-up alert digest or separate report.

By way of a commentary, it seems to me that the benefits of the proposal are several. The proposal enables the nine jurisdictions to influence the content of the national scheme legislation in accord with agreed scrutiny principles before a proposal achieves the status of an Act in the first of the participating jurisdictions, that is, before it is set in stone and is too late for any other scrutiny committee to play a meaningful role on behalf of the parliaments those committees represent. I say that because history dictates that once that first bill becomes an Act that is the end of it in terms of the capacity of scrutiny committees to influence the outcome. I support that contention by the two examples I have given you. Two Ministers responded to our committee about issues raised and applauded the fact that they had been raised but said basically that it was too late, it is the law and cannot be changed.

I believe the only way that scrutiny will effectively take place is to scrutinise the national scheme legislation before that bill becomes an Act. Second, it further enables the scrutiny to occur concurrently and contemporaneously rather than going through the protracted process of the same bill being considered by each jurisdiction at different points in time, with the

inevitable possibility of concerns being expressed on differing scrutiny criteria by the several jurisdictions implementing it. By that I mean we simply cannot help ourselves. If all nine of us are asked to have a look at this individually, inevitably we will get nine different opinions on it. We simply cannot help ourselves. Therefore, the mechanism to achieve the outcome we all seek is to have this process undertaken together at a time that I have specified, that is, before the bill becomes an Act. Otherwise it will never happen.

Thirdly, the proposal enables the principles of scrutiny to be observed within each of the participating jurisdictions by ensuring that there has been consideration of the national scheme legislation on behalf of the respective jurisdictions and the report is duly tabled in all participating parliaments. That is a completely self-serving statement because I think this scheme achieves that outcome, and it is one that I recommend to you. There are some practical considerations. There will be issues as to the mechanics, how and when the national committee meets and how it is supported by an administrative secretariat. These issues can be refined in due course. For example, with the range of technology now available there does not appear to be any reason why meetings of the national committee cannot be convened by audio or video link without participants having to travel to a central point. I am sure with some goodwill on the part of all concerned these sorts of mechanical issues can be resolved.

Voting on the national committee would also need to be addressed. However, I emphasise the experience in Victoria, and I dare say in the Senate and in Queensland, that comments made on a bill by a scrutiny of bills committee are determined overwhelmingly by consensus. The role of scrutiny committees is to advise, to counsel and to alert parliaments on the mechanics of legislation, not on whether the content of the policy is sound or otherwise. Scrutiny committees are not legislators, they are commentators. It is a significant distinction. Their commentary is based upon terms of reference in their enabling Acts. It is fundamental though to the function of scrutiny committees that once having reported on the mechanical aspects of a bill the committee leaves it to the parliament to carry the burden of the ultimate policy decision.

For example, in the consideration of more than 260 bills over the last 2 years the Victorian committee has only been unable to reach consensus on two occasions. In any event, as in Victoria, the national committee could commit minority opinions to be published with the report. In that way no-one is locked out of meaningful participation in the scrutiny process. I emphasise that point in fairness to the membership of my committee in that I can assure you that subsequent parliamentary debate lacks nothing in terms of the point of view being put on policy issues. Nothing at all is lost to that subsequent debate. However, although the function of scrutiny committees is one of the most difficult tasks faced by parliamentarians, out of approximately 260 bills we have not achieved consensus on only two occasions.

The national committee will require some sort of secretariat, which would probably be Canberra based and funded jointly by the participating jurisdictions. I do not envisage that the proposal will consume anything more than modest staff or financial resources. I reiterate that to date this year four national scheme legislation bills have come before the Victoria Parliament. So I am not talking about the establishment of any sizeable bureaucracy. Indeed, it might be best to simply use the Federal secretariat as the secretariat for this organisation.

Not all participating jurisdictions presently have scrutiny committees involved in both primary and subordinate legislation. If I could be forgiven for saying, without at all intending to be patronising, condescending or otherwise, I would strongly recommend that all parliaments have the function of scrutinising legislation. As I observed in Adelaide two years ago, only

perusing regulations is akin to coming into a race halfway run. It is much better as a matter of logic if parliaments actually scrutinise the legislative base which gives rise to the regulatory framework and scrutinise the whole rather than the part, important though that part is.

This proposal may be a catalyst to enable this to happen. In any event, the national scrutiny committee proposal should stand alone. It is worth consideration by all jurisdictions, even those not wishing to establish a scrutiny of bills committee. In passing, I would like to emphasise that the establishment of such a national committee ought not to be seen as simply the addition of another layer of scrutiny or another layer of bureaucracy in the legislative minefield. Rather it is a procedure where all parliaments can scrutinise a national scheme bill once, but at a point in time when the report of the national committee can play a useful role in pointing out possible pitfalls.

By way of a proposed course of action I suggest that we submit the proposal for consideration, discussion and comment by each committee or delegation represented here. If a proposal is accepted and distributed for comment to each of the respective jurisdictions in Australia and is acceptable either as it is or in some modified form, then it can be progressed to the draft legislative stage in the originating jurisdiction, the Commonwealth, and implemented in all other State and Territory jurisdictions. Indeed, we are developing a resolution for your consideration on Friday.

I have already sought some informal feedback for this proposal from the Queensland Scrutiny of Legislation Committee and the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements. I had hoped to do so in New South Wales but events to do with elections interceded. Both the Victorian Premier's Department and the Victorian Parliamentary Federal-State Relations Committee see merit in the proposal. In the scheme of things we need to keep this proposal, these books, all the words in context. What we are talking about is small beer. We do not need any vast undertaking to solve the problem which has loomed with us now for the best part of eight years. It is on that basis that I endorse this proposal and put it to you for your consideration.

That luminary Senator Barney Cooney has also considered this and thinks it has merit. Indeed, he did so in Genevieve's Cafe in Carlton about three months ago. To return to the script, perhaps like the *Star Wars* film, to which I referred in my title, there will be ongoing intergalactic wars before the institution of parliament gains a role in the scrutiny of national scheme legislation. But, like the Jedi, we must make our preparations. At a conference such as this it is timely to remind ourselves that the course of the parliament's legislative supremacy over the Executive has never been smooth. For now I will take the optimistic view that in the near future we may be able to add to the proud traditions of the last 1,000 years or so of parliamentary ascendancy and say that today the parliament strikes back. May the scrutiny be with you.

CHAIR: Thank you very much, Mr Ryan. It may be, as you described it, small beer but you show what I can only call commendable optimism in your hope that if the nine jurisdictions of the Federation consider legislation at the same time it will somehow facilitate easier agreement. We will see how that progresses. There is a short time available for questions.

Ms LAVARCH (Queensland): I want to make a couple of comments to matters put by Peter and I also have a couple of questions. I do not know whether we will discuss them at a later date within the conference or address them now. For the benefit of everyone here, the Queensland Scrutiny of Legislation Committee scrutinises all bills introduced into the House, not only those referred to it. Firstly, I want to join with Peter to encourage those jurisdictions that

do not scrutinise bills to do so. All is well in Queensland and the process is well accepted. I am sure that Peter will attest with me that your frontbench colleagues still talk to you and buy you a drink and you do not become the pariah. As to the comment in Peter's paper regarding the 1992 situation in Queensland with the mutual recognition bill, that would not have happened had we been scrutinising bills at that time. The Queensland committee commenced scrutinising bills in 1995.

In answer to the question on the financial sector reform bill, the Queensland committee raised two of the three issues that you raised. We did not raise the staff issue because we looked at the Commonwealth bill which basically gave the same answer as you got from your Minister. But we did have a slightly different focus on the other couple of matters. As to my central question to Peter, there are so many different types of national scheme legislation. Under your structure, what happens with those bills that basically have uniform terms but are peculiar to each State's jurisdiction? Will they still fall under that heading or will all the different types be separated out and only those that are truly national scheme legislation will be scrutinised in that way? Further, are you confident that we can achieve amendments of that legislation through that process?

Mr RYAN: As to the extent to which this proposal would apply, that is something we would take on its merits at the time. At the moment I am more concerned to establish the principle of the operation of this sort of forum. That is one of the issues we would need to have regard to for the purpose of setting terms of reference and the like. It seems to me though that I would be inclined to err on the side of being broader than narrower. The reality is that these forms of legislation have a growth path about them which is inevitable. Therefore, the more they are open to scrutiny in the nature that we undertake it the better it is, albeit that it may only have a limited application in the manner we described.

By way of response to your comment, Madam Chair, while I recognise particularly from a Commonwealth perspective that the notion of bringing all the States together for the purpose of comment in the way that I am now proposing causes you some grief, I can absolutely assure you that if we do not do it this way and try to do it individually we have no hope at all. I see it as being an advance from the position which we now have. In terms of Linda's other observation about the nature of chairing one of these committees, I can but again say what I said in Adelaide: the day I was appointed to the task and the Premier read out my name as the chair of the committee in the Coalition room some wit at the back called out, "There ends a promising career."

Ms SALIBA (New South Wales): Many intergovernmental agreements are made in pursuance with international obligations under treaties or international standards, for example, with respect to trade. Is it appropriate that State and Territory parliaments have the power to vary these agreements?

Mr RYAN: It is a different issue. Our role as scrutiny committees is to scrutinise legislation and regulation against terms of reference which are set out in our enabling Acts. That is our function. We are not policy developers, nor are we legislators. All we are required to do under our terms of reference, and I believe it applies elsewhere, is to scrutinise the legislation against those terms of reference. The more generalist issue of the capacity to be able to have in the power of government of any jurisdiction to amend international agreements is something I would like to leave to another day.

CHAIR: Thank you for your address this afternoon. I am sure that everyone has found it very interesting.

SCRUTINY: WHEN?

CHAIR (Ms Lavarch): I will be chairing this afternoon's session. As I said earlier, I am the Chair of the Queensland Scrutiny of Legislation Committee. This is the last presentation this afternoon. I think all delegates will join with me in saying that today has been a rather thought-provoking day. We have all learned a lot and there is still a lot to learn tomorrow. It is my honour to introduce Peter Nagle as the presenter for the session Scrutiny: when? Peter, as well as being the Chair of the Regulation Review Committee of New South Wales, has been our most gracious host for this conference. Peter, who was elected to the New South Wales Parliament 11 years ago, is the State member for Auburn. In that time he has had extensive service in chairing parliamentary committees, from the Committee on the Independent Commission Against Corruption to the Ethics Committee, and now to the Regulation Review Committee. He has also had several years on the council of the University of Technology of Sydney. Prior to his election to State Parliament he was an alderman of Auburn City Council at the very young of 22. I now call on Peter to address the seemingly innocent but quite vexed question: Scrutiny: when?

Mr NAGLE (New South Wales): As a new boy on the block of regulation review and parliamentary scrutiny, I quickly came to the view that the most important matters for discussion are the scrutiny by legislation committees, the consideration of the grounds upon which they review legislation and the optimal time to carry out such review. My paper is about the optimal time at which parliamentary scrutiny of legislation should take place. Professor Allars, in her paper, will consider committee grounds for review—a justifiably common topic indeed. However, I will examine the period of time or the time sequence for such review. Over a period of time, and perhaps at these conferences, we have paid insufficient attention to the time for scrutiny question and the different results that can be brought about by considering alternative time frames and mechanisms for review. I hope that agreement can be reached on the general proposition that the most favourable time for scrutiny should be at that point in time when a meaningful change to the legislation can occur, subject always, of course, to the requirement that it is not so early as to be involved in the formulation of the policy of the legislation.

It is not our function to make policy, but to look to its proper implementation and to evaluate what the government wants to achieve in such legislation. The crucial difference between bills and delegated legislation is that bills are reviewed before they become legislation, while regulations are usually reviewed after they become law. Another difference is that the policy formulation is usually clearer with bills as they are subject to Cabinet approval and their policy development is subject to government wants and desires, and bills are tested on the floor of the Parliament. A third difference is that some committees, in reviewing delegated legislation, are expressly prohibited from examining government policy. Moreover, some scrutiny of bills committees exclude major policy issues from their deliberations when they feel that these will be fully debated in the Parliament. The distinction of government policy in regulation review is a study in itself which Professor Pearce will enlighten us upon later in the conference. These distinctions become complicated by the fact that regulatory impact statements [RISs] are required to be prepared on proposed delegated legislation in a number of jurisdictions. They are now required even for bills in the Commonwealth.

Some scrutiny of legislation committees are given the task of reviewing these statements and will, in theory at least, be reviewing some of the policy formulation on the relevant legislative instrument, that is, after the process is concluded and the instrument is made. Policy sometimes is well and truly decided and the decision made before the formal RIS is drafted. This, of course, fails to comply with the procedures for making these statements, which

in New South Wales are set out in the Subordinate Legislation Act 1989. My Regulation Review Committee frequently discovers that even where policy is involved in RISs for regulations, it is departmental policy rather than government policy that is in real issue. Therefore, timing is all important for scrutiny of bills committees.

Scrutiny of bills committees are referred bills at the time they are introduced into Parliament and by the following sitting week the committees have usually prepared a detailed digest or report which sets out their comments on each bill. Scrutiny of bills committees normally request ministerial responses to be made by the following week and these are then dealt with in a subsequent report. National schemes of legislation present their own timing difficulties for committees, because individual parliaments are locked into ratifying legislation agreed to at the national level by the relevant ministerial council. In 1996 a joint position paper of all Australian scrutiny of legislation committees suggested two possible solutions. Option one proposed the establishment of a national scrutiny committee to scrutinise legislation at one of two points of time—a matter which has already been discussed today—firstly, when the draft legislation is in its final or near-to-final form, but before it is introduced into the Parliament and, secondly, when the legislation is first introduced into the Parliament. Option two proposed that each Parliament amend its standing orders or pass a resolution to provide that, where a scrutiny committee commented on a bill implementing a uniform scheme, no further debate or progress was to be made upon the bill until the Minister responsible had reported back to the Parliament on the issues raised.

I will not dwell on the national schemes as these have been the subject of Peter Ryan s important paper. Suffice it to say that most scrutiny of bills committees review the legislation at the point where they can bring about meaningful change. This change is in line with their review grounds as the legislation is usually listed for debate by the House when the scrutiny of bills committees are considering it. The timing of the scrutiny of delegated legislation is more complex. Committees can usually review regulations only at the time or times that Parliament can consider those regulations, and this is usually during the period when the disallowance of a regulation may be moved. My committee, for instance, is given the additional role of considering and reporting on any matter in connection with a regulation that has been referred by a Minister, whether or not the regulation is still subject to disallowance. This referral power has been used only once.

Australian regulation review committees generally review regulations after they have commenced and must conclude their review within a certain number of sitting days after the legislation is tabled. In New South Wales this is 15 sitting days. This should be contrasted with the position in the United Kingdom where some statutory instruments have to await a report by the joint committee and affirmative resolution of both Houses before they can commence, and in some cases before they can be made. Therefore United Kingdom instruments fall into three broad categories: affirmative instruments, which must be approved by resolutions of both Houses in order to come into or remain in force, or which may not be made except in response to an address by each House; negative instruments which are subject to annulment by a resolution of either House; and instruments not subject to parliamentary proceedings or general instruments which may be required to be laid before the Parliament, but which are not subject to approval or annulment. No motion to approve an affirmative instrument may be moved until a report on it has been tabled by the Joint Committee on Statutory Instruments.

In their authoritative book *Delegated Legislation in Australia*, which was published this year—and I am indebted to these people for their assistance in the preparation of this paper—Professor Dennis Pearce and Stephen Argument both argue that there are various

ways that Australian parliaments can exercise control over the form of delegated legislation. These include: first, requiring that the legislation be laid before the Parliament and not come into operation unless the Parliament approves of it; second, allowing the legislation to come into force immediately, but providing that its continuance in operation is dependant upon a resolution of the Parliament permitting it; third, providing for the legislation to be tabled in Parliament and for it to come into force after a specified number of days, unless the Parliament resolves that it cannot come into operation; and, fourth, allowing the legislation to commence immediately it is made, but requiring that it be tabled and providing the Parliament the right to disallow the legislation by resolution at any time or within a specified period.

The first two devices are identified as affirmative resolution procedures and the latter two are identified as negative resolution procedures. It will be seen that this classification is similar to that for the United Kingdom, except that in the UK there is an additional affirmative procedure in respect of regulations which cannot be made except in response to an address by each House. Therefore, the best time for scrutiny is entangled with the time selected for commencement of the regulations. Professor Pearce and Stephen Argument suggest that the method of disallowance used in Australia is almost uniformly as that stated in category three, that is, the negative resolution procedure operating on legislation that is already in force. As one advances down the regulation review and legislation scrutiny road, one sees that it becomes desirable for each of these alternatives to be considered, starting with those that give Parliament the fullest control.

I refer to the topic "Regulation may not be made except in response to an address by each House—affirmative procedure". This UK model gives great control over the making of the regulations, but involves a debate on the policy issues of the regulation in the House, preceded by the report of the committee. On the evidence, this could be the reason that the United Kingdom committee constrains itself to an examination of "technical" matters. As a lawyer and member of Parliament I wonder about the use of this term "technical" in relation to the scrutiny of legislation. The areas that scrutiny committees examine, such as trespass on rights of the citizen, are fundamental to any examination of a regulation. A properly considered policy would have taken them into account; they are hardly "technical matters". "Technical" is an unfortunate method of contrasting policy and non-policy considerations. But to return to this first category, we are dealing here with matters that really assume the status of principal legislation and perhaps should have been included in the bill to create the principal Act. I feel uneasy about this procedure being adopted in Australia for the making of regulations.

I refer to the topic "Regulation made, but does not come into force unless the Parliament approves it—affirmative procedure". This procedure has more relevance to the Australian position; although it would place a heavy burden on the committee, which would be under pressure to deal with these regulations in advance of others. The advantage of this option is that the impact of the regulation is delayed and the rights and obligations of the public will not have been affected until the regulation has been reviewed. The disadvantage is that the mischief to be remedied, or the policy objectives to be achieved, could be unavoidably delayed.

I refer now to the topic "Regulation tabled and comes into force after a specified number of days, unless the Parliament resolves that it does not come into operation—negative procedure". I tend to give this option a higher ranking in terms of parliamentary control than the affirmative procedure where the regulation comes into force immediately; but, requires the resolution of Parliament to continue. This is chiefly because, under this option, the Parliament has a right, if not a duty, to evaluate the impact of the regulation on the public before it commences. In the OECD report entitled "Report by the Public Management Service of the OECD on

Regulatory Impact Assessment in N.S.W." the view expressed is that while the New South Wales committee has taken an active and thorough approach to its task, it has been limited in its effectiveness by involvement occurring after the regulations are in force.

The OECD suggests that better results might be obtained by the Regulation Review Committee moving from solely ex poste scrutiny to a position of involvement in the final shaping of the regulation before it comes into effect. Therefore, the OECD believes that the correct optimal time is the regulation-making process. An example of this last option was recently adopted by the New South Wales Parliament in the debate on the Food Production (Safety) Bill 1998 in the Legislative Council. An amendment was introduced to give the Parliament an opportunity to consider regulations amending the food safety scheme under the Act before they came into force. The relevant provision of the Food Production (Safety) Act states that a regulation establishing a food safety scheme does not take effect unless:

> (a) the last day for giving notice of motion for a resolution to disallow the regulation in either House of Parliament has passed and no notice has been given in either House, or
>
> (b) if notice of motion for a resolution to disallow the regulation has been given in either House of Parliament, the notice has lapsed or has been withdrawn or the motion has lapsed, been withdrawn or been defeated.

Such regulations take effect on the day after the last day for the moving of disallowance or the day after the lapsing, withdrawal or defeat of the motion, unless a later day is specified in the regulation. The Government agreed to the amendment and the current Attorney General, the Hon. Jeff Shaw, said that it would ensure that Parliament had an opportunity to debate a food safety scheme before that scheme takes effect and that it will also ensure that all food safety schemes under the legislation do not impose unnecessary or excessive compliance costs on food industries.

The Attorney General also made it clear that regulatory impact statements will be prepared for all food safety schemes and that structured and effective consultation will take place with affected industries and consumers before a food safety scheme is introduced. Under this amendment, food safety schemes covering low-risk primary industry sectors will not be implemented until the period to move for disallowance has expired or any disallowance resolution has been determined. A question is why this commonsense approach could not be achieved administratively. It would be entirely feasible to introduce this type of option without any legislative change in New South Wales. To do so would only require a government guideline requiring each government Minister to insert a commencement date sufficiently subsequent to the gazettal to allow an adequate time for review. In 1988 our then Regulation Review Committee encouraged the Government to take this course. In a report to Parliament in 1988 the committee stated:

> Section 39 of the Interpretation Act 1987 states that a statutory rule shall be published in the gazette and take effect on the day on which it is published or, if a later day is specified in the rule for that purpose, on the later day so specified. Statutory rules include regulations.
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> The Regulation Review Committee notes that it is almost habitual practice in New South Wales for regulations to be brought into force on the date of their gazettal. In the course of examining over 300 recent regulations the Committee found that 82 per cent of them came into force immediately or within a week of their gazettal.

The committee further reported that the general practice of bringing regulations into force on the date of their gazettal required reconsideration by the government Minister concerned, particularly in those cases where regulations imposed duties or obligations on members of the public or where an offence could be committed for breach of them. In the course of preparing this paper I

randomly selected a *Government Gazette* dated 26 February 1999 to get an idea of the current situation. Several large regulations appeared in this copy. The Residential Parks Regulation is one of those; it occupies 77 pages and came into force on 1 March 1999, some two days after its gazettal. The public, therefore, had a weekend to familiarise themselves with it, assuming, of course they received a copy of the *Government Gazette* on the same day it was published.

I found the same situation applied in the case of the Marine Parks Regulation and the Fair Trading Regulations. Remember, ignorantia juris neminem excusat—ignorance of the law does not excuse. This places an enormous burden on our citizens who may unknowingly come within the direct or indirect operation of the regulation. Therefore it becomes obvious that the situation has not changed as a result of our committee s earlier recommendations. Lobbying of government is the only way to get the legislative change necessary to cure a problem that can be an unjustifiable burden on the citizen. A significant change in regulatory law has occurred in the United States of America through the Congressional Review Act of 1996. This Act requires all agencies to send their final regulations, together with any impact assessment, to Congress for review 60 days before they take effect.

This Act serves as an excellent example of the importance being attached by the United States of America to the question of the optimal time at which regulations should be reviewed and therefore they have grasped the importance in controlling citizen behaviour or dealing with administration or attaining government policy goals and yet at the same time not creating too great a burden on the citizen affected. During the 60 days notice period, Congress can pass a joint resolution of disapproval which would stop the rule coming into force. It is strongly argued that this new law provides Congress with the power to rein in unruly regulators, restores accountability to the rule-making process and brings back the law making power to the Parliament. However, there has been considerable concern by advocates of regulatory reform about the lack of use of the law by the Congress.

I refer to the topic "Regulation comes into force immediately but continuance dependent upon a resolution of the Parliament—affirmative procedure". This option has the disadvantage of the regulation operating and affecting the rights of persons before Parliament has considered it. The fact that Parliament has to approve each such regulation irrespective of its actual impact on rights could waste parliamentary resources. If it has any advantage, it lies in the fact that Parliament, in having to approve the continuance of the regulation, can take into account the actual impact of the regulation on personal rights in the making of the decision.

I refer now to the topic "Regulation commenced immediately but Parliament has the right to disallow—negative procedure". This is the option with which we are most familiar. It is the least advantageous in terms of parliamentary control; but enables the actual impact of the regulation on personal rights to be considered. The main disadvantage is the reluctance of Ministers and their departments to countenance any change to a regulation that has been through all the steps of exhibition, consultation, gazettal and commencement and quite arguably so, if the requirements have been achieved too. Therefore it is extremely difficult, in these circumstances, to get a department to carry out a supplementary RIS where the first was defective. Their usual response is to give an assurance that "we will do better the next time." Yet, and meanwhile, the regulation has its impact on the citizen. Moreover, in the world of *Yes Minister* memories are short and we frequently see the same shortcomings recurring at the next review period.

A suggestion is, that if a department does not fully comply with its obligations in making the regulation the bureaucrats can be held personally liable and can be penalised. If this occurred then you would see the cat amongst the pigeons. The best example of the limitations

of this option can be seen in the instance of the disallowance of the Police Service Amendment (Transit Police) Regulation 1999 which occurred last month in the New South Wales Legislative Council. In *Government Gazette* No. 56 of 7 May 1999 a regulation was published that enabled members of the transit police to become police constables after serving a months probationary period. For various reasons the Opposition moved for the disallowance of this regulation. The Minister in reply said that the regulation was made by the Governor on 5 May and commenced on 14 May. He said:

> On that day, transit police who had undertaken the conversion course at the Police Academy were attested and sworn in as probationary constables. The Interpretation Act 1987 provides that on the passing of a resolution disallowing a statutory rule, the rule ceases to have effect and disallowance restores the statutory rule as it was immediately before it was amended.
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> The restoration or revival of a statutory rule takes effect on the day on which the disallowance resolution is passed. Accordingly, anything done under the statutory rule prior to it being disallowed is done in accordance with the law and has full effect. Therefore the Police Service Amendment (Transit Police) Regulation commenced on 14 May and the attestation of the transit police on that day was done validly and in accordance with the law. That simply means that the disallowance motion cannot invalidate legitimate action. It should be clear to the Leader of the Opposition that this disallowance motion is simply a stunt that will achieve nothing other than to waste the time of the Parliament.

Actually, I thought we were here to waste the time of the Parliament. The crossbench members supported the motion even though they conceded that the disallowance was irrelevant in a practical sense. One Independent member said:

> It bothers me somewhat that we are debating the disallowance of a regulation that has already been implemented.

This member went on to accentuate the point that a disallowance motion in these circumstances was irrelevant, except for the purpose of sending a message to the Commissioner of Police that he should assess each individual transit police officer's training and experience and then decide which officers should be given additional training to bring them up to the requisite level.

In conclusion, what is most noticeable in all this, is that, with the possible exception of the first option, all the above do not necessarily involve the New South Wales Regulation Review Committee in the deliberation of policy issues. Secondly, the negative procedures have the advantage of saving parliamentary time and confining debate to the most important matters and legislation. Additionally in the case of option three, they can preclude adverse impact on personal rights by review prior to commencement. It is my conclusion that option three will promote the most effective scrutiny of legislation by the elected members of Parliament. Of course, we must remember when we are talking of options available to a scrutiny committee that their scope becomes determined in the course of drawing up the regulation-making power in the bill.

This brings us back to the role of the scrutiny of bills committees to ensure that these powers are appropriately framed to secure the fullest parliamentary scrutiny of the delegated legislation. Remember the caveat, which is the effect on the citizen is ignorantia juris neminem excusat and that it is not the bureaucrats who make the regulation who suffer at the end of the day it is in effect the citizen who has to obey the regulation. As all regulations are set in train for the purposes of the citizen obeying them and to obey them they must have knowledge of them and must understand the impact upon them, therefore Parliament and Ministers must understand the impact upon the citizen of regulations which they make.

Mr BEK (Office of Regulation Review): We were charged with the task of looking at all regulations. Those regulations which affected business needed to have regulatory impact analysis done on them. We found that in the subordinate legislation area there was not a

simple category of disallowable instruments and that ilk, but things like principles that were mandatory or guidelines that were mandatory. Rules that were gazetted got nowhere near Parliament and there were industry plans such as with Fisheries, which could actually close a fishery or affect the way a fishery or fisherpeople operated. We had in mind a pyramid with primary legislation at the top, a thin film of subordinate legislation under that, and a great wad of regulation that fits the description of government attempting to influence the way business behaves. When we asked whether there was any policy guidance given to departments and agencies as to what categories or what nomenclature should be used, we found that there was no policy guidance. Maybe something needs to be done in this area.

CHAIR: You could probably add a couple more to that list: gazette notices, codes of practice, for example. Are there any more questions?

Mr TURNER (New South Wales): This may sound like a Dorothy Dixer, but if regulations cannot commence for 15 sitting days they will often be affected by the parliamentary recess and it might take months before they commence. What will happen in the case of urgency or an emergency?

Mr NAGLE (New South Wales): All those types of matters can be taken into account in the formulation of both guidelines and legislation so that matters that are really urgent can be dealt with. I am aware of some Acts of Parliament, particularly the Industrial Relations Act, in which part of the Act is not proclaimed and the regulations do not come into force for years, until the legislation is proclaimed. But, if there is urgency, that matter can be dealt with urgently. These are matters that we can think through, and we can work out adequate systems to deal with them. Some regulations are urgently needed to cover some mischief or problem that is affecting the citizens in relation to the Government or vice versa. At the end of the day, as members of Parliament, we should always remember we really are the servants of the State of New South Wales or Victoria or Queensland, or even Australia. We should look at the consequences to the citizens of a regulation being created by people who are not accountable to those citizens.

Mr GREWAL (Canada): In response to an example you have quoted the 77-page regulation that gives only two days before it comes into force. The Canada *Gazette* has three parts. Number one refers to material required by statute or regulation to be published in the Canada *Gazette* other than items identified by part 2 and part 3. Proposed regulations are pre-published in this part 30 days before they come into force. That gives ample time for the public to understand and to communicate any input. There is a fixed term when they are published but the pre-publishing gives 30 days. I think that is an excellent idea.

Mr WIESE (Western Australia): I had the pleasure of being police Minister for four years and had the carriage of the firearms legislation through the Western Australian Parliament. Let me say that your option 3 indicates the best time to look at a regulation is during the process and development of it. In that particular case in Western Australia I introduced the regulations into Parliament as a green bill along with the Act as a green bill and gave everybody the chance to look at the two at the same time. While it certainly does not meet the requirements of regulation legislation review as we would see it in our committees, it certainly gave the people an opportunity to have a look and to make a lot of comment—which I can assure you they did in that process of the development. It worked out very well. I was amazed to find it was the first time that that had been done in Western Australia and I can tell you it is the last time. It has not been done since. Your comments?

Mr NAGLE: I think that has a lot of merit. Someone who introduces a new bill into Parliament which contains many controversial regulations should know what the regulations are going to be, if that is possible, or a broad outline of what the regulations shall be; the policy objectives of the regulations; and what they intend to achieve or the mischief they intend to rectify, to give the members of Parliament debating the bill the opportunity of knowing, after the principal bill has gone through, what the regulations will be and what they aim to achieve. I believe your approach was excellent in the most controversial legislation in the entire country. I commend you for that.

Mr REDFORD (South Australia): In South Australia the primary principle is it does not come into effect until the expiration of 12 sitting days of Parliament, which covers the period you are up. About five years ago we introduced some legislation which the Executive could say was an emergency and we want it to come into effect straight away. Unfortunately, the practice has been that in 99 per cent of cases it is an emergency. So on a number of occasions my committee has reported that the Executive is abusing it. The real risk from the Executive's point of view is that the Executive does not control completely both Houses of Parliament and it seriously runs the risk—and I know this only arises now and again—of having the opportunity to introduce something as an emergency taken away from it because it has abused that privilege. At the end of the day, as parliaments, we do let the Executive get away with this on many occasions. I suppose I can say—there is no-one here from anywhere else in South Australia—that the Opposition had a bill taken right away from it and it sat on the notice paper. I understand the Opposition had another caucus meeting, the polls went up and it looked as if it could win the next election, and it promptly withdrew the bill.

Mr NAGLE: Does it not go back to the time of Henry VIII? There has always been a struggle between the Parliament and the Executive, the King.

Mr REDFORD: Today's Parliament is tomorrow's Executive.

Mr NAGLE: True.

Ms HERVIEUX-PAYETTE (Canada): In Canada the civil law has influenced the common law. Now that the bills are written just as they are in civil matters, very detailed, and regulations are playing a smaller role, in your years in Parliament have you seen an instrument or did you write legislation in broad terms with all the details in the regulations, which is the common law approach? I feel that nowadays in Canada the civil legislation has influenced so much the common law that they are going along with the French way of writing laws and, of course, regulations are far less important. There is more detail in the law than in the regulations.

Mr NAGLE: For example, in the case of legislation that deals with an important part of national parks, someone will write 77 pages of regulations for people to obey and gives them two days. The legislation is being written in a more simple way. but it is a matter for government. We have parliamentary draftsmen, but governments tell them, "This is what we want, you draft it for us." They draft it, and if the regulations are going to be more important the Ministers still take advice from their bureaucracies, they still have Cabinet meetings and they still deal with policy issues. I have seen some legislation that is very detailed, with very few regulations, and I have seen legislation that is very limited but regulations which are very extensive. It is a matter of the importance of the scrutiny of bills and the scrutiny of delegated legislation.

NOTICES OF MOTIONS

CHAIR (Ms Burton): Before we conclude today's formal business we need to consider the drafting of some notices of motion for conference resolutions arising out of the proceedings. These will be debated when we move to the motions on Friday. It is important that we come up with some resolutions of the conference topics and other concerns that emerge with respect to the work of the committees, in order to assist committees with routine business and to act as the focus for future conferences. We do not want these motions to be mere afterthoughts. We want them to be pivotal in framing our future conferences and the future work of the committees. I understand the Chairman of the New South Wales committee has prepared some notices and if delegates have further notices arising out of the proceedings they may read them now or do so at this time tomorrow.

Mr NAGLE: Ladies and gentlemen, Cherie Burton is a newly elected member of the Legislative Assembly for the seat of Kogarah. This is her first opportunity to sit in the Speaker's chair. I give notice that on Friday I shall move:

1. That this conference resolves that a report be presented at future conferences of Australian Scrutiny of Legislation Committees on the approaches of the Commonwealth, States and Territories in respect of regulatory impact assessment, as compared with international best practice.

2. That this conference establishes a national committee comprised of the chairs of Australian Scrutiny of Legislation Committees for the purpose of reviewing proposed national schemes of legislation and that the national committee inquire into and report upon the operation on the desirability of the adoption of common terms of reference by all Australian Scrutiny of Legislation Committees and whether the extended terms of reference of certain committees should be retained.

3. That this conference resolves that Australian Scrutiny of Legislation Committees report to their next conference on the desirability of a review model which provides that regulations come into force at the expiry of a specified number of days after tabling, unless the Parliament resolves otherwise.

4. That this conference resolves that the question of funding of future conferences be referred to the next conference of presiding officers of State and territorial parliaments for consideration.

CHAIR: These notices will lie on the table and the conference will debate them and any amendments to them on Friday. Are there any further notices? I am prepared to take notices for debate on Friday.

Mr RYAN (Victoria): I did have a notice but it might have been overtaken by one of those that Peter Nagle read out. I desire to give notice that on Friday I shall move:

That this conference notes the paper delivered by myself, Peter Ryan, Victoria, concerning the proposal to establish a national committee for the scrutiny of national schemes of legislation. Further, this conference recommends that all Australian jurisdictions place the proposal before their respective committees for consideration by them and to report to a joint meeting of chairs by 29 February 2000.

CHAIR: I will arrange for those to be printed for delegates. There being no further notices I will adjourn the conference until 9.00 a.m. tomorrow.

(The Committee adjourned at 4.43 p.m.)