Regulation Review Committee
Parliament of New South Wales

Report on the Meeting of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

Parliament House, Darwin
14 and 15 February 2000

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Regulation Review Committee

Members:

Mr P. R. Nagle, MP, Chairman
Hon J. A. Saffin, MLC, Vice Chairman
Ms C. A. Burton MP
Hon D. T. Harwin, MLC
Hon M. I. Jones MLC
Dr E. A. Kernohan, MP
Ms M. F. Saliba, MP
Mr R. W. Turner, MP

Secretariat:

Mr J. Jefferis, Director
Mr G. Hogg, Project Officer
Mr D. Beattie, Clerk to the Committee
Ms S. Dale, Assistant Committee Officer

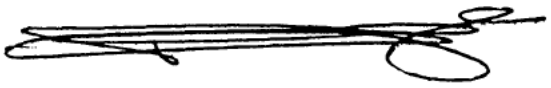
Chairman's Foreword

This report summarises the matters discussed at the meeting of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees which was held in Darwin on Monday and Tuesday 14 and 15 February 2000. I have annexed each of the papers presented at the meeting in order to inform Parliament of the breadth and significance of the issues raised by the Working Group.

It will be seen that the chief concern of Chairs and Deputy Chairs was the growth of national schemes of legislation and the strategies available to the Parliaments of Australia to put in place effective systems of scrutiny. In the report that follows I have summarised the main thrust of each of the papers and the discussion that ensued from them. It should be borne in mind that in a Working Group such as this the papers only form a catalyst for discussions of issues and I will table the transcript of the full meeting of the Working Group when this becomes available.

I would like to thank the Chairs and Deputy Chairs for attending the meeting and in particular our hosts, the Honourable Terry McCarthy, Speaker of the Legislative Assembly, Mr Ian McNeil, Clerk of the Parliament, and members of the Subordinate Legislation and Publications Committee of the Northern Territory: Mr Steve Balch MLA, Chairman; Mr John Elferink MLA; Mrs Maggie Hickey MLA; Mr Phil Mitchell MLA; Mr Maurice Rioli MLA; and Mr Terry Hanley, Secretary and his assistant Roseline Vogeli.

The full list of delegates is set out in Appendix 1.



Peter R. Nagle, MP
Chairman

Opening Addresses

The meeting was opened by the Honourable Terence McCarthy, Speaker of the Legislative Assembly of the Northern Territory:

Hon Terry McCarthy, MLA (Speaker, NT Legislative Assembly):

Good morning to everybody and welcome to Darwin. On behalf of the Northern Territory Parliament I extend to all delegates a warm welcome to Darwin, the land of opportunity and optimism, you have probably picked that up, and as we Territorians affectionately refer to it as "The gateway to our neighbours in Asia".

Those of you who have visited the Top End on other occasions will have noticed that Darwin is on the move. Some landmarks may have disappeared but others have appeared in their stead.

You may well be housed in one of our excellent hotels and you will today enjoy the surroundings of our modern Parliament House.

You will undoubtedly pick up the air of optimism that exists here in Australia's Top End. In just a few months time a long awaited goal of the Northern Territory will take the first step to reality. The rail link from Alice Springs will be commenced. This link to a new and modern port to be open in Darwin this week will become Australia's trade link to Asia.

You have certainly opted for a most unusual time of the year to hold this meeting, as it is right in the middle of our wet season and, as you have no doubt all personally experienced, the humidity can be a bit overbearing, but it can be a lot worse I can assure you.

If on the other hand you had attempted to position the meeting around the dry season, through June to August, you would have run into stiff competition in locating adequate accommodation as that is the time when every other public and private sector group book their annual pilgrimage to Darwin. Perhaps this is a sign of your commitment to the Scrutiny of Legislation or maybe, like me, you prefer the Top End in the Wet.

I can see that your agenda is tight and there is no real opportunity to experience the sights beyond Darwin. We have much to offer and I hope that many of you take the extra time or return to experience the real Top End.

I note that the theme running through the agenda is that of Scrutiny of National Scheme Legislation. I am aware that this has been an issue since the delegates placed the matter on the agenda of the Fourth Australasian and Pacific Conference on Delegated Legislation in conjunction with the First Australasian and Pacific Conference of the Scrutiny of Bills in Parliament House in Victoria during July of 1993.

I do not intend to offer comment on this complex issue given the essentially political nature of the proposal, apart from making observations that it would appear any national committee would probably be established administratively rather than legislatively This in itself would make me conclude that there is a real need for all committees to clarify, sell and explain to their colleagues the final proposal if you are to progress the matter.

I must congratulate both the New South Wales and Northern Territory Chairmen for co-hosting this meeting. I am led to believe that this is the first occasion that the group has broken away from the traditional format and I believe this reflects the opportunity you see to work together for a common goal.

Just moving away from the topics that you will be discussing at this extraordinary meeting over the next two days. I am aware that, as a major group responsible for the scrutiny of principal and subordinate legislation, you only conduct a biennial conference. The subject papers and the networking links that are established between all Territory and State Committee Members and at Officers' level as a result of these conferences, are invaluable and should continue to be nurtured —and, I guess, that is the case for all such meetings.

Similar comments were made by the Hon. Trevor Griffin, MLC, Attorney General and Minister for Consumer Affairs when addressing your 1997 conference in Adelaide where he said "The roles of the Legislative Review Committees or Scrutiny of Bills Committees are important in our parliamentary system and an opportunity to exchange ideas and information relating to the work of the Committees in the broader context of a parliamentary process is critical".

I now have pleasure to officially open this meeting in Darwin of the Working Group of Chairs and Deputy Chairs of the Australian Scrutiny of Primary and Delegated Legislation Committees. I wish you well for your deliberations.

In their opening addresses Mr Steve Balch MLA, Chairman of the Subordinate Legislation and Publications Committee of the Northern Territory, and Mr Peter Nagle MP, Chairman of the meeting, outlined their intentions for the meeting.

Mr Nagle in his address included extracts from a book entitled *The Death of Commonsense: How Law is Suffocating America* by Philip K. Howard, which outlines a number of examples of regulations which are out of step with the practicalities of modern life in America. He suggested that committees could find similar examples in their own legislatures. A copy of Mr Nagle's address is set out in Appendix 2.

Resolutions of the Previous Meeting

The following three resolutions of the previous meeting of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees, held in Sydney on 10 March 1998, were noted by the Working Group:

(i) *That a steering committee for the purposes of a joint appraisal of the strengths and weaknesses of employing cost benefit and sunset requirements to scrutinise Acts and Regulations and to review other scrutiny options be established comprising a member from the Standing Committee on Regulations and Ordinances and a member from each of the scrutiny committees of New South Wales, Victoria, South Australia, Queensland and Tasmania, and that Western Australia, the Australian Capital Territory and the Northern Territory be invited to participate as member of the committee.*

(ii) *The preparatory work be initiated by a steering subcommittee comprising a member from the Standing Committee on Regulations and Ordinances and from each scrutiny committee from New South Wales and Victoria.*

(iii) *That this meeting of chairs and deputy chairs of scrutiny committees resolves to establish a permanent working group, inviting membership from chairs and deputy chairs of committees involved in legislative scrutiny in the Parliaments in the Commonwealth of Australia.*

APPLICABILITY OF THE OECD RECOMMENDATIONS TO AUSTRALIAN SCRUTINY COMMITTEES

In this paper Mr Nagle, with the assistance of Mr Greg Hogg, Project Officer to the Regulation Review Committee of New South Wales , outlined the 19 recommendations that the OECD made in its report on Regulatory Impact Assessment in New South Wales. That report was made pursuant to resolutions (i) and (ii) of the previous meeting held in Sydney on 10 March 1998. It was tabled by the Regulation Review Committee in its report No. 18 of the 51st Parliament in January 1999. In addition to outlining the recommendations Messrs Nagle and Hogg provided the meeting with examples illustrating the issues raised by the OECD.

A copy of this paper is included as Appendix 3.

SCRUTINY OF NATIONAL SCHEME LEGISLATION – PROPOSAL BY THE SCRUTINY OF ACTS AND REGULATIONS COMMITTEE OF THE PARLIAMENT OF VICTORIA

This paper was delivered by Ms Mary Gillett, MLA, the Chair of the Victorian Committee. It outlined a previous proposal for the establishment of a Committee for the scrutiny of national scheme legislation comprising representatives of the respective Australian scrutiny committees. Considerable debate ensued on the type of legislation which could be scrutinised by the committee and the desirability of establishing it by Commonwealth legislation. A copy of Ms Gillett's paper is included as Appendix 4.

SCRUTINY OF NATIONAL SCHEME LEGISLATION: CASE STUDIES, QUEENSLAND

This paper was presented by Mrs Linda Lavarch MLA, Chair, Scrutiny of Legislation Committee Queensland and outlined case studies with respect to the Committee's scrutiny of the following bills:

Competition Policy Reform (Queensland) Bill 1995;
Electricity – National Scheme (Queensland) Bill 1997;
Friendly Societies (Queensland) Bill 1997;
Gas Pipelines Access (Queensland) Bill 1998;
Audio Visual and Audio Links Amendment Bill 1999;
Road Transport Reform Bill 1999.

The Queensland Committee considers that it has improved the standard of information required to be provided to Parliament with respect to national scheme bills. A copy of Mrs Lavarch's paper is included as Appendix 5.

SCRUTINY OF NATIONAL SCHEMES OF LEGISLATION: NEW SOUTH WALES CASE STUDY

This paper was presented by Mr Hogg, Project Officer, New South Wales Regulation Review Committee, and outlined the review of the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999* which is national scheme subordinate legislation. The paper emphasised the importance of cost benefit analysis and consultation on national scheme proposals and reference was made to the major difficulties associated with the application of the regulation which were raised in a submission on the RIS by the Chief Magistrate of the Local Court in New South Wales. A copy of Mr Hogg's paper is included as Appendix 6.

NATIVE TITLE - EFFECT ON NORTHERN TERRITORY LEGISLATION

Mr Balch indicated the historical background to the native title debate in Australia and its particular importance to the Northern Territory because of the extent of the lands involved. He said that a number of different models of national scheme legislation had been considered with respect to native title.

A copy of Mr Balch's paper is included as Appendix 7.

ADMINISTRATION (INTERSTATE AGREEMENTS) ACT 1997 OF THE AUSTRALIAN CAPITAL TERRITORY

Mr Peter Bayne, legal advisor to the Standing Committee on Justice and Community Safety of the Australian Capital Territory outlined the operation of the *Administration (Interstate Agreements) Act 1997* which provides that where a Minister proposes to participate in a negotiation for an interstate agreement the Minister shall consult with the Standing Committee of Justice and Community Safety regarding the matter. Mr Bayne considered that the ACT Committee could provide an early warning of national scheme proposals to all Australian scrutiny committees by means of the notification given under this Act.

A copy of the *Administration (Interstate Agreements) Act 1997* and of *Scrutiny Report No. 1 of 2000* of the Standing Committee on Justice and Community Safety are included as Appendices 8 and 9.

NATIONAL SCHEMES OF LEGISLATION: THE SOUTH AUSTRALIAN PERSPECTIVE

This paper was delivered by the Honourable Angus Redford, MLC, Presiding Member of the Legislative Review Committee of South Australia. Mr Redford outlined different models of national scheme legislation in his paper, and the approach of the South Australian Parliament and the South Australian Government to their scrutiny. Because of the South Australian Government's approach to national scheme legislation Mr Redford considers that an ad hoc or informal system of scrutiny of national scheme legislation should be adopted by Australian scrutiny committees.

Mr Redford indicated that the model of national scheme legislation, known as template legislation, was not adopted in South Australia due to Government policy. For this reason he considered that a Committee for the Scrutiny of National Schemes Legislation would have limited functions so far as South Australia was concerned.

A copy of Mr Redford's paper is included as Appendix 10.

UNIFORM LEGISLATION: IMPACT ON WESTERN AUSTRALIA

This paper was presented by the Honourable Kevin Minson, MLA, Chairman of the Standing Committee on Uniform Legislation and Intergovernmental Agreements of the Western Australian Parliament.

Mr Minson outlined the method of developing national scheme legislation through Ministerial councils and several case studies on national scheme legislation with respect to native title, the environment, transport and gun law reform. This paper is included as Appendix 11.

RESOLUTIONS

The following resolutions were passed by the meeting:

1. *This meeting remains committed to the resolution carried by the July 1999 Sydney Conference to establish a system of national scrutiny of National Scheme of Legislation (NSL).*

2. *This meeting defines NSL as any legislation which is enacted or made or proposed to be enacted or made, in more than one Australian jurisdiction as a result of an inter-governmental agreement.*

3. *Being mindful of the divergent views expressed at this meeting but wishing to move forward as a group on the establishment of such a national committee, this meeting resolves to –*

   (a) (i) ensure that a regular exchange of information and views takes place;

   (ii) ensure that all Federal, State and Territory Committees receive the earliest possible advice of any proposed or potential NSL and assign a staff member from each Committee for such a purpose;

   (iii) request that the Working Group make further recommendations concerning the establishment of a formal national committee;

   (iv) enable the Federal, State and Territory Committees to address the issues identified;

   (v) request that the Working Group report on their activities and present further recommendations at the Biennial Conference.

(b) *That the following dates be the future meeting dates of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees:*

May 2000, Brisbane

October 2000, Alice Springs

February 2001, Tasmania

May 2001

October 2001

February 2002

May 2002

October 2002

May 2003.

(c) (i) *That the meeting formalise the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees to elect a National Executive;*

(ii) *That the National Executive shall have a national chairperson, one senior vice-president and four vice-presidents;*

(iii) *That the National Chairperson hold office for a period of two years and that the position rotates;*

(d) *That up to four members from this meeting attend Canberra whilst the National Parliament is in session and before the end of March, to appraise Senator Cooney and Senator Coonan's respective Committees of the deliberations and resolutions of this meeting for the purpose of seeking their support and co-operation.*

(e) *That a comprehensive list of national scheme legislation be prepared.*

(f) (i) *That the national chairperson of the Working Group be:*

Mr Peter Nagle, MP
Chairman,
Regulation Review Committee, New South Wales.

(ii) That the senior Vice-President be:

the Honourable Angus Redford MLC,
Presiding Member,
Legislative Review Committee, South Australia.

(iii) and that three of the four Vice-Presidents be:

Mrs Linda Lavarch, MLA
Chair,
Scrutiny of Legislation Committee, Queensland;

Mr Bob Wiese, MLA
Chairman,
Joint Standing Committee on Delegated Legislation,
Western Australia;

and

Mr Steve Balch, MLA
Chairman,
Subordinate Legislation and Publications Committee,
Northern Territory.

DISCUSSIONS WITH SENATE COMMITTEES

Pursuant to resolution 3 (d) above, on the afternoon of Thursday 9 March 2000, Mr Peter Nagle, MP, Chairman, the Honourable Angus Redford MLC, Senior Vice-President, Mr Steve Balch, MLA Vice-President , and Mr Greg Hogg attended the Senate in Canberra to appraise Senator Cooney and Senator Coonan's respective Committees of the deliberations and resolutions of this meeting.

The delegation met with Senator Coonan, Chairman of the Regulations and Ordinances Committee, Senator Crane, a member of both the Regulations and Ordinances Committee and the Scrutiny of Bills Committee, and Senator Mason, a member of the Scrutiny of Bills Committee.

The Chairman outlined the course of the proceedings in Darwin and said that the two major topics were the OECD report which was the subject of a paper delivered by the New South Wales Committee and the Scrutiny of National Schemes of Legislation.

He said that most of the debate at the meeting centred on the scrutiny of national scheme legislation, and that it was important the Senate be represented on a sub-committee to scrutinise this legislation. He said there was an additional vacancy for a vice-president on the working group and that after discussions with Senator Cooney it was decided to invite Senator Coonan to fill this vacancy.

In reply, Senator Coonan said that due to the Senate's workload it would not be possible for her or any one senator to fill the vacancy for the initial term of appointment of two years. However she asked that the vacancy be held on the basis that either Senators Cooney or Coonan or their alternates appointed from their respective Committees be permitted to serve as vice-president at any meeting.

The Chairman agreed to put this recommendation to the next meeting of the working group at Brisbane and said that he would support it. Messrs Balch and Redford also agreed to this course.

The Chairman said that he was meeting Senator Cooney on the 21st March and he would bring him up to date on the Darwin meeting and subsequent developments.

The Senators indicated that it should be possible for a representative of their Committees to attend the meeting of the Working Group in Brisbane on 8 May 2000.

APPENDIX 1

List of Delegates

List of Delegates

Northern Territory
Subordinate Legislation and Publications Committee

Mr Steve Balch MLA – Chairman
Mr John Elferink MLA
Mrs Maggie Hickey MLA
Mr Phil Mitchell MLA
Mr Maurice Rioli MLA
Mr Terry Hanley

Queensland
Scrutiny of Legislation Committee

Mrs Linda Lavarch, MLA - Chair
Mr Christopher Garvey, Research Director

New South Wales
Regulation Review Committee

Mr Peter R. Nagle MP - Chairman
Hon Janelle Saffin MLC - Vice Chairman
Hon Malcolm Jones MLC
Ms Marianne Saliba MP
Mr Greg Hogg , Project Officer

Commonwealth of Australia
Standing Committee for the Scrutiny of Bills

Mr James Warmenhoven, Secretary

Commonwealth of Australia
Standing Committee on Regulations and Ordinances

Ms Janice Paull, Research Officer

Australian Capital Territory
Standing Committee on Justice and Community Safety

Mr John Hargreaves MLA - Deputy Chairman
Mr Tom Duncan, Secretary
Mr Peter Bayne, Legal Adviser

Victoria
Scrutiny of Acts and Regulations Committee

Ms Mary Gillett MP – Chair
Hon Jenny Mikakos MLC
Mr Tony Robinson MP
Mr Andrew Homer, Senior Legal Adviser
Ms Jenny Baker, Legal Adviser (Subordinate Legislation)

Tasmania
Standing Committee on Subordinate Legislation

Hon Geoff Squibb MLC - Deputy Chair
Ms Wendy Peddle, Secretary

South Australia
Legislative Review Committee

Hon Angus J. Redford MLC - Presiding Member
Mr Peter Blencowe, Secretary

Western Australia
Standing Committee on Uniform Legislation and Intergovernmental Agreements

Hon Kevin Minson MLA - Chairman
Ms Melina Newnan, Research Officer

Western Australia
Joint Standing Committee on Delegated Legislation

Hon Bob Wiese MLA – Chairman
Mr Bill Thomas MLA
Mr Nigel Pratt, Advisory/Research Officer

APPENDIX 2

Meeting of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

Darwin, 14 and 15 February 2000

Opening Address

Mr Peter R Nagle MP
Chairman
Regulation Review Committee New South Wales

I thank Steve Balch for his warm welcome to Darwin. Our purpose here today is to examine a number of issues of common concern to Committees in a more informal atmosphere than the Biennial Conference of Committees permits. While we have a few prepared papers they are really only a catalyst for further discussion of the issues of concern. I suppose our longest standing issue is that of the scrutiny of National Scheme Legislation. Several papers will address this.

It is perhaps unfortunate that Senators Cooney and Coonan are not able to be with us to give us an update on the position in the Commonwealth with respect to the scrutiny of National Scheme Legislation, although I hope James Warmenhoven and Janice Paull will be able to provide us with some background.

As I understand it the issue is very much tied up with the progress of the Legislative Instruments Bill of the Commonwealth which is yet to be re-presented to the Parliament.

As most of you know that bill has had a chequered career under a number of Governments and in fact was one of the potential triggers for the double dissolution prior to the last Commonwealth election. I understand that the Senate insists that the power to scrutinise National Scheme Legislation be included in the bill but this has been rejected by the House of Representatives on a number of occasions.

I have arranged to brief Senator Cooney and Senator Coonan on the outcome of our deliberations on my return.

Moreover, we will need to look at what future directions we can take on National Scheme Legislation. We should also be examining and look to a more formalised structure for the meetings of the Chairs and Deputy Chairs. I hope that we will be able to examine these issues tomorrow afternoon.

As you can see from the agenda the next item to be discussed is the resolutions of the last meeting of Chairs and Deputy Chairs which was held in Sydney in March 1998. Arising from those resolutions another major item for discussion at this conference will be the OECD assessment of our regulatory impact assessment procedures.

Finally and before we proceed to those resolutions I would just like to mention that I was given a book, when I was recently on a study tour to the United States, which I think outlines some of the problems our Committees face in reviewing regulations. The book is entitled *The Death of Common Sense – How Law is Suffocating America* by Phillip K. Howard. Mr Howard outlines a number of examples of regulations which are out of step with the practicalities of modern life in the United States.

He cites the following example:

> *In the winter of 1988, nuns of the Missionaries of Charity were walking through the snow in the South Bronx in their saris and sandals to look for an abandoned building that they might convert into a homeless shelter. Mother Teresa, the Nobel Prize winner and head of the Order, had agreed on the plan with Mayor Ed Koch after visiting him in the hospital several years earlier. The nuns came to two fire-gutted buildings on 148th Street and finding a Madonna among the rubble, thought that perhaps providence itself had ordained the mission. New York City offered the abandoned buildings at one dollar each, and the Missionaries of Charity set aside $500,000 for the reconstruction. The nuns developed a plan to provide temporary care for sixty-four homeless men in a communal setting that included a dining room and kitchen on the first*

floor, a lounge on the second floor, and small dormitory rooms on the third and fourth floors. The only unusual thing about the plan was that Missionaries of Charity, in addition to their vow of poverty, avoid the routine use of modern conveniences. There would be no dishwashers or other appliances; laundry would be done by hand. For New York City, the proposed homeless facility would be (literally) a godsend.

Although the city owned the buildings, no official had the authority to transfer them except through an extensive bureaucratic process. For a year and a half the nuns, wanting only to live a life of ascetic service, found themselves instead traveling in their sandals from hearing room to hearing room, presenting the details of the project and then discussing the details again at two higher levels of city government. In September 1989 the city finally approved the plan and the Missionaries of Charity began repairing the fire damage.

Providence, however, was no match for law. New York's building code, they were told after almost two years, requires an elevator in every new or renovated multiple-storey building. The Missionaries of Charity explained that because of their beliefs they would never use the elevator, which also would add upward of $100,000 to the cost. The nuns were told the law could not be waived even if an elevator didn't make sense.

Mother Teresa gave up. She didn't want to devote that much extra money to something that wouldn't really help the poor. According to her representative, "The Sisters felt they could use the money much more usefully than for soup and sandwiches." In a polite letter to the city expressing their regrets, the Missionaries of Charity noted that the episode "served to educate us about the law and its many complexities."

He goes on to refer to obsolete design rules which have little place in modern America. He states:

Have you ever noticed how new housing subdivisions have an open, almost empty look? It isn't just the absence of trees. The streets are fifty feet wide, about 50 percent wider than streets were a few decades ago. Why? Because the traffic engineers who wrote the standard code after World War II believed that streets should be wide enough to allow two fire engines going in opposite directions to pass each other at 50 miles an hour. Andres Duany, a Miami architect who specializes in designing new towns, maintains that the traffic engineers have thereby depleted human interaction and fellowship from modern America. He calls them the "devils".

The two-fire-engine rule did not evolve because it was sensible or by amazing coincidence of judgment by town boards around the country. It was part of a model code that was accepted as "modern", and cities and towns fell before it like dominoes. Once the words were designated as law, there was no longer a need to think about it. Almost no one who builds new houses knows why the requirement is there. Nor do bureaucrats. They abide by it because they have to. It's the law.

The book goes on to quote the following further example:

In the late 1980s, Dr Michael McGuire, a senior research scientist at UCLA, found himself in trouble. His lab, which sits on five acres, is funded by the Veterans Administration. Its lawn also needs to be cut. When the lawnmower broke, Dr McGuire decided to go out and buy another one. He filled out no forms and got no approvals. He also told VA mechanics they could use the broken lawnmower for spare parts. During a routine audit, the federal auditor asked why the lawnmower was different.

Dr McGuire told the truth, and thus launched an investigation that resulted in several meetings with high-level federal officials: "I couldn't understand," Dr McGuire notes, "why important agency officials would spend their time this way." Finally, after months, they rendered their findings: They could find no malice, but they determined Dr McGuire to be ignorant of the proper procedures.

He received an official reprimand and was admonished to study VA procedures ("about the size of an encyclopaedia"). Dr McGuire has not yet achieved the proper state of contrition: "I guess I made the egregious mistake of tossing a broken federal lawnmower." One other fact: Dr McGuire bought the lab's lawnmower with his own money.

I am sure we can find equally inappropriate bases for regulations in our own jurisdictions. This is not to say that there may not have been good reason for designing regulations in this form when they were first introduced but logic tells us that they need to be regularly reviewed to ensure that they remain relevant to the current social and legal framework.

That is the purpose of the staged repeal programs in a number of our jursidictions and we will be considering the regulatory impact assessment processes that apply in several of our legislatures.

In concluding my opening remarks, I would like to thank the Chairs, Deputy Chairs and observers for attending and I look forward to their participation in this meeting.

APPENDIX 3

Meeting of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

Darwin, 14 and 15 February 2000

Applicability of the OECD recommendations to Australian Scrutiny Committees

As I indicated in the previous session, 19 recommendations were made by the OECD for the improvement of regulatory impact assessment in New South Wales. In conducting its report the OECD drew on international experience and examined the position in a number of other Australian jurisdictions. I therefore intend to invite the views of the delegates on the recommendations of the OECD report. As New South Wales was the focus for the OECD we first should examine the progress made in implementing these recommendations.

We tabled the OECD recommendations in January 1999 in our report No. 18 of the 51st Parliament. I think you were all provided with a copy of this report. After we tabled the report we forwarded a copy to the Premier of New South Wales and subsequently contacted the Cabinet Office. We have been informed that the report is under consideration along with a number of other options and it will be discussed with our Committee in due course.

Recently the Committee also noted that our report was listed among the regulatory reforms of the States and Territories in the 1998-99 Annual Report of the Commonwealth Productivity Commission's Office of Regulatory Review. For those of you unfamiliar with this publication, it sets out the best practice processes for regulation and RIS requirements that apply in the Commonwealth and each year indicates the degree of compliance by the respective Commonwealth Government agencies with those requirements.

The Annual Report also contains a section on the progress in regulatory reforms among the States and Territories. It states that the suggested improvements in our report will be considered along with other options for improving regulatory quality. This is obviously information that has been derived from the New South Wales Cabinet Office. As our report came about from the resolutions of the previous Chairmen's conference we were keen to get a more definitive view from the Premier of the options being considered as a consequence of our report. Accordingly I wrote to the Premier last month seeking details of when the assessment of the options is likely to be completed and we are awaiting a response.

What I would like to do is to invite delegates to discuss the recommendations contained in our report and any other matter relevant to the OECD's assessment.

Perhaps if we go through the recommendations it might assist delegates in the debate.

I should point out that the recommendations refer to "RIA", this is the process of Regulatory Impact Assessment which is embodied in a document called a Regulatory Impact Statement or "RIS" which compares the costs and benefits of the proposed regulation with those in respect of other relevant options. However the two expressions RIA and RIS are often used interchangeably.

8.2. Recommendations

8.2.1. Substantive provisions

The basic approach to Regulatory Impact Assessment contained in the Subordinate Legislation Act 1989 is sound and has delivered limited but important gains in terms of regulatory quality and public participation in the regulation making process. However, the Act should be substantially redrafted to address a number of significant weaknesses. In particular:

Recommendation 1: The Subordinate Legislation Act should be broadened to incorporate appropriate mechanisms to ensure RIA disciplines equivalent to those applicable to delegated legislation are also applied to primary legislation.

Systematic analysis of primary legislation has potential gains at least as large as those deriving from RIA of subordinate legislation. Despite being an early adopter of RIA for subordinate legislation, NSW has not followed the practice of the majority of OECD countries in providing for RIA scrutiny of primary legislation. While the adoption of systematic *ex poste* review requirements for primary legislation provides a useful quality control discipline, it is not a substitute for a requirement for *ex ante* assessment. While the Australian Federal Government's experience shows that such scrutiny can be provided for administratively, consideration should be given to a legislated requirement that would also provide for the integration of consultation opportunities based on the release of RIA information.

Recommendation 2: The coverage of the Act should be broadened to include amending, as well as principal, statutory rules.

The legislative distinction between principal and amending rules bears little relation to the extent of the impact of a rule. Amending regulations may have major regulatory impacts and should be subject to the same threshold tests to determine if RIA is warranted as are applied to principal rules.

Recommendation 3: The coverage of the act should be broadened to include all substantive delegated legislative instruments.

Consideration should be given to the adoption of a broad definition of "delegated legislative instruments" such as that employed in the Federal Legislative Instruments Bill, in order to ensure that major gaps in the coverage of RIA disciplines are avoided and incentives for a strategic use of different forms of legislative instrument do not arise or persist.

Recommendation 4: The Act should specifically require that incorporated materials, such as national standards, be assessed in RIA and tabled with the regulations that incorporate them

National standards often impose the bulk of a regulation's real burden or, where optional, can be an invaluable guide to assessing the likely burden of a performance based regulation. They should be specifically required to be incorporated in the RIA and tabled for review in the Parliament along with the regulations that incorporate them.

Recommendation 5: The sunsetting cycle should be extended to 10 years to ensure that review activity is required only where there is a strong possibility that regulation has become outdated and requires significant change. In conjunction, the availability of postponements to the sunsetting requirement should be reduced to a single twelve-month postponement.

The current sunsetting cycle is universally regarded as too short by major participants in the process and, arguably as a result, has been undermined by the extensive use of the postponement mechanisms well beyond the purpose for which they were originally designed. Moving to a 10 year cycle would bring consistency with most other Australian jurisdictions and allow review and RIA resources to be better deployed - for example in the conduct of RIA on amending regulation.

Recommendation 6: Sunsetting should occur on the tenth anniversary of the coming into effect of a regulation, rather than on 1 September each year, as at present.

The existing system necessarily ensures that the mass of regulatory activity is clustered within several weeks prior to the 1 September sunsetting date and therefore strains the resources of a range of parties to the regulation-making and review processes. Effective quality assurance has, accordingly, suffered. The alternative, of adopting the tenth anniversary of the coming into effect of a regulation as its sunsetting date, would avoid this problem and allow enhanced regulatory quality without posing significant practical problems.

Recommendation 7: Consideration should be given to making the current trend to including review requirements in major primary legislation more systematic by explicitly including in the Subordinate Legislation Act, or its successor, a requirement that such review clauses are mandatory.

The recent move to insert review clauses in major primary legislation is an important step toward ensuring that *ex post* performance evaluation is systematically conducted in this area, and thus can achieve many of the benefits associated with sunsetting. The practice could be made more systematic by incorporating a general requirement for such reviews in the Subordinate Legislation Act. This would be a logical corollary of including a requirement for *ex ante* RIA of proposed primary legislation. A legislated review requirement should also incorporate detail as to the minimum essential features of the review process to be conducted.

Recommendation 8: The "threshold test" to determine when RIA is required to be conducted should be redesigned to ensure RIA is used only where it can contribute to regulatory quality. The use of more effective preliminary analyses and of expert advice from a dedicated regulatory reform body should be considered.

RIA resources are currently being used in circumstances where there is little possibility of them positively affecting the regulatory outcome. This diverts assessment resources from higher productivity uses and undermines support for RIA. A more realistic and flexible test, able to draw on expert judgement should be implemented. This requires *inter alia* that preliminary assessments, such as those currently required under Schedules 1 & 2 of the Act, should be made available to the regulatory review body before it provides advice as to exemptions. A more flexible methodological requirement is also needed so that regulations that cannot easily quantified can be subject to appropriate forms of RIA to help in informing policy debate.

Recommendation 9: The exemption from RIA requirements in the case of matters arising under "substantially uniform" legislation should be removed, with exemptions only being available where equivalent RIA have previously been conducted.

RIA should be applied to all regulation, whether uniform with other jurisdictions or not. While duplication should be avoided, the case for applying RIA exists even where regulation is to be uniform between two or more jurisdictions.

Recommendation 10: Specific responsibility for reviewing and approving draft RIA should be allocated to a dedicated Office of Regulatory Reform located in the Cabinet Office.

While the Parliamentary Regulation Review Committee has taken an active and thorough approach to improving the quality of RIA it has been limited in its effectiveness by the fact that it necessarily becomes involve only after regulation is in force. The experience of numerous OECD countries, as well as other Australian States indicates that there is considerable value in allocating specific responsibilities in this area to a dedicated review body located in the centre of government. Certification of the adequacy of RIA prior to the completion of the regulatory process is essential if a high level of compliance with the provisions of the Subordinate Legislation Act is to be ensured.

Recommendation 11: A consultative process should be undertaken regarding the current Regulatory Flexibility amendments with a view to incorporating any additions and changes necessary in the redrafted Subordinate Legislation Act during its development.

The recent amendments to the Act were introduced without a specific consultation process being followed and without consultation being conducted with the Regulation Review Committee. Confidence in the adequacy and workability of the arrangements proposed to implement this important initiative may therefore be lacking, particularly as the provisions are silent about a range of important specific matters addressed in models for such a mechanism previously developed in Canada and in Victoria. Conduct of a thorough consultation process prior to redrafting the Act would provide an opportunity to ensure public confidence in the initiative and, given that this is a new area for legislation, would provide additional assurance as to its workability in practice.

8.2.2. Supporting arrangements

Recommendation 12: Establish a dedicated Office of Regulation Reform within the Cabinet Office that is dedicated solely to regulatory reform issues, in order to ensure adequate focus, resourcing and accountability.

OECD best practices argue that specific responsibilities for regulatory reform should be allocated at political and administrative levels. The above recommendations propose legislative changes to address this issue. They should be supported by a reorganisation within the Cabinet Office that would ensure that regulatory reform was entrusted to a dedicated office accountable specifically and solely for this area. It must also be accorded significantly greater resources than are currently devoted to regulatory reform within the Cabinet Office.

Recommendation 13: Establish an ongoing training programme designed to impart in a wide range of policy-makers within the administration an understanding of the purpose of the Subordinate Legislation Act as well as the specific skills required to conduct RIA and related processes.

A sufficiently detailed training programme should be established as a permanent part of Government efforts to support and implement the requirements of the Subordinate Legislation Act. This should be integrated as far as possible with the provision of written guidance materials and the provision of positive assistance on RIA and related tasks and should be the responsibility of the proposed Office of Regulation Reform.

Recommendation 14: *Consider the provision of positive assistance in RIA preparation, including the "on-call" availability of specialist analytical resources where necessary to regulators engaged in major RIA.*

Limited experience exists with this approach, but early feedback from the Netherlands, for example, suggests that this may be an effective and low cost way of responding to concern over the lack of specific RIA expertise in many regulatory agencies, while at the same time forging positive relations with regulatory reform authorities and contributing to the cultural change among regulators that RIA ultimately seeks.

Recommendation 15: *Supplement the provision of RIA guidance material with best practice manuals on closely related regulatory quality issues such as principles of good regulation and the use of regulatory alternatives.*

Effective RIA guidance material must balance the need to be understood by policy officers with limited technical training with the need to provide detailed guidance sufficient to support high quality RIA. One means of providing broader support for better regulatory quality is to supplement this guidance with other material addressing related topics. Review of NSW RIA indicates that guidance on the characteristics and uses of regulatory alternatives is likely to be particularly useful, while general guidance on regulatory quality, probably to be produced in conjunction with Parliamentary Counsel, would also assist consistency of regulatory approach and overall quality.

Recommendation 16: *Require the regulatory reform body to collect and report on key regulatory reform statistics on a regular basis.*

OECD's work on reform, including the recent regulatory indicators database, clearly shows evaluation to be a relatively neglected area of reform activity and yet, as a rapidly evolving area of policy, evaluation and feedback are essential to enhancing the benefits of reform. Key statistics on reform, including RIA, should be reported to parliament on a regular basis as an input into future policy-making.

8.2.3. National context

Recommendation 17: *Take positive steps to ensure maximum consistency between RIA, consultation and sunsetting processes at Federal and State levels and including the CoAG (The Council of Australian Governments) guidelines and principles applying to regulation made under national uniformity schemes.*

As States have adopted RIA and associated scrutiny systems across Australia, a broadly consistent approach has been taken, but important inconsistencies remain. Moreover, the Federal Government's current initiatives represent a significantly different approach in some respects, while the CoAG guidelines covering national uniformity agreements differ again. There are clear benefits in achieving consistency of regulatory quality standards across jurisdictions in terms of favouring convergence of regulatory outcomes, preventing "jurisdiction shopping" and disseminating best practices. Action must be multifaceted and consider institutional as well as legislative issues. The CoAG process offers an obvious forum through which such co-operative efforts can be co-ordinated.

Recommendation 18: Work toward the evolution of principles, such as the subsidiarity and proportionality principles of the European Union, to guide decisions as to when and how to use national uniformity and regulatory harmonisation approaches.

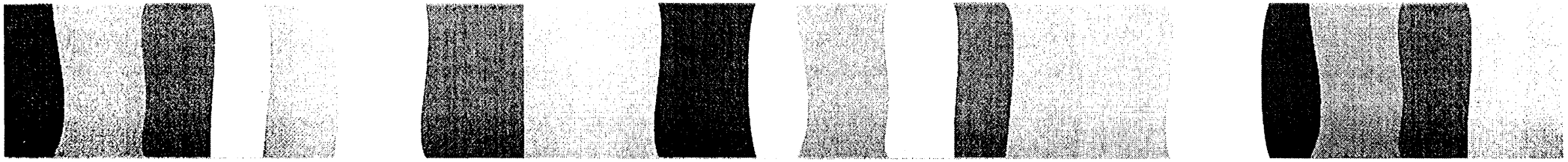
Achieving regulatory harmonisation or uniformity is resource intensive and may tend to impede subsequent updating and reform. Hence, it is important that decisions to move in this direction be based on a clear view of the benefits to be achieved. The European Union has developed principles to guide the decision as to which issues should be regulated at community wide level and which at national or sub-national levels. Given the current extensive use of national uniformity or harmonisation arrangements in Australia, identification of appropriate principles for the Australian context should be considered. NSW should take a leading role in putting forward this concept for discussion.

Recommendation 19: Establish procedures for information exchange between jurisdictions

Easy dissemination of a range of material related to regulatory quality assurance efforts (such as sunsetting, RIA registers, regulation-making statistics, disallowance statistics) would facilitate learning across jurisdictions, support research efforts and favour evaluation of the performance of the tools used. All of these outputs have the potential to contribute to the dynamic improvement of regulatory quality assurance processes.

APPENDIX 4

PROPOSAL FOR SCRUTINY OF NATIONAL SCHEMES OF LEGISLATION



Ms Mary Gillett MLA
Chair

Scrutiny of Acts and Regulations Committee

Parliament of Victoria

The Issue

National Schemes of Legislation (NSL) are on the increase. For years Scrutiny Committees have wrestled with the development of a practical mechanism for scrutiny of these forms of legislation.

The fundamental problem is that there are so many layers and players involved in the development and passage of the legislation and its scrutiny, that all attempts at establishing a system have foundered.

The Proposal

Attached is a diagrammatic representation of the proposed flow of the system, identifying its major features.

In essence:-

- **A proposal for National Scheme Legislation (NSL) is developed either through an individual Government or a collection of Governmental decisions as in the context of COAG. NSL may be primary legislation or subordinate legislation.**
- **Legislation applicable to the initiative is developed and becomes the NSL.**
- **The NSL is auspiced through a jurisdiction of the Federal, State or Territory Governments.**

- **Upon the NSL being introduced in the originating jurisdiction (OJ) it is marked on its face as being NSL.**
- **When the NSL is Second Read in the OJ it is immediately referred to a Committee for Scrutiny of National Scheme Legislation (CSNSL).**
- **The CSNSL could comprise one or two representatives from each of the six States, the two Territories and the Commonwealth Government being nine or eighteen members in all.**
  - The Committee would be established through Commonwealth legislation with mirror legislation in the States and Territories where this is necessary.
  - It would have a capacity to scrutinise both primary and subordinate legislation.
  - Its membership would comprise representation from the Scrutiny Committees or parliamentary nominees in each of the national jurisdictions.

- **The CSNSL would scrutinise the legislation and prepare a report.**

  This presently happens under the Victorian Parliamentary Committees Act through the operation of our Scrutiny of Acts and Regulations Committee and in the Senate, Queensland and the A.C.T with the tabling of an Alert Digest.

- **The Report would then be tabled within the Parliaments of each of the nine jurisdictions and would represent the report to the respective Parliaments upon the NSL.**

  To enable this to happen the equivalent of the Victorian Parliamentary Committees Act which established our Scrutiny of Acts and Regulations Committee, would need to be amended to exclude from its jurisdiction NSL and also to provide for the tabling of an Alert Digest pertaining to NSL in the form of the Report from the CSNSL. A similar process would need to occur in some of the other jurisdictions or the terms of reference/standing orders may need to be amended.

- **In the event of any future amendment to the NSL, the process would still apply in that the proposal would be scrutinised by the CSNSL.**

Commentary

(a) It would require Commonwealth legislation to establish the CSNSL.

(b) The proposal enables the nine jurisdictions to have a capacity to influence the shape of the NSL in accord with scrutiny principles and common terms of reference.

On the other hand it also enables scrutiny to occur contemporaneously - rather than going through the protracted process of being considered by each jurisdiction at different points in time with the inevitable proposals for change coming from different points of view. Any proposed change is appropriately co-ordinated by the CSNSL.

(c) The proposal enables the principles of scrutiny to be observed within each of the national jurisdictions by ensuring that there has been consideration of the NSL on behalf of the respective jurisdictions and that a report is duly tabled in each Parliament.

(d) There will be issues as to the mechanics as to how the Committee meets that can be refined in due course.

For example, with the range of technology now available, meetings may be convened without participants having to travel to a central point. The mechanics can be resolved later on.

Equally issues such as venue and timing of meetings, if actual attendance is required, can be resolved in due course.

(e) Voting at the CSNSL will also need to be resolved. It may be by simple majority.

If the representation from each jurisdiction is two, comprising one representative from the government and opposition parties this should allay any fears concerning political composition of the CNSL at any time, ie. there would always be a balance between Labour and Coalition.

However it should be noted that the experience in Victoria and probably in other States, is that the overwhelming number of decisions are taken by consensus without a vote being necessary.

(f) The CSNSL will require some sort of secretariat which should probably be Canberra based and funded jointly by the participating jurisdictions.

(g) Not all participating jurisdictions presently have scrutiny of bills committees.

It may be that this meeting should encourage them to consider having that function.

This proposal may be a catalyst to enable that to happen but in any event it should not matter nor is it a condition precedent for the immediate purposes of this proposal.

Proposed Course of Action

(a) Consider the position and/or proposals of other delegations.

(b) If the proposal is accepted, with or without modification, distribute it for comment by each Australian jurisdiction.

(c) Once the proposal is an acceptable form, progress it to the legislative stage and implement it.

APPENDIX 5

SCRUTINY OF NATIONAL SCHEME LEGISLATION
CASE STUDIES – QUEENSLAND

Presented by

Mrs Linda Lavarch MLA

Chair
Scrutiny of Legislation Committee (Queensland)

Meeting of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

Darwin, 14-15 February 2000

SCRUTINY OF NATIONAL SCHEME LEGISLATION
CASE STUDIES – QUEENSLAND

INTRODUCTION

Since its establishment in October 1995, the Scrutiny of Legislation Committee of the Queensland Parliament has scrutinised both primary and subordinate legislation. Prior to that, a predecessor committee had examined subordinate legislation for two decades.

In the period since 1995, the committee has of course regularly encountered national scheme legislation ("NSL") at both primary and subordinate levels. As I understand Greg Hogg will be discussing matters from a regulations perspective, I thought I would look at my committee's experience of NSL in the context of bills.

One difficulty in constructing case studies on NSL is that there is often not a lot of meaningful dialogue with the sponsoring Minister.

However, the examples I have included illustrate a number of issues raised by NSL bills. After I have taken you through those, I will try to summarise the position.

Given the nature of NSL, many of you will probably be familiar with some or all of these bills.

CASE STUDIES

The committee made a cautious start to its dealings with NSL bills. Within a month of its establishment in October 1995, it encountered the *Competition Policy Reform (Queensland) Bill 1995*. Whilst reporting in full on other aspects of the bill, the committee contented itself with a brief reference to the bill's status as NSL and the difficulties which that legislation posed for Parliaments. This approach was repeated in relation to several subsequent NSL bills.

However, by 1997 the committee was ready to declare a definitive position on NSL bills, and when the *Electricity – National Scheme (Queensland) Bill 1997* was introduced, the committee devoted the whole of its report on the bill to a consideration of its NSL aspects.

The major underlying concern about NSL bills is that Parliament's capacity to consider amendments of them is inhibited by the Minister's insistence that any amendment would undermine the inter-governmental consensus which it reflects. However, where the NSL applies the laws of another jurisdiction, as in force from time to time, there can also be concerns about Parliament's level of knowledge of these extraneous laws and their subsequent amendment.

The committee's report on the *Electricity – National Scheme* bill concentrated on these latter concerns.

Under the bill, Queensland applied as Queensland law the National Electricity Law, which was contained in a schedule to a South Australian Act (the *National Electricity (South Australia) Act 1996*) and in regulations made under the South Australian Act. These were to be applied as in force from time to time.

The committee declared its general concerns about "applied" NSL as follows:

> *Legislation merely applying the laws of another jurisdiction effectively circumvents the usual safeguards which have been built into the legislation-making process in Queensland. In 1992 the Queensland Parliament passed the Legislative Standards Act which requires that legislation should have sufficient regard to fundamental legislative principles.....These principles establish a very high standard for Queensland legislation to comply with. Some of the matters to which legislation is required to have sufficient regard are unique to Queensland, for example, legislation is required to have sufficient regard to Aboriginal tradition and Island custom.*

The committee went on to refer to the part normally played by the Queensland Office of Parliamentary Counsel in drafting legislation for the Queensland Parliament, and to his statutory role in incorporating the standards mentioned above into legislation. In respect of its own role, the committee pointed out that:

> *where a law of another jurisdiction is applied to Queensland, any concerns that the committee may raise with respect to the adopted legislation cannot be effectively addressed in Parliament because the adopted legislation cannot be amended* (by the Queensland Parliament).

The committee then turned to more specific concerns. It pointed out that none of the "applied" South Australian legislation was physically incorporated into the Queensland bill, and that copies of that legislation had not been circulated to Members of the Parliament, although one copy had been tabled with the bill.

Moreover, as the committee pointed out, an important Code of Conduct to be made under the applied laws by the participating Ministers was still in the course of development, although the latest draft had been tabled with the bill.

The committee considered that the result to be that:

:

> *Debate on the substance of this proposed legislation is made almost impossible by the fact that it is not made available to all members of Parliament, interested members of the public, members of the press and the committee.*

The committee considered that:

> *The full text of what this bill applies as a law of Queensland should be placed before Parliament. To ask Members of Parliament to pass voluminous documents as Queensland law without having the opportunity to examine them and consider their impact on Queensland citizens would seem to the committee to be asking them to neglect their responsibilities as Parliamentarians.*

The committee accordingly recommended that further consideration of the bill be delayed until the full text of the proposed law was made available to all Members of Parliament and the community. The committee requested that the minister consider inserting into the bill requirements that:

- In future, proposed amendments to the South Australian law applied by the bill be tabled; and
- Regulations made by South Australia pursuant to the law be tabled.

The bill was debated and passed only two days after the committee's report, but pleasingly the Minister moved an amendment which incorporated the text of the National Electricity Law into the bill, and imposed a requirement for future amendments of that Law and the regulations by the South Australian Parliament to be tabled in the Queensland Parliament.

Quite shortly afterwards, the committee was called upon to consider the *Friendly Societies (Queensland) Bill 1997*. This bill, which applied the *Friendly Societies (Victoria) Code*, and Victorian regulations giving effect to the Code, as laws of Queensland, raised similar issues to the earlier *Electricity – National Scheme* bill. The committee reported in similar terms and secured an amendment which required future amendments to the applied Victorian legislation to be tabled in Parliament. The Treasurer declined to incorporate the Code into the Queensland bill, but did provide a copy of the Victorian Act and Code to all members of Parliament.

The *Friendly Societies* bill is worth mentioning chiefly because it raised an issue relevant to the national scrutiny of NSL. The Explanatory Notes to the bill stated:

> *Care has been taken in drafting this bill to ensure that no aspects of the bill infringe upon fundamental legislative principles* (these being the Queensland statutory requirements for legislation, which are overseen by my committee). *The Victorian legislation, which this bill will apply, has been reviewed by the Victorian Scrutiny of Legislation Committee* (sic). *In its Alert Digest No 8, that Committee raised no objections to the contents of the Friendly Societies (Victoria) Act and Code. The Victorian Committee operates under similar guidelines to Queensland's Scrutiny of Legislation Committee.*

The Queensland committee, which did report on several aspects of the bill, responded to this assertion by arguing that, although the terms of reference of the two committees were similar, there were also substantial differences. In particular, the committee noted, the Queensland terms of reference included a list of specific examples, and the matters it had decided to report upon all came from that list.

The committee sought to take advantage of this matter by drawing the attention of the Treasurer, who had introduced the bill, to the benefits of a scheme for national scrutiny of NSL. The Treasurer's response (perhaps predictably) expressed interest in the possible costs associated with such a scheme. The committee referred the Treasurer to the 1996 Position Paper on the *Scrutiny of National Schemes of Legislation*, and expressed great interest in discussing the matter with the Treasurer or her representatives. Alas, the Treasurer did not respond.

In relation to the next bill I will mention, the *Gas Pipelines Access (Queensland) Bill* 1998, the committee obtained a small but significant extension of the range of information provided to members of Parliament.

That bill applied the South Australian Gas Pipelines Access Law as a law of Queensland. The relevant Law consisted of provisions contained in Schedules 1 and 2 to the *Gas Pipelines (South Australia) Act 1997*. The bill included an attachment setting out the full text of the South Australian Act.

The committee conceded that the requirements imposed by Queensland's *Legislative Standards Act 1992* in relation to explanatory notes for Queensland bills, probably did not require the provision of such notes for the clauses of the

attachment. The committee considered, however, that given the significance of the South Australian Act and its Schedules in relation to the Queensland bill, the provision of explanatory notes on the South Australian laws was essential to enable members of the Queensland Parliament to effectively examine those provisions before voting on the bill.

The Minister, to his credit, complied to a reasonable degree by obtaining and providing to members of Parliament copies of the South Australian clause notes on the provisions of the South Australian Act. The Minister claimed, however, that he could not assist in relation to Schedule 2 to the South Australian Act, as the South Australian clause notes had not dealt with it.

Of course, not all types of national legislative scheme require the enactment of identical bills. The committee in its reports has repeatedly indicated its view that the least objectionable form of national scheme, in terms of its impact on the institution of Parliament, is one which permits the various participating jurisdictions a degree of latitude in enacting their own legislation, whilst requiring that that legislation give effect to agreed principles.

This type of scheme should allow the sponsoring Minister to adopt a more relaxed attitude to proposals for amendment of the NSL bill.

Two bills of this latter type are of interest, for somewhat different reasons.

Last year the committee reported on the *Audio Visual and Audio Links Amendment Bill 1999*. The Explanatory Notes and the Attorney-General's second reading speech both stressed its NSL character: the former described the bill's first object as being:

> *(to provide) for Queensland to participate in a substantially uniform interstate scheme for the taking or receiving of evidence, and the making or receiving of submissions, from or in participating States*

and the latter declared that the bill:

> *implements an agreement by the standing committee of Attorneys-General to enact provisions enabling evidence to be taken and submissions to be received by video link or telephone within Australia.*
>
> *The standing committee developed a model bill and part two of this bill reflects the provisions of the model bill.*

Nevertheless, when the committee expressed its standard concerns about NSL and the narrowed scope for amendment by Parliament, the Attorney responded as follows:

> *Although the bill does form part of a uniform interstate scheme and draws substantially on the Standing Committee of Attorneys-General (SCAG) Model Bill, it does not merely slavishly adopt the uniform scheme. Rather, it innovatively adopts the thrust of the scheme while at the same time making appropriate modifications to suit the needs of this jurisdiction. Further, provisions quite apart from the SCAG scheme, have been included in the bill to address the concerns of key Queensland stakeholders such as the Director of Public Prosecutions and the Queensland judiciary.*
>
> *The bill is both appropriate and adapted to the jurisdiction, consistent with current drafting practice and, in my view, does not undermine the sovereignty of the Queensland Parliament.*

Despite this emphasis on the degree of autonomy involved in the drafting of the bill, it is perhaps worth noting that the Attorney did not offer to amend it to accommodate any of the concerns which the committee expressed about specific provisions.

Also last year, the committee scrutinised the *Road Transport Reform Bill 1999*.

That bill, in the words of the Minister's speech, would:

> *Introduce into Queensland a comprehensive and integrated road transport reform package which will deliver significant, long term economic, safety and efficiency benefits to Queenslanders.*

The Minister referred in his speech to several national inter-Governmental agreements which were all in some way intended to be implemented by the bill.

The committee commented:

> *It seems from the nature of the amendments (which the bill makes to existing Queensland Acts) that Queensland is, in effect, enacting its own legislation to give effect to principles embodied in the various agreements. Accordingly, the bill does not itself adopt legislation in a pre-determined standard form, agreed to by the participating governments. In that regard, the bill constitutes one of the less objectionable forms of national scheme legislation.*

As to the structure of the NSL bill, the Minister in his response to the committee's report provided the following (quite encouraging) information:

> *I am pleased to advise the committee that new intergovernmental agreements have been prepared which amend the processes for development of the National Road Transport Law.*
>
> *Previously, intergovernmental agreements required that States and the Northern Territory should adopt the National Road Transport Law via "template" legislation, simply applying the legislation of the host jurisdiction.*
>
> *Queensland has never followed this course and I am pleased to advise that the template approach has now been formally set aside. As amended, the agreements now provide;*
>
> ***8A.** Prior to a decision by Heads of Government under cl.8B, each Party, other than the Commonwealth and the Australian Capital Territory, shall progressively apply the substance of the [commonwealth Road Transport Legislation] as enacted or made from time to time so as to provide a uniform or consistent national operating environment for road transport.*
>
> ***8B.** Not later than three years after the execution of [the Agreements] or such later time as agreed by the Australian Transport Council, the Australian Transport Council will consider and recommend to Heads of Government the preferred means of achieving a nationally uniform or consistent integrated road transport law and Heads of Government shall make their decision by unanimous vote, on the recommendation and any consequential amendments to [the Agreements].*
>
> *As the committee correctly observes, the current bill entails Queensland enacting its own primary legislation to give effect to principles embodied in the National Road Transport Law*
>
> *While I note the committee's caution regarding national model regulations, I believe the new agreements and the bill's approach to implementing primary legislation strikes a sound balance between securing the benefits of national schemes of legislation and recognizing the importance of the institution of Parliament.*

The Minister's comments do seem to raise questions about whether the more prescriptive forms of NSL legislation, such as those involving "mirror" and "applied" legislation, could in fact be used less frequently than they are.

I might add that in the case of this bill the Minister demonstrated his flexibility by agreeing to the committee's recommendation that the bill be amended, to remove a "Henry VIII Clause".

However, despite the relatively acceptable format of the primary legislation in this case, it appeared that there was a sting in the tail in that the regulations necessary to fully implement the national scheme would be in a pre-determined form agreed upon at inter-government meetings.

CONCLUSIONS

What conclusions can be drawn at the end of 4 years of scrutiny of NSL bills?

The committee considers it has achieved a number of minor gains at the margins of the NSL process, primarily in relation to the standard of information provided by Ministers to Parliament in respect of extraneous legislation which is to be applied in Queensland .

The committee finds that these Acts are now either attached to the Queensland bill, or are otherwise provided to members of Parliament.

Also, the Explanatory Notes to NSL bills now tend at least to address the NSL issue in their treatment of the bill's impact on the "fundamental legislative principles", rather than (as was previously the case) completely ignoring that negative aspect of the legislation.

In short, the committee feels it has gone some way to ensuring that, even if members (as they seem invariably to do) accept the Minister's urging to pass the bill unamended, they are at least as well informed as possible about the contents and impact of the legislation they are voting for.

I would of course like to be able to report that, when the committee expressed significant concerns about parts of NSL bills, the sponsoring Ministers undertook to renegotiate those parts of the bill's contents with the other Governments involved. Naturally, there has not been a single example of that.

The committee's few victories in achieving amendments to NSL bills have occurred where the legislation is not identical, but only substantially uniform.

However, despite being unable to budge Ministers from their routine rejection of amendments to NSL bills, the committee has continued to report in full on the contents of these bills, in order that members may be made as aware as possible of their ramifications before voting on them.

I would conclude by conceding that I have found reporting on NSL bills one of the more frustrating aspects of my committee's work.

What, if anything, can ultimately be done to alleviate the difficulties caused by this form of legislation remains to be seen.

APPENDIX 6

Meeting of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

Scrutiny of National Schemes of Legislation

New South Wales Case Study

SCRUTINY OF NATIONAL SCHEMES OF LEGISLATION

NEW SOUTH WALES CASE STUDY

The purpose of this paper is to outline some approaches taken by the New South Wales Committee to the scrutiny of National Scheme Legislation. The example I have chosen illustrates some of the problems in assessing the costs and benefits of national scheme legislation and the importance of consultation with those likely to be affected by it.

Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999

The objects of this Regulation are to incorporate the Australian Road Rules published by the National Road Transport Commission and approved by the Australian Transport Council into the law of New South Wales.

The Australian Road Rules cover the basic requirements that drivers, motorcyclists, cyclists and pedestrians need to follow in using the road system. The don't cover the field and they enable other law of the States to deal with driver licensing, vehicle registration, roadworthiness, drink or drug driving, driving hours, log book requirements, and carriage of driver licences.

New South Wales will retain and phase out over seven years a few existing regulations which are inconsistent with the Australian Road Rules such as those aspects of its parking system which provide for no standing signs.

By 1 December 2006 all existing no standing signs will be replaced with no stopping or no parking signs.

This practice of phasing out certain inconsistent State variations from National Scheme legislation over a particular time frame is usually a requirement of the national agreement governing the making of the legislation.

The regulation is also cognate with the package of reforms introduced by the Road Transport (General) Act , the Road Transport (Safety And Traffic Management) Act and the Road Transport Legislation Amendment Act.

When the package was passed in June 1999, the Committee noted that it amended Schedule 3 to the Subordinate Legislation Act 1989 to provide that proposed principal statutory rules concerning matters involving the substantial implementation of the national agreement to make the Australian Road Rules that have been the subject of regulatory assessment, are exempt from the requirement under the Act for the preparation of a Regulatory Impact Statement for a proposed principal statutory rule.

The Committee had not been consulted on that amendment despite an earlier undertaking by the Premier given in 1997 that where practicable he would have his officers undertake informal consultation with the Committee before bills which change procedures on regulations are introduced.

The explanatory note to the amendment states that although statutory rules that are substantially uniform or complementary with the legislation of the Commonwealth or other States are already exempt from the requirement for an RIS, the exemption does not cover statutory rules made in New South Wales before the relevant legislation is introduced in the Commonwealth or other States and does not cover nationally agreed provisions that are implemented in New South Wales by statutory rules where neither the Commonwealth or another State has implemented the provisions as part of its law.

This provision is of some concern, particularly if it is to be used in future cases, as the national agreement could well provide that each state is to substantially adopt its own law with the exception of a few minor national provisions. In such a case the the bulk of the regulation would escape assessment at both the national and State level.

RIS

While a State Regulatory Impact Statement was prepared for the regulation, it fails to consider alternative options.

The RIS acknowledges that the *Subordinate Legislation Act* requires that alternative options for achieving the objectives of the regulation must be considered, however it states that New South Wales has agreed to the development of nationally consistent road law under the arrangements co-ordinated through the National Roads and Transport Commission (NRTC) and the approach of this legislation is to make minimal changes needed for nationally consistent road law. The RIS indicates that any alternative must imply greater changes to current New South Wales law than would result from the proposed regulations and would go beyond the purpose and objectives of the proposed regulations.

What this effectively means is that the old traffic regulations have been rolled over with minimal changes and without any identification of alternative options for achieving their objectives.

More importantly there is no identification of the options that would achieve greater national uniformity. The RIS goes on to indicate that the NRTC prepared their own RIS on the Road Rules.

Costs and Benefits

The RIS states that the costs of adopting the Australian Road Rules in New South Wales law are outlined in the NRTC's RIS. As for the State variations adopting the existing New South Wales law, the RIS states that the proposed regulations will not add to the ongoing costs and that the introduction of this major reform with minimal change must result in minimum cost to achieve the objective.

However it must be noted that clause 1(c), Schedule 2 of the *Subordinate Legislation Act* of New South Wales requires the total costs and benefits of the regulation and its alternatives to be assessed, not merely the marginal costs and benefits of the any minor changes to the existing law.

4. Failure to comply with the undertaking to consult the Parliament's STAYSAFE Committee.

5. The question of what consideration was given to the representations made by the Chief Magistrate of the Local Court, the Motor Traders Association, the EPA and NatRoad Limited.

6. The fact that RISs by the NRTC on the Australian Road Rules concentrate on the costs to Government rather than identifying compliance and social costs to the public.

NEW SOUTH WALES

The Chief Magistrate of the Local Courts

Level 5, Downing Centre,
143-147 Liverpool Street,
Sydney, N.S.W. 2000
Telephone: 9287-7615/9287-7588
Fax: 9264-1617

10 November 1999
PJS:AJBG:dm

Ms Leonie Pattinson
Project Manager
Australian Road Rules
Roads and Traffic Authority
PO Box K198
Haymarket NSW 1238

Dear Ms. Pattinson,

I refer to your undated letter inviting comment on the Road Transport (Safety and Traffic Management) (Road Rules) Regulation, 1999, the Road Transport (Safety and Traffic Management) (General) Regulation, 1999 and the Road Transport (General) Regulation, 1999. Your letter arrived at my office on 3 November last and given the voluminous materials enclosed with it, my comments are qualified to the extent that it is possible to properly address all relevant issues in the time allowed.

I also note that comment has been sought from the Director of Local Courts. It should be understood that my comments do not address any practical implications of the regulations for management of court offices or the training of Local Courts staff.

It is understood that the regulations will come into effect on 1 December next and that, with the repeal of the Traffic Act 1909 and regulations, the Road Transport (Safety and Traffic Management) Act, 1999, the Road Transport (General) Act, 1999, and the Road Transport Legislation Amendment Act, 1999 will commence on the same day. This legislation follows the Road Transport (Driver Licensing) Act, 1998 and the Road Transport (Driver Licensing) Regulation, 1999 which commenced earlier this year.

Therefore it appears that from 1 December next, the Courts, legal practitioners and the general public will have to refer to at least eight sources to ascertain the traffic law in New South Wales. The fundamental matters of the penalties for serious traffic offences, the automatic and minimum disqualifications for such offences and the consequences of driving while disqualified, cancelled or suspended are to be dealt with in three separate pieces of legislation. Now it is proposed that the penalties and disqualifications for serious speeding offences be contained in the Road Transport (Safety and Traffic Management) (Road Rules) Regulation, 1999.

The practical result is extremely unfortunate. The Traffic Act 1909 has been much criticised for its complexity and confusing drafting, but at least the basic sources of law affecting road users were to be found in one legislative instrument. It is recognised that the drafting of the new legislation is improved and that the legislative and regulatory scheme to be implemented is reflective of an attempt at a national approach to traffic law and road rules. But, even before its commencement, this legislative framework is seen as leading inevitably to confusion and error, and such a prospect is completely unsatisfactory when the implications of these laws for the community are considered.

I also believe it is poor policy to provide for the penalties and disqualifications for serious speeding offences in regulations. Clause 119 of the proposed Road Transport (Safety and Traffic Management) (Road Rules) Regulation, 1999 (in Part 7 Miscellaneous) substantially reproduces existing provisions of the Traffic Act. Such offences are among the most common heard before Local Courts and, while some benefits of flexibility in the capacity of Parliament to vary such penalties may be achieved, the offences are sufficiently serious to warrant their inclusion in the principal Act with the increased level of scrutiny which that affords.

It is also noted that throughout the regulations maximum penalties have been provided for individual offences rather than establishing one maximum penalty for all offences under the regulations. It is undesirable to have a range of differing monetary penalties in the regulations. While that may not be the case as the regulations stand, it seems that such a result may be contemplated by the format which has been adopted.

Of particular concern to magistrates is the formula adopted for the provision of appeals to Local Courts. Clause 6 of Schedule 2 of the Road Transport (General) Regulation, 1999 adopts similar terminology to Clause 52 of the Road Transport (Driver Licensing) Regulation 1999 which commenced earlier this year. Clause 6 provides in subclause 7 -

> "(7) A Local Court must hear and determine an appeal made to it under this clause and may confirm (with or without variation) or disallow the decision appealed against, or make such other order in the circumstances as to the Court seems just."

Subclause 8 provides -

> "(8) For the purposes of varying a decision of the Authority under subclause (7), the Court may exercise only such powers as the Authority could have exercised under the Road Transport (Driver Licensing) Act 1998 or the Road Transport (Driver Licensing) Regulation 1999 when making that decision."

In the past appellants have appealed demerit point cancellation of a licence essentially on the ground that having regard to their character, special needs and overall driving record their licence should not be cancelled. Magistrates hearing such appeals were able to deal with appeals in a variety of ways which accorded with the concept of "make such other order in the circumstances as to the Court seems just." For example, a particular offence might be disregarded and an appellant permitted to retain his or her drivers licence, but with the majority of demerit points remaining on the licence. Essentially it was possible to have regard to the overall driving record of the appellant and formulate a "just" order.

Under the present law the powers of the Authority are almost all expressed in mandatory terms in the governing legislation. Section 16(3) of the Road Transport (Driver Licensing) Act, 1998 appears to contain one of the few discretionary powers capable of being exercised by the Authority, and the only discretionary power which relates to the accrual of demerit points.

Accordingly a magistrate exercising "only such powers as the Authority could have exercised" has no general discretion to "make such other order in the circumstances as to the Court seems just." Certainly the example referred to in my previous paragraph could only result in an order to "confirm ..... or disallow the decision", neither of which would necessarily be a "just" result.

Many of my colleagues have expressed concern at the confusing form of the subject provisions and some clarification ought to be provided in order to indicate what kind of discretions are envisaged. This is particularly important because it is evident that legal practitioners and the public are generally unaware that the legislative basis for "licence appeals" has changed with summonses continuing to be issued with the old formulation of "fit and proper person to hold a driver's licence" as the foundation of the appeal. This is a direct consequence of including important matters in regulations which are by their nature less accessible to the community. As a result there are many disappointed members of the public wasting time at court in futile appeals.

I should observe that if there are to be appeals of any kind arising from the provisions of the new regulations, it would be preferable to give the Courts a clear and unfettered discretion to "make such other order in the circumstances as to the Court seems just." If such a policy is not, for any reason, acceptable, it is obviously important that certainty be provided as to the scope of the discretion that is envisaged by Government.

Generally it seems that existing provisions of the Traffic Act and regulations have been reproduced in the new principal acts and regulations. Their content is a matter for Parliament and I have no comment to make beyond the practical matters addressed above.

I am however very disappointed that the opportunity has been missed to consolidate the traffic laws in one Act of Parliament. Such a consolidated statute would have been a useful tool both for the those who appear regularly in Local Courts and for those who preside in them.

More importantly I think the community is entitled to expect that all the laws affecting road users will be located in one accessible document. In this regard I note that the Attorney General's Department has taken a decision to stop distributing pamphlet copies of Acts to courthouses. Copies of regulations have never been uniformly or reliably distributed. When essential matters are buried in voluminous, and numerous, regulations, how can the community be properly said to have reasonable access to relevant law?

Yours faithfully

Patricia J Staunton
Chief Magistrate

APPENDIX 7

NATIVE TITLE – EFFECT ON NORTHERN TERRITORY LEGISLATION

PAPER BY MR STEVE BALCH, MLA, CHAIRMAN, SUBORDINATE LEGISLATION AND PUBLICATIONS COMMITTEE, NORTHERN TERRITORY

Introduction

The purpose of this Paper is to provide the meeting with an information statement about of the current status of the Northern Territory's proposed alternative provision schemes pursuant to s.43A of the *Native Title Act* of the Commonwealth and related matters involving the legislative relationship between the Territory and Commonwealth Parliaments.

Delegates may be aware that the provisions of the *Native Title Act,* as they relate to States and Territories, provide a number of different ways land development applications can be processed. States and Territories can use the national scheme of the *Native Title Act,* they can replicate the scheme in their own legislation or they can legislate alternative provisions subject to the strict standards set out in s.43A(4)(6) and (7) of the Act.

In regard to an alternative State or Territory scheme, the Commonwealth Minister, the Attorney-General, has to consult the representative bodies about the proposed schemes. After considering any submissions received pursuant to s.43(1)(b) of the Act the Minister may make a written determination that the scheme complies with the required standards.

The written determination of the Commonwealth Minister is a disallowable instrument (s.214). Under s.46A of the *Acts Interpretation Act* of the Commonwealth, the determination is treated like any other disallowable instrument.

The Territory legislated in accordance with the requirements of s. 43A of the *Native Title Act.* It carefully reviewed the submissions received by the representative bodies and made a number of changes to address their concerns. It has been generally acknowledged that the Territory's schemes comply with the standards previously determined by the Commonwealth Parliament and were so endorsed by the Commonwealth Attorney-General. However, as it turned out, the Territory legislation was disallowed by the Senate, for reasons other than non-compliance.

The Northern Territory Government is of the view that its proposed alternative schemes are reasonable and balanced and should not have been disallowed by the Senate.

Importance to Northern Territory

The issue of what land administration regime is to apply is of particular importance to the Northern Territory. This is because approximately 50% of the Territory comes

within the control of the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act 1976*. About 42% of the Territory is Aboriginal land and a further 8% is under claim under that Act.

The *Land Rights Act* has its own land administration procedures that apply instead of those in the *Native Title Act*. While the *Land Rights Act* has been very successful in returning land to Aboriginal Territorians, it has not in my view been successful in regard to promoting indigenous employment or creating development opportunities.

In addition to this 50% under the control of the *Land Rights Act*, a further 49% of the Territory is pastoral leasehold land over which there may be coexisting native title.

The land administration procedures that apply to Aboriginal land under the *Land Rights Act* are different from those in the *Native Title Act*. The *Land Rights Act* prevents any acquisition by the Territory, even for government purposes, and essentially allows the land holders to veto all mining and development.

The combined effect of the Commonwealth's *Land Rights Act* and the *Native Title Act* is that special restrictive land administration laws apply to over 99% of the Northern Territory. It is argued that this has retarded development in the Territory and has had a detrimental effect on employment opportunities for Aboriginal Territorians.

Given these constraints on Aboriginal land it is of critical importance that the Territory has the best possible land administration system for that 49% of the Territory covered by the pastoral estate.

Historical Background

To properly appreciate the current issues of concern it is necessary to provide some historical background on:

- the development of Native Title in Australia;
- the capacity and procedure for States and Territories to create their own schemes to deal with Native Title in certain circumstances; and
- the Northern Territory's alternative provision schemes—how they were implemented and their current status.

In respect of native title, in 1992 the High Court determined in *Mabo* that native title survived colonisation and that it may still exist in parts of Australia—provided that it had not been extinguished and that the necessary connection to the land had been maintained.

Because native title was an interest relating to land, the existing laws meant that if it existed it had to be dealt with prior to the relevant land being developed.

This led to the development of the original *Native Title Act 1993* of the Commonwealth. The Act sets up two distinct processes, one for determining native title and one for dealing with future development applications.

The process for dealing with development applications has become commonly known as the "right to negotiate" (RTN) process. Essentially, it sets out the procedures that need to be followed before there can be a grant of a valid mining interest or an acquisition of land for private development purposes over land on which native title exists or may exist.

The fact that the procedures apply over land where native title may exist—that is before there is a formal determination of native title by the Courts—is of fundamental importance. The RTN procedures nominally apply Australia-wide but, in fact, have the greatest application in the less developed parts of Australia.

In the *Wik* decision, in 1996, the High Court determined that native title can co-exist with pastoral leases (and perhaps other sorts of interests). As described above, 49% of the Territory is covered by pastoral leases.

It is generally accepted that the RTN procedures of the *Native Title Act* were only intended by the Commonwealth Parliament to apply to areas such as vacant crown land where no-one other than the native title holder had an interest. They were not intended to apply to areas where there were co-existing interests.

It soon became apparent that the RTN was a relatively expensive, time consuming and inefficient process. After consultation with the States, the Commonwealth agreed in 1998 to amend the *Native Title Act.*

These amendments commonly known as the "10 point plan" provided, amongst other things, that States and Territories could set up their own alternative land administration schemes for processing development applications—but only over land where native title may co-exist.

The capacity to set up alternative provision schemes is set out in s.43A of the *Native Title Act* (as amended in 1998). The section sets out the process that needs to be followed to establish such a scheme and the standards that such schemes have to comply with. Once such a scheme is effective it replaces the right to negotiate provisions.

For the alternative provisions to be effective the following steps must be complied with:

- they have to comply with the strict standards set out in the *Native Title Act*;
- the Commonwealth Attorney-General has to consult the indigenous representative bodies and consider any submissions received;
- the Commonwealth Attorney-General has to make a written determination that schemes comply;

- the written determination is an instrument disallowable in the Commonwealth Parliament.

The Territory's Proposed Alternative Provisions

The Territory applied for 3 separate alternative provision determinations, they relate to schemes under:

- the *Land Acquisition Act*,
- the *Mining Act*, and
- the *Petroleum Act*.

Since August 1998, the Territory has been seeking to put its alternative provision schemes into effect. The process essentially required a rewriting of Northern Territory land administration procedures. It required the recognition of possible native title interests in land and procedures for dealing with these interests. It had to meet the subjective approval of a Commonwealth Minister and it had to take into account issues raised by the indigenous representative bodies. It had to intermesh the Commonwealth *Native Title Act* concept into Territory law. This has been a convoluted and complex process. (A schematic description of the development of the alternative provision schemes is at Attachment A).

It is worth noting the process used to address compliance issues allowed the use of regulations to make legislative amendments.

The Subordinate Legislation and Tabled Papers Committee of the Legislative Assembly considered this capacity to make amendments by regulations and was informed that the Government made the decision to use 'Henry VIII' provisions in order to ;-

- address compliance issues raised by the Commonwealth,
- address issues arising from the consultation process,
- try to implement the alternative provision schemes as soon as possible.

This meant using the Regulation making power to make amendments when the Assembly was not sitting because of time constraints and the impact of native title on Northern Territory industries and its economy.

The Senate Standing Committee on Regulations and Ordinances considered the subject of clauses that allow amendment by regulation and recommends that such clauses should incorporate the following features:

(1) a sunset clause;

(2) no retrospectivity before the commencement of the regulation making power; and

(3) for the regulations to be subject to tabling and disallowance.

(4) deal with a specific subject matter.

The Committee considered that the Regulations complied with all these requirements.

It should also be noted that the Regulation-making power in question expired as soon as the Commonwealth made the determination that the Territory laws complied with S.43A of the Native Title Act.

Subsequent to modifications to address issues relating to compliance, and issues raised in the consultation process, the Commonwealth Attorney-General made 3 determinations that the Territory schemes complied with s.43A *Native Title Act* requirements.

The Territory Government had further discussions with the representative bodies in an attempt to ensure that the Territory's schemes could become operative. This resulted in the passage of the *Lands and Mining (Miscellaneous Amendments) Act (No.2) of 1999* assented to an 17 June 1999.

Essentially, the Territory Acts and Regulations referred to above do three things:

(1) they modify Territory administrative processes to comply with the requirements of the *Native Title Act;*.

(2) they recognise the possibility of native title interests in land and provide (where no specific procedures are prescribed) that these interest holders have the same procedural rights as all other interest holders; and

(3) they set up alternative provision schemes in compliance of the requirements set out in the *Native Title Act.*

(A chronology of relevant Territory legislation is at Attachment B.)

These amendments go above and beyond s.43A compliance and were made in an effort to reach agreement with the representative bodies.

The Disallowance Motion and Its Implications

Unfortunately, it was not possible to reach an agreement with the representative bodies. Senator Bolkus gave notice of motion of disallowance of all 3 proposed schemes on 24 June 1999.

At the end of the extensive consultations between the representative bodies and the Northern Territory Government, there were three issues standing in the way of an agreement:

(a) the content of the legislation;

(b) security regarding future amendments to Territory schemes; and

(c) how to deal with the backlog of exploration and mining applications.

In regard to the content of the legislation, the joint land councils made an initial submission—some 100 pages long and about "an inch thick"—at the start of the consultation phase. By 22 June 1999 the outstanding matters had been reduced to 8 relatively insignificant matters. Of these 8 issues, the Territory Government says that its legislative schemes clearly address 3 and the Commonwealth has said that it will address one.

The remaining issues were as follows:

- Firstly, the representative bodies say that the requirements in the Territory schemes—that claimants should give particulars of how the proposed development is likely to affect their rights and interests—should be removed.

The Territory Government says these particulars are necessary to allow the consultation process—to minimise the impact of the activity on native title interests—to work. The provision of details will facilitate agreements being reached regarding projects.

- Secondly, the representative bodies say that superior courts should be prevented from obtaining access to anthropological material, filed in the Territory's Land and Mining Tribunal, for the purpose of making recommendations regarding development or mining applications.

The Northern Territory schemes already make provision for the protection of culturally sensitive material, and the Northern Territory Government says that it is contrary to public policy to have secrecy provisions.

- Thirdly, the representative bodies want the removal of a provision requiring those claiming compensation to give notice of the claim within three years.

The Territory's response is that this provision applies to all those with an interest in land, can be complied with simply by sending in a one-line letter and is necessary to allow for orderly land administration. In any event, there is a procedure for extending the time period by applying to the Land and Mining Tribunal.

- Fourthly, and finally, in some circumstances the representative bodies say that compensation should be paid without proof of native title.

This proposal has been debated at length and is not accepted by the Territory Government.

It is the Territory Government's proposition that the significance and merits of these outstanding issues need to be considered in the context of the schemes in their entirety and in the context of the concessions and accommodations made to date. In this light it is argued that these outstanding legislative issues are of little consequence. Since these discussions the representative bodies have raised a whole range of further issues they want addressed. These further issues are, in the Territory's view, equally spurious.

The other two outstanding matters were security regarding future amendments and the backlog of outstanding mining applications. The *Native Title Act* sets out the national standards that State and Territory alternative provision schemes have to comply with. There is in-built security in the *Native Title Act*, which sets out the process for reviewing and revoking determinations if a State or Territory scheme is amended at any stage in the future so that it falls below the specified requirements.

Nine-tenths of the Territory schemes are reviewable under the process set out in s.43A(9) of the *Native Title Act.* It is only those enhancements made to the scheme, which go above and beyond the *Native Title Act* requirements, that are at issue.

In regard to the outstanding mining matters the Territory offered to have an orderly and practical scheme to deal with these applications.

Further Territory Undertakings

Notwithstanding the fact that the security issue involves only future amendments above the national standards set by the Commonwealth Parliament, the Northern Territory proposed a scheme to deal with these concerns. It involves:

- passing of legislation requiring consultation with the representative bodies prior to any amendment to s. 43A;

- agreeing to allow at least two months between the introduction of any amendment bill and debate;

- consultation with representative bodies with a view to reaching agreement concerning the form of the amendments; and

- providing a draft bill and reasons for amendment prior to introduction.

The Northern Territory has no intention of making any amendments to its schemes. However, it has to be recognised that unforeseen circumstances and workability issues may arise. Accordingly, State and Territory parliaments must have the capacity to make amendments.

The Territory's proposals would make the procedure for any amendment open and transparent.

It was suggested by the representative bodies that one way of dealing with this security issue would be to abandon the s.43A schemes and place them in an indigenous land use agreement (ILUA). However, this is fundamentally flawed. It is contrary to public policy and probably illegal.

It would require the current Territory Government to delegate legislative authority and fetter the discretion of future Territory parliaments.

Given that these schemes can only operate on co-existing land, the ILUA proposal would split land administration procedures into multiple layers: one legislative layer for non-native title issues, and a private agreement for native title procedures.

The concept of an indigenous land use agreement is simply not viable in these circumstances.

The Northern Territory Government suggests that it has been unfairly penalised for enhancing its legislation beyond the standards set out in the *Native Title Act.*

It offends parliamentary propriety to set legislative standards, have a jurisdiction comply with those standards, and to then say that compliance with the legislative standards previously set is not the basis upon which State and Territory schemes will be assessed.

The Chief Minister, the Hon. Denis Burke, MLA, has said that he is prepared to do all that is legislatively possible to address the concerns raised, but the reality is that it is not a matter that the Territory Parliament can address alone.

Current Position

In summary, the Northern Territory has sought to establish its own schemes for dealing with mining and petroleum applications and private development proposals over pastoral lease land. Notwithstanding compliance with the procedural requirements and general acknowledgement that the Territory schemes exceeded the required legislative standards, they were disallowed by the Senate.

During the debate in the Senate, the Opposition and the Australian Democrats gave three reasons for voting for disallowance. The primary reason was what they saw as a fault in the Commonwealth Act. Under the *Native Title Act* once a State or Territory scheme is endorsed it can be amended at will by the relevant jurisdiction, provided that the scheme always remains above the national standards.

This is an important proviso. Under the current *Native Title Act* the Commonwealth Attorney-General has the capacity at any stage in the future to revoke the endorsement of a State or Territory scheme if it is amended to no longer comply with the *Native Title Act* requirements.

Resolution of this issue is not in the hands of the Territory Parliament. In any event State and Territories must have the flexibility to deal with unforeseen issues regarding the workability of their schemes.

The second reason cited for disallowing the Territory scheme was concern that there be adequate provisions to deal with the backlog of outstanding mining applications.

To assist dealing with the backlog, the Territory Government offered to have an orderly and staggered approach to processing the outstanding applications and proposed the development of standard exploration terms which could have resulted in a significant reduction in the number of objections lodged by potential native title claimants.

The third reason given for disallowance was that there were a number of outstanding legislative issues.

The Territory Government was not able to reach complete agreement with the Land Councils as to the terms of the Territory legislation and maintains that no responsible Government in Australia could have accommodated the outstanding requests

Present and Future Options

Since disallowance on 31 August 1999 the Northern Territory continued to try to work towards the achievement of a acceptable regime acceptable to the diverse parties.

Numerous discussions have been conducted with the Commonwealth Government and a joint Government/Democrat/Land Council meeting was held in Darwin on 10 September 1999.

These efforts have not been successful to date.

If the line of the Opposition and Australian Democrats is maintained, effectively taking the position that they will only support the Territory scheme if the Land Councils agree, then an impasse persists.

The Territory Government submits that it has done all it can to make its alternative provisions acceptable and effective.

- The alternative schemes comply with the national standards set out in the *Native Title Act.*
- Every substantial concern raised by the Land Councils in regard to the schemes has been addressed.
- There is a fair and reasonable plan for dealing with the backlog.

If the disallowance stands, the Territory will be obliged to use the Commonwealth's right to negotiate scheme.

In some respects the legislative model used in the Native Title legislation mirrors the National Scheme legislation model.

While each State and Territory jurisdiction is able to legislate for alternative provision schemes, there is a strict requirement to comply with the national standards set out in the *Native Title Act.*

In this case, the success of the "Native Title model" approach will be dependent on the Commonwealth Parliament accepting the standards which it set in the 1998 amendments.

The development of the Northern Territory's S.43A (NTA) alternative provision schemes.

The development can be set out in 3 stages :-

1. Development prior to commencement of the formal consultation process required under S.43A(3) NTA.

- Series of Acts commenced 28 August 1998
- Amendment regulations 1 October 1998
- Miscellaneous Amendment Act 23 December 1998

2. Amendments resulting from consultation process and submissions from Representative Bodies.

- Miscellaneous Amendments Act 19 February 1999
- Series of Amendment regulations 16 & 20 April 1999

3. Amendments since Attorney-General's S.43A determinations on 27 April 1999 as a result of further discussions with Representative Bodies.

- Miscellaneous Amendments Act 17 June 1999

CHRONOLOGY OF LEGISLATION

Date of assent or making	Short title	Act or Reg. No.	Commencement
27 July 1998	*Native Title Amendment Act 1998 of the Commonwealth*		
28 August 1998	Energy Pipelines Amendment Act 1998	No. 56 of 1998	1 Oct 1998
	Lands Acquisition Amendment Act (No. 2) 1998	No. 50 of 1998	1 Oct 1998
	Lands and Mining Tribunal Act 1998	No. 51 of 1998	1 Oct 1998
	Mining Amendment Act (No. 2) 1998	No. 52 of 1998	1 Oct 1998
	Petroleum Amendment Act 1998	No. 53 of 1998	1 Oct 1998
	Petroleum (Submerged Lands) Amendment Act 1998	No. 54 of 1998	1 Oct 1998
	Validation of Titles and Actions Amendment Act 1998	No. 55 of 1998	1 Oct 1998
1 October 1998	Energy Pipelines Amendment Regulations	1998, No. 45	1 Oct 1998
	Lands Acquisition Amendment Regulations	1998, No. 42	1 Oct 1998
	Mining Amendment Regulations	1998, No. 43	1 Oct 1998
	Petroleum Amendment Regulations	1998, No. 44	1 Oct 1998

...continued overleaf

3 December 1998	*Application made for determination under section 43A(1)(b) of the Native Title Act 1993 of the Commonwealth*		
23 December 1998	Lands and Mining (Miscellaneous Amendments) Act 1998	No. 93 of 1998	Pts 2, 3, 4, 5, 7, 8, 10, 11, 12 &13 & s.272: 1 Oct 1998 Rem: 23 Dec 1998
19 February 1999	Lands and Mining (Miscellaneous Amendments) Act 1999	No. 1 of 1999	Pt 2: 1 Oct 1998 Pt 4: 23 Dec 1998 Rem: 19 Feb 1999
16 April 1999	Lands Acquisition Amendment Regulations	1999, No. 12	16 Apr 1999
	Mining Amendment Regulations	1999, No. 11	16 Apr 1999
	Petroleum Amendment Regulations	1999, No. 13	16 Apr 1999
20 April 1999	Amendments of Mining Amendment Regulations	1999, No. 14	20 Apr 1999
	Amendments of Petroleum Amendment Regulations	1999, No. 15	20 Apr 1999
27 April 1999	*Determination under section 43A(1)(b) of the Native Title Act 1993 of the Commonwealth*		
17 June 1999	Lands and Mining (Miscellaneous Amendments) Act (No. 2) 1999	No. 26 of 1999	17 June 1999

APPENDIX 8

AUSTRALIAN CAPITAL TERRITORY

ADMINISTRATION (INTERSTATE AGREEMENTS) ACT 1997

This consolidation has been prepared by the ACT Parliamentary Counsel's Office

Reprinted as at 31 October 1998

TABLE OF PROVISIONS

Section

AUSTRALIAN CAPITAL TERRITORY

ADMINISTRATION (INTERSTATE AGREEMENTS) ACT 1997

An Act relating to interstate agreements

PART I—INTRODUCTION

1. Short title

This Act may be cited as the *Administration (Interstate Agreements) Act 1997*.[1]

2.[1] Commencement

(1) Sections 1 and 2 commence on the day on which this Act is notified in the *Gazette*.

(2) The remaining provisions commence on a day fixed by the Minister by notice in the *Gazette*.

(3) If a provision referred to in subsection (2) has not commenced before the end of the period of 3 months commencing on the day on which this Act is notified in the *Gazette*, that provision, by force of this subsection, commences on the first day after the end of that period.

3. Object

The object of this Act is to impose on Ministers duties to inform and consult with other Members of the Assembly in regard to interstate agreements, so as to protect the freedom of the Assembly to carry out its legislative deliberations without being subjected to necessity or compulsion due to the actions of the Executive, and shall be construed accordingly.

4. Interpretation

In this Act—

"government" means the executive of any of the States, the Territories or the Commonwealth;

"interstate agreement" means any agreement, including a proposed agreement, between governments, whether negotiated at an official forum or otherwise, the implementation of which could reasonably be expected to require legislation to be passed by the Legislative Assembly;

"negotiation" means a negotiation between a Minister and another government or its representative.

5. Application

Part II of this Act does not apply in relation to negotiations for agreements of the kind specified in the Schedule.

PART II—NOTIFICATION AND CONSULTATION

6. Notification of negotiations

(1) Where a Minister proposes to participate in a negotiation for an interstate agreement, he or she shall comply with subsection (3) as soon as practicable after becoming aware of the impending negotiation.

(2) Where—

(a) a Minister is participating in a negotiation for an interstate agreement; and

(b) subsection (3) has not been complied with in relation to the negotiation;

he or she shall do so as soon as practicable.

(3) A Minister shall, in writing, inform each member of the Legislative Assembly of—

(a) the nature of the negotiation or proposed negotiation;

(b) any timetable for the negotiation or proposed negotiation;

(c) the nature of any legislation which may be proposed as a result of the negotiation; and

(d) any position the Minister is taking, or intends to take, in the negotiation.

7. Consultation regarding agreements

(1) Where a Minister proposes to participate in a negotiation for an interstate agreement, he or she shall, if practicable, comply with subsection (3).

(2) Where—

(a) a Minister is participating in a negotiation for an interstate agreement; and

(b) subsection (3) has not been complied with in relation to the negotiation;

he or she shall do so as soon as practicable.

(3) A Minister shall consult with—

(a) a standing committee of the Legislative Assembly nominated by the Speaker of the Legislative Assembly for the purpose; and

(b) the Standing Committee on Justice and Community Safety;

regarding the matters to be considered at the negotiation.

(4) If a standing committee of the Legislative Assembly has been nominated under paragraph (3) (a) in relation to a negotiation or proposed negotiation, it is sufficient compliance with paragraph (3) (b) in relation to that negotiation or proposed negotiation if the Minister consults with the Standing Committee on Justice and Community Safety when it is performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee in so far as its terms of reference in that capacity are relevant.

(5) In participating in a negotiation, the Minister shall have regard to any recommendation made by a relevant committee following the consultation.

8. Procedure before entering into agreements

(1) A Minister shall not, on behalf of the Territory, enter into a proposed interstate agreement until either—

(a) a recommendation made by a committee consulted in accordance with section 7 has been received; or

(b) 6 days have elapsed since the consultation was undertaken in accordance with section 7.

(2) A Minister shall, in considering whether to enter into an interstate agreement, have regard to any recommendations received under subsection (1).

9. Notification of outcomes

Where a Minister participates in a negotiation for an interstate agreement, and an agreement is reached, the Minister shall, within 7 days, inform in writing each Member of the Legislative Assembly of the terms of the interstate agreement and any commitments made on behalf of the Territory.

10. Urgent or extraordinary negotiations

Where the relevant Minister is satisfied, on reasonable grounds, that compliance with a requirement specified in section 6, 7 or 8—

(a) would not be possible or reasonable because of the urgency of the negotiations; or

(b) would adversely affect the public interest or the interests of the Territory;

the Minister—

(c) is not required to comply with that requirement; and

(d) shall inform in writing all Members of the Legislative Assembly of his or her opinion under paragraph (a) or (b), and the grounds for that opinion, within 7 days of commencing the negotiations.

11. Discharge of requirements

(1) Where—

(a) a Minister is required by this Act to consult with a committee, or to provide information to Members, regarding negotiations for an interstate agreement; and

(b) two or more Ministers are jointly engaged in the negotiations in question;

a requirement of this Act may be fulfilled by one of those Ministers consulting, or providing information, on behalf of all the relevant Ministers.

(2) In relation to negotiations for a particular agreement, a Minister is required to fulfil a requirement in sections 6, 7, 8 and 9 once only.

SCHEDULE

Section 5

NEGOTIATIONS TO WHICH THIS ACT DOES NOT APPLY

Agreements, including references issued by the responsible ACT Minister, which are considered by the Inter-governmental Committee of the National Crime Authority, constituted under section 8 of the *National Crime Authority Act 1984* of the Commonwealth.

Agreements reached in the course of meetings of the Australian Loan Council of the Premiers' Conference.

NOTES

1. The *Administration (Interstate Agreements) Act 1997* as shown in this reprint comprises Act No. 115, 1997 amended as indicated in the Tables below.

2. The *Legislation (Republication) Act 1996* (No. 51, 1996) authorises the Parliamentary Counsel in preparing a law for republication, to make certain editorial and other formal amendments in accordance with current legislative drafting practice. Those amendments make no change in the law. Amendments made pursuant to that Act do not appear in the Table of Amendments but details may be obtained on request from the Parliamentary Counsel's Office.

Table of Acts

Act	Number and year	Date of notification in *Gazette*	Date of commencement	Application, saving or transitional provisions
Administration (Interstate Agreements) Act 1997	115, 1997	24 Dec 1997	Ss. 1 and 2: 24 Dec 1997 Remainder: 15 January 1998 (*see Gazette* 1998, No. S29)	
Administration (Interstate Agreements) (Amendment) Act 1998	43, 1998	14 Oct 1998	14 Oct 1998	—

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision	How affected
Title	rs. No. 43, 1998
Ss. 3, 4	am. No. 43, 1998
Heading to Part II	am. No. 43, 1998
Ss. 6, 7	rs. No. 43, 1998
S. 8	am. No. 43, 1998
Ss. 10, 11	am. No. 43, 1998

APPENDIX 9

Legislative Assembly for the Australian Capital Territory

Standing Committee on Justice and Community Safety

(incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

SCRUTINY REPORT NO. 1 OF 2000

8 February 2000

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(incorporating the duties of a SCRUTINY OF BILLS AND

SUBORDINATE LEGISLATION COMMITTEE)

Mr Paul Osborne MLA (Chair), Mr John Hargreaves MLA, Mr Trevor Kaine MLA, Mr Harold Hird MLA

Mr Greg Cornwell, MLA
Speaker
Legislative Assembly for the Australian Capital Territory
CANBERRA ACT 2601

Dear Mr Speaker

Please find enclosed a copy of Report No. 1 of 2000 of the Standing Committee on Justice and Community Safety (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee). Under its resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. I seek your approval to print and circulate Report No. 1 of 2000.

Yours sincerely

Paul Osborne MLA
Chair

8 February 2000

Approved
Greg Cornwell MLA
Speaker

8 February 2000

Civic Square, London Circuit, Canberra ACT 2601
GPO Box 1020, Canberra ACT 2601
Telephone: (02) 620 50171 - Facsimile: (02) 620 53109

TERMS OF REFERENCE

(1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).

(2) The Committee will consider whether:

(a) any instruments of a legislative nature which are subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act:

(i) meet the objectives of the Act under which it is made;

(ii) unduly trespass on rights previously established by law;

(iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

(iv) contain matter which should properly be dealt with in an Act of the Legislative Assembly.

(b) the explanatory statement meets the technical or stylistic standards expected by the Committee.

(c) clauses of bills introduced in the Assembly:

(i) do not unduly trespass on personal rights and liberties;

(ii) do not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(d) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.

(3) The Committee shall consist of four members.

(4) If the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation.

(5) The Committee be provided with the necessary additional staff, facilities and resources.

(6) The foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

MEMBERS OF THE COMMITTEE

Mr Paul Osborne, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Mr Trevor Kaine, MLA
Mr Harold Hird, MLA

Legal Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan
Assistant Secretary (Scrutiny of Bills and Subordinate Legislation): Ms Celia Harsdorf

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comments on them.

Commission for Integrity in Government Bill 1999

This is a Bill to establish a Commission for Integrity in Government. The primary functions of the Commission would be to investigate conduct lacking integrity or possible such conduct, and to educate public authorities and the community generally on the detrimental effect of such conduct. The concept of "conduct lacking integrity" is defined. A Commissioner would be appointed by the Attorney-General, and be removable only by an address to the Legislative Assembly. The Commissioner would be responsible for the Commission. An Operations Review Committee would advise the Commissioner concerning the investigation function of the Commission, and an Ethical Standards Council would carry out work in relation to educative functions of the Commission.

Environment Protection Amendment Bill (No 2) 1999

This Bill would amend the *Environment Protection Act 1997* by the insertion of a provision that would require the chief executive of an administrative unit, or a public authority, to include certain information in reports under the *Annual Reports (Government Agencies) Act 1995*. This information relates to the actions of the unit or of the agency as it impinges on the environment and in particular in relation to the principles of ecologically sustainable development.

Independent Competition and Regulatory Commission Amendment Bill 1999

This Bill would amend the *Independent Competition and Regulatory Commission Act 1997*. Primarily, it would rename the existing Independent Pricing and Regulatory Commission as the Independent Competition and Regulatory Commission (ICRC). Commissioners would be appointed on the basis of their skills and knowledge. Associate Commissioners may be appointed for particular purposes. The Bill would also expand the regulatory oversight function beyond that of the existing Commission. The ICRC would investigate competitive neutrality complaints. The Bill would make consequential amendments to a number of Acts.

Liquor Amendment Bill (No 2) 1999

This Bill would amend the *Liquor Act 1975* to insert a new section 177A to govern the admissibility in evidence in judicial proceedings of breath analysis tests conducted in licensed premises.

Stadiums Corporation Bill 1999

This is a Bill for an Act to establish a Stadiums Corporation as a body corporate. It would have various functions, including, in particular, to own, operate or manage sporting or entertainment facilities. The Corporation would be comprised of 4 to 6 directors, appointed by the Minister, and the chief executive, who would be appointed by the appointed directors. There is provision for the termination of the appointment of the appointed directors, and for the appointment of staff, and of consultants. The Minister may give directions to the Corporation about the performance of its functions. Such directions must be laid before the Legislative Assembly. The Authority must, at the request of the Minister, develop a business plan. Such plans are to be laid before the Assembly. The Treasurer has certain powers and functions in relation to the Corporation.

Tobacco Amendment Bill (No 2) 1999

This Bill would amend the *Tobacco Act 1927,* and to repeal the *Tobacco Licensing Act 1984* and certain other Acts. There is provision for the application for, and the grant or refusal of, and other matters relating to a retail tobacconist's licence. and a wholesale tobacco merchant's licence. There is provision for disciplinary action in relation to licensees, and for offences by licensees and others. In particular, a person must not, without a licence, sell or carry on tobacco retailing, or tobacco wholesaling. There is provision for review by the Administrative Appeals Tribunal of significant decisions affecting licensees and those who make application to become licensees. The Minister must make determinations in relation to fees payable by licensees.

Workers Compensation Amendment Bill 1999

This Bill would amend the *Workers Compensation Act 1951* to create criminal offences in relation to and provide penalties for evasion of payment of premiums and the understatement of wages in order to lessen the payment of premiums in relation to insurance policies concerning workers compensation.

Bills - Comment

The Committee has examined the following Bills and offers these comments.

Defamation Bill 1999

This is a Bill for an Act to regulate certain aspects of the law concerning defamation. It is not a code concerning that law. The Bill would make a number of substantial changes to the law as it stands. In particular, it would (i) introduce a new defence based on the concept of negligence; (ii) restore the common law position in that it would permit a defendant to plead, as a defence, that the published matter was true; (iii) introduce an "offer of amends" scheme; and (iv) establish some principles to govern the award of damages.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The rights dimension of defamation law

A law concerning defamation bears on the two different personal rights. In *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 113 the High Court said that "[t]he purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech". In its report *Unfair Publication: Defamation and Privacy* (ALRC 11), the Australian Law Reform Commission (ALRC) said that the report "dealt with two important but competing interests: on the one hand the protection of individual honour, reputation and dignity and on the other the protection of freedom of expression and access to public affairs": (see at http://www.austlii.edu.au/au/other/alrc/publications/reports/20years/vol2/Unfairpublicationdefamatio.html).

There is, thus, on the one hand, "freedom of expression". A modern expression of the content of this notion may be found in Article 19 of the ICCPR:

> *Article 19*
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include **freedom to seek, receive and impart information and ideas of all kinds**, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be **subject to certain restrictions**, but these shall only be such as are provided by law and are **necessary**:
>
> (a) **For respect of the rights or reputations of others**;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The Committee has pointed out at various times that the ICCPR is the rights instrument of most direct relevance to an assessment of the extent to which an ACT law may be thought to have unduly trespassed on personal rights and liberties. At the same time, common law concepts of rights and liberties are also a yardstick against which to make such a judgment.

In the context of defamation law, it is those who publish allegedly defamatory matter who invoke "freedom of expression" as a source of limitation on the scope of this law. The point was made by Powell J in *Gertz v Robert Welch Inc* (1974) 418 US 323 (passage cited in the Presentation Speech):

> "... punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedom of speech and the press".

Justice Powell was speaking of the First Amendment to the Constitution of the United States. This, as relevant here, provides simply that: "Congress shall make no law ... abridging the freedom of speech, or of the press; ...".

It is well to remember, however, that it is only comparatively very recently that the First Amendment has been understood in the USA to have consequences for the scope of defamation law. As one commentator has noted:

> For nearly two centuries, there could be no doubt that only socially acceptable speech was entitled to constitutional protection. The most obvious example is provided by defamation. It was not until the 1960s that the Supreme Court, in the landmark decision *New York Times Co v Sullivan* [376 US 254 (1964)] began to rewrite the law of slander and libel along lines derived from a new interpretation of the First Amendment" (F Kubler, "How Much freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights" (1998) 27 *Hofstra Law Review* 335 at 338).

Such legal development in other jurisdictions is even more recent. The same commentator noted that

> [In *Lingens v Austria* (1986) 103 Eur Ct HR (ser A)] the European Court of Human Rights followed suit a few years later, rejecting the traditional application of Austrian defamation law as a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (ibid).

Article 10 of the Convention which was in issue in *Lingens* (the European Convention) provides:

> 1. Everyone has the **right to freedom of expression**. This right shall include freedom to hold opinions and **to receive and impart information and ideas** without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it **carries with it duties and responsibilities**, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, **for the protection of the reputation or rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The *Lingens* case is of interest to a consideration of an ACT law for the reason that Article 10 is closely similar to Art 19 of the ICCPR. The methodology applied by the European Court illustrates how these kinds of provisions might be applied to a particular law. Speaking of Art 10, the Court indicated (at para 35) that these questions need to be addressed:

- Was the law in its application in the particular case an "interference by public authority" with a person's "right to freedom of expression"? If so, there is a contravention of Art 10 unless it can be shown that requirements of Art 10(2) are met.
- Under Art 10(2), the first question is whether the interference was "prescribed by law".

- The next is whether the law, or its manner of application, had an aim or aims that is or are legitimate under Art 10(2).
- The final question is whether the law, or its manner of application, was "necessary in a democratic society" for the aforesaid aim or aims.

In relation to this last step, the Court said that "[t]he adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need"", and added that the law-maker has "a certain margin of appreciation in assessing whether such a need exists" (para 39). It said too that a court reviewing the law "must determine whether the interference at issue was "proportionate to the legitimate aim pursued" (para 40). It then added:

> 41. In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" ... .
>
> These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them ... . In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader ... .
>
> 42. Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The analysis in *Lingens v Austria* is but one of many variations on a basic theme. It illustrates in general terms the kind of analysis that Art 19 of the ICCPR requires, and the policy standpoint taken by the Court is also representative of the thrust of judicial approaches. It provides a yardstick that the Legislative Assembly may wish to adopt to evaluate a law concerning defamation.

But from a rights analysis of a law concerning defamation, this is not the end of the matter. The competing right – and one invoked by those reputations are the subject of the exercise of speech – is that of privacy. This was acknowledged by the Court in *Lingens v Austria* (see above, at paras 37-38); (although on the facts of that case, the Court held that Art 8 of the European Convention – which states a right to privacy - was not relevant).

The right to privacy is stated in the ICCPR in these terms:

Article 17

1. **No one shall be subjected to** arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to **unlawful attacks on his honour and reputation**.

2. Everyone has the **right to the protection of the law against such interference or attacks**.

It is to be noted that this right is not stated to be "subject to" the right to freedom of expression in Art 19. Furthermore, Art 19(3) permits laws to qualify freedom of expression to the extent that they are "necessary" to "respect (of) the rights or reputations of others".

There is no way to break out of this circle of argument except by making a judgment in a particular case as to whether the right to freedom of expression should prevail over the right to protection from attacks on honour and reputation. One freedom does not have priority over another.

From this perspective, it might be asked whether the Court in *Lingens* accorded too much weight to freedom of expression when they tied it to a notion of the freedom of the press. Of course, "freedom of political debate is at the very core of the concept of a democratic society", and, of course, the press, and the media generally, are very important vehicles for the conduct of political debate. But those who own the media – whether Australians or foreign – have their own interests to pursue in many political debates. When this occurs, the presentation of the debate through the particular media outlet is often distorted. To accept that "freedom of expression" demands "freedom of the press" creates a danger to democratic debate because it accords a preference to certain major players in that debate.

It must also be borne in mind that those who own the press are very powerful in terms of the financial resources they can bring to bear in any dispute with a person who wishes to bring legal suit against the media owner in respect of allegedly defamatory matter published by the media outlet concerned.

Moreover, if one is to recognise the role of the press in promoting freedom of expression – which is legitimate – one must also recognise the role of the press in promoting and facilitating invasions of the right to privacy in the form of attacks on the honour and reputation of individuals. It must be recognised that "[f]reedom of the Press has another side, in that it may be abused by intrusive investigations, sensational or inaccurate reporting, refusal or failure to publish explanations, and publication of material better ignored" (*Oxford Companion to Law* (1980) 495).

The Committee appreciates that the standpoint that informs the comments that follow may be somewhat different to that stated in the Presentation Speech. The Committee's comments are placed before the Legislative Assembly in the spirit of fostering a debate on this Bill that takes account of the competing rights involved.

The Bill as a whole

Taking the framework for analysis stated in the *Lingens* case, the Committee considers that a law which permits an action in defamation is one that, in a general sense, accords with both the freedom of speech and the right to privacy. Such a law is an interference with freedom of speech stated in Art 19 of the ICCPR. But, in general, it has the legitimate aim of protecting the reputations of those who are the subject of the speech. This latter interest is at the heart of the right to privacy stated in Art 13 of the ICCPR.

The defence of truth

Clause 16 of the Bill would restore the common law defence of truth in a civil proceeding. The point here is that it would no longer be necessary for a defendant to an action in defamation to establish both that the publication was true and that it served a public interest. The Committee has no 'in principle' objection to this reform. It accords with common sense, and the common law is a legitimate standard for assessment of rights.

Clause 16 does, however, bring the right to privacy into focus. The problem was identified by the ALRC over 20 years ago. As stated in an ALRC comment in its report *Unfair Publication: Defamation and Privacy* (ALRC 11):

> In (those) jurisdictions where truth alone was a defence, the law of defamation imposed no inhibition upon the publication of personal information. Intimate facts, of no relevance to public affairs or to the public activities of a person could be published without restriction provided that they were accurate; see at http://www.austlii.edu.au/au/other/alrc/publications/reports/20years/vol2/Unfairpublicationdefamatio.html).

Thus, the ALRC sought to recommend "a law suitable for all Australia that while stimulating the discussion of public affairs, would improve the position of a person falsely defamed and would provide some protection of personal privacy" (ibid). To this end, it recommended that the law be contained in "a single statute without the necessity to resort to earlier decided case". A critical aspect of the particular reforms proposed was that there be

> ... a limited law of privacy protection. It would allow a person to sue for damages or injunction if sensitive private facts were published about that person. These included facts relating to the health, private behaviour, home life, personal or family relationships of the individual which, in all the circumstances, would be likely to cause distress, annoyance or embarrassment to a person in the position of the individual (ibid).

It is apparent that this recommendation is linked to the ALRC's comment that a defence of truth has the consequence that "intimate facts, of no relevance to public affairs or to the public activities of a person could be published without restriction provided that they were accurate".

The Committee notes that the Presentation Speech may take a different standpoint on the desirability of linking recognition of a defence of truth to protection of privacy. It rejects the notion that the protection of reputation is an aspect of a notion of privacy. This view is at odds with the approach taken by international treaties such as the ICCPR. Of course, the Legislative Assembly is not bound to take this latter approach and may in any instance choose not to follow or to have regard to a document such as the ICCPR. In this instance, however, it is to be noted that the ALRC has felt it desirable to link reform of defamation law to protection of privacy, and, moreover, to view them as two sides of the same coin.

It is a question for the Legislative Assembly whether it considers that the approach of the ALRC should be adopted. In particular, the question is whether these reforms should be accompanied by a "a limited law of privacy protection" as recommended by the ALRC.

The Presentation Speech argues that reform of defamation law – and in particular of the removal of the "public interest" element of the truth defence – would mitigate the effect of the current law as "the preserve of the rich and famous".

The legitimate point here is that the sheer complexity of the current law makes it difficult for a person whose reputation has been traduced to sue for defamation. The ALRC noted that "the existing law offered a plaintiff complex and expensive litigation leading to a trial years later in which the only available remedy was an award of money damages" (ibid).

The Committee accepts that reduction of the defences will, to some extent, reduce the complexity of the law. This is very important given the enormous financial resources of many media outlets. But there are other aspects of the Bill that will make it easier for a publisher of defamatory matter to defend an action in defamation.

The new defence based on negligence

The Presentation Speech sees this reform as the most significant change proposed by the Bill. Clause 23(1) provides that:

> (1) It is a defence if the defendant establishes that the published matter (other than any published matter imputing criminal behaviour) was not published negligently.

But the scope of this provision appears to be more broadly based, for by clause 23(2):

> (2) For subsection (1), it is sufficient if the defendant establishes –
>
> (a) that if the plaintiff had proceeded against the defendant in an action for negligence –
>
> (i) the defendant would not have owed a duty of care to the plaintiff; or
> (ii) the defendant would not have breached a duty of care to the plaintiff; or
>
> (b) that, because of the publication, the plaintiff did not suffer, or is not likely to suffer harm; or
> (c) the defendant took reasonable steps to ensure the accuracy of the publication.

The notion that a defendant might prove that he or she or it was not negligent will strike many as fair. Nevertheless, it must be recognised that this defence will provide another means by which rich and powerful defendants may resist an action in defamation. The Presentation Speech argues that this defence "will provide a new and powerful reason for journalists and publishers to get their stories right". But it may be asked whether this incentive is even greater if there is no defence of absence of negligence; that is, where, as at present, a no-fault scheme operates.

Moreover, the Committee notes that it will be sufficient under clause 23 for a defendant to merely establish "that, because of the publication, the plaintiff did not suffer, or is not likely to suffer harm". This appears to have nothing to do with a 'no-negligence' defence. It would enable a defendant to place in evidence a great range of matters relating to the reputation of a plaintiff, and might be thought to be another discouragement to mounting an action at all. (It is also not clear how this aspect of clause 23 relates to clause 15 of the Bill.)

The offer of amends procedure

Part 2 of the Bill is headed "Resolution of disputes without litigation". The essence of the scheme is summarised in the Presentation Speech:

> Under the proposed scheme, litigants are encouraged to consider timely and reasonable corrections. A publisher may make a formal offer of amends that may consist of an apology, correction, offer of settlement or a combination of these. A person defamed must seriously consider an offer.
>
> Under the proposed model, the making of an amends at the earliest sign of a problem is now very attractive. A reasonable offer of amends is a complete defence to a later action for defamation.

This reform is welcome if it operates to provide an efficacious, speedy and inexpensive means for redress. If so, will do a great deal to further the interest a person has in her or his reputation.

The Committee notes, however, that the consequences for a plaintiff who does not accept an offer are such that he or she will be under great pressure to accept an offer of amends, notwithstanding that they may feel that the offer is not adequate. Thus, while this reform will place some pressure on a potential defendant to make an offer, it also will place pressure on a potential plaintiff to accept the offer. This may seem to be an appropriate means to achieve the resolution of disputes without litigation. But, in situations where there is great inequality of bargaining power, this procedure will favour the stronger party. In many cases, this will be the press and the media.

The Committee notes that by clause 11 of the Bill, a potential plaintiff to whom an offer of amends is not made "may apply to the Supreme Court for an order to vindicate his or her reputation". The Bill makes no further provision concerning this procedure, and, in particular, as to just what the Supreme Court may do.

Damages

Out of concern to ensure that in this field of the law "damages serve principally to vindicate a plaintiff's reputation" (see the Presentation Speech), clause 25 of the Bill provides:

> 25 Damages
>
> In deciding the amount of damages to be awarded, a court must –
>
> (a) ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded; and
> (b) take into account the ordinary level of general damages component in personal injury awards in the Territory.

The Committee accepts that there is a perception that some awards of damages in defamation cases have been too high. It is not clear that this provision will be of much assistance in this regard. It may be presumed that courts (including juries) endeavour now to achieve what is stated in clause 25(a). With respect to clause 25(b), it is not said how "the ordinary level of general damages component in personal injury awards" should be taken into account. Nor is it easy to see how the assessment of damage to reputation is to be measured by reference to damages assessed in respect of a very different form of injury.

The High Court's freedom of political communication

In *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 106-107 the High Court, confirming earlier case-law, held that arising from ss 7 and 24 of the Australian Constitution there was a "freedom of communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice as electors". The Court also held that the common law concerning libel and slander must conform to this freedom. It stated the scope of a defence that must be available to a defendant in a defamation matter and held that an Australian legislature could not abridge the scope of this defence.

This Bill does not attempt to state this defence, and it will be a matter for litigation whether the provisions of the Bill amount to an unconstitutional limitation of the defence stated by the Court in *Lange*.

Conclusion

The Committee does not cavil with attempts to reform defamation law. It has been recognised for many years that the current law is highly technical and due for reform. The Bill does not purport to be a code on the subject, and the government has signalled the need for further change.

From the perspective of the role of this Committee, the issue that the Committee considers needs to be addressed by the Legislative Assembly is whether the Bill makes an adequate adjustment between the right to freedom of expression and the right to privacy.

Interpretation Amendment Bill 1999

This Bill would amend the *Interpretation Act 1967* by the insertion of a new section 27A to deal with the publication of short-form notices of the making of an instrument under a law.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

To remove any doubt concerning the operation of the law as it stands, it would be declared that certain things done prior to the commencement of this Bill are to be taken to have been validly done. The Committee notes this retrospective aspect of the Bill. It finds that this is not an objectionable feature. The policy of the Bill is that which was intended by the Legislative Assembly in 1994 amendments to the *Subordinate Laws Act 1989*. Moreover, it is far from clear that the rights of any person would be affected adversely by this aspect of the Bill.

Road Transport Legislation Amendment Bill (No 2) 1999

This Bill would amend a number of Acts dealing with road transport. It would amend the *Road Transport (General) Act 1999* to provide for automatic disqualification for certain driving offences. It would amend the *Road Transport (Safety and Traffic Management) Act 1999* by the insertion of (i) a new section 5A to prohibit racing and other kinds of activities involving speeding on roads or road related areas without the approval of the road transport authority; and (ii) a new section 5B to prohibit burnouts on roads or road related areas. A new division 2.3 of this Act deals with the seizure, impounding and forfeiture of vehicles for offences against proposed new sections 5A and 5B.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Mandatory sentences – clause 4

Under these clauses, a person would, upon conviction for certain offences in relation to driving, be automatically disqualified from holding a driver's licence.

Any form of mandatory sentence is a matter of concern.

Forfeiture and seizure of vehicles

The Committee notes that these provisions do contain provisions to ameliorate the hardship that their enforcement might entail.

SUBORDINATE LEGISLATION

There is no subordinate legislation for comment in this report.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Government, in response to its Report No. 16 of 1999 concerning the Supervised Injecting Place Trial Bill 1999;
- the Minister for Education, in response to its Report No. 15 of 1999 concerning Determinations Nos 255-259; and
- the Minister for Urban Affairs, in response to its Report No. 16 of 1999 concerning subclause 78(5) of the Water Resources Amendment Bill 1999.

The Committee thanks the Ministers for their responses, and proposes to comment further in respect of subclause 78(5) of the Water Resources Amendment Bill 1999. Clause 78 would enable the Minister, by notice in the *Gazette*, to determine the fees payable under the Act. By subclause 78(5): "A reference in this section to a fee includes a reference to a fee that is a tax".

The Committee commented on this kind of provision in its *Report No 14 of 1999*, in relation to a provision of the Road Transport (General) Bill 1999. It pointed out that this kind of provision reverses the general constitutional position that taxes should be levied only by the legislature. The issue is whether the Assembly wishes to confer a power to levy a tax on a Minister.

In relation to clause 78 of the Water Resources Amendment Bill 1999, the Minister has stated in his response that the government does not intend that the power to determine fees should be employed so as to fix a tax. It is said that: "The subclause [78(5)] in question has been included for completeness and clarity and to prevent any vexatious claims against the validity of determined fees and charges".

The issue is whether these kinds of considerations should prevail over the desirability if maintaining the general constitutional position that taxes should be levied only by the legislature. In this respect, it is to be noted that the omission of subclause 78(5) would not compromise or effect government policy in relation to the use of the power in clause 78. Furthermore, if careful attention is paid when making a determination of fees under clause 78, there should be very little possibility of "vexatious claims against the validity of determined fees and charges".

Paul Osborne, MLA
Chair

9 February 2000

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

GOVERNMENT RESPONSE TO

SCRUTINY OF BILLS REPORT NO. 16 OF 1999

COMMENT MADE ON THE

SUPERVISED INJECTING PLACE TRIAL BILL 1999

7 December 1999

1. INTRODUCTION

1.1. The Government notes that the Committee makes no recommendations for any alterations to the Bill.

1.2. The Government welcomes a number of observations about aspects of the Bill which are worthy of attention, and is pleased to make comments in response.

2. COMMITTEE COMMENTS

"Dispensing with the law"

2.1. The committee has commented on a number of issues arising from the proposed use of a Direction to the DPP to deal with issues of client criminality. The committee refers to this as "dispensing with the law". The Committee indicates that, although it is open to the legislature to use this device in a statute, "*a number of matters might be noted*" by the Assembly in deciding whether to make such an enactment.

The Government welcomes these observations, and specific responses to the matters that might be noted are set out below.

2.2. General comment on "dispensing with the law"

Committee comment:

"*There is a long-standing principle of constitutional law and practice that an executive body should not dispense with the operation of the law. ...*

The principle may, of course, be displaced by statute. The issue for the Assembly is whether displacement is justified in any particular case. ..."

Government response:

The ACT Assembly, like every Australian jurisdiction, has delegated the execution of prosecutions to a statutory official, the Director of Public Prosecutions.

ACT law has also, by statute (the *DPP Act 1990*) provided that the Government may issue directions relating to prosecutions. It is not in dispute that this procedure may be used to forestall the commencement of prosecutions in relation to a class of cases. This device has in fact been used in the ACT in regard to 'passive euthanasia' cases.

The Bill openly proposes that this device be used in the context of the supervised injecting place trial. As the Committee correctly points out, the issue is a matter for the Assembly to determine the appropriateness or otherwise of enacting the provisions of the Bill before it. The Government has presented a strong case, made out on public health and health information grounds, supporting the enactment of the legislation

2.3. Specifics of Directions to DPP

Committee comment:

"*it is not very clear what kinds of directions to the DPP would be justified ... Might this extend to the protection from prosecution of the drug dependent person in relation to his or her purchase of the drug?, or to the seller of such a drug?...*"

Government response:

The Government believes that the careful wording of clause 8, and of the accompanying explanatory memorandum, are in fact quite clear.

The purpose of these amendments is to relieve clients using the facility of the prospect of prosecution. The Directions will accordingly be limited to use and possession offences by clients of the facility.

In relation to the specific effect of statutory Directions on purchase and supply offences, the Government notes that the existing powers under the *DPP Act* could be used to that legal effect. However, subclause 8(1) of the Bill has been clearly drafted to apply to actions of persons using the facility, and not to other actions.

The Government has no intention to provide any relief for offences of supply and sale. Addressing this issue, the responsible Minister said in his presentation speech:

> "*...let me stress that in regard to the offences of supply and sale, nothing in the proposed project would affect these crimes. The effects of the Bill, and the discussion below, are limited to the possession and drug use offences under ss. 169 and 171 of the Drugs of Dependence Act.*"

Any directions to the DPP issued by the Government under this legislation will not affect such offences.

Subclause 8(2), whilst not limiting the scope of directions, clearly indicates the emphasis on offences of use and possession under sections 169 and 171 of the *Drugs of Dependence Act 1989*.

2.4. Definition of "drug dependent person"

Committee comment:

"...the definition of "drug dependent person" ... is a limited one... the definition will not pick up many persons (such as the relatively new user) who may use, or wish to use, a facility. ...

[this] points to the difficulties the DPP (and possibly the police), will face in giving effect to any direction. How, and when, is it to be ascertained whether a particular person is a "drug dependent person"?

Government response:

The Government considered this very issue when drafting the Bill, and the term "drug dependent person" was chosen deliberately.

The policy behind this trial is that services will be provided only for the use of persons who have developed a dependency. Rules will be put in place to refuse services to persons who appear to be contemplating drug use for the first time, or are otherwise not yet apparently dependent. Diversion to counselling would be an obvious alternative service to provide to such persons.

As no person who is not drug dependent would therefore be permitted to use the facility, no issue of prosecution in relation to such a person will arise.

It will therefore not be necessary, as the Committee anticipates, for prosecutors to determine the state of dependency of a client of the facility, in order to be able to decide not to prosecute a client in accordance with the Directions.

The argument raises the hypothetical case of a facility client whom, on all other grounds, the DPP would refrain from prosecuting, but against whom a prosecution is nevertheless commenced on the sole ground that the client may not have a physical state of dependency to drugs.

The Government does not believe that this is a realistic scenario. The tight rules that will be adopted for the facility, and the Directions to the DPP themselves, can be used to ensure that no instance of this hypothetical DPP decision occurs.

2.5. Role and responsibilities of police

Committee comment:

"*There may be particular problems in respect of the police. ...there may be a point where there is a duty to enforce the law in some particular situations. A critical issue is how the provisions of this Bill can be adjusted to the duties and functions of a member of the AFP*"

Government response:

The Committee has noted that the Bill does not address the scope of the common law and statutory powers of a police officer to arrest and charge a person for an offence. The Committee acknowledges that there is legal debate as to the extent of the obligation of a police officer to enforce the law.

The Committee's comments suggest that it may subscribe to the approach taken by Lord Denning in *R v Commissioner of Police; ex parte Blackburn* (1968) 2 QB 118, that a constable "*... is not a servant of anyone, save the law itself.*" and that police, therefore, have a duty to enforce the law which cannot be overborne by anyone, including the executive arm of government.

This doctrine had its roots in concerns about the creation of the London Metropolitan Police force, and the need to ensure that an organised police force was not a mere tool of the Executive used to oppress the citizenry and advance the government's political objectives. The need for freedom from interference in law

enforcement for partisan political reasons remains today. However, what the Denning view in *Blackburn* fails to reflect is that, today, public policy considerations are an important and accepted element in law enforcement and prosecution decisions.

The Government takes a more modern view of the office of constable and the concept of police accountability. The fact is that police forces are hierarchical structures whose law enforcement activities are determined according to choices between objectives and priorities. It is not the case that policing priorities and practices are developed in isolation from wider public policy considerations. Two examples of how policing practice is influenced by external policy considerations are the non-attendance of police at drug overdoses and the non-pursuit of drug-users patronising needle-exchange services.

The Legislative Assembly, in passing this Bill, would clearly set out the policy intention of the ACT legislature, with respect to users of a supervised injecting place. The Executive will be responsible for its implementation. Police officers and police management, in providing policing services to the ACT, must be accountable to the Executive.

This view is consistent with the Report of a South Australian Royal Commission conducted by Justice Bright in 1970. While the Report noted that a police force has some operational autonomy, it is still part of the Executive Branch of Government. Bright J commented:

> "*In a system of responsible Government, there must ultimately be a Minister of State answerable in Parliament and to the Parliament for any executive operation. This does not mean that no senior public servant or officer of State has independent discretion. Nor does it mean that the responsible Minister can at his pleasure substitute his own will for that of the officer responsible to him. The main way in which a Minister and an officer of State become identified with an important decision is by a process of discussion and communication ... Almost always in such a case agreement will be reached on the broad basis of decision and action. From thereon, the officer will be the "field commander". He will carry out the decision, acting responsibly and using his own discretion in circumstances as they arise. But ultimately he will be responsible, through the Minister, to the Parliament - not in the sense that he will be subject to censure for exercising his discretion in a manner contrary to that preferred by the majority in Parliament, but in the sense that all executive action ought to be subject to examination and discussion in Parliament.*
>
> "*To point up this discussion, a Commissioner of Police is an important executive officer of State. He is trusted to exercise powers essential to any civilised society. He necessarily exercises some discretion in the mode of exercise. It is right that he should, in important matters, especially matters which have some political colour, discuss the situation with the Minister who is ultimately responsible to Parliament.*"

This view of the relationship between a police commissioner and his or her minister, which the Government endorses, is different from that established by the common law and is more consistent with modern practice than the common law position.

The Government does not anticipate that the common law position of constables will give rise to any practical problems in the implementation of the policy underlying the Bill, at least in respect of ACT offences. The Government

anticipates that the AFP will carry out their duties taking into account the express wish of the ACT legislature and executive.

Even in the unlikely case that individual police officers ignore the policy determined by the ACT legislature, and charge SIP users with relevant offences, the direction to the DPP will ensure that no prosecutions proceed.

2.6. Authority for, and conditions upon, Directions to DPP

Committee comment:

> "*...it is not entirely clear how the power in proposed section 8 relates to the power of the Attorney-General to give directions to the DPP under subsection 20(1) of the DPP Act 1900. It appears to be intended that the qualifications in section 20 apply to any exercise of the power in section 8. ... Subsection 20(3) states that "[a] direction ... shall be of a general nature and shall not refer to a particular case.*"

Government response:

The Government believes that the intended relationship is clear. The instrument to be issued is one issued under Section 20 of the *DPP Act 1900*. The authority for this instrument derives from that legislation, not the Bill. The Bill's effect is not to provide a head of power for the instrument, but to require the use of the power under the *DPP Act 1900* to be exercised (subject to certain preconditions).

Accordingly, the Committee is correct to conclude that "*...the qualifications in section 20 apply to any exercise of the power in section 8.*", and this was indeed the intended result.

The Government is aware of the principle, referred to by the Committee, that directions to the DPP should refer to *general* classes of prosecutions, never to *individual* cases. As stated above, all the qualifications in section 20 of the DPP apply, including that in Subsection 20(3), which states:

> " **(3)** A direction or guideline shall be of a general nature and shall not refer to a particular case."

The term "case" in that provision is accepted to mean an individual prosecution.

Consistent with this principle, the term "circumstances" was used in subclause 8(2) of the Bill to emphasise common situations, rather than individual persons. The Committee recognises this outcome in the comment:

> "*Subsection 8(2) might be read as a power to direct that persons of a certain kind or class not be prosecuted.*"

Accordingly, the Government believes that it is clear that the arrangements proposed by the Bill will continue to be limited to general directions.

Nevertheless, the Government is open to amending the Bill to remove any doubt on this point. An appropriate amendment to this end might be to copy subsection 20(3) as an additional clause 8 of the Bill.

2.7. Clauses 5 and 8 – capacity to alter or revoke Directions

Committee comment:

> "*...there are questions about the interrelationship between proposed sections 5 and 8. ... this will limit the ability of the Attorney-General to amend or revoke directions given under section 8.*"

Government response:

The Government intends that the issuing of an appropriate Direction under clause 8 is a precondition of the use, by the responsible Minister, of the power to declare a place to be a facility under clause 5. The Committee correctly observes that the Bill has that intended effect.

The Government does not agree that the capacity to amend or revoke the Directions is limited. There is no apparent limitation on the face of the Bill or the DPP Act.

It may be suggested that a revocation of the Directions, or the amendment of the Directions to an extent that they no longer comply with clause 8, would result in the automatic revocation of the facility's status. This result does not necessarily follow on the face of the Bill.

However, it would obviously be the case that any decision by a Government to reduce the scope of the Directions below the effects required by the current Bill would only be taken in the context of closing the facility, or at least substantially changing its services. Such a prospect is hypothetical and is not relevant to the workability of the arrangements currently proposed.

"Civil liberties and treaty obligations"

2.8. The Committee draws attention, in a very limited way, to civil liberties. It merely observes that the area is "*one in which rights are in conflict*".

The Committee briefly raises the issue of the application of international treaties to this proposed trial. This is a matter which has received extensive attention and consideration, and upon which the Government has obtained independent legal advice from Mr Pat Brazil AO. The Government has previously supplied that legal advice to all members of the Assembly.

The Committee suggests that the Assembly may wish to take these treaties into account. The Government agrees, and encourages the Assembly to do so.

Bill Stefaniak MLA

Minister for Education
Responsible for
Schooling
Vocational Training
Children's Youth and Family Services
Sport and Recreation

Member for Ginninderra
Australian Capital Territory

Mr Paul Osborne
Chair
Standing Committee on the Scrutiny of Bills and Subordinate Legislation
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Dear Mr Osborne

Standing Committee on Justice and Community Safety - Scrutiny Report No. 15 of 1999

I am writing in reference to comments on Determinations No. 255 – 259 under Subordinate Legislation referred to in Scrutiny Report No. 15 of 1999 that relate to my portfolio.

Determinations No. 255-259 of 1999 were made under section 7(1) of the *Building and Construction Industry Training Levy Act 1999* and advised appointments to the Building and Construction Industry Training Fund Board from 1 November 1999 until 31 October 2002. The Committee noted that these appointments were signed on 29 October 1999, appeared in the Gazette Notice of 10 November 1999 and that they would take effect from 1 November 1999.

The Committee was concerned about the effect of section 7 of the *Subordinate Laws Act 1989* on these appointments, in that subordinate law shall not be expressed to take effect from a date before the date of its notification in the gazette if it would prejudice the rights of another person or impose liabilities on any person. The Committee accordingly sought confirmation that no person's rights had been prejudicially affected or any liabilities imposed on any person during the relevant period of retrospectivity.

The *Building and Construction Industry Training Levy Act 1999* is a very recent Act and these appointments are the first appointments made under the Act. I am advised that there would not be any person whose rights would be affected in a manner prejudicial to that person or that liabilities would be imposed on any person by the retrospective effect of the appointment.

I hope this explanation satisfies the Committee's concerns.

Yours sincerely

BILL STEFANIAK MLA

17/11/99

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Dear Mr ~~Osborne~~ Paul

Thank you for the *Scrutiny Report No. 16 of 1999* of the Standing Committee on Justice and Community Safety. The Committee questions whether it is intended that subclause 78(5) of the *Water Resources Amendment Bill 1999* confer on a Minister a power to levy a tax.

The principal act clearly specifies the nature and type of fees that can be set. There is no intention to change the nature of the fees currently provided for and legal advice has indicated that current charges are not taxes. The subclause in question has been included for completeness and clarity and to prevent any vexatious claims against the validity of determined fees and charges.

I commented previously when a similar matter was raised in relation to a provision of the *Road transport (General) Bill 1999*, in the *Scrutiny Report No. 14 of 1999*. In reality the Government sets a budget and fee amounts are determined in order to meet the Government's requirements. Through the Budget Cabinet process, fees are scrutinised and agreed by Government members before being Gazetted. The Assembly can take action if there is strong disagreement concerning fees, as the fee determination is a disallowable instrument for the *Subordinate Laws Act 1989*.

Yours sincerely

Brendan Smyth MLA

8 December 1999

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APPENDIX 10

National Schemes of Legislation

The South Australian Perspective

TABLE OF CONTENTS

INTRODUCTION

South Australia throughout its near 100-year membership of the Australian Federation has developed a reputation as an innovative State. In many cases it has led legislative reform throughout the Commonwealth of Australia.

From its very early days, reforms in South Australia left other jurisdictions in its wake and on occasions, I suspect, dragged other jurisdictions kicking and screaming into major reform. In 1884, the South Australian initiative of granting women the voted forced the Commonwealth into giving women voting rights from the inception of the Federal parliament. Women were eligible to vote for both the SA House of Assembly and the Legislative Council in 1895 yet most legislatures granted women the right to vote in the early 1900s.

Other SA initiatives included the promulgation of the Torrens Title system, not adopted by some States for many decades, the establishment of a Workers' Compensation Scheme and many other reforms. In 1962 we passed the Associations Incorporation Act, an initiative followed by Victoria and New South Wales some 30 years later. We led the nation in consumer protection laws in the 1970's. Obviously other States have also led in other reform areas. So in this sense, the notion of Competitive Federalism in legislative reform has been around for a long time.

I suspect many of these reforms would have taken much longer, at least as far as South Australia is concerned, if we had had to obtain uniformity through Ministerial Councils and their ultimate creation – National Schemes of Legislation.

This has created a culture (perhaps until very recently) of fierce independence on the part of South Australians as represented by the Members of Parliament. On the other hand there are those who believe particularly in recent times that the States or at least some of them have lagged behind others. Until recent times the Commonwealth has often provided monetary incentives for States to come into line with national policy. An example of this

occurred in relation to our drink driving legislation in 1991. South Australia had a limit in the prescribed concentration of alcohol for drivers of motor vehicles of 0.08. The Commonwealth offered the States and Territories an irresistible financial incentive to come into line with a uniform concentration of alcohol of 0.05. South Australia (with the Northern Territory) was one of the last States to adopt this and then only in a modified way. We provided that a concentration of between 0.05 and 0.08 incurred a fine and not an automatic suspension of licence and we got the money.

Lately, uniform schemes have come into effect without even a monetary incentive. The Uniform Road Rules is the most recent example. However, these schemes have sometimes required changes to make them compatible with our conditions. In the cast of the Uniform Road Rules, they had to be immediately amended because they did not permit firefighters to fight fires from the back of a utility.

So from my point of view it can be useful to look this topic at through the prism of South Australian history. South Australia was born a freethinking State – It was set up by legislation but more than that some people came there to escape political and religious persecution and freely express their views within the rule of law.

Douglas Pike in his book *Paradise of Dissent -South Australia 1829-1857* said that the men who settled South Australia had stated ideals of "civil liberty, social opportunity and equality for all religions. Some of this freethinking attitude survives in the State. People continue to value their independence from centralised authority.

A pragmatic icon of this view was Sir Thomas Playford who was Premier from 1938 until 1965. Sir Thomas was what might be called a "a States righter" although the State that was always in the right was South Australia. Called the "holy terror" by Sir Robert Menzies, the teetotal Adelaide Hills cherry grower had forthright opinions on the centralisation of power in Canberra. The South Australian Supreme Court Judge Sir Roderick Chamberlain apparently often told a story about Sir Tom that illustrates his view of Canberra.

In the 50s when Chamberlain was Crown Solicitor he went with the Premier Tom Playford to Canberra. Tom organised an early morning walk with Chamberlain from their lodgings at the Hotel Canberra to see a grave. Playford told him that the grave was that of the person who discovered Canberra. After plunging through the scrub that was to become capital hill they came on a gravesite. On asking whether this was in fact the grave of the person who discovered Canberra, Tom Playford said "yes Rod this is the ...grave". Chamberlain then asked "What are we going to do now we're here?" "We're going to piss on it, Rod" responded the Premier.

OUTLINE OF PAPER

In the following few minutes I am going to detail to you -

- the SA Cabinet guidelines to model, template and mirror legislation and the referral of State powers to the Commonwealth.

- the Cabinet guidelines on the general principles to be used in deciding whether to participate in national schemes.

- the SA Government's attitude to:
  (a) the methods of implementation of legislation.
  (b) the Senate and Victorian proposals for scrutiny of National Schemes of Legislation
  (c) the National Schemes of Legislation Position paper
  (d) the general principle of Scrutiny of national schemes of legislation

I will then conclude with my own comments on the Scrutiny of national schemes of legislation

CABINET PRINCIPLES

The SA Cabinet has developed guidelines in 1994 that it uses to evaluate proposals for national schemes of legislation. The guidelines outline the four major methods of implementation of national schemes of legislation, including model legislation, template legislation, mirror legislation and reference of power to the Commonwealth.

MODEL LEGISLATION

Model legislation is described as legislation that is consistent but not necessarily identical legislation passed by each jurisdiction. Usually a model bill is drafted and each jurisdiction uses that model for its own Act. The model bill is usually drafted in accordance with the principles established by an intergovernmental agreement. The guidelines state that this method has few disadvantages from the point of view of the State. This is because the legislation and amendments are always carried out by the Parliament. The down side to this option is seen in maintaining uniformity.

The Cabinet guidelines note that apart from ministerial agreements (which are not legally enforceable) there is no way of ensuring that all jurisdictions will continue to support the legislation.

TEMPLATE LEGISLATION

This, of course, is where one State acts as the lead jurisdiction and passes legislation. The other jurisdictions pass legislation applying the lead jurisdiction's legislation. The Cabinet guidelines note several disadvantages -

- It does not permit the full parliamentary process to operate. If a State is not the lead State, the substantive legislation is not before the Parliament. Once the initial application laws are passed by the State Parliament, amendments can potentially be enacted by the lead State without any reference to State parliament

- Subordinate legislation is not subject to Parliamentary scrutiny in each jurisdiction

- Ministerial Councils may agree to amendments and an intergovernmental agreement may provide that the approval of a ministerial council is required before amendments can be made. Parliament either has to accept the Ministerial Council's decision or withdraw from the scheme

- The legislation can reduce the autonomy of the State and its Institutions. Some examples of this given in the Cabinet Guidelines include -

(a) where the law was to be interpreted according to the law of another jurisdiction ,or

(b) that another jurisdiction's administrative law rules is to apply to the scheme, or

(c) that the law provided for appeals to a court of another jurisdiction.

MIRROR LEGISLATION

Mirror Legislation is where the States enact identical complementary legislation to cover areas that the Commonwealth cannot cover because of constitutional limits or uncertainty on the relative legislative powers of the States and the Commonwealth. This is said to have been used when there was uncertainty whether the States or the Commonwealth could enact the law because of questions of legislative power.

Other advantages and disadvantages of this type of legislation were not discussed in the paper.

REFERENCE OF POWER

Another system discussed in the Cabinet guidelines is one or more States make a reference of power to the Commonwealth using Section 51 (37) of the Commonwealth Constitution. When a reference of power is in force the State is powerless to vary the Commonwealth law and the State cannot make laws inconsistent with the Commonwealth law. There are also arguments that the State may not be able to legally withdraw a referred power.

APPLICATION OF PRINCIPLES (SA GOVERNMENT)

The Cabinet guidelines recommend that national scheme legislation should only be used where there were real commercial or practical considerations that require national uniformity. I must say I have yet to see any Minister stand up and refer to these principles in bringing forward any national schemes legislation in any speech to Parliament.

Factors the Cabinet will take into account in deciding whether to participate in a national scheme are –

- the extent to which divergence from uniformity can be tolerated
- the cost of implementing the scheme
- the effect of the division of powers in Australia's Federal system
- the effect on the autonomy of Parliament
- the effect on the jurisdiction of the State's Courts
- the administrative law regime under which the uniform scheme will operate.

THE SA GOVERNMENT'S VIEW

The Attorney General Hon Trevor Griffin MLC who was first elected in 1979 and has spent some 11 years in opposition has always been a keen supporter of State rights, of the sovereignty of the Parliament and of the State. He has long championed the right of the Parliament to scrutinise legislation that has an affect on the State. In 1997 when opening the Bi-Annual Conference on Delegated Legislation and the Scrutiny of Bills, he said:

> *The scrutiny of national scheme legislation is a hot topic. In South Australia the Government as well as the Parliamentary Legislative Review Committee both have strong views on this issue. The South Australian Government is strongly of the view that the role of a State legislature is sidelined where template legislation is proposed and we take a dim view of pressures which are brought to bear, sometimes from Federal public servants and, ultimately, Ministers or from public servants and Governments from the East flexing their muscles to submit to template models. Frequently, business is not interested in the constitutional issues and just wants Governments to get on with the job and brings its own pressure to bear to compromise on principle.*

In 1998 I wrote to the Attorney on behalf of our Committee asking for his views on the two proposals for national schemes of legislation. His response of the 17th August, 1998 is annexed to the written paper distributed at this conference.

The Attorney has also recently provided the Government's current considered view on the various suggestions for the scrutiny of national schemes of legislation. Obviously being in Government and dealing with the associated pressures and the essential and pragmatic considerations needed by Executive Government through the cabinet process from time to time has occasionally tempered the practical implementation of his views.

An example of this was the promulgation of the Financial Sector Reform Act. The Attorney General, the Government and ultimately the Parliament were subjected to enormous pressure from the finance community to pass the legislation notwithstanding his principled reservations.

SA GOVERNMENT'S PREFERRED METHOD OF IMPLEMENTATION

The Government view is that –

(a) for regulatory national schemes or national schemes affecting criminal law, it prefers the model legislation approach, because it allows State Parliament the greatest possible control over the legislation while facilitating national uniformity.

(b) for schemes requiring constitutional re-arrangement between States and the Commonwealth, a limited referral of power approach may sometimes be used.

However, if a State Parliament, is to pass model legislation to implement a national scheme and later decides to vary or amend it in a way that contravenes the terms of the intergovernmental agreement, the Government recognises this may frustrate the aim of uniformity. The Government's view is that such an action would not be taken lightly because it may constitute a

clear indication that the scheme no longer has national support and should not be used in its current form.

SA GOVERNMENT VIEW OF PROPOSALS

SENATE AND VICTORIAN PROPOSALS

The Senate Committee on regulations and ordinances (in 1996 and 1997) and the Scrutiny of Acts and Regulations in Committee in Victoria (in 1998) separately addressed the issue of parliamentary scrutiny of national scheme legislation. The Senate proposal was largely the initiative of former Senator and Presiding Member of the Senate Committee Bill O'Chee.

The Victorian proposal was put forward by the Peter Ryan Chair of the Scrutiny of Acts and Regulations Committee, Parliament of Victoria. These reports arose from concern that the role of State and Federal Parliaments would be adversely effected by the methods used to introduce those schemes and that existing legislative review mechanisms were inadequate.

Recommendations from The Senate and Victorian Committees include the placing of exposure drafts of primary national legislation before participating Parliaments, and the establishment of a National Committee of Scrutiny with representatives from the scrutiny committee of each State, Territory and the Commonwealth. The Senate proposal was not supported by the Commonwealth Attorney General apparently because it was unclear and did not have unanimous national support.

The SA Government's has indicated that it has number of reservations about the Senate and Victorian proposals. They are -

- the potential cost and delay inherent in the proposed scrutiny procedures
- the fact that the scrutiny committee proposed by the Senate would only deal with regulations promulgated under the national scheme (and not the legislation itself)

- it poses a threat to the ultimate aim of uniformity
- the "very limited nature" of State and Territory participation in the scrutiny envisaged by the Senate Committee
- the fact that South Australia could not participate in a National Scrutiny Committee as proposed by the Victorian Committee unless the powers of the SA Legislative Review Committee were changed
- Notwithstanding any scrutiny under the scheme, endorsement by COAG would be required before the Government considered a proposal to establish a committee

  (So much for the concept of Parliamentary Sovereignty!)

NATIONAL SCHEMES OF LEGISLATION POSITION PAPER

The Attorney General has also noted the Position Paper on the Scrutiny of National Schemes of legislation released by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia.

SA does not have a specific scrutiny of bills committee unlike other States. Such committees in other states have been set up to take an active role in examination of national scheme legislation.

The South Australian State Government preference for the model legislation approach where the State Parliament considers such legislation, means, according to the Government position, legislation can be scrutinised by the SA Legislative Review Committee and Parliament like any other legislation. *Further, the South Australian Committee can scrutinise legislation referred to it by either or both Houses of Parliament or on its own motion under the Parliamentary Committees Act although its resources provide a brake on it ability to do so.*

Accordingly the SA Government's view is that it is unnecessary to establish a Scrutiny of Bills Committee dedicated to dealing with national schemes of legislation.

To its credit the Government does acknowledge that the proposal could allow for Parliament to have a greater role in policy formation than it does at present. The Government is not convinced, however, other than scrutiny what role the Committee might have to influence the outcome of the legislative process.

The Government notes the proposal by the Working Party is that a National Scrutiny of Legislation Committee have regard to "the expected social and economic impact of the subordinate legislation" in deciding to recommend disallowance.

The Government in responding to this suggestion notes that this would give the SA Legislative Review Committee a policy function it does not currently exercise in regard to local legislation. In the interests of equal treatment of local and national scheme legislation, the Government believes this is undesirable.

SUMMARY OF SA GOVERNMENT VIEWS

The Government considers that the Scrutiny of National Schemes proposals may have some benefit in relation to scrutiny of template legislation. The proposals were also considered to have value where there was general referral of powers to the Commonwealth by the State.

However because it is Government general policy not to use template legislation or an unlimited referral of power it is contended by the government that specific Scrutiny of National Schemes of Legislation Committee is not necessary for South Australia.

COMMENTS

Now for my own view. I appreciate the Attorney detailing his response to this matter particularly in time for me to present it to this gathering. I acknowledge that all schemes may require further consideration and refining and that in the case of the Senate proposal the scope for scrutiny was limited.

I am confident that the Attorney-General and his department are fierce protectors of this policy.

However, the Government's view is entirely dependant upon maintaining its policy of not participating in template schemes, or general referral of powers. We all know that Governments can and do change policy and, occasionally, subvert or surpass a policy in favour of another inconsistent policy.

Further, there is the question of scrutiny of existing template legislation or general referral of powers that occurred prior to the promulgation of the existing policy, particularly insofar as subordinate legislation.

I believe that the Government view, as expressed above on the face of it, has some merit.

For example, the Financial Institutions (Application of Laws) Act 1992 is an example of such legislation where South Australia applied the Queensland Financial Institutions Code as law in South Australia.

Similarly, the Parliament passed template legislation in the guise of the Agricultural and Veterinary Chemicals Act (South Australia) 1994 which applies certain laws of the Commonwealth relating to agricultural and veterinary chemical products as laws of South Australia.

The current or existing National Scheme Legislation affecting South Australia, according to my advice, is as follows:

(a) Complementary or Mirror Legislation

- Crimes at Sea Act, 1998
- Australasia Railway (Third Party Access) Act
- New Tax System Price Exploitation Code (SA) Act.
- Federal Courts (State Jurisdiction) Bill.

(b) Model Legislation

- Classification (Publications, Films and Computer Games) Act 1995
- Food Act, 1985
- Dangerous Substances (Transport of Goods) Act.

(c) Template Legislation

- Financial Institutions (Applications of Laws) Act, 1992
- Agricultural and Veterinary Chemicals (SA) Act, 1994

(c) Referral of Powers

- Mutual Recognition Act, 1993
- Trans Tasman Mutual Recognition Act
- Australia Acts (Request) Act, 1999
- Financial Sector Reform (South Australia) Act
- Financial Sector (Transfer of Business) Act.

There is currently no legislative method of preventing template legislation or preventing unlimited referral of power to the Commonwealth and I am not sure, short of a Constitutional Amendment and referendum, that we could do that.

I appreciate the Attorney will be vigilant in this matter, but he is only one member of Cabinet. Theoretically, the Attorney General can be placed under great pressure to ignore the policy, particularly where draft uniform legislation has resulted from long and hard negotiations at Ministerial Council level.

In addition, I think that the practical benefits of looking at legislation early should not be underestimated. The Ministerial Council process can and has overlooked matters that should be dealt with at an early stage.

That is not to say that a vigilant State scrutiny committee cannot be effective under the current process.

For example, in February last year, the South Australian Committee considered regulations which were part of a national scheme of harness racing rules. Not only was this a national scheme regulation, it was a non-government regulation. The Rules made any "official" liable to be hauled before the stewards if the person had any detectable level of alcohol in their blood.

The rules covered drivers, trainers, the ticket seller and the bloke with the broom who followed the horses. It was not unique that such a matter was not picked up at an earlier stage. However, an inquiry by the South Australian Legislative Review Committee, the SA Harness Racing Authority caused amendments to the new national rules to provide that officials only include persons whose duties are not related to the care and control of horses or the conduct of a race.

All this was brought about by sensible negotiation between the Committee and the relevant authorities, although the Committee was dependant on the goodwill of the harness racing community (something not always enjoyed with Ministers). Another example, and a consequent difficulty, arose with regulations made under the National Electricity (South Australia) Act 1996 which is uniform legislation designed to help develop a coordinated national electricity grid and set up the national electricity market. South Australia was the lead State with this legislation.

Despite the fact that the South Australian Parliament passed the model legislation, the Act provided that the regulations were not to go before our Committee as is the case with all other regulations. This was presumably because it was national legislation.

In summary, the South Australian Government's position can be said to be that because it has an existing policy of not agreeing to template legislation, or to general referral of powers, there is no real need for any nationally coordinated scrutiny committee.

On the face of it, I laud the Government policy of not agreeing to template legislation or general referrals. The view that there is no need for a nationally coordinated scheme of scrutiny overlooks a number of factors including:

(a) the scrutiny of regulations or subordinate legislation promulgated under existing template and general referral legislation;

(b) the ability of our sovereign parliament to scrutinise legislation and/or subordinate legislation in a timely fashion in the even that:

  (i) the policy change (whether publicly announced or otherwise);

  (ii) the policy is suborned in favour of some other existing or newly formed policy;

  (iii) the policy is overlooked because of some other Government imperative (or failure to scrutinise itself).

I acknowledge that, in South Australian context, it can be argued that there are so few identified existing template schemes (2) and general referral of powers (6) that it hardly warrants the expense of such a scheme. Further, a change in legislative policy by a South Australian Government to introduce template legislation or legislatively refer general powers, will after all have to come before our Parliament.

There are arguments that this body must address if we are to convince our respective Parliaments and governments of the merits of a nationally coordinated scheme.

In that regard, there is much work to be done by all our respective Committees before these proposals can advance too far. My tentative views are that a well coordinated ad hoc (and perhaps informal) system of national scrutiny should be explored. The passage of time would then demonstrate whether there is a need (or not) for such a committee and identify the best way of scrutinising national legislative schemes should a formal structure become necessary.

In closing, I think, whilst we continue to agitate for reform in this area by our respective Parliaments and governments, we do already have in our hands the capacity to develop informal processes of reviewing and scrutinising national scheme legislation. We can do this by improving communication between our respective committees by attendances at conferences such as this and more importantly, direct communication between ourselves and the staff of our committees.

cc D Pegram ✓
17 AUG 1998

THE HON K TREVOR GRIFFIN LL.M, MLC

ATTORNEY-GENERAL
MINISTER FOR JUSTICE
MINISTER FOR CONSUMER AFFAIRS

Reference: AGD 212-96
Correspondence ID No.: 25654
Imr:misc:lrequery:RedfordNatScheme

Hon A J Redford MLC
Presiding Member
Legislative Review Committee
Parliament of South Australia
DX 56506
ADELAIDE

Dear Mr Redford

I refer to your letters dated 12 May and 2 July, 1998 regarding the scrutiny of national scheme legislation.

I have considered the scheme developed by the Victorian Scrutiny of Acts and Regulations Committee (the Victorian Committee). I have also considered the Standing Senate Committee of Regulations and Ordinances' (the Senate Committee) proposals as you have detailed the scheme in your letter dated 12 May 1998. I understand that the Senate Committee has not presented a firm proposal in relation to the scrutiny of national scheme legislation. Consequently, I have assumed that the information you have provided represents the whole of the Senate Committee's proposals.

Both proposals attempt to provide a mechanism to allow the Commonwealth, State and Territory Parliaments to have a greater opportunity to scrutinise national scheme legislation. Also, it appears they both operate on the similar principle that a committee with representatives from the Parliament in all 9 jurisdictions (the Commonwealth, 6 States and 2 Territories) will be involved at some stage to scrutinise the relevant national legislation. However, I acknowledge there appears to be some differences: namely,

- the Senate Committee's proposal appears to envisage that all national scheme legislation will originate in the Commonwealth jurisdiction because the procedures for scrutiny only begin when the legislation is introduced into the Senate, whereas the Victorian Committee's scheme begins when the national scheme legislation is introduced into the first of the 9 jurisdictions.

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- you have stated that the Senate Committee's proposals only relate to national scheme Regulations, whereas the Victorian Committee's scheme envisages that a national scrutiny committee will scrutinise all national scheme Bills and Regulations.

- The Senate Committee proposal does not appear to envisage that the State or Territory Governments will play a part in determining whether to support or disallow the national scheme of legislation. The fourth dot point on page 2 of your letter dated 12 May 1998 states that "any decision to recommend disallowance or 'no action' would be made by a vote of a working group comprising the chairs of all Australian parliamentary legislative scrutiny committees".

I have several reservations about both proposed schemes. Some of my concerns are specific to a particular proposal, but many of my concerns are equally applicable to either proposed scheme. I will first deal with my general reservations about the proposed schemes to review national scheme legislation, and then I will outline my specific concerns regarding the particular proposals.

General Concerns

- The proposed schemes could be costly. The cost of establishing video links, or organising attendance at meetings to discuss and scrutinise the legislation is potentially significant. The cost could be doubled if the national scrutiny committee must consider both the Bill and the Regulations because potentially the national scrutiny committee will be required to meet twice in relation to each national scheme of legislation.

- The time required by the scrutiny committee to arrange to meet, and then to give proper consideration to the legislation, is likely to slow the process of implementing the national scheme of legislation which would arguably not serve anyone's interest.

- It is likely that all States and Territories will bring different local interests to the committee's discussion table when reviewing the national scheme. This could make consensus difficult, and therefore the development of appropriate submissions would be time consuming. Alternatively, a particular State's interests may be overlooked due to the dynamics of the group and the people assuming control of the national scrutiny committee. This could severely undermine the proposals which presumably are designed to prevent the erosion of Parliament's right to scrutinise proposed legislation, and Parliament's right to scrutinise the erosion of the State's autonomy over its exclusive powers.

Concerns about the Senate Committee's Proposal

- It appears that the Senate Committee's proposal assumes that national schemes of legislation will be considered by the Commonwealth Parliament before being introduced to the State and Territory Parliaments. Consequently, problems may arise

where some State and Territory Parliaments have passed the legislation arising out of the national scheme before such legislation is considered by the Commonwealth Parliament.

- The action of a State could result in a notice of disallowance. Under the Legislative Instruments Bill a notice of disallowance will effectively prevent the regulations from being reintroduced for 6 months unless the State and then the House rescinds the disallowance. This could slow down the legislative process considerably, and may have a significant impact on other States and Territories, particularly if the national scheme legislation has originated in other jurisdictions.

- Your letter dated 12 May 1998 states that the Senate Committee's proposal give the States and Territories a limited opportunity to participate in the scrutiny of the Regulations yet it arguably does not achieve this. Unlike the scrutiny of local regulations or the scrutiny of national schemes of legislation proposed by the Victorian Committee, the Senate Committee's proposal does not allow the State and Territory Parliaments to consider the national scheme of legislation and vote on a plan of action. It appears that the proposal envisages that the relevant decisions will be made at the State Committee, and National Committee levels.

Concerns about the Victorian Committee's Scheme

- This Scheme proposes that members of local Scrutiny of Bills Committees would review national scheme Bills, while members of local scrutiny of subordinate legislation committees would review national scheme subordinate legislation. In theory this sounds appropriate, however, only 4 States/Territories maintain Scrutiny of Bills Committees. The result of this would be that, without South Australia developing its own Scrutiny of Bills Committee or extending the functions of the Legislative Review Committee, it would not be represented in a National Scrutiny Committee. This would mean that issues of particular concern within this State would be ignored in the review of the legislation. It is possible that South Australia may authorise a Parliamentary Committee to review national scheme legislation as Western Australia have done. However, this would result in the treatment of national legislation being different from local legislation.

This Government is conscious that national scheme legislation raises issues regarding the impact on autonomy of the Parliament of the States and Territories. However, as outlined above I am concerned that the Senate Committee's proposal and the Victorian Committee's scheme do not provide a solution to the perceived erosion of the Australian federal system and the autonomy of Parliament caused by national scheme legislation. As previously advised in my letter to the Legislative Review Committee of February 1997, the State Government believes that national scheme legislation should only be introduced where there are real commercial or practical considerations which require national uniformity. In recognition of this, the Government will consider the effect that the chosen implementation method has on the autonomy of the Parliament and the effect the national scheme legislation has on the

Parliament's duty to 'make laws for the peace, order, and good Government of the State', amongst other things.

In relation to the Legislative Instruments Bill currently in the Commonwealth Parliament, I understand that the Commonwealth Government does not propose to support the Senate Committee's amendments which the Committee has proposed subject to the development of a nationally coordinated system to scrutinise national schemes of legislation. I am informed that the Commonwealth Government is concerned about the lack of a clear and detailed proposal regarding the scrutiny of national schemes of legislation, and the lack of consultation and national support for such a scheme. In any event, if a clear proposal is established it would be appropriate for COAG to consider the matter before any scheme was adopted.

Thank you for the opportunity to comment on these issues.

Yours sincerely

K Trevor Griffin
ATTORNEY-GENERAL

APPENDIX 11

STANDING COMMITTEE ON UNIFORM LEGISLATION AND INTERGOVERNMENTAL AGREEMENTS

UNIFORM LEGISLATION IMPACT ON WESTERN AUSTRALIA PAPER

by

Hon. Kevin J. Minson, MLA

February 2000

Meeting of the Working Group of Chairs and Deputy Chairs of Scrutiny of Primary and Delegated Legislation Committees

PARLIAMENT HOUSE, DARWIN

NORTHERN TERRITORY

14 and 15 February 2000

1. Introduction

The harmonisation of laws aims at eliminating obstacles and disparities between States and countries for a number of reasons, including economic and health reasons. There is no doubt that there are enormous benefits from the free flow of goods, services and information across our State boundaries. However, laws that are designed to be uniform must take into account the effects of application and their practicability in all parts of this vast continent.

2. The Federal System and Harmonisation

International trade agreements as well as other international treaties have impacted on State laws and have sometimes lead to national legislation to ensure compliance with international agreements. However, State legislatures need to be kept informed of international and national agreements and accords which impact on their area of jurisdiction.

The scope of government functions in the twentieth century has evidenced considerable diversity. Activities have expanded relating to international relations, the functions of the global economy, the expansion of government social activity and the relative expansion and operation of the legal system. This has required both Federal and State Governments to adopt a more co-operative approach. It has also evidenced the trend and demand for more uniform standards and laws in a variety of areas, including those which were considered exclusively within State jurisdiction.

National harmonisation of laws consists of laws regulating a number of sectors including social policy, agriculture, transport and environmental protection.

State legislatures and State Governments can actively participate in providing input to proposed legislative measures. The requirement that State legislatures are informed ensures a measure of accountability to the legislature and ultimately the people.

3. The Constitution

The Australian Constitution confers on the Commonwealth Parliament the powers set out in the Constitution, most of which will be found in sections 51 and 52. The itemised grant of powers includes areas where the Commonwealth Parliament has exclusive powers as well as concurrent powers, that is, where both the Commonwealth and State Parliaments have the power to legislate in the same areas.[1] Other powers are left to the States, but Federal law prevails where there is a conflict over concurrent powers.[2]

Section 109 of the Constitution also established the legislative pre-eminence of the Commonwealth Parliament over State Parliaments, by providing that where laws made by State Parliaments conflict with laws made by the Commonwealth Parliament, the laws of the Commonwealth Parliament prevail.

Increasingly international agreements and treaties have impacted on State laws and have sometimes lead to national legislation. In Australia, the power to implement treaties is primarily within the authority of the Commonwealth Government.[3] There is no established procedure for State Parliaments to be informed and participate in the treaty process.

4. Intergovernmental Agreements

Intergovernmental agreements are political compacts which represent agreements reached by Executive branches of Government at the Council of Australian Governments (COAG) and/or Ministerial Councils, to a scheme involving the passage of uniform legislation in different jurisdictions. The agreement usually describes the substantive principles upon which the legislation will be based.

Once COAG or the relevant Ministerial Council has approved a proposal in principle for a scheme, the matter is usually referred to a working party for detailed development of the structure of the scheme and drafting of the legislation. After

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1 Powers which are held concurrently with the States include taxation (section 51(ii)) even though income tax collection has been exercised exclusively by the Federal Government since 1942.

2 Section 109 of the Australian Constitution provides: "When a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".

3 Section 51(xxix) of the Australian Constitution.

consultation the working party makes recommendations to COAG or the Ministerial Council. This may be a lengthy process.

The increasing number of intergovernmental agreements is a gradual yet significant element in transforming the Westminster system of Government in the Australian Federation. Intergovernmental agreements have been introduced for a variety of reasons. There is however, no procedure or opportunity to make Governments more accountable with respect to the creation and implementation of these agreements.

5. Ministerial Councils

In Australia, increasingly the move towards national scheme legislation has evolved a method of law-making which involves Ministers at Ministerial Councils agreeing on national uniform legislation. Ministers at the Federal and State level have established close contacts and work towards agreement on issues within their portfolios. Ministerial Councils do not regularly report to Parliament after meetings on intergovernmental matters and on proposed national legislation.

Although many parties interested in proposed intergovernmental agreements or proposed uniform legislation are consulted about the proposals, Parliaments are rarely informed. Scrutiny of legislation committees in Australia have expressed their concern that individual Parliaments and their Committees have been effectively excluded from the scrutiny process of much national uniform legislation.[4]

6. Accountability

In its 10th and 21st Reports, the Standing Committee stressed the need for parliamentary accountability and scrutiny -

> Accountability by the Executive to the Parliament is central to the system of responsible Government. Procedures which allow access to information are essential if Parliament is to

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4 Scrutiny of National Schemes of Legislation: Position Paper, by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, October 1996, ACT.

perform its role. It is important to remember that Parliament is supreme and the Government of the day serves at the pleasure of Parliament.[5]

The reality of a federal system requires Governments to liaise and develop common policies and laws. Intergovernmental relations depend on consultation, negotiation, bargaining and conflict resolution in such forums as Ministerial Councils.

The need for Federal and State Governments to co-operate to ensure efficient provision of services to citizens, as well as the globalisation of the economy has accelerated the demand for the harmonisation of laws. This development towards intergovernmental agreements and uniform legislation has resulted in a reduction in the role of State legislatures and effectively diminished parliamentary scrutiny in Australia.

7. Case Studies - Effects of National Legislation in Western Australia

As indicated at the beginning of this paper laws that are designed to be uniform must take into account the effects of their application and their practicability in all parts of the country. The impact of some uniform legislation has been far from uniform in its application because of quite unique regional differences. Discussed below are a number of case study examples where such legislation has had a significant impact on Western Australia because the application of such uniform standards did not account for regional, geographic and demographic differences.

The three case studies of national legislation involve native title legislation, environmental laws and national transport laws. All of which have been introduced by various legislative means under difference constitutional powers.

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5 WASCULIA, Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements (1995), *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* Tenth Report, Perth, p. 14.

8. Native Title

The Commonwealth *Native Title Act 1993*[6] is an outstanding demonstration of what can happen with national legislation which is constructed without recognition of regional differences.

The existence of native title is not disputed. However, the efficiency of the *Native Title Act 1993* as a means of managing native title has exhibited continuing problems. The Act was conceived as a special law for the descendants of the original inhabitants of Australia. The preamble of the Act also recognised that many indigenous people, because of dispossession of their traditional lands, would be unable to assert native title rights. Thus the Act conceived that some Aboriginal people would have native title rights and many might not. In that respect the Act inferred from the outset – without a great deal of detail – that it might not have a uniform impact.

The design of the *Native Title Act 1993* did not take into consideration a vast range of non-uniform factors across Australia which have influenced where and how native title claims are made.

For example, the Act does not take into account the land tenure histories of the different States and Territories. The history of land grants differs remarkably from the South-East of the continent to the North-West.

Furthermore, the legal status of a pastoral lease, for example, in one jurisdiction is not the same as pastoral leases in other jurisdictions. The different land administration and mining tenement management systems, have different potential implications for the statutory extinguishment of native title rights and interests. There is no standard national Aboriginal heritage management system and that different jurisdictions have adopted different definitions and means to manage Aboriginal heritage, each with different potential impacts on native title management.

The list of variations in the statutory frameworks for land and mineral title management in different States and Territories is virtually unlimited. This is vividly demonstrated by the fact that the amended *Native Title Act 1993* was forced to include a schedule for each State or Territory listing thousands of different types of leases and land grants which are recognised as having extinguished native title.

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6 Amended in 1998.

Western Australia's land and mineral tenement systems reflect the high volume of land and mineral titles granted annually.[7] In other words the management of land and mineral title is pivotal to the State's economy. By comparison with other jurisdictions, Western Australia issues more titles and requires a high level of turnover of mineral title, and has vast areas of unallocated crown land.

In this context a national law which makes land tenure a fundamental factor in determining if native title rights survive and which makes the resource industry the most vulnerable to native title compensation for any effect on alleged native title rights is bound to have an impact. As a consequence, the State has had the highest proportion of claims, the most overlapping claims in areas of high mineral interest, and the highest level disputation between indigenous interests. In simple terms the *Native Title Act 1993* has had a highly non-uniform impact on Australia, with the most impact on the western and northern parts of the continent.

9. The Environment

Through the use of the external affairs power, the Commonwealth has legislated in the environmental area. The Commonwealth legislation impinges on the State's responsibilities in -

- conserving and managing biodiversity, land, water, vegetation and sea on an ecologically sustainable basis. Under the *Natural Heritage Trust Act 1997* funding from the part sale of Telstra was allocated to projects which improved Australia's environment and natural resources;

- setting national environmental goals, standards, protocols or guidelines. This is through National Environmental Protection Measures which relate to matters such as ambient air quality, motor vehicle noise and emissions and environmental impacts associated with hazardous wastes under the *National Environment Protection Council Act 1994*.

Most recently the Commonwealth *Environment Protection and Biodiversity and Conservation Act 1999* has been developed to provide a national scheme of environmental protection and biodiversity conservation. The *Environment Protection and Biodiversity and Conservation Act 1999* was passed by the Commonwealth Parliament in June 1999 and will commence in July 2000.

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[7] Approximately 25,000 transactions annually.

There are a number of implications of this legislation on Western Australia.

The initial expectation was that the implementation of the Commonwealth legislation would lead to the streamlining of the environmental assessment and approval processes relating to matters of national environmental significance. This was to occur by relying on State processes as the preferred means of assessing proposals and by providing for the development of Commonwealth/State bilateral agreements which will enable accreditation of State processes under Commonwealth legislation.

There are now concerns regarding the practical implications of the legislation and particularly that it may enable Commonwealth intrusion into an area of State assessment and decision-making.

Of main concern to Western Australia, is that the proposed threshold test for projects of national significance is set too low. The matters of national significance identified in the Act as triggers include World Heritage Properties, wetlands[8], nationally threatened species and ecological communities, migratory species, Commonwealth marine areas and nuclear actions (a Greenhouse Trigger is also being considered). This means that it is possible that actions with only modest impacts would be caught in the Commonwealth regulatory framework.

10 Transport

In the Australian system of Government, road transport is an area of State responsibility. Over time, each of the States has evolved its own systems of standards, practices and laws governing such issues as the carriage of dangerous goods, vehicle and driver registration, vehicle and load mass limitations, management of driver fatigue and vehicle road worthiness. With developments in road transport technologies and the growing economic importance of the trans-national movement of vehicles and goods via Australia's road transport network, it was recognised that significant economic benefits could accrue to the States and to the nation as a whole in developing a more uniform approach.

The national road transport reforms originated with two intergovernmental agreements, the *Heavy Vehicles Agreement* and the *Light Vehicles Agreement* signed in 1991 and 1992 respectively. The *Heavy Vehicles Agreement* provided for

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8 Wetlands recognised under the Convention on Wetlands of International Importance, commonly referred to as the Ramsar Convention, aims to conserve one of the most threatened group of habitats, wetlands.

the development of uniform or consistent national regulatory arrangements for vehicles over 4.5 tonnes gross vehicle mass. It also established, under Commonwealth law, the National Road Transport Commission (NRTC) to develop the road transport reform program, and the Ministerial Council for Road Transport to oversee implementation of the reforms and the NRTC. The *Light Vehicles Agreement* extended the national regulatory approach to cover light vehicles.

Originally, the scheme to achieve national uniformity was to be by the introduction of "template" legislation, to be passed by the Commonwealth, applied in the ACT and then automatically adopted as law in all States and Territories. Western Australia does not generally support the template model as a means of achieving national consistency. Rather, Western Australia prefers to enact its own substantive State legislation, so that the Western Australian Parliament maintains control and accountability to its electorate over its laws. National consistency can be achieved by ensuring that the key elements of such legislation, and its outcomes, are substantially similar to a nationally agreed model, and that mechanisms for changing the legislation over time are agreed in advance via an Intergovernmental Agreement.

The national scheme for road transport reform was that the proposed reform projects and legislation were to be approved by a simple majority of the voting members of the Ministerial Council. In other words, Western Australia could be overruled on any particular reform by five out of nine other jurisdictions. Western Australia has a unique geographic and demographic transport context, and the common interests of the more populace eastern seaboard States and New Zealand could taken precedence over Western Australia's concerns and issues.

In 1995, all Australian Governments agreed to implement the National Competition Policy (NCP) reform package. The National Competition Council (NCC) was established, among other things, to assess State's progress in implementing the reforms, but there would also be penalties for slipping behind. The transport reforms which had begun in 1991 were incorporated into the NCP. However, the NCP Intergovernmental Agreement referred to "effective observance of the agreed package of road transport reforms" without clearly defining what these were.

For Western Australia, the problems in the national road transport scheme were compounded. A dynamic, integrative process involving a three year rolling strategic plan of reform projects suddenly became subject to NCC scrutiny and assessment. Rather than promoting ongoing transport reform, these developments had the potential to inhibit further reform.

Many of the problems have now been resolved. For example, the original focus on the need to adopt template legislation was overtaken as the different jurisdictions employed combinations of legal instruments to make their own road transport laws achieve the consistent operating conditions for road users intended by the national model. In 1997, as the result of the review of the NRTC and its legislation, the Ministerial Council agreed not to require a formal template legislative process for every reform. Also, a framework of priority reforms for NCC assessment purposes was agreed.

10. Conclusion

These case studies illustrate that while the harmonisation of laws is desirable it is important that there is sufficient prior negotiations and co-operation but also scrutiny of the legislation to ensure that the legislation does not have unintended adverse effects in a particular jurisdiction or region.

In most federal States there is an emphasis on more complementarity and co-operation rather than separation and autonomy between constituent authorities. This type of co-operative federalism has encouraged co-operation to develop in many different, often informal ways such as intergovernmental conferences and agreements to achieve objectives. It is this development in Australia which has not seen a complementary change in procedures to ensure parliamentary involvement and scrutiny of proposed legislative measures which has been the concern of this Committee.

Procedures proposed by the Australian Scrutiny Committees would ensure that State Parliaments are informed of intergovernmental agreements negotiated at Ministerial Councils. Under such procedures background materials and legislative drafts would be tabled in the State Parliaments ensuring the legislature's role in providing a degree of scrutiny and providing accountability to the Parliament by the Executive.

This Standing Committee has been looking at the problems posed for parliamentary scrutiny in a time of dynamic change not only nationally, but globally and has proposed minor institutional changes which would allow the Parliament to perform its functions within this changing global environment.

APPENDIX 12

Transcript Of Proceedings

Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

Parliament House, Darwin Northern Territory

Monday and Tuesday 14 and 15 February 2000

TRANSCRIPT OF PROCEEDINGS

DAY 1

WELCOME TO DELEGATES

Mr Nagle: Good morning, ladies and gentlemen from all around Australia. Welcome to the Northern Territory Legislative Assembly. First I will call on Steve Balch to commence the opening. Then Steve will call on the Speaker to officially open the conference.

Mr Balch: Thank you, Peter. Good morning, everybody. I am delighted to see you all up here in the north for our lovely cool weather - by our standards. Some of you actually come here for the cool weather. I'm delighted that we have been able to make this conference happen here. As Peter said, it is now my pleasure to introduce our Speaker, Hon Terry McCarthy, who will officially open our meeting.

Mr McCarthy: Thanks, Steve. Good morning to everybody and welcome to Darwin. On behalf of the Northern Territory parliament I extend to all delegates a warm welcome to Darwin, the land of opportunity and optimism - you have probably picked that up - and as we Territorians affectionately refer to it, the gateway to our neighbours in Asia.

Those of you who have visited the Top End on other occasions will have noticed that Darwin is on the move. Some landmarks may have disappeared but others have appeared in their stead. You may well be housed in one of our excellent hotels and you will today enjoy the surroundings of our modern Parliament House. You will undoubtedly pick up the air of optimism that exists here in Australia's Top End. In just a few months time a long-awaited goal of the Northern Territory will take the first step to reality. The rail link from Alice Springs will be commenced. Connected to the new, modern port to be opened in Darwin this week, it will become Australia's trade link to Asia.

You have certainly opted for a most unusual time of the year to hold this meeting, right in the middle of our wet season. As you have no doubt all personally experienced, the humidity can be a bit overbearing. But it can get a lot worse, I can assure you, than it is today. If on the other hand you had attempted to position the meeting around the dry season, June through to August, you would have run into stiff competition in locating adequate accommodation, as that is the time when every other public and private sector group book their annual pilgrimage to Darwin. Perhaps this is a sign of your commitment to the scrutiny of legislation. Or maybe, like me, you prefer the Top End in the Wet. I see that your agenda is tight and there is no real opportunity to experience the sights beyond Darwin. We have much to offer and I hope that many of you take the extra time or return to experience the real Top End.

I note that the theme running through the agenda is that of scrutiny of national scheme legislation. I am aware that this has been an issue since the delegates placed the matter on the agenda of the fourth Australasian and Pacific Conference on Delegated Legislation in conjunction with the first Australasian and Pacific Conference on the Scrutiny of Bills, in Parliament House in Victoria during July 1993. I do not intend to offer comment on this complex issue, given the essentially political nature of the proposals, apart from making the observation that it would appear that any national committee would probably be established administratively rather than legislatively This in itself would make me conclude that there is a real need for all committees to clarify, sell and explain to their colleagues the final proposal if you are to progress the matter.

I must congratulate both the NSW and NT Chairmen for co-hosting this meeting. I am led to believe that this is the first occasion that the group has broken away from the traditional format and I believe this reflects the opportunity you see to work together for a common goal.

Moving away from the topics that you will be discussing at this extraordinary meeting over the next two days, I am aware that, although as the major group responsible for the scrutiny of principal and subordinate legislation you only conduct a biennial conference, the subject papers and the networking links that are established between all territory and state committee members and at officer level as a result of these conferences are invaluable and should continue to be nurtured. I guess that is the case for all such meetings. Similar comments were made by Hon Trevor Griffin MLC, Attorney-General and Minister for Consumer Affairs, when addressing your 1997 conference in Adelaide. He said:

> *The roles of the legislative review committees or scrutiny of bills committees are important in our parliamentary system. An opportunity to exchange ideas and information relating to the work of the committees in the broader context of a parliamentary process is critical.*

I now have the pleasure to officially open this meeting in Darwin of your Working Group of Chairs and Deputy Chairs of the Australian Scrutiny of Primary and Delegated Legislation Committees. I wish you well in your deliberations.

CHAIRMAN'S OPENING REMARKS

Mr Nagle: Thank you, Mr Speaker. I thank Steve Balch for his warm welcome to Darwin and the entertainment last night and also you, Mr Speaker, for allowing us to have our conference here and for the work that your staff and particularly your Clerk and *Hansard* have put into preparing for it - it's not easy - and also Terry Hanley and his staff who have worked in preparation for the conference.

Our purpose here today is to examine a number of issues of common concern to committees in a more informal atmosphere than the biennial conference of the committee permits. While we have a few prepared papers, they are really only a catalyst for further discussion of the issues of concern. I suppose our longest-standing issue is that of the scrutiny of national scheme legislation. Several papers will address this. It is unfortunate that Senators Cooney and Coonan are not able to be with us to give us an update on the position in the Commonwealth with respect to the scrutiny of national scheme legislation, although I hope that James Warmenhoven and Janice Paull may be able to provide us with some background.

As I understand it, the issue is very much tied up with the progress of the *Legislative Instruments Bill* of the Commonwealth which is yet to be re-presented to the parliament. As most of you know, that bill has had a chequered career under a number of governments and in fact was one of the potential triggers for double dissolution prior to the last Commonwealth election. I understand that the Senate insists that the power to scrutinise national scheme legislation be included in the bill, but this has been rejected by the House of Representatives on a number of occasions. I have arranged to brief Senator Cooney and Senator Coonan on the outcome of our deliberations on my return to Sydney.

Moreover, we will need to look at what future directions we can take on national scheme legislation. We should also be examining and looking to a more formalised structure for the meetings of the Chairs and Deputy Chairs. I hope that we will be able to examine these issues today and tomorrow.

As you can see from the agenda, the next item to be discussed is the resolutions of the last meeting of Chairs and Deputy Chairs, which was held in Sydney in March 1998. Arising from those resolutions, another major item for discussion at this conference will be the OECD assessment of our NSW regulatory impact assessment procedures.

Finally, before we proceed to those resolutions, I want to mention that when I was recently on a study tour to the United States I was given a book which I think outlines some of the problems our committees face in reviewing regulations. *The Death of Common Sense — How Law is Suffocating America* by Phillip K Howard outlines a number of examples of regulations which are out of step with the practicalities of modern life in the United States. He cites the following example:

> *In the winter of 1998, nuns of the Missionaries of Charity were walking through the snow in the South Bronx in their saris and sandals to look at an abandoned building that they might convert into a homeless shelter. Mother Teresa, the Nobel Prize winner and head of the order, had agreed on the plan with Mayor Ed Koch after visiting him in hospital several years earlier. The nuns came to two fire-gutted buildings on 148th Street and, finding a Madonna among the rubble, thought that perhaps providence itself had ordained the mission*
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> *New York City offered the abandoned buildings at $1 each and the Missionaries of Charity set aside $500 000 for the reconstruction. The nuns developed a plan to provide temporary care for 64 homeless men in a communal setting that included a dining room and kitchen on the first floor, a lounge on the second floor and small dormitory rooms on the third and fourth floors. The only unusual thing about the plan was that Missionaries of Charity, in addition to their vow of poverty, avoid the routine use of modern conveniences. There would be no dishwashers or other appliances; laundry would be done by hand*
>
> *For New York City, the proposed homeless facility would be (literally) a godsend. Although the city owned the buildings, no official had the authority to transfer them except through an extensive bureaucratic process. For a year and a half the nuns, wanting only to live a life of ascetic service, found themselves instead travelling in their sandals from hearing room to hearing room, presenting the details of the project and then discussing the details again at two higher levels of city government. In September 1989, the city finally approved the plan and the Missionaries of Charity began repairing the fire damage.*
>
> *Providence, however, was no match for the law. New York's building code, they were told after almost two years, requires an*

elevator in every new or renovated multi-storey building. The Missionaries of Charity explained that, because of their beliefs, they would never use the elevator, which also would add upward of $100 000 to the cost. The nuns were told the law could not be waived even if the elevator didn't make sense.

Mother Teresa gave up. She didn't want to devote that much extra money to something that wouldn't really help the poor. According to her representative, 'The sisters felt they could use the money much more usefully for soup and sandwiches.' In a polite letter to the city expressing their regrets, the Missionaries of Charity noted that the episode 'served to educate us about the law and its many complexities'.

He goes on to refer to obsolete design rules which have little place in modern America. He states:

Have you ever noticed how new housing subdivisions have an open, almost empty look? It isn't just the absence of trees. The streets are 50ft wide, about 50% wider than streets were a few decades ago. Why? Because the traffic engineers who wrote the standard code after World War II believed that streets should wide enough to allow two fire engines going in opposite directions to pass each other at 50mph.

Andres Duany, a Miami architect who specialises in designing new towns, maintains that the traffic engineers have thereby depleted human interaction and fellowship from modern America. He calls them 'the devils'. The two-fire-engine rule did not evolve because it was sensible or by amazing coincidence of judgment by town boards around the country. It was part of a model code that was accepted as 'modern', and cities and towns fell before it like dominoes. Once the words were designated as law, there was no longer a need to think about it.

Almost no one who builds new houses today knows why the requirement is there. Nor do bureaucrats. They abide by it because they have to. It's the law.

The book goes on —this is the final one:

In the late 1980s Dr Michael McGuire, a senior research scientist at UCLA, found himself in trouble. His lab, which sits on 5 acres, is funded by the Veterans Administration. Its lawn needed to be cut. When the lawnmower broke, Dr McGuire decided to go out and buy another one. He filled out no forms and got no approvals. He also told VA mechanics they could use the broken lawnmower for spare parts.

During a routine audit, the federal auditor asked why the lawnmower was different. Dr McGuire told the truth, and thus launched an investigation that resulted in several meetings with high-level federal officials. 'I couldn't understand,' Dr McGuire notes, 'why important agency officials would spend this time in this way.' Finally, after months, they rendered their findings: they could find no malice, but they determined Dr McGuire to be ignorant of the proper procedures. He received an official reprimand and was admonished to study VA procedures 'about the size of an encyclopedia'.

Dr McGuire has not yet achieved the proper state of contrition: 'I guess I made the egregious mistake of tossing a broken federal lawnmower.' One other fact: Dr McGuire bought the lab's lawnmower with his own money.

I have taken the liberty of taking an extract from the book *The Death of Common Sense* and passing it around. I hope you all have a little look. I am sure we can find equally inappropriate bases for regulations in our own jurisdictions. This is not to say that there may not have been good reason for designing regulations in this form when they were first introduced, but logic tells us that they need to be regularly reviewed to ensure that they remain relevant to the current social and legal framework . That is the purpose of the staged repeal programs in a number of our jurisdictions and we will be considering the regulatory impact assessment processes that apply in several of our legislatures.

I thank the Chairs and Deputy Chairs and observers for your attendance here today and tomorrow. I look forward to your participation in this meeting and hope it is of value to all of us.

We might now move to the agenda and discuss a couple of issues. I intend to chair this morning's session but I'll get Steve to chair this afternoon's session. Then we might find some other people to chair tomorrow's morning and afternoon sessions.

Mr Hogg: Ladies and gentlemen, you did receive this folder. However, we had a slight change to the agenda so the current agenda is on the loose-leaf sheets that have been placed on your desks. That's to accommodate our colleagues from Tasmania who have to leave earlier, so we brought one of the sessions forward to today.

Mr Squibb: No, we're not going until Wednesday.

Mr Nagle: We have a problem with our Canberra colleagues from the ACT so we'll talk about what we're going to do with regard to their travel. If anyone else wishes to talk about the agenda we can throw it open for discussion. Does anybody have any discussions on it? OK, the agenda will remain as it stands, but if you do have a problem ...

Mr Redford: There are two papers to be delivered subsequent to the decision that we might make might make on scrutiny of national scheme legislation. I question the logic of that. We discuss it and we come to a resolution and then we have two papers subsequent to it which might have been of some use during the course of the discussion. It is like having a debate in parliament on an issue before you take it through to the second-reading speeches.

Mr Hogg: Perhaps I can clarify. It isn't the resolutions of this meeting that we're speaking of here. It's just the resolutions that were passed. They're virtually like the minutes of the previous meeting, you might say, seeking any debate on those matters on that two-sheet document you have there headed 'Resolutions of Meeting of Chairs in Sydney on 10 March 1998'. That's all that is being discussed. It's not resolutions of this meeting.

Mr Nagle: If there are any resolutions out of this meeting, they will take place tomorrow afternoon at about 3 o'clock. This goes back to the meeting in Sydney on 10 March 1998. If anyone wishes to discuss those, we will give you some time to read them.

INTRODUCTIONS

Mr Nagle: Ladies and gentlemen, most of us have met one another, but we might start off with Steve and then go around the table and everybody can introduce themselves.

Mr Balch: I'll kick off then. These are my colleagues on the Territory's Subordinate Legislation and Publications Committee, Maurice Rioli and Phil Mitchell. We have two other members who are from the central Australian region. Unfortunately there has been a lot of rain in the last five days and they are having problems getting out, but one of those may join us tomorrow. And this is Terry Hanley, our secretary.

Ms Gillett: My name is Mary Gillett. I am the new Chair of the Scrutiny of Acts and Regulations Committee in Victoria. My parliamentary and executive colleagues are perfectly able to introduce themselves.

Mr Robinson: Tony Robinson, member for Mitcham, a new member to this committee, previously on the Law Reform Committee in Victoria. I was elected in 1997 in a by-election and re-elected just recently.

Ms Mikakos: I'm Jenny Mikakos. I'm a newly-elected member of the Legislative Council, having been elected in September last year. It's yet to be formalised but I expect to be chairing our Delegated Legislation Subcommittee as part of our structure.

Mr Homer: Andrew Homer. I am the surviving, returning executive officer.

Ms Baker: I'm Jenny Baker, the legal adviser on subordinate legislation.

Mr Minson: Kevin Minson. I'm the Chairman of the WA Standing Committee on Uniform Legislation and Intergovernmental Agreements. I have been in parliament for 12 years. This is probably my last meeting, because I'm heading from semi-obscurity back to obscurity before the next election.

Ms Newnan: Melinda Newnan. I am the legal research officer with the WA Standing Committee on Uniform Legislation.

Mr Pratt: Nigel Pratt. I am the advisory officer to the Joint Standing Committee on Delegated Legislation.

Mr Wiese: And I'm Bob Wiese, Chairman of the Joint Standing Committee on Delegated Legislation in WA.

Mr Marlborough: Norm Marlborough, on the same committee, having being in parliament since 1986.

Ms Paull: Janice Paull. I'm the research officer for the Regulations and Ordinances Committee of the federal parliament.

Mr Warmenhoven: James Warmenhoven, secretary of the Senate Scrutiny of Bills Committee.

Mr Blencowe: I'm Peter Blencowe, secretary of the SA Legislative Review Committee.

Mr Redford: Angus Redford, presiding officer of the SA Legislative Review Committee since 1997, Member of parliament since 1993.

Ms Peddle: Wendy Peddle, secretary of the Subordinate Legislation Committee in Tasmania.

Mr Squibb: Geoff Squibb, Deputy Chair of the same committee.

Mr Garvey: Chris Garvey, Research Director for the Queensland Scrutiny of Legislation Committee.

Mrs Lavarch: Linda Lavarch. I am Chair of the Queensland Scrutiny of Legislation Committee, elected in a by-election in 1997, re-elected in the general election in 1998. I have been Chair since *[inaudible – laughter].*

Mr Bayne: I am Peter Bayne. I provide legal advice to the ACT committees.

Mr Duncan: Tom Duncan. I am the secretary of the ACT committees.

Mr Hargreaves: John Hargreaves. I am Deputy Chair of the Standing Committee on Justice and Community Safety, which incorporates the scrutiny of bills and subordinate legislation. I work with Peter Bayne on both.

Mr Hogg: Greg Hogg, I am the project officer of the Regulation Review Committee of NSW and have been so for the past 12 years.

Ms Saliba: Marianne Saliba. I am a relatively new member of the Regulation Review Committee. I joined last year.

Mr Jones: My name is Malcolm Jones. I was elected to the Legislative Council of NSW last year and have been with the Regulation Review Committee since July last year.

Ms Saffin: Janelle Saffin, Deputy Chair of the Regulation Review Committee and longest-serving member. Those of us in the Upper House were surprised that they actually let somebody in the Upper House be their Deputy Chair. I guess it's because they all love me.

Mr Nagle: And I'm Peter Nagle, Chair of the Regulation Review Committee, member of parliament for nearly 13 years. Thank you very much, ladies and gentlemen. We will proceed.

MARCH 1998 RESOLUTIONS

Mr Nagle: Having had a look at the resolutions, this gives you some idea as to what was passed, what other people thought. Has anyone got any views on those resolutions? Or do you want some more time to read them?

Mr Hogg: Mr Chairman, would it be possible to give us a reminder of those?

Mr Nagle: The resolutions of the meeting of Chairs and Deputy Chairs of Scrutiny Committees, held in Sydney on Tuesday 10 March 1998, were as follows:

1. *That a steering committee for the purposes of a joint appraisal of the strengths and weaknesses of employing cost-benefit and sunset requirements to scrutinise acts and regulations and to review other scrutiny options be established, comprising a member from the Standing Committee on Regulations and Ordinances and a member from each of the scrutiny committees of New South Wales, Victoria, South Australia, Queensland and Tasmania, and that Western Australia, the Australian Capital Territory and the Northern Territory be invited to participate as members of the committee.*

2. *That preparatory work be initiated by a steering subcommittee comprising a member from the Standing Committee on Regulations and Ordinances and from each scrutiny committee from New South Wales and Victoria.*

3. *That this meeting of Chairs and Deputy Chairs of scrutiny committees resolves to establish a permanent working group, inviting membership from Chairs and Deputy Chairs of committees involved in legislative scrutiny in the parliaments in the Commonwealth of Australia.*

With regard to resolutions 1 and 2, I think delegates are aware that the steering committee encountered funding problems for the appraisal. The OECD had expressed interest in conducting a study and had included it in their program in the 1998 year. In order to expedite the matter, the NSW committee decided to fund the study itself in cooperation with the OECD. The report of that study was tabled in the NSW parliament in January 1999. I think you all have been provided with a copy of this report.

In the next session we will discuss the applicability of this report to Australian scrutiny committees. I will welcome the views of delegates on these recommendations at that time. States and territories that do not yet have regulatory impact statements may have difficulties in expressing a view on some of these recommendations. However, provisions regarding supporting arrangements and information exchange will be of particular interest to them.

In respect of the third resolution, the Sydney conference had in mind the formation of a working group that could quickly resolve issues of concern

with regard to the scrutiny of national scheme legislation. I hope that by the end of this conference we can appoint members to that working group to consider items of national scheme legislation that come before our respective committees.

With this in mind, several papers will be presented at this meeting concerning actual case studies of national scheme legislation. At meetings such as these we can resolve a lot of our problems with this type of legislation. One of our case studies, for example, concerns the Australian Road Rules.

I now ask Greg to fill us in as to what has happened since that meeting in March 1998.

Mr Hogg: Certainly, Mr Chairman. I think all the delegates should have been provided some time ago with a copy of the report of proceedings in Sydney in 1998. At least all delegations should have a copy. The resolutions that the Chairman read out were taken from pages 30-31 and 40 of the conference booklet. You also have been provided with a copy of the Chairman's OECD report. That was conducted by the Public Management Service of the OECD. In the next session we will be discussing those 19 recommendations that they made for improvements in NSW, with experience in other states such as Queensland and Victoria in mind so far as RIA is concerned.

That essentially is the progress on those first two resolutions the meeting passed in 1998. The third issue concerns the establishment of this very working group that is here today. I think the principal focus of that working group is intended to be the scrutiny of national scheme legislation. If I read from the booklet you will get some idea of the context in which that resolution arose. There was some discussion of our committees establishing ourselves in the same way that public accounts committees do. They call their conferences ACPAC meetings. Melina Newnan informed the conference in Sydney about how that works. I will read what she had to say at that time, from page 40:

> *Ms Newnan: They have a formal structure. The Australian Council of Public Accounts Committees meets biennially. Last year the conference was held in Sydney, and Western Australia will host the Australasian biennial conference later this year. In addition, a mid-term meeting of the heads of committees is held every second year. A meeting of Chairs and Deputy Chairs of public accounts committees was held in Perth recently. It moves around Australia on a yearly basis and then all members of the public accounts committees meet at their conference.*
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> *Chairman: During the past three years we have had numerous meetings in numerous states in respect of the national scheme legislation and we have our biannual meeting and so forth. As regulation review people we quite frequently meet. Unfortunately some of us have budgets that survive; others get by. I do not think that that should be something we should be considering at this particular stage. What is the motion?*

Mr Sullivan from Queensland moved the motion 'that this meeting of Chairs and Deputy Chairs of scrutiny committees resolves to establish a permanent working group, inviting membership from Chairs and Deputy Chairs of committees involved in legislative scrutiny in the parliaments in the Commonwealth of Australia'. The motion was seconded by Ms Hall and supported by Senator O'Chee. The intention was to put consideration of general issues of common concern on a more formal basis than it had been the case in the past, and also to look specifically at the scrutiny of national scheme legislation.

One further thing needs to be said about it. At the biennial conference in Sydney in July last year, the resolution was passed to establish a specific committee of Chairs and Deputy Chairs on scrutiny of national scheme legislation. So from the last meeting in Sydney back in 1998 we had the establishment of a general working group, and in Sydney in July last year we had the establishment of a specific group to review national scheme legislation. That is what is now before this meeting over the next two days - to determine whether it be one group or two separate groups, how those groups will be constituted, which delegations, which Chairs and Deputy Chairs are to go on those respective groups.

Mr Nagle: Also at that meeting were Angus Redford and Kevin Minson and staff members Janice Paull and also Melina. Would any of you like to comment on that conference and the resolutions?

Ms Paull: I agree with Greg Hogg's summation. The working party that was coming out of the meeting in Sydney was to be a general-issues working party. That is the difference between that and the Sydney conference.

Mr Wiese: Mr Chairman, can you clarify whether that group were going to look at primary legislation or both primary and subordinate legislation as part of their work?

Mr Hogg: That is an issue, of course. That was always a problem. You may recall a position paper which was put out back in 1997 by all committees - I

think Tom Duncan has a copy over there - which spoke of the need to have a coverage of both acts and regulations in the scrutiny. Particularly in that case, of course, it was mainly directed at national scheme legislation. I think all that that position paper could do was to exhort each delegation to put before their parliaments the need to have scrutiny of primary legislation committees in their own legislatures. It couldn't go any farther. How this meeting takes that farther is a difficulty. I don't think it can do much more than that discussion paper did, but I will be open to the views of the other delegates as to means of advancing the overall scrutiny of principal legislation in Australia.

Mr Nagle: I'm not putting Janice or James on the line, but we unfortunately don't have Senator Coonan and Senator Cooney here. Do you want to fill us in as to the current situation with the legislation?

Ms Paull: The *Legislative Instruments Bill* was designed specifically for delegated legislation, so it is more in the sphere of the Regulations and Ordinances Committee. It fell off the notice paper at the end of the last parliament. I heard that they were trying to negotiate some agreement on the provisions of the bill before they would reintroduce it, but at this stage there has been no word as to whether they are going to proceed with it. So, unfortunately, we're as much in the dark as anyone else.

Mr Nagle: Angus, is there anything else that you can recall arising from that March 1998 meeting?

Mr Redford: No. My only comment is that NSW is to be congratulated and commended for going ahead and arrange for the preparation of this document. For those of you who weren't at the meeting, the discussion was that we needed a document such as this, which is an OECD view of how we ought to look at regulations generally and, more specifically, national scheme regulations. There was a lot of discussion about who had what money, where and how. The Victorians said they had money, New South Wales said they had money, and Kevin and I went very quiet at that stage. They decided they would form a joint committee and Kevin and I were happy that that wasn't going to cost us anything. Then the Victorians pulled out and New South Wales went ahead with it. We should all be grateful to the New South Wales taxpayer. I'm not being facetious. It is a very important document. I urge everybody here to read it.

Really, that was the entire focus of the meeting. Bill O'Chee outlined one option for scrutiny of national scheme legislation and that was discussed, but with no specific resolutions about that issue.

Mr Minson: My only comment is a general one. We all face elections at different times and we have such a change in personnel that it's going to be really difficult to address these things. We have to persist, in my view, because if we don't then events are going to overtake us and it will be forced on us in the states in some other way. The population is not going to put up with us dragging our heels and coming up with a situation *[inaudible]*. So we've got to progress it and persist.

The problem, I suspect, is that from time to time it's inconvenient for a particular party or a particular executive government to want to push it. We don't necessarily have control of the purse strings, so cash is always going to be a difficulty. It only takes one of the member states or territories to say, 'We can't put in any money in' and the rest say, 'Well, we won't either.' So I echo what Angus said - thank you to NSW for progressing it the way they have. It's interesting to reflect that if they hadn't, nothing would have been done.

It's not a very sexy sort of an area. We're not going to make the headlines with this. It's not at the forefront of any parliament's agenda, I suspect. As I say, it can be inconvenient for parliaments and particularly for executives. My view is that we've got to persist with it. Just how we do that, I hope we will have decided by the end of this meeting.

Mrs Lavarch: My only comment, following on from what Kevin had to say, is about corporate knowledge. Who has the memory of what has occurred in the past? Queensland's experience has been though John Sullivan, who was Chair of the first Scrutiny of Legislation Committee. He was very vocal in his support for a national body for scrutiny of legislation. Then he became Deputy Chair *[inaudible]*. John was at that last meeting, but John is no longer in the Queensland Parliament. The director of the committee at the time, *[Inaudible]* is no longer *[inaudible]*. So we have a committee where there is no one who was at those previous meetings.

Though Queensland still is as committed, it's just that we don't know what happened *[inaudible]*. Obviously somewhere along the line – it's not recorded - they must have asked for money and the answer was no, because nothing else has been progressed in Queensland.

Mr Nagle: The other thing is that here we've got every state now represented, and the Northern Territory and the ACT, together with the staff members of the federal parliament *[inaudible]*.

Ms Gillett: Following from what Linda and Kevin have both said, though I am new to the chair of the

committee, I served on the committee since *[inaudible]* under Peter Ryan's very fine chairmanship. I also served on the Scrutiny of Regs Subcommittee under Murray Thompson's very fine stewardship. I also do not understand - and it's not clear from the transcript even when you read it - what the issue with money was. Both Peter and Murray remain fine MPs. Peter is about to be elevated to further greatness, I suspect. We have a corporate history - not as much as I would like, but the Victorian committee in as much as we are represented here (and we've only had one meeting since the change of government) has a commitment to an appropriate body that can properly scrutinise national scheme legislation. It's so fundamentally necessary. We're not going to change. I thought I had better reassure everybody that our personnel has changed a little but our commitment has not changed one bit. But I don't know what happened about the money.

Mr Redford: At the 1998 conference, the question of who was going to pay for this OECD study was one issue. That has been fixed. NSW picked up that cost and we all should grateful for that. The question is, from there, if we form any structure (a) what the format of that structure might be and (b) how it is going to be funded, if indeed funded at all.

Ms Gillett There's a few more devilish details, I think, as well as that.

Mr Redford: I am putting that in a very broad sense. They are the two issues. At the 1998 meeting in the terms of this resolution there was a secret discussion as to who was to pay for this study. That was as far as that discussion went.

Mr Wiese: The comments from Mary cheered me up no end, as someone who has been involved with delegated legislation basically since 1987 when I came into parliament. Victoria has been one of the major leaders in this whole question of scrutiny, especially of subordinate legislation, but broadening out and doing all of those things that we in Western Australia would love to be doing and perhaps some of the other states aren't doing. So, Mary, it's great to hear that you are going to go down that route.

The basic problem has not changed one iota. We are all subject to delegated legislation - primary legislation that is passed at Commonwealth government level as uniform legislation and has impact then across every one of our jurisdictions. As yet we have no mechanism whereby we are able to have some sort of a say, some sort of an input. We are not even aware, in most cases, of what's being envisaged. Most back-benchers would not be aware of what is being done at a primary level with uniform legislation, and when it comes down to subordinate legislation we haven't the foggiest notion of what is being put in place, uniformly, at the Commonwealth level. We still don't have a mechanism which gives us an ability to have say.

That's one of the things Bill O'Chee was pushing for and had virtually got us to, but he never was able, as I understand it, to get it accepted at a Commonwealth level. Nevertheless, everything that Bill was working for was something that we as states had an enormous vested interest in seeing put in place. Again, for all of those new people in here, we absolutely have to work to get some mechanism whereby we can have at least some information about what is being put in place and ideally - and absolutely necessarily in my opinion - some say in what is put in place, especially in that subordinate legislation area. The question is absolutely critical.

Ms Paull: For people who are new and were not aware of what was put forward at the 1998 meeting by Senator O'Chee, with the introduction of the *Instruments Bill* in 1996 they weren't going to allow for scrutiny of national scheme legislation. Senator O'Chee had a meeting with the federal Attorney-General and discussed with him the possibility of making them subject to parliamentary scrutiny and disallowance by the Commonwealth parliament. He agreed, if Senator O'Chee could get the states to agree, that disallowance would only occur in one jurisdiction, which would be the Commonwealth jurisdiction.

Senator O'Chee took a proposal to the Sydney meeting that would set up a form of national committee and the Senate would act as their agent in taking their concerns and putting them through to the Senate if there was any agreement to move a notice to disallow. Unfortunately, we didn't progress any farther than that because states came back to us with concerns that some were established by statute and their terms of reference were quite extensive, beyond what was initially agreed in the position paper. Also, there were concerns that it was going to take away the rights of their own parliaments to be able to move a motion to disallow as well.

So that's as far as we got with that particular option. Then we had a change of parliament and Senator O'Chee, unfortunately, was not re-elected and we have a new committee as well. If the bill does come back on again, and that option does raise its head, the new committee would have to consider whether it wanted to proceed with that.

Mr Nagle: What I want is different views from people from the various states about what Janice just said.

Mrs Lavarch: I think Queensland would have problems giving the right to disallowance to the Commonwealth. Given that there isn't one generic type of national scheme legislation - there are so many combinations and permutations of the legislation and then the regulations that come out of that legislation - it would only really apply to a very finite number of bills. There isn't a piece of legislation, say something like the *Corporations Law*, which is the only one that actually took the power from the states to the Commonwealth. There isn't one, any acts that are passed or regulations at the Commonwealth level that apply to every state.

All that does really, I suppose, is make the obvious known. One of the thing that we find - and you'll get the same feedback from your responsible ministers - whether it's a regulation or an act, with national scheme legislation when we propose an amendment or find something offensive, the standard answer comes back: 'Oh, but this is national scheme legislation. You know, it's a no-go zone.' The only way there is that there is nothing to stop us from doing a disallowance motion on it, if we found it so offensive. In short, I think Queensland has *[inaudible].*

Mr Duncan: Mr Chairman, I raise this as a point of order. I think putting this agenda item here may have got it wrong. We are talking about the resolutions from a meeting held in 1998. As I understand it, this gathering here is to resolve two issues. One is the national scheme legislation, and as you see from the agenda that is going to be talked about at 2 o'clock this afternoon when we're going to look at a proposal by Victoria. But the issue before us now is to deal with the cost-benefit and sunset requirements of the proposal.

Mr Nagle: We're just getting some indications as to what happened in 1998. It does show too why there should be more regular meetings of the Chairs and Deputy Chairs, because we're talking March 1998, nearly two years ago. It's a long time and there has been a turnover of people. So something we should consider later in this meeting is when we hold the next meeting of Chairs and Deputy Chairs.

Mr Hargreaves: One of things that I've noticed lately is the number of pieces of national scheme legislation being picked up at what seems to be an immoderate pace, or quicker than this group is able to keep up with by a process that should keep check. That's one thing that I took away from the conference last time. One of my biggest fears about this is that, as Linda just said, we get this piece of legislation down and it's untouchable. 'It's national scheme legislation - too bad.' It gets even worse from where we sit because of the subordinate legislation, the regulations that go with that. You never see them until the actual bill itself is passed into an act. Then you say: 'Give us a look at the subordinate legislation.' 'Oh, we've got to work that out after we've passed the act.' So of course by the time it gets back it's too late.

No doubt some of you have problems with bits of it, but in general terms it's OK. It seems to me that if a jurisdiction wanted to put a niggle in there just for a little bit, to suit themselves, they'd get into the no-go zone. The three-card trick, of course, is to make the primary legislation quite brief and the subordinate legislation quite extensive. By the time you figure it out, it's too late. I think it's absolutely imperative that there be some sort of check, some sort of an audit, on that stuff long before it gets to this stage. I'd like to see something come out of a meeting such as this whereby when it comes to national scheme legislation nothing can be provided to a state parliament unless it's complete. I'm not happy about having primary legislation *[inaudible].*

Ms Gillett: Victoria would find it excruciatingly difficult selling the idea of a precondition of disallowance by the Senate committee. One wonders whether that proposal was put up in order that we should fail with our national scrutiny committee. Is disallowance still a precondition? Is it still in?

Ms Paull: It's fallen off the notice paper. I think we'll have to go back and start again, if they do decide to re-introduce an instruments bill. We don't know if the provisions will be the same, because there has been some discussion on including national scheme legislation in that bill. In the Chamber itself there have been some concerns raised, during the 1996-98 debates on the bill. We don't know what will come out if they do re-introduce it. This proposal that was put forward by Senator O'Chee, I'd say, we wouldn't proceed in the same form anyway, because we have a new committee and they may have other ideas.

Mr Minson: Following on from what John was saying, I was just talking to Angus and I'm frankly not sure whether the amount of national scheme legislation will increase, decrease or remain the same. Is it being monitored? I'm under the impression that Senator Chris Ellison before there was a change of government was trying to do a lot of work to slow it down and put in some checks and balances. He chaired a committee, the name of which I can't remember, but he's no longer in the ministry. I think it will be a good idea, before we put any resolutions about it, to do a quick audit and find whether there has really been a change in the amount of national scheme legislation.

Mr Hogg: Yes, gathering statistics, I suppose, is one of the first tasks of a committee. And that would be,

I think, the first task of a national committee. Funding for that committee ... If anything was established at the last biennial conference in Sydney, there is a national committee. It doesn't have anyone on it. If anything this group could resolve, a secretary or particular person or particular committee collects the statistics on national scheme legislation. There's no funding required other than the funding which you have to have for normal, routine committee activity. I think that could be done through. But when it comes to considering actual pieces of national scheme legislation later on down the track, that's when the funding will be important - the time, getting members together etc. Perhaps that crucial function of monitoring the legislation volume and the different types of scheme could be delegated now to a particular committee or group of you.

Mr Redford: With the greatest respect, Peter, I thought we were discussing the OECD report. I'm delivering a paper on this. If you want the paper now I'll give it.

Mr Nagle: Resolutions should be considered and discussed after we've got the information from the various states and territories. I'm sorry for the ACT if they have to leave early, but that's tough. I think this ought to be left to the end of the meeting so we can consider all of the information that's going to come out.

Mr Hogg: I should apologise. My remarks weren't directed at resolving that now. It was just about considering that issue as we speak to these papers over the next couple of days.

Mr Redford: I'm prepared to move, to bring this to an end, a resolution that this committee acknowledge the work done by NSW in preparation of the OECD report, and that any further matters associated with that be deferred to the end of the meeting.

Seconded **Mr Minson;** motion agreed to.

OECD RECOMMENDATIONS

Mr Nagle: Mr Chairman, as I indicated in the previous session, 19 recommendations were made by the OECD for the improvement of regulatory impact assessment in NSW. In conducting its report the OECD drew on international experience and examined the position in a number of other Australian jurisdictions. I therefore intend to invite the views of the delegates on the recommendations in the OECD report.

As NSW was the focus for the OECD, we first should examine the progress made in implementing these recommendations. Our committee tabled the OECD recommendations in January 1999 in our report No 18 to the 51st parliament. I think you were all provided with a copy of this report. After we tabled the report we forwarded a copy to the Premier of NSW and subsequently contacted the Cabinet Office. We have been informed that the report is under consideration along with a number of other options and it will be discussed with our committee in due course.

Recently the committee also noted that our report was listed among the regulatory reforms of the states and territories in the 1998-99 annual report of the Commonwealth Productivity Commission's Office of Regulatory Review. For those of you unfamiliar with this publication, it sets out the best-practice processes for regulation and RIS requirements that apply in the Commonwealth and each year indicates the degree of compliance by the respective Commonwealth government agencies with those requirements.

The annual report also contains a section on the progress in regulatory reforms among the states and territories. It states that the suggested improvements in our report will be considered along with other options for improving regulatory quality. This is obviously information that has been derived from the NSW Cabinet Office.

As our report came about from the resolutions of the previous Chairmen's conference, we were keen to get a more definitive view from the Premier of the options being considered as a consequence of our report. Accordingly I wrote to the Premier last month seeking details of when the assessment of the options is likely to be completed. We are awaiting a response.

I invite delegates to discuss the recommendations contained in our report and any other matter relevant to the OECD's assessment. Perhaps if we go through the recommendations it might assist delegates in the debate. I should point our that the recommendations refer to 'RIA'. This is the process of regulatory impact assessment which is embodied in a document called a regulatory impact statement, or RIS, which compares the costs and benefits of the proposed regulation with those in respect of other relevant options. However, the two expressions 'RIA' and 'RIS' are often used interchangeably.

I propose to read each recommendation and the comment on it. Then Greg may at different times pass on examples of the way things have progressed. Our report stated:

> *The basic approach to regulatory impact assessment contained in the* Subordinate Legislation Act 1989 *is sound and has delivered limited but important gains in terms*

of regulatory quality and public participation in the regulation-making process. However, the act should be substantially redrafted to address a number of significant weaknesses. In particular:

> *Recommendation 1: The* Subordinate Legislation Act *should be broadened to incorporate appropriate mechanisms to ensure RIA disciplines equivalent to those applicable to delegated legislation are also applied to primary legislation.*

Systematic analysis of primary legislation has potential gains at least as large as those deriving from RIA of subordinate legislation. Despite being an early adopter of RIA for subordinate legislation, NSW has not followed the practice of the majority of OECD countries in providing for RIA scrutiny of primary legislation. While the adoption of systematic ex post *review requirements for primary legislation provides a useful quality-control discipline, it is not a substitute for a requirement for* ex ante *assessment. While the Australian federal government's experience shows that such scrutiny can be provided for administratively, consideration should be given to a legislated requirement that would also provide for the integration of consultation opportunities based on the release of RIA information.*

Greg, do you want to discuss that now with an explanation?

Mr Hogg: The first recommendation basically says that acts should have RISs done on them. It occurs in the case of limited Commonwealth legislation, as I understand it. Janice will be able to outline what occurs there. I think the Office of Regulatory Review that Peter mentioned earlier administratively reviews RISs before they are finalised.

My case study tomorrow on the Australian Road Rules will show that there are some drawbacks with this process. In the case of the road rules there were two RISs done at the national level - a much earlier one on general principles and a later one in 1998 on the specific legislation. The ORR's comments on the draft ran into several pages. They gave them to the department. Unfortunately, in the administrative processes it works out that ORR doesn't get to see the final RIS. It goes straight out for public consultation and there is no feedback to the ORR to determine whether any of their recommendations have been implemented in the final RIS.

I think what the OECD is looking at there is more formal assessment procedures, the administrative ones that exist at the Commonwealth level, being adopted for primary legislation in NSW. But it could be looked at Australia-wide.

Mr Nagle: Janice or James, do you want to say anything about the procedure?

Mr Warmenhoven: As far as I understand it, the procedure is, as Greg put it, for the purposes of the Scrutiny of Bills Committee. We don't review the RISs in any systematic way either when they are included.

Mr Hogg: I think the intention was that your committee might get that role. If the *Legislative Instruments Bill* went through, they might assume that role. I remember Professor Whalan addressing that issue in an earlier draft of the bill. I don't think he was in favour of that idea, but I think the subcommittee resolved to consider reviewing RISs. Perhaps you can clarify that one.

Ms Paull: Professor Whalan would have been speaking of it in relation to the recommendations arising out of the debates on the *Legislative Instruments Bill*. There was debate in the Chamber that a committee would be given a monitoring role to oversee the process of consultation and RISs if the *Instruments Bill* was passed in the Commonwealth. It never went any further than that. It was just a suggestion that was put forward. The committee hasn't given any thought to it.

The Regulations and Ordinances Committee does use the impact statement together with the explanatory statement to get a better feeling of the background as to what the instrument itself is doing. But they are limited. They only come through in relation to anything that substantially affects business, so we don't see many in the course of a year.

Ms Gillett: When I read the OECD's report it worried me that they used the terms 'regulatory impact assessment' and 'regulatory impact statement' interchangeably. My understanding is that a regulatory impact statement is a statement that attaches to a piece of delegated legislation and demonstrates that it has gone through not just *[inaudible]* process but on occasions community consultations as well. What do the OECD mean when they say 'regulatory impact assessment'? Are they talking about a set of ethical principles that mean that scrutiny of a different type has to take place, or are they talking about a specific document like a regulatory impact statement?

Mr Hogg: That's an unfortunate thing, that very often they're used interchangeably. I think the OECD is talking about the principles.

Ms Gillett: When I read recommendation 1, what I thought it meant was that the discipline of scrutiny ought to be applied to primary legislation, which to me is a recommendation that said there would be a scrutiny of regulatory standards as well.

Mr Hogg: I think that's a necessary implication, that if you're going to have RIA principles for primary legislation you must have a scrutiny of bills that will be implemented in parliament to oversight it. It hasn't happened in the Commonwealth as yet. I reckon it would be a sad thing if it doesn't. I think it necessarily has to follow. I don't think you can leave it to an administrative unit within government, like the ORR, to complete the process. As I have mentioned, its recommendations might not be adopted. Essentially they're advising the government - they don't represent parliamentary scrutiny.

Ms Saffin: I have written to them at the OECD about what they mean, because it isn't always clear. What they do mean is what you just said, that it's a principle to be applied to principal legislation as well as regulations, so it's a framework that overlays what becomes a scrutiny of bills. They were really talking about the absence of scrutiny of all of the legislation, whatever form it takes, that goes on in Australia. That's really what they're on about.

Then the question arises too about the regulatory impact statement, which is the statement that comes before our committee. There is a legislative base because the regulation-makers have to supply the RIS, but we don't review it as such. We actually factor it into our deliberations whether they have gone through the process correctly. So in a sense we do review it, but we don't ... Really, with the RIA, there they're talking about having that scrutiny.

Mr Robinson: I wonder if there's an implication there that it be applied to every piece of legislation or whether one must read into it that it be applied to primary legislation 'where appropriate'. To have circumstances, particularly in legislation involving revenue or taxation measures, the process of supply, you'd be trumpeting to the world at large *[inaudible]*.

Mr Hogg: This recommendation has to be read down by the subsequent ones about the limits and the threshold test for conducting RIA. You'll see there in recommendation 8: 'The threshold test to determine when RIA is required to be conducted should be redesigned to ensure RIA is used only where it can contribute to regulatory quality.' Some of the terms are fairly difficult to define, to pin down, but they're concerned with those principal pieces of legislation that are going to have a significant impact out there in the community.

Mr Minson: I understand where they are coming from, and in an ideal world, I suppose, we ask for assessments and statements of a process type. My view is that primary legislation if you've got two houses of parliament goes through a very exhaustive process. If you've got just one house of parliament it still gets plenty of opportunity to be aired, pulled to bits, questioned, circulated publicly. Someone is going to come up with questions about what the effect will be. My understanding of these statements and assessments as applied to delegated legislation is that that's when it stings, when that sort of delegated legislation is slipped through parliament. You really do have to be on the ball. That's why I am very supportive of these assessments and statements as applied to subordinate legislation.

But I'm just wondering, unless you are very careful you can get yourself bogged down in a lot of stuff that you don't really need to get bogged down in. I don't know how other parliaments work, but I suspect they are the same as the WA one. If there's flaw there or a cost there, then the opposition or somebody is going to pick it up and pull it to bits. In a sense it gets well chewed over before it becomes law. So while it would be a nice discipline, it would be nice for a parliament to have with the legislation some sort of assessment process that gives a statement and says, 'If we enact this legislation this is going to be the result,' I think most of us, going back to the early meetings we had, are more concerned with delegated legislation that is usually twice as long as the primary legislation. That's where the sting is and that's the stuff that gets rushed through the parliament - not so much rushed through, but it's sent through without any sort of formal process for it to be scrutinised. I just sound that note of caution. It would be nice in a perfect world, but it wouldn't worry me if we didn't apply it to primary legislation.

Mr Redford: Of course, we don't have these in SA. My question is, what is the sanction and how is it applied where an agency fails to provide either a regulatory impact assessment or provides one that is deficient on the face of it as far as delegated legislation is concerned? Secondly, if you did adopt this recommendation and extend it to primary legislation, what is the sanction? If parliament wants to pass a law, no matter how stupid it might be, it passes the law. If parliament wants to pass a law without having any consultation whatsoever, it passes the law. I'm not sure how you can pass amendments to your *Subordinate Legislation Act* which would provide any meaningful sanction for failure to comply. It would be a grave conspiracy, because it would involve the majority of members in both

houses of parliament to ignore the law to get that law through in any event..

Mr Hogg: Yes, the sanction is an interesting issue. The first state to adopt RISs for subordinate legislation was Victoria, and the sanction was in the reading of the instrument. The Philip Morris tobacco company pursued and was successful in invalidating a regulation for tobacco products marketing or whatever. That was seen as creating a lawyers' paradise for persons to invalidate regulations which might be out there not for the public benefit but for some narrow private interest. For that reason, when NSW passed its *Subordinate Legislation Act* in 1989, it decided to leave the sanction with the parliament, so there is no legal sanction for failing to produce an RIS or an RIS of sufficient standard.

Mr Redford: What does your committee do?

Mr Hogg: It reports the matter to parliament and parliament can disallow the regulation, which would have the same affect as invalidity. But the discretion lies with the parliament to weigh up the public benefit of disallowance against the benefit of ensuring the process is adhered to and making sure that departments and the ministers get the message that they've got to do their RISs and do them properly.

Mr Nagle: The thing is that if the opposition was to move disallowance in the Upper House and our committee went along with the opposition's view, having taken on the government majority, it's a pretty good slap in the face of the minister and the people who created the regulation. And we have done that. We have supported a motion to disallow a regulation.

Ms Saffin: In the real world of politics our committee is chaired by a government member and it has a lot of government members on it. But in terms of how we go through the process, we take that quite seriously. We have inquiries - rather short inquiries, but comprehensive. We bring the bureaucrats before us and get them to justify their RIS. We can now look at an RIS and know if it is quite deficient and they haven't done their community consultation. That's one of the things we are big on. We will often have an inquiry. We'll get all the parties in, we'll hear from them all and then we'll put it back to the bureaucrats who are putting the regulation up to go back and get their house in order, involving the minister sometimes. We've done that a lot and we've actually got them to change things as a result.

We did recommend disallowance after an inquiry concerning Department of Education bureaucrats and the Board of Studies, over a very contentious home schooling regulation. Many people on the committee supported the policy intent but it was done in a heavy-handed, inappropriate way. That wasn't easy, because it was us government members saying to our minister: 'We don't support this regulation.' That got disallowed in parliament.

Mr Nagle: That's a fair slap in the face of ministers who are very quick to rush through to see if they can avoid others getting involved. I'll give an example. The *Dangerous Goods Act* had a requirement in regard to a refrigeration gas. The RIS said an experiment took place in which the gas was placed in a car and then a naked light was put in with a litre of gas and the car blew up. That was fantastic. The minister got up in parliament and said: 'Look, this gas is dangerous! This gas will kill people! We can't have it!' So a multi-million-dollar business which would have employed 3500 people around Australia was lost.

But eventually the Greens got together with the industry – it was quite an interesting exercise, having the Greens on that side - saying the gas was environmentally friendly and it wasn't dangerous. We called in all the people involved and went through the process. I asked this question of the person who was in charge of the experiment: 'Where are your documents on how you conducted the experiment?' He had nothing. 'Well, did you invite anyone from the industry to this experiment when you blew up the car?' No, he hadn't. 'What was your methodology?' He didn't know. 'Who blew up the car?'. Some bloke out in the western suburbs. 'Were you there?' No. In the end, they begged us not to panic - they would go back and redo it all.

Ms Saffin: So we expose people.

Mr Nagle: Exactly. That's the way it's done, basically.

Mr Hogg: I'm going to bring it back to this recommendation for RIAs in principle. The question therefore is, what sanction is there if the RIS isn't done properly? But again, it's still up to the parliament. If parliament considers the RIA is not of a sufficient standard to inform the debate properly, it could say: 'This bill is just not going to get passed until we do get it.'

Mr Redford: In other words it's a requirement from within the parliament. The parliament expects an RIA. If they don't get one, I assume you create the right culture in the Upper House compelling the government to submit the bill to some form of inquiry.

Mr Wiese: I think Greg is on the right track. We need to get back to looking at what we're talking about, and that's the impact on primary legislation

and the need. If you have a look at what happens in the various OECD countries, there is a huge range in the scope and standards of what they look at in their impact statements and their impact assessments. Obviously, that is going to be something that would happen in Australia. I'm sure that the standards would be different and the level of assessment would be different. Ideally they wouldn't.

I don't share Kevin's point of view with regard to primary legislation, that the parliamentary system sorts out all the bugs. My experience has been that in fact an enormous amount of horrible things get through without being picked up by us as legislators - and I am talking about primary legislation - as they are going through on the floor of parliament. Some of those things that get through the system are appalling when you see what happens in practice.

I think this is where this whole thing came from. There needs to be a system of assessment, to actually pick up in that process of assessment some of the things that should never get through in primary legislation. That can be as simple as a regulation or a notice. In WA we only look at regulations and bylaws and that type of thing. We don't look at notices and all of this other subordinate legislation that has a huge impact on people out there. If you look at the primary legislation, ideally you should be able to amend it and make sure that it does become assessable, so that there is a scrutiny of that form of subordinate legislation.

That's a very simplistic look at it. But how much primary legislation do we put through which, if you were to do a cost-benefit analysis, would never be put in place? If as is suggested here and as is done in a couple of the OECD places, you do a consequence analysis, how much of our legislation would go through? Where, for instance, would the NT legislation on juvenile crime be, or where would our WA three-strikes-and-you're-in legislation be, if you were to do a proper, genuine consequence analysis and talk to the general public and talk to the experts?

My experience is that a great deal of the legislation that we pass is not subjected to public scrutiny. You talk to ministers and you ask: 'What scrutiny have you given? What public consultation have you had?' You'll find that the department might have talked to one or two of their cronies out there. They haven't spoken to the real people out there on the ground who are affected by that primary or secondary legislation. That's what you're talking about when you're talking about doing assessment. And I think it's as important or more important in primary legislation than it is in subordinate legislation.

Mr Homer: If I can offer an uncharacteristically cynical view – and this is no reflection on the Victorian government – if you don't subject primary legislation to an RIS process you could have someone unscrupulous in the executive legislating regulations - in other words, being over-prescriptive in legislation. That can easily be done by simply having the regulations appended as an appendix to the act, knowing full well that they're not going to be subject to an RIS process. That's the weakness in not applying it to primary legislation. I'm not saying you're not going to have problems. You've got the question of Cabinet confidentiality and all the usual Westminster arguments about subjecting primary legislation to an RIS. But if you don't have it, that is a possible consequence.

Mrs Lavarch: By way of general comment, I endorse the view of Kevin, being from one of the few states – I think there are two, aren't there? – with scrutiny of primary legislation. The purpose of the scrutiny of primary legislation is far different from the purpose of the scrutiny of the regulations. With primary legislation, in our committee's view we're there just to give information to the parliament, to all the members of the parliament, in relation to that piece of legislation, to assist them in the debate in the House. At the end of the day there is no sanction. It's just an information service for those who haven't generally a clue.

We have a big *Alert Digest,* which is the report we table in the parliament. Our committee meets on the Monday. Because our parliament sits Tuesday to Thursday in a sitting week, we meet on the Monday in the morning and again in the afternoon to scrutinise any legislation that was introduced since the last report. Then we table in the parliament first thing Tuesday morning. If anyone hasn't seen it I have actually got some old copies here. We go through the bill in detail, raising issues in relation to that bill.

We have a cross-section of the members of the committee from Queensland here at the moment. The government doesn't have a majority on it. There is myself and one other government member, three independents and one opposition member. We come from different kinds of electorates and all walks of life, and bring to life some of the sections in the bills. We know from our interactions with our community what problems there may be, and try to address those or raise those as an issue.

Also, in Queensland legislation all our acts are required to follow fundamental legislative principles. We apply those like a mini bill of rights to each piece of legislation. If they breach those fundamental legislative principles then we make a big song and dance about it.

A lot of the ministers or a lot of the ministerial officers report back to me that when they are bringing in legislation they speak constantly with the office of the Parliamentary Counsel. Over the years, this committee has actually influenced the way they do their drafting and they are very conscious and very excited. They call me 'the ferocious woman'. So there has started to be a cultural change. They still have the wrong person, but there's a cultural change. They know we'll pick things up and are there to report to parliament. A lot of other matters have been considered, and they know.

I brought this to the attention of the conference in Sydney. In a lot of the explanatory notes that go with the bills they will now be up-front and honest and say: 'We are breaching an FLP and we are doing it for these reasons.' So it is a fully-informed parliament that knows they have just trampled all over someone's rights and liberties. They're telling you all about it and making sure it goes before the house.

The other interesting thing, from an opposition point of view, is that you'll find all the opposition speeches in the debate are sprinkled with what the Scrutiny of Legislation Committee has said. If they can't find anything really bad to say about a bill, they know the committee will have raised some issue.

Mr Hargreaves: What happens in Queensland is like what happens in the ACT. I have here a copy of our *Scrutiny Report.* Our Standing Committee on Justice and Community Safety incorporates *[inaudible]* scrutiny of subordinate legislation. *[Inaudible.]* Like Queensland, it is essentially a mechanism to see that people's rights and liberties are not trampled on. Of course, a report will be eventually provided to the parliament with our *[inaudible].* Interestingly, though, we don't at this stage do regulatory impact studies.

When I went to the conference in Sydney I was particularly taken with the idea of RISs, so much so that I have spoken to my colleagues in the ACT and have asked them to draft instructions to get them for subordinate legislation, mainly because I thought that it was the delegated legislation, the subordinate legislation, that I couldn't get a handle on. There was just too much of it. When you look at a lot of the primary legislation, you say, 'This might be what we're going to do, guys,' but when you get down to the subordinate legislation you say, 'This is what we're definitely going to do'. I felt that we could run it down that track.

I'm particularly interested to hear comments from Kevin about whether or not you really need it for the primary legislation. I guess I'm leaning towards Kevin's view. If you have a look at the legislation Queensland's got, the exclusions that you have are quite extensive. I think that possibly there is a case for being consistent on having it for subordinate legislation and staying a little easier about the primary legislation.

Mr Hogg: I want to comment on what Linda was saying about the FLPs. It's a fairly extensive check-list of matters for consideration. I suppose it raises the question, wouldn't the RIS be dealt with in similar fashion, just put there for the information of the parliament, to give a background and some knowledge of what consultation took place and what the likely impact is going to be out there?

When we talk about trespass on personal rights and liberties, it's fairly nebulous. Aren't we, by applying RIS or RIA principles – and they only call them principles - just asking for additional detail in terms of the impact on personal rights and liberties? Isn't it just an extension of that check-list that you have? Perhaps Chris and Linda may comment.

Ms Lavarch: What it boils down to, the difference is that at the moment it's a voluntary request from our committee's point of view. One of the things we do when we report, at the initial stage if we have questions to ask the recommendation is that we invite the minister and find out about these issues. A recent example that comes to mind is a bill to change the structure of our corrective services, having an independent commission to cover the Department of Corrective Services and also giving formalisation to maximum security. One of the questions we raised as a committee was whether the minister had given consideration to our international obligations under human rights treaties in relation to the holding of prisoners. You'll see in the report, in part B, the ministerial response. The minister told the inquiry all of the information on every human rights treaty that Australia was a signatory to that impacted on the holding of prisoners. That information was then before parliament. So in way that was voluntary – not something we raised as a committee.

But on the other side of it, here I see a compulsion, making it compulsory and making it part of our legislation that the committee has to ask those questions at all times. Now, without being properly being able to articulate it at this stage, I do have difficulty with making it a compulsory requirement, because from a practical point of view I don't think it is ever going to work.

I think the starting point for Australia would be for every state to have scrutiny legislation. And maybe these discussions should be the starting point at the national level: As a country and within our federal system, what other components do we want? What do we want out of our parliamentary committee

systems to best serve our public? Is it by having those extra things and strengthening our committee systems to enhance our legislation? Is the next component what principles apply? Should all states have fundamental legislative principles and have legislation that reflects the highest principles? Set those out first to build the foundation, and then work on the rarefied air of RISs.

Mr Warmenhoven: Through you, Mr Chairman, a question to Greg. Paragraph 18 of section 3.1 of the OECD report says: 'The primary role of regulatory impact analysis is to guide policy choice.' How does that fit with the usual approach of scrutiny, which is not to trespass in policy matters?

Mr Hogg: That's a good question. It's true: contrary to what the OECD has been saying, apart from these requirements for the RIA for principal legislation, government should get its act together as well and have a central unit that oversees the preparation of its instruments within government and make sure that policy is properly developed to fully take account of the costs and benefits to the community of its proposals. That's a problem that I suppose we all face when we're dealing with RIAs, even for subordinate legislation: there is policy on everything. Professor Pearce's paper at the biennial conference addressed that policy limitation that we have. The OECD are not that concerned about our particular dilemma. They are concerned about getting it right from a national and international perspective. How we see our role being limited is a matter for us.

I have often thought that RISs, even though they may be prepared in a policy framework, certainly shed light. As Janice was saying, they are used as a form of extrinsic evidence in interpreting particular pieces of delegated legislation. They shed light on the intentions. They shortcut the process for committees. We know what the mischief is that is being addressed in a particular regulation. So I don't think we can turn our backs on RISs and say because they have been originally prepared in a policy framework they don't exist for our purposes. Where we come into the process again is a matter that is open to us.

Ms Saffin: When you read that, it's difficult. For all of us, our review is of legislation and we don't stray into policy areas. We know it's OECD stuff – I'm not defending them - but what I read into it is that they're talking about macro-policy. We determine at government level that this is our policy regarding regulations and reflect that by passing a subordinate legislation act. Then that is sort of a macro-policy in there, and when you apply the RIS you are actually implementing that policy and that's not trespassing on people's rights about not tampering with business too much, making it too difficult to do business. But in terms of straying into policy areas as a committee, we don't stray into government policy areas on particular issues down at a micro level. So I don't see any conflict. The OECD, I gather, at one level are technocrats. They didn't understand the intrinsic workings of parliaments and politics.

Mr Minson: Mr Chairman, we're in some danger of getting bogged down here. I think we are all in agreement that the better the quality of any information you can get when you are legislating, the better will be the legislation, the fewer mistakes you'll make. What I was really trying to point out was that through the primary legislative process there is at least some opportunity to scrutinise and ask the questions at various stages. I would be more than happy if we had had assessments and statements available for all legislation at all stages.

What I'm really saying is that if I had to make a choice it seems to me that the delegated legislation is the one where - particularly in our WA Legislative Assembly - you would have the least control. Even in the party room, in government, I've had ministers stand up and say: 'This is all so urgent. You haven't seen it, but I've got to introduce it. If you've got any problems, let me know later.' That's a highly unsatisfactory way to proceed, but I suspect it happens in all party rooms. In the WA Legislative Assembly it's actually worse. You can move to disallow, but there is no incumbency on the government to bring the debate on. The statutory number of sitting days can lapse and the thing becomes law without it being debated. So there could be people who have reservations and you can express those reservations by way of moving a motion, but you never get to debate it.

Happily it's the other way around in the Upper House, where if it's not debated it's disallowed. To me that's better. All I'm really saying is, if we can have what this recommends for both primary and secondary legislation, I'm happy. But if we can't have the lot then I think it should be secondary legislation.

Mr Hogg: Perhaps it might assist the debate if we ran through some of the other recommendations, because they pick up some of these other issues.

Ms Gillett: This is principally to do with something a bit more basic than the technical details of primary scrutiny. Fundamentally our Victorian committee works in very similar ways, even in terms of meeting days and times, and the name of the report we produce is the *Alert Digest*. It would be silly if this group was to go on talking about establishing a committee to deal with primary legislation if we didn't have some understanding of the very real

political considerations of setting up such a committee.

I'll spend just two minutes on the past. Mark Birrell, a Liberal Party member of the Upper House, in late 1991 or early 1992 introduced a private member's bill to establish a scrutiny of acts and regulations committee. They were in opposition. An election was called and they won. The bill came back, which is to the Kennett Government's credit, and the committee was established. It has operated for seven years. Peter Ryan's caucus colleagues, when it was announced that he was to chair Scrutiny of Acts and Regs, patted him on the back and said a fine political career had been brought to an untimely end.

The establishment of such a committee is highly political. No government wants any more scrutiny than it absolutely has to put up with. To get one through takes a great deal of legal will and political effort. And that's the bottom line: once you have got it, making it work requires members of every political party and independents as well to have an overarching commitment to the job that you do.

The job you're doing on subordinate legislation it is exactly the same, except that our charter comes from the *Parliamentary Committees Act*. It tells us what areas we will check every bill against, and it only works by consensus. It can't work any other way. If you start using the numbers on it, and we've got the numbers this time - it feels fabulous! - you have an enormous responsibility to be even more fair and more balanced because you're not fair unless you've got that overall commitment. If you don't have the political will and you haven't got the other members' goodwill you will never get a committee to scrutinise primary legislation. And it's a great pity if that doesn't happen, because all of the wonderful things that flow from having a committee of all parties, of all Houses, scrutinising legislation. The legislation gets better. That's the bottom line. If we don't do our job and we don't have it, all sorts of little demons come lurking.

The only other comment I make is that the only way that scrutiny will ever work on primary legislation is if you stay right out of policy. It's the one thing that politicians will actually kill one another over. If you let them start to have a debate you'll be there for hours and there'll be blood all over the place. So you must discipline yourselves to stay right off policy. You can argue with one another, but no substantive debate. We all understand that that's for the floor of the parliament.

Our job, exactly as Linda said, is to make sure our parliamentary colleagues, all of them, are as well informed as they can possibly be in accordance with the criteria for the examination of a bill that we have had to perform. And it doesn't get much more complicated than that.

Mr Nagle: I now move on to recommendation 2:

> *The coverage of the act should be broadened to include amending, as well as principal, statutory rules.*
>
> *The legislative distinction between principal and amending rules bears little relation to the extent of the impact of a rule. Amending regulations may have major regulatory impacts and should be subject to the same threshold tests to determine if RIA is warranted as are applied to principal rules.*

Mr Hogg: One particularly bad one that comes to mind was the Environmental Planning and Assessment Amendment Regulation 1998. It was 108 pages long. It was bigger than the principal regulation itself and indeed it was bigger than the act. It implemented major changes to the Planning Scheme. There was a cognate act that went through, but most of the detail was in the regulation. It created new classes of exempt and compliant development in NSW which changed the planning system significantly. The committee formed the view, given the size and complexity of the regulation, that it would have been in the spirit of the *Subordinate Legislation Act* for the minister to have prepared a formal regulatory impact statement setting out the costs and benefits of the regulation so that the public could understand and appraise the whole proposal.

Other states have different threshold tests for RISs. In NSW the distinction between amending and principal regulations is particularly important because an RIS is only required in respect of a principal statutory rule. That's only, I suppose, a smaller issue, but it carries to the next recommendation.

Mr Nagle: We'll do 3 and then we can discuss them all.

> *Recommendation 3: The coverage of the act should be broadened to include all substantive delegated legislative instruments.*
>
> *Consideration should be given to the adoption of a broad definition of delegated legislative instruments, such as that employed in the federal* Legislative Instruments Bill, *in order to ensure that major gaps in the coverage of RIA disciplines are avoided and incentives for a strategic use of different forms of legislative instrument do not arise or persist.*

Greg, tell us all about this one.

Mr Hogg: Merely by altering the title of an instrument from 'regulation' to, say, 'direction' or 'determination' the instrument can escape scrutiny. Professor Pearce dealt with it in his book on delegated legislation. He said:

> *A possible defect in the NSW jurisdiction which is common to several other jurisdictions is reliance on the definition of 'statutory rule'. This means that scrutiny can be avoided simply by an instrument being designated as something other than a statutory rule. As long as this avenue is available, there is always the possibility that the bureaucracy will exploit it and so will avoid scrutiny by the parliament.*

Now, I think it was going to be addressed in the *Legislative Instruments Bill* by a general definition of 'instruments of a legislative character'. Janice will be able to tell us more about that. The idea was that it didn't matter what you called the instrument. If it had a legislative character it would be reviewable by the committee, as distinct from an instrument that was of administrative character which would have its own method of review through the Administrative Appeals Tribunal. I think that was the logic behind the original Administrative Review Council report which led back in 1992 to the first *Legislative Instruments Bill.* The idea is to cover the field so that there is no instrument that just by a change of name can escape either parliamentary scrutiny or administrative review. Is that correct, Janice?

Ms Paull: Yes, what they intended to do was widen the definition of what would be considered to be reviewable by the parliament. They went through and decided that if it had any form of legislative of character that would have an impact imposing some sort of obligation on the person, then that should be subject to parliamentary scrutiny. Regardless of what it was called, it would come before the parliament.

Mr Nagle: Recommendation 4:

> *The act should specifically require that incorporated materials, such as national standards, be assessed in RIA and tabled with the regulations that incorporate them.*
>
> *National standards often impose the bulk of a regulation's real burden or, where optional, can be an invaluable guide to assessing the likely burden on a performance-based regulation. They should be specifically required to be incorporated in the RIA and tabled for review in the parliament along with the regulations that incorporate them.*

Mr Hogg: A good example of this was when the committee considered the Local Government (Approvals) Regulation. It noted that it incorporated the Building Code of Australia. I'm sure most of you are familiar with the BCA, a major piece of national code legislation governing the construction of buildings that has been adopted with or without changes by various legislatures. The regulation - in NSW, the Local Government (Approvals) Regulation - made a significant state variation of this code by deleting certain provisions concerning the construction of buildings in bushfire-prone areas. The effect of those provisions was to require timber treated with fire retardant to be used in bushfire-prone areas, and the regulation exempted this requirement in NSW. Strangely, it came not long after our disastrous bushfires of 1994.

It was of particular concern to our committee to find that this requirement had been deleted. What it came down to was the examination of what took place on the Standards Committee - the drafting of that standard, what pressures were put, commercial and otherwise, in terms of the building industry not wanting to comply with the use of timber treated with fire retardant. The committee said that not only the adoption of the standard but also the state variation should be assessed in the regulatory impact statement for regulations, particularly in the interests of public safety.

I think what the OECD is concerned about is that if you are going to have RISs on regulations, they're not going to be much good if they incorporate a major code or other document which itself hasn't been assessed.

Mr Nagle: Recommendation 5:

> *The sunsetting cycle should be extended to 10 years to ensure that review activity is required only where there is a strong possibility that regulation has become outdated and requires significant change. In conjunction, the availability of postponements to the sunsetting requirement should be reduced to a single 12-month postponement.*
>
> *The current sunsetting cycle is universally regarded as too short by major participants in the process and, arguably as a result, has been undermined by the extensive use of the postponement mechanisms well beyond the purpose for which they were originally designed. Moving to a 10-year cycle would bring consistency with most other Australian jurisdictions and allow review and RIA*

resources to be better deployed – for example, in the conduct of RIA on amending regulation.

Recommendation 6: Sunsetting should occur on the 10th anniversary of the coming into effect of a regulation, rather than on 1 September each year as at present. [That's in NSW].

The existing system necessarily ensures that the mass of regulatory activity is clustered within several weeks prior to the 1 September sunsetting date and therefore strains the resources of a range of parties to the regulation making and review processes. Effective quality assurance has, accordingly, suffered. The alternative, of adopting the 10th anniversary of the coming into effect of a regulation as its your sunsetting date, would avoid this problem and allow enhanced regulatory quality without posing significant practical problems.

Those are recommendations 5 and 6. Does anyone have any problems there?

Mr Redford: What's your current system?

Mr Nagle: Our current system is five years, on 1 September. Then they can make application five more times each year for postponement. In the 10th year, that's the end of it. But they must justify to our committee why they need postponement. It's to ...

Mrs Lavarch: Does that come out of a national scheme agreement? Was it something to do with competition policy?

Mr Hogg: The five years? No. In fact, when the committee originally recommended the *Subordinate Legislation Act* for NSW back in 1989, it recommended seven years. But the government of the day decided to contract the period because it wanted to get as many old regs off the books as soon as possible, and that was it. It was seen as having problems at the time, because it's just too short a period for people to gear up under the regulations and apply them before they come up again for renewal. So moving to 10 years was seen as desirable. These are particular NSW anomalies, that aren't necessarily shared by other states.

The idea of a common repeal date was thought good at the time because the Parliamentary Counsel was having difficulties keeping track of the sunsetting dates – well, he wasn't but some of the departments were, and he felt that departments would have greater convenience with that. But as it turns out, they all bunched up just before September. It's almost like the end-of-year spend-up that used to and still does occur in a lot of agencies. It's the reverse of that. It's end-of-regulatory-year desperation, you might say, to get a new regulation in and get an RIS done before the deadline.

These recommendations will just take care of those to ensure it's the anniversary of the making of a regulation rather than a common date.

Ms Lavarch: Our legislation does exactly the same. We had an amendment last year, I think it was, it relation to regulations that come out of uniform legislation. I understand that we still have the 10-year expiry on 1 September, but instead of only having a one 12-month period, or an extension of 12 months, it's for five years. Well, that's the way I read it. You can have up to 20 years, actually. You can have a 5-year and a further 5-year period. That's my understanding. I stand to be corrected. I just wondered whether that had come out of an intergovernmental agreement or something.

Mr Hogg: Well, we're not aware of what relations are as far as respective Parliamentary Counsel Offices are concerned.

Mr Nagle: OK, recommendation 7:

Consideration should be given to making the current trend to including review requirements in major primary legislation more systematic by explicitly including in the Subordinate Legislation Act *or its successor a requirement that such review clauses are mandatory.*

The recent move to insert review clauses in major primary legislation is an important step towards ensuring that ex post *performance evaluation is systematically conducted in this area and thus can achieve many of the benefits associated with sunsetting. The practice could be made more systematic by incorporating a general requirement for such reviews in the* Subordinate Legislation Act. *This would be a logical corollary of including a requirement for* ex ante *RIA of proposed primary legislation. A legislated review requirement should also incorporate detail as to the minimum as essential features of the review process to be conducted.*

Mr Hogg: This is not quite staged repeal of primary legislation, but it's somewhat along those lines, the idea of having a review clause. I can tell you the terms of a standard review clause in NSW legislation. It says: 'The minister administering the act must, five years after the date of assent, review the act to determine whether the policy objectives which the legislation sought to achieve remain valid and the

form of the legislation remains appropriate for securing those objectives'. And the minister is required to report to the parliament on the outcome of the review. When he introduced this, the Premier said:

> *The inclusion of such review clauses will ensure that the legislation is properly reviewed after it has been in operation for several years, and that the need for its continued existence is fully considered. This action will assist in the government's efforts to remove obsolete and ineffectual statutory provisions, and reduce the quantity of legislation in existence.*

The Regulation Review Committee a number of years ago considered that the more obvious course, rather than removing obsolete provisions, would have been to start with the oldest acts first, as the staged repeal program does for regulations. The committee expressed its concern in its 15th report to the 50th parliament that under this policy the need for the act would not have been properly established in the first place, and neither would the need for the amending bills. That, as the OECD perceived, would be a corollary of RISs for bills, so that before you actually have an act in place which has to be reviewed at the end of five years, the bill for the making of that act will have established its worth in terms of its costs and benefits before the parliament actually passes it. That's the idea of those review clauses.

Mr Nagle: In fact, our Parliamentary Counsel says it's much easier in NSW now to pass an act in parliament than it is to pass a regulation.

Mrs Lavarch: That's good news!

Ms Gillett: In 1994, our committee received a reference to basically do what the OECD recommends, which is to review legislation which they suspect to be redundant, inappropriate or not performing. So we now have a redundant legislation subcommittee.

I have a question that maybe Greg can't answer but maybe Peter or one of the MPs can. How do the ministry feel about having to review their legislation and report to the parliament on each piece every five years? It seems to put an enormous burden on already-busy ministers. Whereas if you've got a subcommittee that can do it, you can actually work through in a very thorough way, as Greg says starting with the oldest legislation and moving all the way through.

Mr Nagle: It's a matter of picking things up. We passed a piece of legislation which said that you can appeal from the Local Court to the District Court on the basis of fact of the law in a criminal prosecution in the Local Court. But the transcripts were to be read by the judge and that was to be the only evidence adduced. It means that when you've got a great dispute between the witnesses, the judge never gets to see the demeanour of the witnesses. He only gets to read the transcript. So if you're a brilliant cross-examiner and you show up better, the judge will let you go. When it came to our caucus, they told the Attorney-General: 'It's just not going to work. You can't say to a judge he's got to read the matter *de novo* and is not going to hear any witnesses.' Eventually they had to come back four or five months later and repeal the amendment because it just wouldn't work. That was out of necessity. So there are needs to review legislation.

Mr Hogg: Our terms state 'whether the policy objectives which the legislation sought to achieve remain valid'. If it's a government of a different party, they're going to find that the policy objectives of the former government aren't valid, perhaps. They also say 'whether the form of the legislation remains appropriate'. Well, you might get some improvements in that regard. But I've looked at some of the reviews and they're fairly sparse in terms of the kind of detail that scrutiny committees would normally require. Again, as I say, I think what's needed is something more definite in terms of cost-benefit analysis, rather than just a general policy issue.

Mr Wiese: If you were to start in WA with the oldest legislation, the *Police Act,* which I administered, is over 100 years old. That would take care of the first 12 months. The *Criminal Code* has had reviews done by the law review group within the legal profession, totally outside of parliamentary processes. That was done something like 20 years ago and we are still working our way through some of the recommendations of that committee. The theory of it is absolutely terrific. In practice it would be a very interesting exercise, in WA at least.

Mr Nagle: There is this danger. I'll give you an example. Section 48 of our *Real Property Act* deals with indefeasibility of title. Under the concept of indefeasibility, you can't be *[inaudible]* of title. If there is a fraud on the title, there's compensation. And this has worked for over 100 years. It's a very good section. I think under section 106 of the *Real Property Act*, you'd be compensated if some fraud had been committed and obviously the Registrar-General had done things he shouldn't have done.

They decided to amend various parts of the *Real Property Act*, and they came to this bit about compensation. As I knew, practising in that area as a barrister, it had been very effective in compensating people by this concept of indefeasibility of title.

Why was it being changed? I asked that question in debate. I asked the minister to please advise me in his reply why a section that had been performing so well for over 100 years required changing. Up comes the shadow minister and says: 'Can you wind up? They want to adjourn the debate.' I asked: 'Why do they want to adjourn the debate?' He said: 'Because the minister doesn't know why they're amending that compensation clause.' They adjourned the debate to find out why it was being amended!

The moral of the story is that really sometimes things are put in to legislation which are perfectly all right. But somebody's got an idea about it, and it needs to be evaluated and looked at. It becomes our role as members of parliament to ensure it's right. There are the three tiers of government - the executive, the parliament and the judiciary. That's the fundamental of our democratic Westminster system. If we allow the executive to do, on the advice of its advisers, things that could really have a great impact on the people who elect us to the parliament, we have a responsibility as backbenchers to do be sure it's right. Of course, I could change that view if I ever become a minister ...

We'll move on. Recommendation 8:

> *The 'threshold test' to determine when RIA is required to be conducted should be redesigned to ensure RIA is used only where it can contribute to regulatory quality. The use of more effective preliminary analyses and of expert advice from a dedicated regulatory reform body should be considered.*
>
> *RIA resources are currently being used in circumstances where there is little possibility of them positively affecting the regulatory outcome. This diverts assessment resources from higher-productivity uses and undermines support for RIA. A more realistic and flexible test, able to draw on expert judgment, should be implemented. This requires* inter alia *that preliminary assessments, such as those currently required under schedules 1 and 2 of the act, should be made available to the regulatory review body before it provides advice as to exemptions. A more flexible methodological requirement is also needed so that regulations that cannot be easily quantified can be subject to appropriate forms of RIA to help in informing policy debate.*

Mr Hogg: What the OECD is basically saying is that the preliminary test in schedule 1 of our *Subordinate Legislation Act*, as to likely impact on persons, on the community, is being carried out very badly or simply not at all before people go full-on into an RIS. People often forget - I don't know if other jurisdictions have this problem – that there are two tests that have to be carried out. Schedule 1, which is an internal assessment within the department as to the likely impact of a regulation, applies to all regulations whether they're principal or amended regulations. It's done internally, as I say, and if it appears likely to have appreciable burden on persons, if it will impact, then they have to do a full RIS. What's happening is they're just going, very often, into a full RIS without considering that first schedule 1 test. I'll read some of the instruction:

> *Before a statutory rule is proposed to be made, the objectives sought to be achieved and the reasons for them must be clearly formulated. The objectives are to be checked to ensure that they are reasonably appropriate in accord with the objectives of the enabling act. Alternative options for achieving those objectives, compared with the option of not proceeding with any action, must be considered ... Implementation by means of a statutory rule should not normally be undertaken unless the anticipated benefits to the community from the proposed statutory rule outweigh the anticipated costs to the community.*

As I mentioned, that applies to all regulations. But very often, before a principal regulation is made, they don't apply that test to determine whether they really need to go all the way and prepare a full RIS. So what we're talking about is proper allocation of resources to those regulations which are really going to have some impact out there in the community.

Mr Blencowe: Isn't that test the same as the national competition policy test?

Mr Hogg: Pretty much the same, yes.

Mr Homer: This is actually quite an important recommendation. It should really have been a subset of recommendation 1 because it qualifies it. Recommendation 1 really gave me the impression that it should apply to everything, both primary and secondary delegated. But if you read it in conjunction with recommendation 8, it makes a lot of sense. We've got to have some sort of criteria, not just an assessment and a statement about everything but a threshold test. Having passed that threshold, then you want the assessment and statement for both primary and secondary legislation. I think that's sensible.

Mr Nagle: Recommendation 9:

> *The exemption from RIA requirements in the case of matters arising under 'substantially*

uniform' legislation should be removed, with exemptions only being available where equivalent RIAs have previously been conducted.

Mr Hogg: Again, this is one that we share with a number of other jurisdictions. If legislation is substantially uniform national scheme legislation, in NSW it's excluded, irrespective of whether an RIA has been done on that legislation. The OECD is saying that that shouldn't exempt it. The RIA should be done somewhere in the jurisdiction that first adopts that national scheme legislation, the jurisdiction that drafts that national scheme legislation or wherever. It's got to be done somewhere. It just can't escape purely because it's national scheme legislation.

Mrs Lavarch: We have great difficulties with that one as well. We had a new breed of the exemption come up with, I think, a fair trading regulation. Where we are, why an RIA hasn't been done - and for the benefit of everyone here, in Queensland we only have them for what they call 'significant' regulations, and for it to be a significant regulation you have to have an appreciable cost. We're talking cost burden, so again that threshold test.

At an executive level, the Business Review Unit, which is part of the State Development Department, is conducting a review of the department and its RIS processes. We as a committee have had hearings. We've made contributions to that inquiry and it has had meetings in relation to our input. But the new breed we have is one where it wasn't asserted that it was uniform regulation, that this regulation was substantially the same as that that existed in every other state. So there's one for you.

Mr Hogg: There's another interesting variation that we'll consider tomorrow in our case study of regulations made pursuant to a national agreement which mightn't necessarily be uniform themselves. In the case of the Australian Road Rules, they actually adopt a lot of state variations. But they're nonetheless made pursuant to the national agreement, and therefore they're considered to be exempt. So it becomes more problematical as they think of these escape devices for being mutually recognised in national scheme legislation throughout Australia.

Mrs Lavarch: That's actually the saddest point, that they're looking for how to get out of it, the exemptions, rather than embracing the concept. Call me naïve.

Ms Newnan: The fair trading acts of the states, although they are separate legislation, their provisions mirror the federal act. That is why they're probably saying that it's substantially the same. They mirror that part of the act, the part 5 provisions.

Mrs Lavarch: We argued for what was the intergovernmental agreement, which became a uniform regulation. The response was: 'Well, there wasn't.' It was just substantially the same. It wasn't actually the fair trading one, it was one out of that department. I can't recall exactly which one it was.

Ms Newnan: But all the states changed their trading acts, which weren't the same, to virtually mirror the federal act.

Mrs Lavarch: It just struck me that it was one that wasn't. It was because it was 'substantially the same'. That's what the argument was.

Mr Wiese: But what you've got to realise is that so many of those intergovernmental agreements are put in place with no consultation with the parliaments, with no consultation with the backbenchers, and in many cases without even consultation within the Cabinet. They are put in as a result of, in many cases, bureaucrats behind the minister driving an agenda that they've probably been driving for five or 10 years without success, and eventually get in place. Somewhere along the line, somebody in the parliamentary process needs to be able to come in and review what is put in there. Often what's been agreed at a COAG meeting or ministerial council isn't necessarily going to be agreed to by the people back in the state they're representing.

Mr Hargreaves: Picking up what Bob was just saying, it would be nice to have an RIA process applied when we talk about the national implications of the present legislation. But it also struck me that in a lot of the cases, the implications of national legislation on jurisdictions individually will change. It'll be different in each and every jurisdiction. For example, with the road rules issue, there's reference in there to behaviour on roundabouts. Not a problem in the ACT. We've been living with them for years. Some people haven't.

Other rules, on the other hand, have different definitions. So we would have a different theme, a different document with an RIS, at that level. It seems to me, as you said, that it's one of those slip-through merchants who gets their piece of legislation up. And I'd like to add to your list of people not consulted. Quite often it's not the punter who's consulted either.

Mr Nagle: Recommendation 10:

Specific responsibility for reviewing and approving draft RIA should be allocated to a

dedicated Office of Regulatory Reform located in the Cabinet Office.

While the parliamentary Regulatory Review Committee has taken an active and thorough approach to improving the quality of RIA, it has been limited in its effectiveness by the fact that it necessarily becomes involved only after regulation is in force. The experience of numerous OECD countries, as well as other Australian states, indicates that there is considerable value in allocating specific responsibilities in this area to a dedicated review body located in the centre of government. Certification of the adequacy of RIA prior to the completion of the regulatory process is essential if a high level of compliance with the provisions of the Subordinate Legislation Act *is to be ensured.*

I will give you an example. I don't know whether you've seen the little bulldog on my tie. Someone said it was the Bulldogs football team, but it's not. That is the logo for the regulatory review office in Albany, New York, in the United States. 'Get them by the ankle and don't let them go!' In December last year, I had the benefit of discussions with the New York State Governor's Office of Regulatory Reform, otherwise known as GORR. (Yes, when I first heard it I thought it was 'gore'.) Governor Patarki's*[?]* office has developed some very workable methods to oversight regulatory proposals.

Governor Patarki signed an executive order in January 1995 placing a 3-month moratorium on the adoption of most new regulations. Subsequently this moratorium was extended twice. The executive order required executive agencies and commissions to review their existing regulations and identify those which unduly burdened the economy, caused job losses or went beyond legislative mandates. Very interesting – 'legislative mandates'.

Agencies responded with their recommendations for repealing or revising regulations, along with plans to implement these recommendations. GORR staff then conferred with business groups and local government to solicit further suggestions for reform. Individuals and organisations across New York State also submitted their ideas for regulatory reform to GORR, using the 'What's Driving You Nuts?' form that GORR had developed for this specific purpose.

In November 1995, the Governor signed an executive order which provided the framework for developing regulations . It recognised certain criteria by which all new regulations are evaluated. Under this order, new and existing regulations are subjected to the discipline of cost-benefit analysis, risk assessment and peer review. In New York State all major regulations are reviewed by the Office of Regulatory Reform prior to their publication, and they cannot proceed until that office is satisfied with them. The regulatory steps that have to be followed are interesting. I will very briefly outline them because they have a bearing on the OECD recommendations which we are now considering:

1. The government department or agency develops a regulatory proposal.

2. The agency identifies groups affected by the regulation and talks to these organisations about the need for the proposal.

3. The agency produces a draft text of the regulation.

These regulations are drafted by lawyers and the particular agency according to a prescribed format. A draft regulation must be accompanied by a regulatory impact statement. A regulatory flexibility analysis must also be produced where the proposed regulation would impose an adverse economic impact on small business or local government. There is an additional requirement of a rural area flexibility analysis where the regulation is likely to have an adverse impact on rural areas. The final requirement is for a job impact analysis where the proposal is likely to result in a decrease of more than 100 jobs.

The Governor's office can in effect exercise a moratorium on the making of new regulations until it's satisfied that they have been adequately justified. New York State is very serious about regulatory reform and has been supported from the top down. I was advised by the office that savings resulting from its regulatory reforms total a staggering $1780m.

That's what they do. They're really are strict on what the process has to be and what should be done in regard to controlling this. They had so many regulations it was just out of control. Someone had to do some work. So that's the New York experience. What do you think of the idea of having a regulatory body to assess regulations within the Cabinet Office?

Mr Homer: I'm very supportive of having a dedicated office, but I have grave reservations about having it in the Cabinet area. I really believe you ought to have an established office of the parliament. If you pressed me, I'd say that Cabinet was the worst place. I'm serious. It's really just another arm of the same administration. I'm very nervous about that. It's better to have it there than not have one. But what's wrong, if you're going to resource the thing and it's going to exist, with making it an office of the parliament?

Mr Redford: Kevin, we already do that in South Australia. We actually have, within the Cabinet Office, a regulatory reform unit. And I have to say my experience is that it is excellent and works well. My only comment from a pragmatic point of view is that with all the reform required to implement competition policy, they seem to have been diverted wholly and solely to dealing with those issues. But from a SA perspective, firstly the quality of the staff they have in there is outstanding. Secondly, they have a very close relationship with my committee and we work very well together. Thirdly, the ability for them to initiate the appropriate mechanisms to get bureaucracy at large to confront regulatory reform is better than that which can be applied by a parliamentary committee. So from our perspective, it works very well. The only rider I put on it is occasionally they do get diverted, and for the last couple of years they have been diverted because they need to be the link in reviewing regulations based on competition policy.

Mr Homer: Given that the thing works and you have excellent personnel - and that's probably why it works - would it be any less effective if it were not a committee of the parliament but an established office of the parliament?

Mr Redford: I think it's more effective that way because the impetus for reform is coming from the executive arm of government. So they're less defensive about the whole process than they might be if it was initiated by the parliament. A lot of it's not very sexy stuff anyway, which we're all used to in this room. But they will deal with those issues, whereas a lot of parliamentarians - this room excepted - aren't interested in that sort of nuts and bolts, dotting i's and crossing t's stuff. Because of that it's very hard for members of parliament to even get the resources to enable one to do it.

I think we've got five people in the Cabinet Office doing this. If we tried to establish it within the parliamentary process - I don't know how your executive behaves - we wouldn't get the resources for themselves. They seem to be able to manage to find the resources. I'm just saying that from a practical point of view it works. I am cynical about all these regulation bodies because I've not seen one that's done anything to actually reduce the volume of it. It's always increasing. But they do some good work. The critical thing is to develop a good relationship with them, because they've been terribly helpful to my committee. And the fact that they're in the Cabinet Office as opposed to where they used to be, in the Attorney-General's Office, also gives them greater clout in terms of dealing with the rest of the bureaucracy. That's been the SA experience.

Mr Blencowe: Very often a regulation comes up from a department and the Cabinet Office, since they're central, would look at it from perhaps a less biased perspective than would the head of the department. They're used to looking at Cabinet proposals from an overall point of view, so it's helpful for us to have them there.

Mr Nagle: I'd like to see any type of office having a very straight input into the parliamentary committee, and the two working together, irrespective of whether they were in the Cabinet Office or where they were.

Mr Hogg: There's a limit to a parliament's ability to get involved in *ex ante* scrutiny regulations. That's what the OECD was concerned about, nipping the bad regulations and bad bills in the bud, those that aren't justified on their costs and benefits. And that's the whole idea of that unit, to act as a central body, not just to filter out the bad ones but to coordinate the responses and also to properly train the bureaucrats in preparing RISs. That was always the intention. Under the *Subordinate Legislation Act* of 1989 a training program was to be adopted. There was a Cabinet subcommittee on it, but unfortunately it never got off the ground. There was only limited training, a couple of half-day sessions for the then bureaucrats, who six months after had probably left the relevant departments. There was no continued culture in terms of the skills in preparing RISs and the requirements of the act. We've had to start from square 1 all over again with every department, and we've been doing it regularly ever since, trying to educate them. But without that central role, you don't have much luck.

Mr Nagle: We have noted, I think, the Victorian experience and the Queensland experience that the bureaucracy have a mindset as to what their obligations are when they happen to be producing legislation or regulation. And that's what you've got to get through to them.

Mr Redford: I find generally that the bureaucracy are my best allies within the executive arm of the government in terms of making sure of the material they send my committee. If there is a particularly bad part, they're onto the department quicker than we are in some cases.

Mrs Lavarch: As I said before, in State Development we have BRU, the Business Review Unit, and our committee has a very good working relationship with them. The departments go to that unit to ask if they've got to do an RIS, and they perform an educational and also a monitoring role on the departments in relation to their impact statements or assessments, at appreciable cost. Our working relationship is fairly good to the extent that if the minister says, 'BRU said we didn't have to do one,'

we don't go behind that except to ask, 'In what context did BRU say you didn't have to do it?' We trust them and we have a very good working relationship. That unit was set up to cut the red tape. It has a business focus in regulation reform, which I think is where the OECD is coming from as well, to make it more business-friendly. That's why ours is in State Development.

Ms Gillett: Probably you should keep it there. So is our ORR in State Development. It had a particular role under the last government, *[inaudible]* reflected in the act. *[Inaudible]* be much more involved with the committee since the change of government, which we've welcomed.

Mr Blencowe: Also what we've got is, if somebody wants to go through a regulatory process they look in the *Cabinet Handbook*. It says you have to do this and you have to consult and you have to say that you've consulted and you have to go through a proper procedure. Even with legislation, that would go through some sort of proper procedure so the Cabinet group can check up and say, 'Well, have you done that? Have you consulted? Have you attended to these other matters?' before that even gets to them.

Mr Nagle: Recommendation 11:

> *A consultative process should be undertaken regarding the current regulatory flexibility amendments with a view to incorporating any additions and changes necessary in the redrafted* Subordinate Legislation Act *during its development.*
>
> *The recent amendments to the act were introduced without a specific consultation process being followed and without consultation being conducted with the Regulation Review Committee. Confidence in the adequacy and workability of the arrangements proposed to implement this important initiative may therefore be lacking, particularly as the provisions are silent about a range of important specific matters addressed in models for such a mechanism previously developed in Canada and in Victoria. Conduct of a thorough consultation process prior to redrafting the act would provide an opportunity to ensure public confidence in the initiative and, given that this is a new area for legislation, would provide additional assurance as to its workability in practice.*

Mr Hogg: Basically, this is a particular problem that existed in NSW. A *Regulatory Flexibility Bill* was introduced to amend the *Subordinate Legislation Act*. It would require a regulatory flexibility analysis to go forward as part of the RIS for every regulation. What regulatory flexibility means essentially is that you've got to give people who are going to have to comply with the regulation a chance to put up alternatives that they consider could better meet the objectives of the regulation. It's like, you might say, a delegated RIS process. You put it out there to industry. If they say they can come up with a process as an alternative to a detailed regulation that's going to achieve the same results, and then if the analysis shows that, then that process would be implemented rather than the regulation.

The trouble is, the bill was then introduced without any prior consultation with the committee until the day before, when a couple of Cabinet officers came over and briefly gave the committee an outline of this major change in the act and also the philosophy of RISs. The committee was rather upset by that and in the course of debates in the Lower House it pointed up those defects. The bill was pulled before it went to the Upper House. So you might say the committee has been active not only in scrutinising regulations but also in scrutinising any amendment to its own procedures which is being introduced without proper consultation.

Mr Nagle: Recommendation 12:

> *Establish a dedicated Office of Regulation Reform within the Cabinet Office that is dedicated solely to regulatory reform issues, in order to ensure adequate focus, resourcing and accountability.*

I think we basically discussed that when we discussed having it in the Cabinet Office. Recommendation 13:

> *Establish an ongoing training program designed to impart in a wide range of policy-makers within the administration an understanding of the purpose of the* Subordinate Legislation Act *as well as the specific skills required to conduct RIA and related processes.*

Mr Hogg: Training is a necessary part of the recommendation for having a central body to oversight production of regulatory impact statements. It was a requirement that, as I mentioned before lunch was never implemented. Back in 1989, apart from a few one-day or half-day sessions, there was never really any training. There really needs to be an ongoing training program that ensures that you don't have gaps because of changes in personnel or changes in departmental structure over time. It necessarily follows on from having a centralised unit.

Mr Nagle: Recommendation 14:

Consider the provision of positive assistance in RIA preparation, including the on-call availability of specialist analytical resources where necessary, to regulators engaged in major RIA.

Mr Hogg: Since 1995, the Netherlands has had a regulatory help desk. It's jointly run by the Ministries of Justice and Economic Affairs, both of which have considerable regulatory reforms responsibilities, and is supported by the Ministry of the Environment, which makes available specific expertise, including statistical assistance to guide regulators through all phases of RIA, including the design and collection of data requirements. It follows on from recommendation 10.

Mr Nagle: Recommendation 15:

Supplement the provision of RIA guidance material with best-practice manuals on closely-related regulatory quality issues such as principles of good regulation and the use of regulatory alternatives.

Mr Hogg: I think that speaks for itself.

Mr Nagle: Recommendation 16:

Require the regulatory reform body to collect and report on key regulatory reform statistics on a regular basis.

We discussed this earlier. Regulation 17:

Take positive steps to ensure maximum consistency between RIA, consultation and sunsetting processes at federal and state levels and including the COAG (Council of Australian Governments) guidelines and principles applying to regulation made under national uniformity schemes.

Mr Hogg: These discussions that we're having right now are a means of implementing that very recommendation. The idea is to generate a common set of values. I think we realised this morning, as we were discussing it, that there are a lot of differences. But as people have been saying to me over lunch, it's a shared ethic or value we have of wanting to achieve reform in this area. I think we can build on our differences and, hopefully, achieve some uniformity of our own in such areas as scrutiny of bills. NSW doesn't have a scrutiny of bills committee. That's something that we have to talk to Queensland and Victoria about, and we're hoping to achieve in the not-too-distant future.

Mr Hargreaves: We have in fact got scrutiny of bills and subordinate legislation committees.

Mr Nagle: We go down to 18:

Work toward the evolution of principles, such as the subsidiarity and proportionality principles of the European Union, to guide decisions as to when and how to use national uniformity and regulatory harmonisation approaches.

Mr. Hogg: Jim Jeffries, the Director of our committee, spent some time in Paris investigating proportionality and harmonisation and could brief us on this important aspect.

Ms Saffin: *[Lengthy passage inaudible.]*

Mr Nagle: Recommendation 19:

Establish procedures for information exchange between jurisdictions.

Easy dissemination of a range of material related to regulatory quality-assurance efforts (such as sunsetting, RIA registers, regulation-making statistics, disallowance statistics) would facilitate learning across jurisdictions, support research efforts and favour evaluation of the performance of the tools used. All of these outputs have the potential to contribute to the dynamic improvement of regulatory quality-assurance processes.

Mr Hogg: This was raised earlier in relation to statistics on increasing national scheme legislation. What's the trend? Is it going up? Is it going down? Does anyone know? That's something that perhaps could be put in place at the earliest time to ensure that these problems that we perceive are in fact real problems and not just a view that's dependent on one particular case that's caused this concern. So sharing of statistics on disallowance, as is mentioned, RISs and also trends in growth of national scheme legislation would be most beneficial.

Mr Hargreaves: One of the difficulties with this campaign over the years has been the discontinuity of members. There needs to be a process in place that is bigger than the personalities who are driving it at the moment. It seems to me that meetings such as this conference give it a kick along every now and again. But if there's something more formal in place, what happens is that as each step progresses, it does in fact progress. You don't have one-step-forward, three-steps-back progress, which seems to have been the case sometimes in the past. I strongly support this recommendation.

Mr Nagle: That's a matter we'll be discussing tomorrow when we deal with resolutions and what we should do to go forward from here.

Well, that's Peter and Greg Show. Any questions about any or all of it?

Ms Gillett: Those resolutions that we skipped through at the end, to do with training, providing information and all the rest of it - it's incredibly difficult in the work environments that we operate in for there to be that continuity that John's talking about. As I said, I'm only becoming aware of a developing relationship with ORR. I don't wish to be negative, but I think that all of that work, leaving something behind you in terms of a training package, I doubt whether many of our colleagues would be *[inaudible],* given the pressures on their time and how many demands there are for them to keep up to speed with what's going on.

Mr Nagle: That takes us back to having a formal body which is run in the Cabinet Office or somewhere else which is meant to link up with each of the parliamentary committees and work with them, as in the SA model.

That's the summary, the abridged version, of the OECD report. It had a lot of value. I think we should take on board what they have to say, take those things we agree with and reject those we disagree with. I now hand over the chair to my illustrious friend Stephen Balch.

NATIONAL SCHEME LEGISLATION
Victorian Proposal

Ms Gillett: The paper that we're going to talk about, that the Victorian delegation is presenting this afternoon, is one which members who attended *[inaudible]* would be familiar with, so I don't propose to go through it all. I will go through the proposal in its principles and its essence and while I do that, I'm perfectly happy for anybody to interrupt and ask questions as they have them, if that doesn't bother the Chair, so we can try and have an interactive thing.

Mr Balch: That's fine.

Ms Gillett: I will briefly summarise the problem so that we all know what the issue is we're trying to resolve. The Commonwealth, state and territory governments enter into agreements for national uniform schemes of legislation at the executive level of government through, for example, COAG or the Standing Committee of Attorneys-General. These arrangements bind the participants to introduce uniform domestic legislation into their respective jurisdictions. The national scheme is introduced in a first jurisdiction and becomes an act. Once that occurs, the other jurisdictions are duty-bound to follow suit. So subjective scrutiny is rarely possible.

Mr Redford: You're talking about template legislation?

Ms Gillett: Yes I am, template legislation, but indicative regulation. I should have said at the start that while the word legislation may be used throughout, it should be understood that we're talking about both primary and delegated instruments.

Mr Redford: You talk about national schemes of legislation. I assume you're talking about, in terms of this proposal, template legislation.

Ms Gillett: Template legislation has similar problems and should be dealt with, we would suggest, in the same way.

Mr Redford: Just explain to me. There are lots of different national schemes of legislation, some of which are easy to deal with, some of which are difficult. Model legislation is pretty simple. Each parliament autonomously passes its own codes of legislation. I can't see any criticism of that. You've described template legislation. That's what I assume you're talking about for the purposes of this paper.

Ms Gillett: I'm talking about national schemes of legislation. Template legislation, as you say, is introduced in each jurisdiction after an agreement is reached at COAG or the Attorneys-General group, yes. An example of the problem that we have in Victoria was the gas pipelines legislation, introduced in your jurisdiction. It comes to us and we know absolutely nothing about it.

Mr Redford: That's template legislation. I think we need to be very careful about how we define what we're talking about.

Ms Gillett: Well, to help everybody around the table, Angus, would you like to suggest some definitions?

Mr Redford: National scheme legislation covers mirror legislation, it can cover a referral of power to the Commonwealth, it can cover template legislation or it can cover model legislation. I'm not sure whether you're talking about all of them or just template legislation in terms of your proposal.

Ms Gillett: Am I wrong in the opinion that they all offer for us similar sorts of problems?

Mr Redford: No, you are right there.

Ms Gillett: So you tell me what we should be considering here in terms of the ...

Mr Redford: It's your paper. I just want to try and clarify what you're talking about, that's all.

Mr Balch: There's a desire to have a scrutiny process wherever there's an action and the reaction impacts on our jurisdictions, and at the moment we have no ability to make a scrutiny of the process. If you try to narrow down the definition too far, you'll find things dressed up in another fashion. There might be something else that you want to have an input into.

Ms Gillett: I'm a simple woman, Angus. As far as I'm concerned, if legislation is introduced into another jurisdiction which impacts on the jurisdiction that I operate in, then I want to be able to have some say in the scrutiny of it. Whatever name is given to it, has been given to it in the past, or is given to it in the future, template legislation, which you say is a problem, produced a problem for us. So if we want to come up with ...

Mrs Lavarch: Can I make a suggestion here? In some ways Angus is right, because different beasts of national scheme legislation will throw up different sets of problems. It may well be that every jurisdiction introduces model legislation at the same time. The Victorian paper talks about national scheme legislation being introduced into an originating jurisdiction. Can't we just progress discussions this afternoon by the model put up by Victoria, and then apply all the varying combinations of uniform legislation to see if they would fit that model?

Mr Balch: That's a good point. I think it allows the presentation of the model, as you said. It's just been pointed out to me that the scrutiny of national scheme legislation position paper booklet in fact goes through all the different models and the varying ways of dealing with them.

Mrs Lavarch: From my own readings in the very short time I've been involved, it seems this has been the sticking point all along - if a proposal is put up, regardless of the money side of funding the body, how that body can be meaningful in the process. It may well be that we have to consider a model or a proposal and then apply varying standards to it to see how it would hold up against all those ...

Mr Balch: A 'what if' analysis.

Mrs Lavarch: Yes, all the different types of uniform legislation to see whether the model being proposed would provide a proper national scrutiny.

Mr Hargreaves: The definition that drives my interest in sort of thing is what we do about legislation which has either been suggested that we adopt or imposed upon us to adopt. To be quite frank, I don't care whether it's called purple or red or pink or brown. The simple fact is that a bunch of other people have decided: 'This is what's going to be good for you, and you're going to wear it.' I have so often stood up and said: 'This isn't good enough.' But nothing happens to back my argument. So I would rather like to have a model which addresses that. And if we take the most simple one of those impositions and address it, perhaps in fact that will cover the most complicated one to be addressed.

Ms Gillett: The issue that we had with the gas pipelines stuff was one of time. We didn't have time to do the work that we were supposed to do. Other circumstances provide far more *[inaudible]*. You actually want to make a change but you cannot. Where effective scrutiny is really impossible, because the executive claims that the form and content of the legislation or the regulation can't be changed because of a national agreement, the lack of effective scrutiny is far more severe if the originating jurisdiction doesn't have scrutiny primary legislation.

The Victorian proposal, very briefly, is that national scheme legislation, whatever its colour or name, is developed by and has the consent of the Council of Australian Governments or the Standing Committee of Attorneys-General. The national scheme may be primary legislation or subordinate legislation. The legislation is then introduced through an Australian parliament, provided it is legislation. On being introduced, it is marked on its face, as an element of its title, as being national scheme legislation.

After it is second-read in the originating jurisdiction, it is immediately and automatically referred to what Peter Ryan has called in the past 'the national committee'. Further debate on the bill is adjourned in the originating parliament for 2-3 weeks. It gives the national committee time to convene a meeting. It also would give whatever legal advice and support there is around at the time to actually scrutinise that legislation.

At a meeting of the national committee it scrutinises the legislation and agrees on a report - perhaps in the form of an alert digest, which other scrutiny of bills committees are familiar with. If any issue of concern arises from that report, the committee will instruct the secretariat to prepare suitable correspondence to the minister introducing the bill, seeking clarification on the issues of concern. As the national scheme is introduced around the nation, the national committee's alert digest has been tabled in each of

the respective parliaments and would represent the report to that parliament on the national scheme.

In the event of any future amendment to the NSL, the process as has been outlined would apply. The amending proposal would again be scrutinised by the national committee in the same manner as the principal instrument was.

It was suggested that the national committee could consist of two parliamentary representatives from each of the jurisdictions, giving a total of 18 members in all. Two representatives from each jurisdiction may consist of a member from the government and a member from the opposition. This balancing of the numbers would serve to provide a political neutrality, regardless of the make-up in the federation in any particular point in time. The chair of the committee would be chosen on a rotational basis for one calendar year.

The national committee would be established through Commonwealth legislation. Then in tandem the states and territories would introduce counterpart legislation. (We should come back to that, because there are other ways to do it.)

The national committee would have terms of reference permitting it to scrutinise both primary and subordinate legislation. As a starting point, we could consider the terms of reference that are adopted by the Senate, which are also reflected in Victoria's terms of reference. Some jurisdictions such as our own would need to amend their domestic legislation – our *Parliamentary Committees Act* - to exclude the necessity to scrutinise national schemes by their respective scrutiny committees. Currently our act requires the committee to report on all bills.

That's the case in those jurisdictions where scrutiny of bills committees currently exist. States and territories without scrutiny committees could consider the manner in which they would treat an alert digest, such as the formal tabling of the report by a minister or a member serving on the national committee, so that the document actually gets into the parliament. Correspondence arising from a report, if any, and the ministerial response would be published in a follow-up alert digest or NSL report.

Before I go on to what we see as the benefits of that proposal, it is fair and accurate to point out that this is a highly technical way of scrutiny committees going about communicating with one another. My feeling is that it could take us an awfully long time to convince the Commonwealth that they should enact legislation, then for there to be legislation going through in each of our jurisdictions that requires it.

There are some principles established, though, of representation and of time limits - representation by each of the committees to form a national group, and time limits of response. That is, time limits for each of our jurisdictions to be able to respond to a bill or to regulations that have a national impact, and that impact can only be had through enactment in each different jurisdiction.

In very plain English, though this is a highly structured and technical process to go through, there is a far simpler and informal process which would achieve precisely the same thing, which I'd like to talk about at the end. In the context of a very formal proposal that's very technical, I tend to think that there could be a much more straightforward process, with much less reliance on the legislative legerdemain to get us there.

Nonetheless, the proposal as outlined, in the formal sense, does enable the nine jurisdictions to influence the content of national scheme legislation in accord with agreed scrutiny principles, before a proposal actually gets to the status of an act in the first of the participating jurisdictions, before it's set in stone and too late for any other scrutiny committee to play a meaningful role on behalf of the parliaments that they represent. It also enables the scrutiny to occur concurrently, 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. The proposal also allows the principles of scrutiny to be observed within each participating jurisdiction, ensuring that there's been consideration of the scheme of legislation on behalf of the respective jurisdictions and their report is duly tabled in each of the participating parliaments.

Now, the devil's always in the detail, and there are practical considerations such as meetings, voting, minority reports. I have a couple of comments on those for people to think about. There will be issues about the mechanics, about how and when the national committee meets and how it's supported by an administrative secretariat. These issues can be refined over time.

It would be totally inappropriate for one jurisdiction, in my view, to say in a report: 'Here's all the detail. We'll call you if we need to consult.' We did think, though, with the range of technology that is available and the structures that are available within committee systems in some of the states and territories, that there doesn't seem to be any reason why meetings of a national committee couldn't be convened with audio or video link-up or telephone conferencing or on the Internet, without participants actually having to travel, spending money to get to a central point.

With some goodwill, the mechanics could be resolved readily enough.

Voting on a national committee would also need to be addressed. However, as I said this morning, it's the experience of the Scrutiny Committee in Victoria that comment made by us on a bill is determined overwhelmingly by consensus. We work very hard to make sure that, if someone's got a huge issue, we spend enough time going through it so that an appropriate comment can be made and published that reflects the concerns of that part of the committee. The commentary is based upon the terms of reference in our enabling act. In any event, as in Victoria, the national committee could permit minority opinions to be published within the report. In no way could anybody be locked out of the meaningful participation in the scrutiny process - neither a state nor an opposition or a government in any of the jurisdictions.

The national committee would obviously require some sort of secretariat. It could probably be based in Canberra, funded jointly by participating jurisdictions. We've just done a quick calculation of the number of pieces of legislation that we've dealt with over the last couple of years, and we suggest that we'd clearly be talking about part-time legal advice. We're not talking about an enormous amount of bills. The proposed course of action that we've suggested is that obviously the proposal is submitted ...

[Gap between tapes]

I think from our discussions this morning it was clear that everybody understood what the problem was. Where we go from here is in the hands of this meeting. We have the rest of today and all day tomorrow to work through it. But I would like to make it very clear that the Victorian committee is very pleased to be in a position where, if it came to pass that delegates thought that we could do something reasonably quickly (and mindful of the fact that Andrew and Jenny are sitting there just waiting for me happily to increase their workload), if we wanted to experiment and see whether we could put in place a system where informally we could cooperate and use Andrew and Jenny's good offices to look at national schemes as they come in, to provide the sort of advice that we are talking about in the proposal, disseminate that and then just start to talk to one another on a regular basis, using the forms of technology that we have available to us, then I would like delegates to understand that that offer is made here as well.

So we don't have to leap right into it at the legislative end. We could perhaps take a smaller step forward and say when the next national scheme comes up we will see how it works on an informal basis – in other words, practically. When the originating jurisdiction says: 'Andrew, we've got one. Here it is. Have a go at it and advise the advice.' Then two people are nominated from each state and we work through that process. Just have a bit of practice at it before we take too many steps forward. I think it will be a problem to go to the Commonwealth and suggest that we should start looking at draft legislation. I think, practically and politically, it is just not likely to happen - not in the next 18 months, in any case.

Mrs Lavarch: I'll jump in first. I agree with Mary that the formal process is very complicated and I don't know that the Commonwealth are really the right people. So much of this is legislated at the Commonwealth level, but they are only one of a number on those ministerial councils that are in agreement.

The question is, what is it that this committee, whether formal or informal, is really aiming to achieve? On an information basis we work out the best way to deal with bills, probably in the same way as your committee does now and the Queensland committee does. We have a general blurb we make that this is national scheme legislation and no doubt, even though we are going to recommend amendments, the minister is going to tell us that that is not possible because it's an intergovernmental agreement, and the fear is that if they start mucking around with it it will unravel the agreement. In that way, we still inform our parliament of where we find problems. But that is all it is - information. It doesn't achieve any amendments. It doesn't achieve, at the end of the day, anything other than using some more pieces of paper. So that's my first question: how would this committee, whether it be formal or informal, overcome this façade, the shutters that are put down on the national scheme? And are we too late coming in once it has been introduced into a jurisdiction in some form?

I will go on to my second question and a comment on that. I've just had Chris Garvey, my research director, go through the number of pieces of NSL legislation we had last year and how many days there were between first and third reading, between being introduced and passed. Most of them are Treasury – they're tax ones. There was a new tax bill introduced on 23 November 1999. It was passed within 14 days. We had the Federal Court state jurisdiction legislation. That came in and was passed on the same day. We had the request act in relation to the referendum. That was 44 days. The Commonwealth *[inaudible]* taxes was 14 days. And the list goes on. A lot of the Treasury ones are about 14 days between the first and third readings. Things like the audio-visual, the Y2K, they sat there for a number of

months before they were passed. So time is the second question - the time limits of this.

They are basically the questions and the comments I wanted to make: the quantum of time and what we are going to achieve by it. I endorse getting together like we are now and doing that on a regular basis, whether it be through technology or in person, and keeping the dialogue going and sharing the information. We can grow from there.

Ms Gillett: The first question to be asked is probably: 'Is it already too late?' By the time ministers, state and federal, have actually reached an agreement, they are not going to want anybody, let alone a scrutiny committee of national proportions, interfering or asking questions. That is, I would say to you, today no different to any of the other jurisdictions. Scrutiny is not a popular activity for governments of any persuasion in any jurisdiction.

The simple view that I take is that it's a job that must be done. You were talking earlier about work of the Queensland committee. I share your view that one of the most important things we can do is inform. Unless the culture of scrutiny is practised, it's never going to become accepted as the norm and as a useful thing to do. You made the remark earlier on that people are always looking for ways to get out the regulatory *[inaudible]*. They will always be looking at ways to avoid scrutiny as well. After people have worked hard on getting an agreement in place they don't necessarily want outsiders fiddling around with it. That doesn't mean that it isn't perfectly legitimate for outsiders to fiddle around with it.

I'm not suggesting that we would have any sort of a sanction in the initial stages. There will be no sanction. It will be suasion. It will be having good and competent people and it will be, hopefully, having governments that if you can save them the embarrassment of making complete nongs of themselves they will learn to come to rely on the good advice of good officers, not seeing you as spoilers but seeing you as making a positive contribution that can be a protective device for governments. But you are right ...

Mrs Lavarch: So you're saying the most we can achieve is influence?

Ms Gillett: The most we can achieve for the future is the spread of a culture represented by a fairly powerful committee in a very, very important role. I imagine that when any and all of the scrutiny committees were started it was not in the face of any welcoming gestures. They had to be jammed through in people's faces. It would be no different with the national committee.

Your second question was timeliness - just how quickly we could hope to ... We would have to, by moral suasion and other pressures as well, suggest that there needed to be that hiatus in the handling of a bill. So we would have to respond very, very quickly. There was one bill that came into our parliament when it wasn't even sitting. It came through one of the other jurisdictions and got through in that way. It is problematic, that timeliness of it. But if you did have a 2-3 week period ... How long would it take you, Andrew, to go through? I know it depends on whether it's regulation this thick or an act that's two pages long.

Mrs Lavarch: In parliament itself, for all NSL legislation, it becomes *[inaudible]* problems to the minister, not because of the issue in it but because it took so long to get the agreement in the first place, and they want to come in very quickly.

Ms Gillett: The argument that I can see is that because it is such an important piece of legislation and it does have time constraints on it, the national scrutiny committee would be saying, 'We're not going to stand in your way, but if you like give it to us so that we can make sure that it doesn't breach the charter that we have,' so that in the remedying of a problem they are not creating another one.

Essentially, the argument for creating the national body, formally or informally, is the same argument that we have used to create the other scrutiny committees that there are operating already. And it's going to be just as difficult, or more difficult, because you're actually trying to get cooperation *[inaudible]*.

Mrs Lavarch: The committees that are set up to scrutinise current legislation, that have the ability, conform to acts of their parliaments. We are constrained by our act. We can't scrutinise legislation until it becomes a bill before the state parliament, the same as you. Would that be a constraint on the national body, our legislation?

Mr Minson: We would amend our legislation to cover that. We are on side, I assure you. This is a step forward.

Ms Gillett: That needs to be understood.

Mrs Lavarch: Maybe we should put it on the next COAG agenda.

Ms Gillett: In all seriousness, I was going to go back and say to Steve exactly that. We need to raise this at COAG.

Mr Balch: I think you need to get a response from COAG.

Ms Gillett: There's no problem getting support - it's the device you use to make it happen.

Mr Redford: How do you see your committee operating in the context of mirror and model legislation?

Ms Gillett: To provide a scrutiny opportunity. Rather than mucking around again, why don't you just tell me what the problems are?

Mr Redford: No, I'm asking you. I'm just not sure why you want the model or mirror legislation. Explain to me. Convince me that it's perfectly valid.

Mr Homer: It's simply an ability to scrutinise before it becomes an act in any jurisdiction. That is the bottom line.

Mr Wiese: And inherent in that is an acceptance that it is a good thing for the Commonwealth to pass legislation that is going to then be implemented in a common way in every state. Somebody asked the question, what is the problem? I will tell you what some of the problems are. The first one – well, some of you may not understand what template and mirror and whatever are. Go to template legislation, which is the first example that we ever came across in WA. The template was done in Queensland at the end of 1992. It hit us, but it was done in Queensland. In template legislation the state adopts legislation that was put in place in that case in Queensland.

What flows from that is that if Queensland subsequently amends either the primary legislation or the subordinate legislation, each other state has automatically adopted those amendments without having any idea what is being put in place, without having any say in what is being put in place. You have virtually handed over your state parliamentary jurisdiction to another state or instrumentality. You have totally lost any control. That's template legislation.

The others aren't quite as bad. At least in the case of model legislation you in your state jurisdiction have the option of adopting or not adopting some or all of that legislation, in the same way that ...

Mr Redford: Why would we transfer our scrutiny role to a national committee when we already have ...

Mr Wiese: That's exactly the point. I'm saying we have got to go back beyond, behind.

Mr Redford: Let me finish, please. We already have the capacity to scrutinise model and mirror legislation because it goes through in its full form in each jurisdiction. Admittedly you are dependent on the quality of your existing scrutiny bodies. But why ...

Mrs Lavarch: Can I jump in there?

Mr Redford: Please! You two have had a pretty good run at this. Why would you want to transfer it? At the end of the day the political impact of that is to encourage this sort of legislation, because they will say: 'There is a mechanism there. We will adopt the mirror approach or the model approach.' And then when you attempt to scrutinise in your own local jurisdiction you'll be met with the argument: 'Hang on! Your representative was involved in a scrutiny process at a national level. Why are you bothering to go through that process again.' That's the problem I see with this committee applying to model and mirror legislation.

Mr Wiese: If I could finish my comments, the reality was that these different procedures, whatever they may be – I've got to say template legislation I will never wear or accept and I don't think any state should ever, because you totally hand over your ability to legislate to some other state or body. But in the others there are some good reasons why you would have a scrutiny process in there, and at the end it probably relates back to this, that federal ministers especially have an ability and do use that ability to say: 'If you don't put in place these particular changes or this particular legislation that we're putting in place, then we're not going to give you any money.' A classic example, I guess, is some of the water reforms that are currently being put in place.

So there is a very, very good reason for having this centralised body to overlook and have an input, to have a say. We should never abandon or give away our ability to have a say or have an input in there. But at the end of the day we've got to be very careful that what we aren't really doing is handing over our legislative ability to some of the other states. God help us if we ever lose the ability to make changes in our state legislation which actually reflect what happens in our state!

A lot of things happen in Victoria and NSW and Queensland in their legislation and, for instance, in their road rules, especially in heavy transport areas, that quite frankly are not applicable to WA's distances and type of terrain and the circumstances that we operate in. We have to have an ability at a state level to put in place our own.

Mr Redford: But at the moment you do have that ability, with the road rules.

Mr Wiese: Yes, we do. With model and mirror we do. With template you would not have that opportunity.

Mr Redford: Going back to my original question, how do you justify the establishment of this body - forget about template for the minute - for mirror and model legislation when we are dealing with the entirety of that legislation in our own respective parliaments?

Mr Wiese: Because in my opinion it still gives us an ability to have a say in that initial drafting and putting-together process. And if we can get it right at that stage we won't have to come back and make the changes when it hits our jurisdiction.

Mr Redford: We don't have that with our own legislation. When was the last time a minister knocked on your door and said: 'Bob, give us a hand to draft the legislation I'm about to bring in'?

Mr Wiese: About 3 or 4 weeks ago, in regard to firearms legislation.

Mr Redford: But you normally get the first whiff of this, either if you are one of the select few on the backbench committee or alternatively when you walk into the party room. So why do we need this extra for model or mirror?

Mrs Lavarch: With model and mirror, we're talking about two sets of circumstances here. For those states that don't scrutinise the timing legislation, this sort of body would give them the ability of forewarning or even a taste of scrutinising legislation before their parliament. For the delegated legislation, the regulations, I don't know what happens if you scrutinise the model ones in SA. To the extent that they reflect the intergovernmental agreement, the shutter comes up if you're suggesting an amendment or questioning it.

Mr Redford: But that happens anywhere. You question regulations and shutters come up anyway. That's part of the political process. I scrutinise mirror legislation in the same way as I do any other legislation.

Mrs Lavarch: We do too, and I am sure the others do as well. There's nothing in having a national body which I would imagine would prevent each state still doing its own scrutiny. It's an added process.

Mr Redford: Not with mirror or model. They're much different.

Mrs Lavarch: OK, what I'm saying is if the national body is put together and it scrutinises the model or the mirror or the template or the unification, it doesn't take away from each state's own committee. It's like an early warning system, that's all, and it might be that in that extra time your committee can still scrutinise.

Does anybody know, at a COAG level has it ever been on the agenda? At the COAG level, has the issue of our group's concern about national scheme legislation been raised?

Mr Hogg: Oh, yes. It's been discussed.

Mrs Lavarch: And what has been the response?

Mr Hogg: Well, it was interesting. It was put to COAG back in 1994, I think. There was an initial discussion paper - no, I'm sorry. It was referred to SCAG, the Standing Committee of Attorneys-General, in 1994 and they said it was a matter that they couldn't comment on. It was purely a matter for parliaments. It was put to COAG to be put on the COAG agenda. I think the Chairs of Tasmania and SA were going to hand their Premiers ...

Mr Blencowe: He was going to bring it up at the national level, but we had a change of Premier.

Mr Hogg: Yes, that was the problem. I think it happened in both cases. In Tasmania I think there was a change of Premier as well and for that reason it fell off. We didn't have a champion, you might say, in COAG to put it on the agenda. It was referred to our respective Premiers in 1997 to put on the agenda of COAG. As I understand it, it hasn't been put on the agenda. We didn't have that inside running. I think that's the trick, to get someone in COAG to attempt to put it on.

Mr Homer: I seek a bit of clarification. I understand what you are trying to achieve, but are you intending in the back of your mind that this body be a pro-active body that actually asks to look at legislation, that does things of its own volition, or is it something that is reactive and looks only at what is referred to it?

Ms Gillett: *[Inaudible]* in effect, national legislation that must be implemented on a state-by-state basis or in territories.

Mr Minson: Is it your view, or hope if you like, that it would have some powers of recommendation, or is it purely advisory?

Ms Gillett: It would be hard enough to establish it in an advisory role. To try and establish it with any effective baseball bat would just render its creation *[inaudible]*. No, just advisory would be enough to start.

Mr Hogg: The history is set out in 1.5 on page 2 of that scrutiny of national scheme legislation paper, I

think up to page 5. It outlines the history running through SCAG and then seeking COAG approval. Also it outlines the original models, the two options, at the back. There is option 1 at page 41 and option 2 at page 44 - different models, as has been mentioned. We're talking about 'complementary mirror legislation' and 'template or co-operative or applied or adopted complementary legislation' and 'referral of powers and alternative consistent legislation'. All those different types are set out at page 45 to 50. In talking about this area that's the bible. That's the history of the matter.

Mr Duncan: I have been secretary for 10 years and I have been to every meeting except one, the one in March. I just think this is a golden opportunity to get this thing off the ground. I commend the Victorians for raising it. I think what they're proposing is the only viable way to do it, and that is on an informal basis, maybe just starting off with scrutiny of bills and seeing how it goes, and then scrutiny of subordinate legislation.

Linda asked three questions: what is the purpose, are we too late and what about timing? Getting to broad principles, as parliaments we are presented with this uniform legislation by a bunch of ministers, or Chief Ministers or Premiers. They have got the *[inaudible]* of their collaborative efforts and they say to us: 'Here is some legislation that you cannot change.' The principle behind this is that as committees grouped together, and that is where our strength lies, we could say: 'Well, you're out of line with what you've just given us.' It's as a group - not just the ACT committee saying: 'We've got a problem with this bill.'

I would like to be able to get a mirror piece of legislation in, shoot it off to Andrew, shoot it off to James, shoot it off to Chris, and say: 'This is our bill. What do you think about it?' I'll shoot it off to Peter Bayne. We'll come back to our committee. We'll change our resolution format. We're not set up by an act, so it's a simple matter. I think Mr Hargreaves will tell me that if there's the political will to do it we simply expand our terms of reference. You guys might have to try and change your act. It's a little bit more difficult, but it can be done.

We would come into the parliament and we say: 'We've got problems with this particular piece of legislation because it offends our term of reference. And guess what - it offends the Queensland terms of reference on fundamental principles, it offends the Victorian terms, and it offends the Commonwealth terms of reference for their committee as well. And they're going to be reporting in due course to say to their respective ministers that there's a problem.'

Nothing might happen to that, by the way. They might rush through the legislation in a day. True, the timing in some senses is important, but it's not the be-all and end-all. The fact is that we have done our job. We, the creatures of the parliament, have reported back to the parliament: 'This is a problem. If you want to do it you can do it, but you're passing law that breaches our terms of reference.' That's an important step.

I think the fundamental principle is that they are taking away our legislative power by presenting us with this. They're saying: 'Don't worry about parliaments. We will make a law in Darwin or Adelaide or wherever when we meet and we'll present it to a parliament. The parliament doesn't matter - we can just pass it because it's uniform. And once we call it uniform no one can change it.' It's the principle that we may not change anything. It's a principle that has been generated here over the last 10 years. I think this is the way we could go ahead. I think it's well worth trying at an informal level.

As I said, there are lots of practical problems. There are different terms of reference, different acts, different standing orders, different parliaments, some of them bicameral and some unicameral. But I think if we don't start slowly and build up to it we might as well pack it away. We've been talking about it for a long time.

Ms Gillett: If we resign ourselves to a set of circumstances there will never a national culture of scrutiny established. I don't know how others feel, but I think there is generally a movement which partly is *[inaudible]* and there is a more uniform approach taken, providing there can be diversity in that as well. If it's going to keep moving in that direction and if we don't start to encourage a comprehensive scrutiny role ... We have to do something about it. Exactly as Tom said, we have talked about it a lot. If we allow ourselves to be stopped by what seems to be insurmountable legislative difficulty, monetary self-interest, power, anything, then it's just never going to get anywhere. We may as well say that honestly and get on with something else.

Mr Balch: How do we get early warning of what's coming up?

Ms Gillett: With the feds, say when template legislation is designed, I suppose what happens in COAG is that once there's been an agreement, as part of that agreement there is a decision made and they say: 'OK, SA gets to do it,' or ..

Mr Duncan: I think you'll find there's a meeting of Parliamentary Counsel. They follow ministerial

councils and COAGs around. Where a decision is reached at a ministerial meeting or COAG to draft some piece of law, the question of who will introduce it is by and large settled by the PCs. If it's a mirror piece of legislation they'll go away and share notes and stuff like that. If it's a template they designate WA or Queensland or ...

Mr Redford: You have 43 ministerial councils, not just COAG. Wouldn't the ministerial council resolve it at that ministerial level?

Mr Duncan: It's not decided by the draftsman of the bill. It's a matter of quite a deal of haggling. SA has had more than its fair share of originating such legislation because of our current government policy, which is that we will not to agree to template legislation. That's in the *Cabinet Handbook.* We will not agree to template legislation - end of story. So in a register of SA acts you won't be seeing any template legislation unless there's a change of government and a change of policy.

Mr Wiese: That 'unless' is an absolutely critical factor, because there will be those changes inevitably. And in many cases the incoming government and the incoming ministers have no idea of what the hell is going on in the background of many of these subjects that they'll address. That's when you get these changes put in place.

Ms Gillett: We agree scrutiny doesn't transgress in the policy area, but wouldn't it suit the policy of the SA government to be able to look critically at template legislation so that your argument against it can actually be ...

Mr Redford: No, we just won't sign it.

Ms Gillett: It's not a question of signing off on it. It's a question of looking at it and saying what's wrong with it, within the scrutiny context.

Mr Redford: I can agree with that, although I must say most jurisdictions seem to think they've got most of the answers. SA's position is we will not under the current policy agree to template legislation. There was one that went through recently, in the last 18 months. We did agree, but only on condition that we were the lead state. And as the lead state, all our existing scrutiny structures were in place.

Ms Gillett: Did that legislation introduce regulations?

Mr Redford: Yes.

Ms Gillett: So you would have been able to scrutinise the regulations, but not the legislation.

Mr Redford: We scrutinised the lot. We were the lead state with the legislation and the lead state with the regulations. The minister, the Attorney-General, has said that we will not agree to template legislation. Once any other state has a head start as the lead state, other than SA, we just walk away from it. So what you're seeing now is an increase in the amount of mirror and model legislation in national terms.

That begs the question, when we're going through the paper tomorrow, of what we do about existing template legislation and how you might scrutinise that, and any changes and promulgation of regulations pursuant to existing template legislation. What we need to do, and we haven't done this as a group, is identify what we're talking about. Unless we start getting clear and precise about what we're talking about, we will be picked off on any suggestion we put to establish a national body. You said earlier today that we perhaps need a secretariat with a staff of three or four people.

Ms Gillett: No-no-no-no!.

Mr Redford: I apologise - I misheard that. But at the end of the day I can see those who write cheques out on behalf of the taxpayer saying: 'Well, you justify it'. How much legislation are we really talking about? What legislation are we really talking about, and in what circumstances? What are the policies? I know our SA policies. At this stage I'm not aware of what other states' policies are. I do acknowledge that WA has a fairly independent attitude about these sorts of things. Before we start demanding that we establish any formal committee - and I'm not suggesting that we walk away from what you're saying about the importance of consultation between the various committees - we need to know what we're talking about, or we'll get laughed at.

Mrs Lavarch: I'll make another suggestion. Perhaps what we're really debating here is whether to establish an informal body immediately, and perhaps at the first meeting of that informal body each participating jurisdiction can come along with their idea about what is the role of that informal body, defining exactly what it will look at and how it will get down to those nitty-gritties. Perhaps we just have that threshold question: are we committed to meeting on a regular basis? Perhaps we have to have two or three meetings over this year to crystallise or clarify exactly what role that body will take.

Mr Blencowe: I must confess our government was very forthcoming. We knew what their attitude was to national scheme legislation, what schemes of legislation they would agree to. We were very surprised at the amount of information that they actually gave us. Maybe each state delegation should ask its Government about its particular policy...

We've got Cabinet guidelines since 1994 that say the state doesn't appreciate template legislation. Maybe if every other state has such information, that would be handy as well. If only two or three states do favour template legislation it's going out of fashion. A lot of the problem may be solved by that.

Mr Redford: I haven't identified any template legislation since 1994.

Delegates interjecting.

Mr Redford: We're always the lead state. It's your problem, not ours, you see. That's the point I'm trying to make. This is the question you've got to deal with. The financial institutions legislation was a template pick-up. Queensland was the lead state, in 1992. That's a long time ago. The difficulty you have, it's not just a fight with the executive on these things. It's not just that Attorneys-General think that they are the fount of all wisdom. They get put - in our case this is what happened - under enormous pressure by the business community themselves. Our Attorney-General said: 'I won't have a bar of this template. This has come from the other mob. I'm not agreeing to this.' And we had the whole of the financial institutions industry up in arms saying what a bunch of Neanderthals we were because we wouldn't agree to this template legislation. In the end that sheer political pressure won out.

Now, we're not going to be caught like that again with our current Attorney-General, and I doubt whether we'll get caught while our lot is in government. I don't know about the other mob. That's another issue. It's not just a question of us standing up to the executive arm of government. It's a matter of whether one state can hold out against the collective will and the collective desire of all the other states. That again is a very political consideration.

Mr Minson: We're not necessarily discussing template legislation. What Victoria has put forward is a model for our consideration which I'm not going to debate now. But there is no question that from time to time either a state or the Commonwealth is going to bring up the matter of the need either for uniformity or for harmonisation of legislation to make it nationally consistent. Frankly, I don't care which of those happens, but I suggest that unless we do this or something like it ... At the close of business tomorrow, we will have to have made a decision about how we're going to address it. Otherwise we are going to become irrelevant. We might as well not cross Australia to meet.

I don't want to see what Bob alluded to, and that is having someone say: 'Now there's a method to achieve uniformity, let's use it all the time'. But the people of Australia, I pick up that they get a bit frustrated when they cross borders and find that all the standards are different and so on. We've got to fix that, otherwise states will become irrelevant.

I don't think there's a problem with the broad concept of what's been put forward, but I want to sleep on it. We're not talking about technical legislation. It is part of a whole. The way it's progressed today is they go to COAG and they come away with some core provisions that become the master orders for going away and making our own legislation. That then goes back and it's got to be consistent with whatever they've decided they're going to do.

I think we ought to sleep on the model that's been put forward so that we can listen to the rest of the papers today and tomorrow and make a decision about it by close of business. We're sitting here to try to tap some method for state parliaments - not governments but parliaments - to be informed and to be able to scrutinise the legislation on the way and pick up the problems. If we can get to that by tomorrow night we'll have done well.

Mr Balch: You're talking about in-principle legislation which sets down principles that all of the states have got to adhere to. You're talking about getting input at that level. You want to have a say before we have to react to what's been done, before the principles are established in an act. We still get the opportunity to scrutinise it in our own parliament. That doesn't go away. It's the principles referred to in model legislation, before that's done, that set up the trend.

Ms Gillett: Effectively, as Tom put it, an opportunity for *[inaudible]*. So it's not just one state stepping out on its own, it may be a number.

Ms Newnan: Quite often - the friendly societies *[inaudible]* and there are a number of others - template legislation is not the issue. An intergovernmental group agree on core provisions that are going to be in an act. One state, Victoria for instance, may go away and draft it. They may introduce it before the other states get around to doing their draft, but these core provisions they agreed to are in each of the other pieces of legislation that are being introduced in every other jurisdiction. They allow them to have minor administrative differences that don't matter to the core provisions that they have agreed to.

What I'm saying is that if people don't cop template and if core provisions have been agreed to, and they're generally *[inaudible]* attachment to it *[inaudible]* drafting it, so the legislation could be introduced in Victoria, for instance, months ahead

before it is introduced in any other jurisdiction. So this scrutiny could occur in the state that introduces it first. That could be months, maybe half a year, before the rest of the states get around to introducing it. That may be *[inaudible]* that information if we could adopt a process where *[inaudible]*.

What troubles me still is the process from the group of ministers who set those principles in concrete. What also worries me is what if the legislation were drafted in a jurisdiction - not SA but, say, Tassie - where there's no scrutiny of bills committee. The only people who are going to know that that national scheme legislation is being done are Parliamentary Counsel. How do you convince Parliamentary Counsel that they are going to have problems with scrutiny committees that ...

Mr Wiese: It would have gone through Cabinet before it gets to Parliamentary Counsel. The ministers in Cabinet have to have agreed in principle to drafting legislation and that that legislation is going to incorporate a raft of things. That's your first step towards getting it.

I agree that we need to have that process in place along the lines of what Mary has outlined. But if you really want to tackle the problem you have to go back a long way before that. Before you go to a ministerial meeting where all the ministers are sitting around and discussing an agenda, somebody in the rest of the parliamentary process really ought to have an opportunity to see what is going to be discussed and to actually have some input as to what is going to be discussed. In many cases, they ought to be given an opportunity to tell the ministers: 'You're not going to agree to this.' It's very difficult for a minister, once it's gone through the ministerial meeting and they've agreed that they're going to go down that course, for them to come back to the state and then back away from that. They'd lose a lot of votes.

Even prior to the ministers getting to the meeting, certainly what happened in the police portfolio was that all of the commissioners with their advisers had got together and basically set the agenda that was going to be discussed. Luckily, we got a chance to put something on there. You need to be able to get an intervention - and this is talking about a political process - long before you get to anybody agreeing to drafting legislation if you really want to cut off some of the worst things that we have to deal with as members of parliament. I speak as a member of government. If you're in opposition, it's tenfold worse.

Mr Redford: Isn't the answer what they've done in the ACT with their legislation relating to ministerial council business? That opens up ministerial councils for scrutiny too in the legislative process. They do a lot of other things as well.

Mr Hargreaves: *[Inaudible]* requires ministers to advise all other members that he or she intends to sign agreements at ministerial council level. Maybe that's an opportunity for members to say: 'Hang on! We don't like that.' But I have to say that while that enables people to be awake to certain issues, there still is no mechanism, no solid mechanism, enabling us to say: 'Shoosh! Don't go to that meeting and agree to this thing.' I don't know whether it's ever been tested. Really it's just an information idea so that we don't get any surprises. We know the minister is *[inaudible]*. It would be very nice, if you had an interest in a particular subject, if the minister could say this thing had been through some kind of scrutiny process, because it doesn't actually go through our own ACT scrutiny process until it comes back. It's turned into legislation that pops up a couple of days before it's passed, by which time it's too late and then we get saddled with it.

Mr Jones: As a new kid on the block in these discussions, I think a high proportion *[inaudible]* adhere to very rigorous *[inaudible]* protocol. As an act of goodwill to achieve harmony, it would be a more appropriate avenue to follow. I also noted Mary Gillett's comments about the use of the Parliamentary Counsel. If the Parliamentary Counsel in their various checking and referencing in preparation of legislation were to observe this protocol and alert a centralised committee as to important legislation, we could perhaps sell this to various governments as a pilot scheme with a specific termination date to see if they can collectively benefit from this. It may be a way to go *[inaudible]* rather than trying to almost pressure people to sign off on an agreement which because our limited resources we probably wouldn't get right on the first drafting.

Mr Minson: There was discussion earlier about what the timing should be and what the attitude might be of the federal government. It's interesting to note that it is within the federal government's power to pass all sorts of bits of legislation and ram them down our necks. But it hasn't escaped my notice that they actually don't do it very often. The reason they don't do it is that it causes so much pain. We saw at various times - there the Tasmanian dam thing, there was Shark Bay in WA being declared a World Heritage area. So there may be times when it causes a big problem.

I think if this was handled the right way and the federal government was given a model that is eminently acceptable to them and achieves what we want to achieve, that would be a very positive place to start. Now, they might not take any notice of it. I

don't know. But the fact of the matter is that they certainly can have their win. Under section 109 or section 52 or whatever of the Constitution, they can have their win, but it causes them so much pain that they don't want to do it all the time.

They would much prefer, I suspect, to have an avenue that's a bit more formalised, that gets the states on side and irons out the problems before they actually introduce the legislation. I can't say that the federal government would welcome it with open arms, but I suspect that if they're thinking smart they would actually welcome *[inaudible]*.

Mr Balch: Before we go on I introduce my colleague John Elferink, who is another member of our Northern Territory committee. He has just flown out of a very wet central Australia.

Mr Elferink: My apologies for being late, folks. I may have to leave tomorrow as well, which is a damned shame. But most of my electorate is currently under water, so I'm sure you'll understand.

Mr Balch: I notice James Warmenhoven is out of the room. As part of this presentation, we were going to get an update on the Commonwealth position. Janice, are you able to do that?

Ms Paull: James would need to bring you up to date on the bill side.

BIENNIAL CONFERENCE 2001

Mr Squibb: Mr Chairman, when we last met in July we had a couple of questions we needed to resolve. One was the venue. There was doubt in some of our minds as to whether Parliament House in Hobart could accommodate the numbers. We've checked that out and we're quite confident that the meeting arrangements would be adequate. There is some slight doubt about the numbers for catering. I think that will depend on the number of acceptances. If it's not possible in the parliamentary dining room, I think we can make arrangements close by.

We came away from Sydney under the impression that it was the wish to stage the conference in July. However, since then we've had some feedback indicating that some would prefer to have it in February. Unlike the Northern Territory, we don't have just one wet season.

We haven't gone into any great detail. We have put together a conference structure but we haven't put names or topics etc because we want to determine the dates first. What we'd like to do today or tomorrow is to get an indication from the various states as to preferred dates. Once that's supplied we can go ahead then and make the final arrangements. We are open to suggestions.

Mr Marlborough: I think any time for WA between about December and March of next year is simply not on. We've got a state election which can probably fall at any time this year, but I think all the pundits would suggest probably sometime between December and February/March. Last election was the first week in December. My view is that it will be February/March, probably the first week after school goes back. It's a guessing game, but it's certainly not a good time for WA. We certainly wouldn't be able to come, I would think, in those circumstances, with a February/March election on.

Mr Balch: Victoria? We're getting you to nominate whether February or July are suitable.

Ms Gillett: February. We don't want to go to Hobart in winter.

Mr Squibb: Hobart is no different to Melbourne in the winter!

Mr Balch: New South Wales?

Mr Nagle: February.

Mr Balch: ACT?

Mr Hargreaves: We would have to go for February also. In the second part of the year 2001 elections both federally and in the ACT.

Mr Balch: Queensland?

Ms Lavarch: I'd say February. It's not only the Tasmanian winter. We'll be having our elections somewhere between May and the end of the year.

Mr Balch: South Australia?

Mr Redford: July.

Mr Marlborough: December's a very unusual time for us to hold an election. That's the first one I can remember in my political lifetime. It's normally in February, a week after the school holidays in February. But they can go up until May 2001.

Mr Balch: We've got an election on some time next year as well. We think February would be a better time for us. Whichever way you slice it, there's elections happening all over the place next year. More than likely, whatever date we have is going to impact on someone or other. At this stage most people are suggesting February as being the most appropriate time. I think we take the majority view.

Mr Nagle: There's a problem with late February. Federal parliament has to be sitting, and I expect that at least one state parliament, NSW, will definitely be sitting.

Mr Balch: We may sit at the end of February.

General discussion.

A delegate: What about the first full week of February?

Mr Nagle: The first full week is 5-10 February. When is federal parliament likely to sit, Janice?

Ms Paull: We didn't sit until the second week. Actually we had estimates on the 7th, starting last week. The chances are that they'll repeat the pattern next year. But we won't know until the end of the year.

General discussion.

Mr Nagle: People, if I may interrupt, the week starting 5 February is available, and more likely than not the Commonwealth will not be in session.

General discussion.

Mr Nagle: Say we start registration on 6 February and go through to 9 February.

Mr Squibb: That sounds okay. We'll now go back and start putting topics to the sessions that we've outlined on the draft program. Anybody wishing to have particular items listed, forward them to Wendy. I think we have carried over from the Sydney conference resolutions Nos 1 and 3. One may well be dealt with and out of the way this week.

Accommodation-wise, we expect that even at that time of the year there'd be sufficient accommodation within walking distance of the parliament. We can put some packages together and send them out.

Mr Redford: Let's hope the Premier of WA decides to go before Christmas.

Mr Marlborough: Normally if it's a February election, it's the first Saturday after school returns. I think that's when this one will be. That would be the 10th.

Mr Redford: When do you elect your committees?

Mr Marlborough: When the parliament goes back.

Mr Redford: How do you know who's going to come? Do you all come, or ...

Mr Marlborough: No one comes in that week. We couldn't go. It's the week of the election. And even the week after ...

General discussion.

Mr Duncan: Can I ask about the Commonwealth delegated legislation conference? It's due to be held in either Zimbabwe or Canada.

Mr Nagle: I was going to report on that tomorrow, but now that Tom has raised it, Zimbabwe has never delivered. We didn't expect them to. I was hoping they would because Victoria Falls in July is beautiful. The Canadians were very keen when they were in Sydney to host it. They said to us they were going to talk to a lot of people about it. We've e-mailed and faxed them, and we've made an arrangement now that I will be calling them tonight.

Mr Squibb: They would probably prefer to have it in their summer, wouldn't they?

Mr Nagle: They were thinking late July or August.

Mr Nagle: If neither one comes to the party, has anyone got any other suggestions where we may have it?

General discussion.

Mr Nagle: Malcolm just raised an issue: If we did have it in Canada in August, there might be a problem getting back to Australia because of the Olympics. Anyway, folks, I will ring tonight, speak to the Canadians and see what they have to say.

NATIONAL SCHEME LEGISLATION
Update of Commonwealth Position

Mr Warmenhoven: Mr Chairman, for one of the few times in my life I might have to be unhelpful. Basically, I haven't been authorised to speak on behalf of the committee at all. I can say to delegates that the committee hasn't really looked at the issue much beyond what Senator Cooney cited in 1996. Members haven't had a chance to have a meeting to consider the matter since we were informed that this meeting was going to take place. There hasn't been a chance in that period of time over December and January.

By default, I would say that may still apply, but it's a differently constituted committee to the committee which signed off on that position paper. So, in a sense, there's not really anything useful that I can say apart from that. My apologies.

Mr Blencowe: What was the government's attitude towards the proposal? Did they have any official statement on the proposal? Did the Attorney say anything? We had a report in terms saying he wasn't in favour.

Mr Warmenhoven: I think that's the upshot of the correspondence that's referred to, that led up to it. I don't know that there's a lot of enthusiasm for a super scrutiny committee on the part of the executive. But you ask me what the Commonwealth's position is. Basically I could only speak - if I were authorised - on behalf of one part of a Senate committee. Regulations and Ordinances I don't think has had a chance to meet to consider the Victorian proposal either.

Ms Gillett: No.

Mr Balch: I guess we were looking for some feedback on what, if anything, was happening. You've told us nothing has been done at all.

Mr Warmenhoven: I don't think much has been happening, although I think there is an awareness of the issue and the problems. It's just that I'm not sure that there are too many light bulbs with brilliant ideas at the moment.

Mr Balch: It was said before that the loss of certain personnel has taken away some of the energy for it and some of the history with it. OK, do we want any more discussion on that subject? I think, as Kevin said earlier on, it's really a matter now of having a night's sleep on it and coming back so we can make decisions tomorrow. He's right: we need to come away with something, or maybe become an irrelevance. Think about it, formalise some ideas, and come up with some sort of plan tomorrow.

DAY 2

Departure of ACT Delegates

[Delay in start of recording]

Mr Hargreaves: ... particularly grateful to them. I also wanted to say thank you very much to the Victorian parliament for providing something with substance for us to argue about here and hopefully out of which will come something constructive. I'm sure it will after the discussion we've had. As I have said before, the opportunity is before us to move to the next stage, from just talking about it.

I express my endorsement for the pilot program and also express a view that legislation going back decades, this may very well be something we should consider whether it is a good idea. I see it as just part of the process, part of the consultation process. I also see this pilot providing us the opportunity to see whether there is a model which can be applied to the three stages of parliamentary involvement in the scrutiny of our own legislation, being involved in those national implications and also others. I think this model workable. I think it affords us an opportunity to check it out, to see whether or not we can all benefit from the task of making the effort.

Mr Chairman, thank you very much for your indulgence and thank you very much, members, for yours. I also express our appreciation to the staff here at Parliament House and the support they given us. I think it has been exceptional.

NATIONAL SCHEME LEGISLATION
Queensland Case Studies

Mr Redford: It now gives a me great deal of pleasure to introduce Linda Lavarch. Linda, I haven't got your CV, so I can only say what I know about you. Linda has been the Chair of her Scrutiny Legislation Committee since the last Queensland election. I first met Linda at a meeting in Canberra. I'm sure we will listen with interest to the information she provides. She is a legal practitioner by qualification *[inaudible]*, and it takes one to know one. I'm sure that from her scrutiny of national scheme legislation case studies we will all learn a great deal.

Mrs Lavarch: Thank you very much, Angus. Before I deliver my paper, I express my thanks to Steve Balch and the Northern Territory committee for their hospitality, and also my sincere gratitude to Peter Nagle and the NSW committee for making this meeting happen. I think you have been the driving force. We still have a resolution which we can bring up at the next biennial conference without anything really happening with it. I hope that by the end of the day we will have advanced, that the resolution is something that we will be working towards making happen.

I have a paper which has been delivered to everybody in relation to the national scheme case studies. Given the discussions we had yesterday, rather than just deliver the paper I will go through some highlights. You will have time when you get back home to sit and read it in full. I want to hand over some of my time on the agenda to the ACT. Out of discussions yesterday and this morning, their act in relation to intergovernmental agreements has been brought to my attention. I think it should be for the benefit of everyone here. They through that act may have an ability to be our earliest *[inaudible]* with national scheme legislation, I think all of us will admit, by the

time we get it to impinge on the contents of a particular bill. Is everyone happy with me doing that? I think you will find it very interesting.

Queensland has only had the Scrutiny of Legislation Committee scrutinising primary legislation since 1995. Going back through the reports of committee meetings since 1995 when it has encountered national scheme legislation is actually a history lesson in tracing the work that has been done at a national level through scrutiny committees on the approach to national scheme legislation.

Our initial encounter with national scheme legislation was with the *Competition Policy Reform (Queensland) Bill 1995*. The committee went through the bill and scrutinised the bill, and made only brief reference to the fact of its status as national scheme legislation. Two years later, when we encountered the *Electricity – National Scheme (Queensland) Bill 1997*, which was a template bill coming out of SA, the committee devoted its whole report on that bill to the consideration of the national scheme aspects. In that time, we had the position paper that came out of the Adelaide conference and information-sharing at that national level. In that way, at a committee level, members have become more informed and shared the information nationally about their views on the uniform national scheme legislation *[inaudible]*.

At the time of the *Electricity – National Scheme - Bill*, the committee's report concentrated on its concerns over the amount of material that was circulated to members. The comments were made in relation to the difficulty with national scheme legislation of influencing amendments to the bill. Of course, we were totally inhibited by the fact that it was national scheme legislation. The committee did spend some time concentrating on the fact that the bill got introduced into parliament without the SA legislation with it, and without explanatory notes on some of the clauses.

The committee recommended that the sponsoring minister amend the Queensland legislation so that any future amendments coming out of SA would be tabled in the Queensland parliament, and also insist that members be given copies of the SA act and the schedule to that act. That one also had a code of conduct. The other thing that the committee asked in that report was that further consideration of the bill be delayed until the full text of the proposed law was made available to members of parliament and to the community. They requested the minister consider inserting into the bill requirements that in future proposed amendments from SA law applied by the bill be tabled and regulations made by SA pursuant to the law be tabled.

The bill was actually debated and passed two days after the committee's report. But the minister did move an amendment which incorporated the text of the National Electricity Law into the bill and proposed a requirement that future amendments to the law and regulations by the SA parliament be tabled in the Queensland parliament.

Very shortly after that, we had the *Friendly Societies (Queensland) Bill*, which was template legislation coming out of Victoria. The committee reported in similar terms again and secured that amendment again. The interesting thing was that the amendment didn't come automatically. The committee had to ask for the amendment. But there was a very short timeframe between those two bills. That one had a code of conduct following it, and the committee requested the Treasurer to incorporate the code into the Queensland bill. The Treasurer at the time, Joan Sheldon, declined to do that, but she did provide copies of the Victorian act to all members of parliament.

This bill is worth mentioning because it also raised another issue relevant to the national scrutiny of national scheme legislation. The explanatory notes that went with the Queensland bill stated:

> *Care has been taken in drafting this bill to ensure that no aspects of the bill infringe upon fundamental legislative principles* [these being the Queensland statutory requirements for legislation, which are overseen by my committee]. *The Victorian legislation which this bill will apply has been reviewed by the Victorian Scrutiny of Legislation Committee. In their* Alert Digest No 8, *that committee raised no objections to the contents of the* Friendly Societies (Victoria) Act *and code. The Victorian committee operates under similar guidelines to Queensland's Scrutiny of Legislation Committee.*

Well, the Queensland committee didn't share that optimism. The committee at that time reported on several aspects of the bill and responded to the assertion that it had already been scrutinised in Victoria by arguing that although the terms of reference of the two committees were similar there were also substantial differences. In particular, the committee noted, the Queensland terms of reference included a list of specific examples and the matters it had decided to report upon all came from that list.

The committee at that stage sought to take advantage of this matter by drawing the attention of the Treasurer, who had introduced the bill, to the benefits of a scheme for national scrutiny of national scheme legislation. In the committee's report they espoused the proposals coming out of this position paper. The

Treasurer's response, perhaps predictably, expressed interest in the possible costs associated with such a scheme. The committee referred the Treasurer to the 1996 position paper, *Scrutiny of National Schemes of Legislation*, and expressed great interest in discussing the matter with the Treasurer or her representatives. Guess what? The Treasurer didn't respond. She never did respond.

Then we had the *Gas Pipelines Access (Queensland) Bill*, which was another template coming out of SA. This bill applied the SA gas pipelines access law as a law of Queensland. The relevant law consisted of provisions contained in schedules 1 and 2 to the *Gas Pipelines (South Australia) Act*. The bill included an attachment setting out the full context of the SA act. The committee conceded that the requirements imposed by Queensland's *Legislative Standards Act* in relation to explanatory notes for Queensland bills probably did not require the provision of such notes for the clauses of the attachment. But, given the significance of the act, they considered explanatory notes on the SA laws essential to enable members of the Queensland parliament to effectively examine the provisions before voting on the bill.

The sponsoring minister, to his credit, complied to a reasonable degree by obtaining and providing to members copies of the SA clause notes on the provision of the act. However, he could not assist in relation to schedule 2 because the SA act didn't have clause notes dealing with it. It was a significant part of the legislation but it didn't deal with it, so members of the Queensland parliament couldn't be informed about that.

Those are examples of template legislation. Last year we encountered what we call the 'least objectionable' form of national scheme legislation. These are the ones where it is substantially uniform legislation. There is an agreement on what is to be included but, as in the case of the audio-visual legislation, it is actually drafted in relation to our each jurisdiction. We suggested some amendments to that bill. The Attorney-General's response was:

> *Although the bill does form part of a uniform interstate scheme and draws substantially on the Standing Committee of Attorneys-General (SCAG) model bill, it does not merely slavishly adopt the uniform scheme. Rather, it innovatively adopts the thrust of the scheme while at the same time making appropriate modifications to suit the needs of this jurisdiction.*

But, even while saying that, he didn't offer to amend the bill in any way.

Then we had the *Road Transport Reform Bill*. After hearing Angus on the fact that SA won't cop template legislation coming out of another jurisdiction, I thought maybe that had some influence on what happened with the *Road Transport Reform Bill*. I may be wrong. What the minister said there was:

> *I am pleased to advise the committee that new intergovernmental arrangements have been prepared which amend the processes for development of the National Road Transport Law. Previously, intergovernmental agreements required that states and the Northern Territory should adopt the National Road Transport Law via 'template' legislation, simply applying the legislation of the host jurisdiction. Queensland has never followed this course. I am pleased to advise that the template approach has now been formally set aside.*

In the report we go on to say what the agreement provided and why it became substantially uniform legislation rather than a template.

My analysis of those comments is that they do raise questions whether the more prescriptive forms of national scheme legislation such as those involving 'mirror' or 'applied' legislation could be used as less frequently. I think that response actually raises the question whether they do need to use those forms when it could be done in that same way.

We raised a question about a Henry VIII clause in the bill and the minister demonstrated his flexibility by agreeing to our recommendation and removing that Henry VIII clause. But with that one - and I think it will be raised here further today - the sting is in the tail. While the legislation was very flexible, the regulations are not. As I understand it, they are implemented in a predetermined form.

Mr Redford: Can you expand on that a bit, on how the regulations are inflexible?

Mr Hogg: Perhaps I could clarify that. My case study talks about the manner in which the regulations have been drafted. You will see a reference to it there. They certainly adopt the Australia Road Rules, but they leave certain matters to be dealt with by the law of each jurisdiction. This is taken from the explanatory notes to the regulations in NSW:

> *Many of the rules provide for another law in each jurisdiction to define terms used in the rules for the purposes of application of the rules in NSW, to permit things to be done in NSW otherwise prohibited by the rules or to*

exempt persons in NSW from compliance with the rules.

I list there the different types of matters that that applies to. So there is a degree of flexibility built into the agreement in respect to the Australian Road Rules. But that creates problems, unfortunately, which are also referred to in my paper. Perhaps it might be best if I read a letter from the Chief Stipendiary Magistrate on problems it creates in terms of the number of different instruments that they now have to apply in construing the law relating to road usage in NSW.

Mr Redford: Just describe to us in a practical point how your committee is dealing with them, has dealt with them or proposes to deal with them.

Mrs Lavarch: In our committee's experience they are coming through in dribs or drabs. Perhaps the best example may be in relation to our regulations on regulatory impact statements. If it's a significant regulation, it carries the need to have a regulatory impact statement, which puts additional costs on the community. Of course, there is exemption from that if it is uniform regulation. If it's a uniform scheme, they don't need to do an RIS. We are getting them through in dribs and drabs, and they do raise some significant issues. But because they're uniform regulations they say that it's predetermined. Even though they have the flexibility to put the Queensland standard on it, it is still difficult.

Mr Hogg: There's a timetable for phasing out state variations. In NSW our three-tier parking system has got to be phased out by 1 December 2006. We have 'no standing' signs in NSW as well as 'no stopping' and 'no parking' signs, whereas other jurisdictions only have 'no stopping' and 'no parking' signs. We have to phase out our 'no standing' signs. So there is provision for some state variations, but usually there is a timetable on them.

Mrs Lavarch: Basically what I am saying is that while they sanitise the act so that it isn't really national scheme legislation and it has all the flexibility of a state-based act and can be amended, the thing is that all the regulations carry with them the difficulties of a national scheme in relation to scrutiny or complaint about them. They didn't actually come up at ministerial council level, where you have a palatable act. The sting comes through the other side.

Quickly I will go through the conclusions we can draw after four years. I think all we can say is that we have made minor gains at the margins. Primarily, the committee has improved the standard of information provided by ministers to the members, tabled in the House. Explanatory notes to NSL bills now tend to at least address the NSL issue, where before they just ignored it that negative aspect of the legislation. They also address how the bill impacts on the fundamental legislative principles.

Mr Elferink: Explanatory notes - do they form part of the second-reading speech and find their way into *Hansard*?

Mrs Lavarch: No, they go with the bill when it is introduced. The minister does the second-reading speech later, so they are not in *Hansard*. Under our *Legislative Standards Act*, the minister who brings the bill in has to circulate the explanatory notes it to the members.

Mr Elferink: Are the explanatory notes quite a different thing to the second-reading speech?

Mrs Lavarch: Yes, very much so. They have to explain clause by clause what each clause means. Most times, the explanation of the bill is actually inside the explanatory notes. Nine times out of ten the minister's second-reading goes through what consultation they've had. And then they have to address the fundamental legislative principles. In the statute series they have with the bill they also have the explanatory notes series as well. But it doesn't actually get recorded in *Hansard*. So in the Northern Territory the second-reading speech is the explanation.

Mr Elferink: Well, we do get an explanatory note on the legislation that comes through our committee, but I was wondering what the relationship in your jurisdiction was between explanatory notes and what is said in the second-reading speech.

Mrs Lavarch: It's quite complex. One of the goals of our committee is to scrutinise explanatory notes. One of the issues we raise is whether the explanatory note is sufficient. A cause of common complaint is that they just regurgitate them.

Mr Elferink: Our explanatory notes are not public documents. Ours are only released at the discretion of the minister.

Mrs Lavarch: Ours can be used in statutory interpretation and as documents in court.

At an information level, we have made gains at the margins, getting more information to members. We have had limited success in amending anything at all. There hasn't been an example of true national scheme legislation where we have influenced any amendments whatsoever. We continue to be *[inaudible]* informed so that the members know the bill is fully scrutinised. We don't just say: 'It's national scheme legislation, so there's nothing we

can do about it.' We do actually still scrutinise it in full. Whether that has had an influence, who knows? One can live in hope.

That is the Queensland experience. Thank you for the opportunity to talk about it.

Mr Redford: It does provide a useful insight, perhaps in some cases a shared insight, into some of the difficulties we have. I thank you for the time and thought that you have obviously put in to this. Has anyone any questions of Linda *vis-à-vis* her paper?

Mr Wiese: Is the Minister for Transport's position as enunciated in the paper on page 8, where he's saying, 'We don't follow template legislation,' the position of the Queensland government?

Mrs Lavarch: Until we got that response, I wasn't aware - I'm not personally aware that there is a stated position now, maybe at Cabinet level.

Mr Wiese: Have you followed up on his statement, as to whether that's a Cabinet position or not?

Mrs Lavarch: I must say I haven't, but I will. We haven't had a template since we've been elected to government. I just wonder, after hearing Angus yesterday, whether SA has influenced other states in relation to templates. It would be interesting if we all go back and inquire as to our state's position in relation to templates. Maybe we won't see templates in the future.

Mr Marlborough: It does seem to be coming through in your paper that the process has had some impact on ministers. They may all get together and view nationally that the way forward is template, but when they go back to their states, they come up with the old parochial state arguments that prevail. They have to listen to that. They're part of a caucus situation. They're probably going to future meetings and saying: 'We ought to be a bit more flexible. It's just not going to work, whether we like it or not. We've taken it to the states and it's been rejected for these reasons.'

Mrs Lavarch: Yes, I think there's a vague consciousness.

Mr Marlborough: You seem to have a committee position that reflects typical committees at state levels. They're mainly opposed to all sorts of federal interventions. And then you have a minister who's reflecting that. We've got to take notice of that.

Mrs Lavarch: In our committee's charter we have to uphold the institution of the Queensland parliament. That's one of our terms of reference. So that flavouring comes through all the time.

Mr Marlborough: You need template legislation to remove institutions of parliament. Get federal legislation which says we shouldn't do that at a state level. Look at Australia as a nation.

Mrs Lavarch: Why don't we abolish the states while we're at it?

Mr Nagle: We are the ones who allow this to happen, each of the states. You can't blame the Commonwealth, if we allow it the power.

Mr Wiese: But it seems to me that that paper indicates that probably with all the right intentions at a federal level they've attempted what they see as the best way forward on a piece of legislation. Transport across the states, you can see all sorts reasons why it ought to be as standard as possible. They've gone back to the states and run up against all the parochial arguments that always happen at state level. They've got back together again and said: 'It ain't going to work. We've got to be more flexible.'

Mr Redford: I think you're not quite correct. I think probably what's happened is that people around this room, in our respective caucuses and party rooms, are saying to our Attorneys-General: 'This is wrong. It undermines the sovereignty of our respective parliaments and we don't like it. They then go to ministerial councils and say to each other, I suspect: 'I don't want to listen to a lecture from Redford in the party room about template legislation. Can't we just back off and have as a model?' I expect all Attorneys have their own Redfords to lecture them in the respective party rooms and caucuses. So I suspect they do it because it's easier to achieve their outcomes from a political perspective. Because I'm not the only one in my party room, and I'm sure you're not the only ones in your party rooms, who are concerned about protecting the sovereignty of our own parliaments.

Mr Hogg: I was interested in the classification of template legislation in our original position paper of October 1996, on pages 47-48. I think when we've spoken of template we probably talked about those cases you mentioned yesterday, Mr Chairman, where amendments are adopted automatically. But there's a second class, and I think that the Australian Road Rules, at least so far as they're implemented by regulation in NSW, falls into that class. That is when the amendments are enacted separately and the states have some control over the amendments. I think this classification is probably awkward now, given the way that templates are being regarded as something undesirable. But if we look at the second model of templates, it probably is more common than the first. And perhaps that was the case you were talking about earlier, not having been enacted in Queensland - the

first one, probably, where all the amendments are adopted automatically.

Mr Redford: I don't know how it is in other states, but generally speaking our committee and our respective houses of parliament, dealing with regulations, don't have any power to amend. They only have the power to disallow a whole range of legislation or regulations. So you've got a 400-clause body of regulation which is already in existence - everybody's applying it out there in the community - but three clauses in it get right up your nose. So you're confronted as a committee, and indeed as a house of parliament, with the option of disallowing a whole set of regulations because three minor issues get up your nose.

Generally speaking you're bludgeoned. The political reality is that you just let that one pass, even though you don't like it. That's something that we all need to work out, how we're going to deal with that sort of thing. It takes a pretty strong presiding officer of a committee to stand up to the executive and say: 'I'm going to disallow 150 regulations because clause 149 completely offends against any principle that our committee adopts.' That's the difficulty.

Mr Hogg: You don't have the power to disallow regulations in part? In NSW that power exists, and I think it does in a number of other ...

Mr Minson: And in WA.

Mr Redford: That makes it a bit easier for you guys. It's very hard for us.

Mr Wiese: My question to Linda is, has either the committee or the parliament endeavoured to amend any of this so-called uniform legislation as it's progressing through the House? And have they had any success, or is it a matter of numbers and you just can't do it?

Mrs Lavarch: Given that Queensland until just recently had a minority government, the amendments made back in 1997 were in relation to having amendments made in another jurisdiction tabled in the House. The information-sharing, I'm not aware that there were any substantive amendments to it. One of the things with our Scrutiny of Legislation Committee is that it represents all people in our Chamber. Even though I'm a government member in the chair, I don't have a majority on it. There's independents, opposition and government members. The independents inform themselves and the opposition members go back to their party room. There's a general understanding and acceptance that the minister has difficulty in amending the substantive parts of the legislation. I think that is well understood. At the end, we've just made a couple of amendments. These later examples, the ones that the model bills, *[inaudible]* the Queensland standard. We've had, as I said, the Henry VIII clause taken out. So there is the ability there.

NATIONAL SCHEME LEGISLATION
NSW Case Study

Ms Gillett: Greg Hogg is going to take us through the Australian Road Rules as a case study. Greg is the project officer for the Regulation Review Committee of NSW. He is also our elder statesman, the longest-surviving serving officer in the difficult but rewarding job of scrutiny.

Mr Hogg: Thank you, Madam Chair. As we've discussed some of the preliminary matters for this paper, I won't go over them. Basically, it's another form of national scheme. The two issues that the paper is mostly directed at are a cost-benefit assessment through the regulatory impact statement process, which is required under the *Subordinate Legislation Act* of NSW, and as part of that process - perhaps the most important part, I might say - consultation.

And at the end of my paper, I'd like to read from one of the public submissions on the road rules, and the legislation in NSW that adopted them. It's the submission from the Chief Stipendiary Magistrate which shows that if we had the idea that uniformity and national scheme legislation was going to consolidate and make plainer the laws in a particular field, we've got the wrong impression. They're more complex, they're in several more instruments than they were in when they were part simply of the NSW law, and they're more confusing, more difficult to apply. If we have that notion that in spite of the difficulties of parliaments being able to have an active input into the making of national scheme legislation, we nonetheless end up with a consolidated set of laws that are user-friendly and easy to apply, I think we've got the wrong impression. This will be seen from the Australian Road Rules.

The explanatory note to the regulation says:

> *The objects of this regulation are to incorporate the Australian Road Rules, published by the National Road Transport Commission on 19 October 1999 and approved by the Australian Transport Council, into the law of NSW.*

What that means is they're ruling off any further amendments, so far as automatic adoption. In other words, it's not the first model of template legislation we were discussion earlier. It's not automatically

accepting any amendments that are made to those road rules that were adopted on 19 October 1999. You adopt them as they were then, and any further amendments that come along have to go before the Australian Transport Council.

The Australian Transport Council is a ministerial council. It's one of those - I think there are 43 - ministerial councils that look at all national scheme legislation. They represent the various portfolios from around Australia that deal with particular bodies of national law. So you have one on food, for example, with the Food Code.

That ministerial council has a bureaucracy which serves it which in this case is a rather substantial one. It's called the National Road Transport Commission (NRTC). That's responsible for the drafting of the road rules. It takes advice from the respective executives from around Australia and also has a substantial staff to assist in the preparation of the laws.

The Australian Road Rules cover the basic requirements that drivers, motorcyclists, cyclists and pedestrians need to follow in using the road system. They don't cover the field. They enable other laws of the states to deal with driver licensing, vehicle registration, roadworthiness, drink or drug driving, driving hours, logbook requirements and carriage of driver licences.

NSW will retain and phase out over seven years a few existing regulations which are inconsistent with the Australian Road Rules, such as those aspects of its parking system that provide for 'no standing' signs. I referred to those earlier. By 1 December 2006, all existing 'no standing' signs will be replaced with 'no stopping' or 'no parking' signs. You might think that's a pretty small matter, but when we come to the RIS you'll see that in dollar terms it is absolutely substantial. We're talking there about a figure ranging from $6m to $30m to convert 'no standing' signs into either 'no stopping' or 'no parking' signs. It's absolutely incredible to think that that's the price of uniformity.

This practice of phasing out certain inconsistent state variations from national scheme legislation over a particular timeframe is usually a requirement of the national agreement governing the making of the legislation. The regulation is also cognate with the package of reforms introduced by the *Road Transport (General) Act*, the *Road Transport (Safety and Traffic Management) Act* and the *Road Transport Legislation Amendment Act*. Linda referred to the national scheme principal legislative area. My three acts deal with different aspects of road safety and as you'll see from the comments of the Chief Stipendiary Magistrate, they tend to complicate the picture.

When the package was passed in June 1999, the committee noted that it amended Schedule 3 to the *Subordinate Legislation Act 1989* to provide that proposed principal statutory rules concerning matters involving the substantial implementation of the nation agreement to make the Australian Road Rules that have been the subject of regulatory assessment are exempt from the requirement under the act for the preparation of a regulatory impact statement for a proposed principal statutory rule. The committee hadn't been consulted on that amendment despite an earlier undertaking by the Premier, given in 1997, that where practicable he would have his officers undertake informal consultation with the committee before bills which change procedures on regulations are introduced.

One of the committee's concerns was that our *Subordinate Legislation Act*, which sets out the requirements for officers preparing RISs, had been amended on several occasions to exclude particular regulations. The committee was very concerned about that because there was already a procedure in the *Subordinate Legislation Act* for regulations to be made, after having informed the committee, which exempted those instruments.

What had been going on, they were making by way of principal legislation, without consultation, amendments to exempt instruments when there was already a procedure to make regulations exempt, with full information, in the act. So you might say it was a subterfuge.

They were putting in principal legislation matters that were meant to be dealt with by way of regulation, at the same time informing the committee.

The explanatory note says:

> *Although statutory rules that are substantially uniform and complementary with the legislation of the Commonwealth or other states are already exempt from the requirement for an RIS, the exemption does not cover statutory rules made in NSW before the relevant legislation is introduced in the Commonwealth or other states, and does not cover nationally-agreed provisions that are implemented in NSW by statutory rules where neither the Commonwealth nor another state has implemented the provisions as part of its law.*

This is of some concern, particularly if it's to be used in future cases, as the national agreement could well provide that each state is to substantially adopt its

own law with the exception of a few minor national provisions. In such a case, the bulk of the regulation would escape assessment at both the national and state level.

Nevertheless, a state regulatory impact statement was prepared for the regulation. The Minister in the Upper House having responsibility for roads gave an undertaking that, notwithstanding that this amendment had been made, an RIS would be prepared.

However, it's just an RIS in name only. It doesn't take the assessment very much further than the national RIS that was prepared for the Australian Road Rules by the NRTC.

The RIS acknowledges that the *Subordinate Legislation Act* requires that alternative options for achieving the objectives of the regulation must be considered. However, it states that NSW has agreed to the development of nationally-consistent road law under the arrangements coordinated through the NRTC, and the approach of this legislation is to make minimal changes needed for nationally-consistent road law. The RIS indicates that any alternative must imply greater changes to current NSW law than would result from the proposed regulations and would go beyond the purpose and objectives of the proposed regulations.

Therefore, notwithstanding the undertaking to do a state RIS, the fact that any alternative might vary from the existing state law was seen as preventing any assessment from taking place.

What it means effectively is that the old traffic regulations have been rolled over with minimal changes and without any identification of the alternative options for achieving their objectives. More importantly, there is no identification of the options that would achieve greater national uniformity. That was the object originally, of course. One would have thought that at least they could have assessed objectives that might achieve greater national uniformity. But that went without being done as well.

The RIS states that the costs of adopting the Australian Road Rules in NSW law are outlined in the NRTC's RIS. So again, the state RIS is just referring back to the Commonwealth RIS. As for the state variations adopting the existing NSW law, the RIS states that the proposed regulations will not add to the ongoing costs and that the introduction of this major reform with minimal change must result in minimum cost to achieve the objective. I don't know how many states who have RISs get this argument from time to time, but we get it quite regularly - the idea of marginal costs being the thing you've got to assess, rather than total costs.

As you are aware, there are staged repeal programs in a number of states. As the old regulation gets repealed, they might remake a new one, perhaps in substantially the same form, or they might vary it slightly. And what they're meant to do is actually assess the total cost of that new regulation. But what we frequently get is an argument: 'We've changed clause 3 from "report every six months" to "report every year". This won't add any substantial costs to the existing regulation. The marginal cost is nil, so we don't really have to go any farther.' But they're meant to assess the total cost of the original regulation and the total impact on that of the new regulation. It doesn't matter whether it's an entirely new regulation or one that's slightly amended. You've got to assess that total impact.

But this argument is frequently made in NSW and the committee frequently finds that the RIS just hasn't been done properly. The argument was mounted in this case as well, that only the marginal costs were unimportant, therefore no impact. However, clause 1(c) of Schedule 2 of the *Subordinate Legislation Act* of NSW requires the total costs and benefits of the regulation and its alternatives to be assessed, and not merely the marginal costs and benefits or minor changes to the existing law.

Consultation is the most important aspect, I would say. An extensive consultation program is set out in the RIS. However, the parliament's own road safety committee, Staysafe, was not included. I think a number of states have road safety committees - Western Australia, Victoria, Queensland. One would have thought that such a committee would have been consulted on road rules, as their primary concern is road safety. It's nice that the Regulations Review Committee was consulted and had to look at the RIS, but these are expert committees of parliament whose sole function is to review road safety issues and determine the best strategy for reducing the road toll. In this case, it was particularly bad because the committee was given an undertaking that consultation would take place. It didn't. The Roads and Traffic Authority (RTA) said that it would take place, or it had taken place at a national level through the NRTC, but it hadn't.

It's what's called 'captured consultation'. I think it was first termed that by the Administrative Review Council back in 1992, when they prepared their proposals for what became the *Legislative Instruments Bill*. A number of departments, rather than putting a proposal out for general public consultation and with the relevant parliamentary committee, will consult with the 'usual suspects', and they're frequently termed. They might have a

council that they've formed, representing a peak group. The dynamics of the group have been worked out over a number of years and they're seen as being a substitute for broad public consultation and, indeed, consultation with the relevant parliamentary committee. Well, it's not good enough. The ARC said it wasn't good enough in its report back in 1992.

Of course, the Regulation Review Committee takes that view as well. The whole philosophy of the *Subordinate Legislation Act* is to put it out for broad public comment and to seek the broadest possible view to determine, as much as anything, whether the impact that has been assessed in the RIS is in fact the impact that the public perceives it to be. Very often, the comments will come back from a consultation program of an RIS and they'll say, 'This just doesn't make any sense. We've assessed the impact on our industry alone to be $50m, whereas the RIS says it's a few thousand.' We've seen a few cases of that nature.

Mr Redford: A classic case with the road rules was the licence disqualification of the owners of trucks who break the law. The consultation process took place with four of the major road hauliers in the country. Yet in effect that legislation is going to get the little one-truck operator. And they're quite happy to have the removal of the little one-truck operators and their trucks from the road. It doesn't just take the driver off the road, it also takes the truck operator. Someone like Scott Transport or that other fellow that runs football teams that loses grand finals, Lindsay Fox, he's got 100 trucks. So if you take one of his trucks off the road, tough - he's always got one in the garage being fixed. But if you're a single-truck operator, then it impacts and takes your whole livelihood. When we pointed it out to the minister, the minister said: 'Well, we consulted. We consulted with all these groups, like Mr Fox.' And they were all sitting there saying: 'Jesus, we saw this mob coming!'

Mr Hogg: If you look at the people who made submissions, we've got the Motor Traders Association, the EPA, NatRoad Ltd and, as I mentioned, the Chief Magistrate of the Local Court. Again, it's probably directed to the bigger end of the industry rather than the broad public.

Now I'll go on to the Commonwealth regulatory impact statements. Copies of two RISs produced by the NRTC were provided to the committee with the state RIS. On a preliminary examination of them it would appear that they concentrate on the costs to government rather than identifying compliance and social costs to the public. Nevertheless, as RISs, they're certainly better than the one prepared by the state.

The total cost of implementation of the rules in NSW is said to range between $24.381m and $50.083m. Those figures alone make you wonder how good is this RIS if it's got that kind of variability. The reason for it, of course, is the change from the three-tier parking system that I mentioned earlier to a two-tier parking system. And depending upon the speed with which this is introduced, it is said to cost between $6m and $30m.

If we're looking at that major cost, one would expect a better program in mind in terms of implementation, I would think at the ministerial council level, so that we didn't have that kind of variability which can throw the cost to the public, you know, way out. It's a variability in an RIS that I've never seen before, and it makes you wonder whether it's been properly prepared.

Mr Redford: In NSW, who's the responsible authority for actually carrying out that work?

Mr Hogg: The RTA is. The RTA did prepare an RIS, but these two were prepared by the NRTC. These two are the national RISs on the road rules, and there was a separate state RIS. In my opinion none of them are much chop.

I should say that at the Commonwealth level there's no parliamentary oversight yet because, as we were discussing yesterday, there's no *Legislative Instruments Act* as yet. And indeed, there's a question of whether they would look in detail at the cost and benefits of the RIS in any event. What does happen is an administrative oversight of the draft RIS by what's called the Office of Regulation Reform. And that's a strange system. It performs the function that was referred to by the OECD, of being a kind of centralised advisory and training body in preparing RISs. But they only look at the draft RIS. They can only make recommendations and ultimately, when the final RIS is prepared, they never get to see it. They only get to see the second-last draft essentially. They never get to see or sign off in any formal sense on the final RIS.

I think they made about five pages of comments on the second of those two national RISs. But they couldn't say whether they'd been implemented or not. It was strange. You would think that even as a matter of interest, they'd follow it up and get a publicly-available copy of the final RIS to look at and check off, but they don't. So that's one of the disadvantages of these administrative systems. I think it's better to have some kind of formal legislative framework for reviewing RISs.

To sum up, the shortcomings in the process have been as follows:

1. Failure to consult with the committee before the amendment to the *Subordinate Legislation Act* was introduced;

2. Failure to consider alternatives to the existing state law in the RIS;

3. Departure from clause 1(c) of Schedule 2 of the *Subordinate Legislation Act* (that's the one I mentioned, that requires total costs, not merely marginal costs, to be considered);

4. Failure to comply with the undertaking to consult the parliament's Staysafe Committee;

5. The question of what consideration was given to the representations made in the consultation program; and

6. The fact that the RISs by the NRTC on the Australian Road Rules concentrate on the costs to government rather than identifying compliance and social costs to the public.

I'd like to read to you the letter from the Chief Magistrate of the Local Courts. This is the bottom line of all this process. It's terribly tedious detail, I know, running through these RISs and talking about costs and benefits, and marginal costing against total costing. This is the bottom line. This is what it means out there in the legal system in terms of enforcing this law:

> *I refer to your undated letter inviting comments on the Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999, the Road Transport (Safety and Traffic Management) General Regulation 1999 and the Road Transport General Regulation 1999. I also note that the comment has been sought from the Director of Local Courts. It should be understood that my comments do not address any practical implications of the regulations to the management of court offices or the training of Local Court staff.*
>
> *It is understood the regulations will come to effect on 1 December next and that they will repeal the* Traffic Act 1909 *and regulations, and that the* Road Transport (Safety and Traffic Management) Act 1999, *the* Road Transport (General) Act 1999, *and the* Road Transport Legislation Amendment Act 1999 *will commence on the same day. This legislation follows the* Road Transport (Driver Licensing) Act 1998 *and the Road Transport (Driver Licensing) Regulation 1999 which commenced earlier this year.* [So you can see already the complexity with all these different instruments]. *Therefore it appears that from 1 December next, the courts, legal practitioners and the general public will have to refer to at least eight sources to ascertain the traffic law in NSW. The fundamental matters of the penalties for serious traffic offences, the automatic [inaudible] and disqualification for such offences and the consequences of driving while disqualified, cancelled or suspended are to be dealt with in three separate pieces of legislation.*
>
> *Now it is proposed that the penalties and disqualifications for serious speeding offences be contained in the Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999. The practical result is extremely unfortunate. The* Traffic Act 1909 *had been much criticised for its complexity and confusing drafting, but at least the basic sources of law affecting road users were to be found in one legislative instrument. It is recognised that the drafting of the new legislation is improved and the legislative and regulatory scheme to be implemented is reflecting an attempt at a national approach to traffic law and road rules. But even before its commencement, this legislative framework is seen as leading inevitably to confusion and error. Such a prospect is completely unsatisfactory when the implications of these laws for the community are considered.*
>
> *I also believe it is poor policy to provide for penalties and disqualification for serious speeding offences in regulations. Clause 119 of the proposed Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999, in part 7, Miscellaneous, substantially reproduces existing provisions of the* Traffic Act. *Such offences are among the most common heard before local courts, and while some benefits of flexibility in the capacity of parliament to vary such penalties may be achieved, the offences are sufficiently serious to warrant their inclusion in the principal act, with the increased level of scrutiny which that affords.*

[Again, there is another option that could have been considered when the RIS was prepared. Is it really appropriate in terms of the judicial system legislative policy to have these offences in the regulations rather than the act? Obviously that kind of detail – well, it's not really detail – has somehow been lost in the ministerial council process, the NRTC process, and one wonders whether there is any real potential for feedback from these basic concerns in the judicial system to these administrative bodies like the NRTC. Is that level of bureaucracy really a buffer to proper consultation?]

Mr Redford: In addition a relationship between the judiciary and the executive is a far more dangerous one than one between the judiciary and the legislature, potentially.

Mr Hogg:

It is also noted that throughout the regulation maximum penalties are being provided for individual offences rather than establishing one maximum penalty for all offences under the regulation. It is undesirable to have a range of differing monetary penalties in a regulation. While that may not be the case as the regulation stands, it seems that such a result may be contemplated in the format which has been adopted.

Of particular concern to magistrates is the formula adopted for the provision of appeals to Local Courts. Clause 6 of schedule 2 to the Road Transport (General) Regulation 1999 adopts similar terminology to clause 52 of the Road Transport (Driver Licensing) Regulation 1999, which commenced earlier this year. Clause 6 provides in subclause (vii): 'A Local Court must hear and determine an appeal made to it under this clause and may confirm with or without variation or disallow the decision appealed against, or make such other order in the circumstances as to the court seems just'. Subclause (viii) provides: 'For the purposes of varying a decision of the authority under subclause (vii), the court may exercise only such powers as the authority could have exercised under the Road Transport (Driver Licensing) Act 1998 *or the Road Transport (Driver Licensing) Regulation 1999 when making that decision.*

In the past, appellants have appealed demerit-point cancellation of a licence essentially on the ground that having regard to their character, special needs and overall driving record their licence should not be cancelled. Magistrates hearing such appeals were able to deal with appeals in a variety of ways which accorded with the concept of 'make such other order in the circumstances as to the court seems just'. For example, a particular offence might be disregarded and an appellant permitted to retain his or her driver's licence, but with the majority of demerit points remaining on the licence. Essentially it was possible to have regard to the overall driving record of the appellant and formulate a just order.

Under the present law the powers of the authority are almost all expressed with mandatory terms in the governing legislation. Section 16 of the Road Transport Driver Licensing Act 1998 *appears to contain one of the few discretionary powers capable of being exercised by the authority, and the only discretionary power which relates to the accrual of demerit points. Accordingly a magistrate exercising only such powers as the authority could have exercised has no general discretion to 'make such other order in the circumstances as to the court seems just'. Certainly the example referred to in my previous paragraph could only result in an order to confirm or disallow the decision, neither of which would necessarily be a just result.*

Many of my colleagues have expressed concern at the confusing form of the subject provisions and some clarification ought to be provided in order to indicate what kind of discretions are envisaged. This is particularly important because it is evident that legal practitioners and the public are generally unaware that the legislative basis for licence appeals has changed, with summonses continuing to be issued for the old formulation of 'fit and proper person to hold a driver's licence' as the foundation of the appeal. This is a direct consequence of including important matters in regulations which are by their nature less accessible to the community. As a result there are many disappointed members of the public wasting time at court in futile appeals.

I should observe that if there are to be appeals of any kind arising from the provisions of the new regulations, it would be preferable to give the courts a clear and unfettered discretion to 'make such other order in the circumstances as to the court seems just'. If such a policy is not for any reason acceptable, it is obviously important that certainty be provided as to the scope of the discretion that is envisaged by government.

Generally it seems that existing provisions of the Traffic Act *and the regulations that have been reproduced in the new principal acts and regulations. Their content is a matter for parliament and I have no comment to make beyond the practical matters addressed above.*

[**Mr Hogg:** I think that was probably sufficient.]

I am, however, very disappointed that the opportunity has been missed to consolidate

the traffic laws into one act of parliament. Such a consolidated statute would have been useful both for those who appear regularly in local courts and for those who preside in them. More importantly, I think the community is entitled to expect that all laws affecting road users will be located in one accessible document. In this regard I note that the Attorney-General's Department has taken the decision to stop distributing pamphlet copies of acts to courthouses. Copies of regulations have never been uniformly reliably distributed. When essential matters are buried in voluminous and numerous regulations, how can the community be properly said to have reasonable access to the relevant law?

Mrs Gillett: That was a terrific analysis for us all. Thank you for that.

Mr Bayne: The question in my mind is what do we take from that, out of here, from that episode. It illustrates one thing, that sometimes laws will impact on the rights of people etc without us really being aware what's going on. When legislation comes in there is often a very short timeframe to respond. I suspect that that legislation has come through our committee without us really saying very much about it. It's only when one understands from letters such as that from the Chief Magistrate, one can see that there really is a big issue here. The way life is, I suppose, your committee was having a look at this perhaps too late in that case.

What it points to is the need or desirability of your informing the rest of us: 'There's a new problem in this that you mightn't know about.' That's going to be at the fore, I guess of *[inaudible]*. That episode seems to demonstrate the desirability of you all telling the rest of us: 'You're going to get this stuff too. There are a few issues here that we're only aware of now because of this letter. Hopefully, you can do something about it.'

Mr Hogg: The late Professor Whalan, dearly loved by many people here - he was a regular attender at these conferences - used to review the regulations at his home, I think on the weekend. His advice was superb. It was legal advice as to the potential trespass on personal rights. The trouble is, you have also got to have that element of getting consultation, looking at what consultation took place out there on the part of the relevant agency. That RIS process really brings it home, because it's mandatory to advertise the RAS, it is mandatory to appropriately consider all public submissions, and also then to give those public submissions to the committee. The committee might have a view that this could potentially trespass on people's rights. Nonetheless, the real issue out there for the people is the impact on them. And that certainly focuses the consideration of the committee on what the real problem out there in the community is. It shouldn't distract it from its view of trespass on traditional grounds so that it can inform itself as to what it thinks is the real impact. Nonetheless that consultation element, as you say, brings it home as to how people are going to work under this new legislation.

Mr Homer: Could we have a copy of the magistrate's letter?

Mr Hogg: I think we can release it, probably. It will be up to the committee to decide to release it, I suppose, but having read it into the public record ...

Mr Eleferink: The letter from the magistrate, this came obviously after the legislation was enacted.

Mr Hogg: After the act was passed but before the regulation came in.

Mr Elferink: How long was the consultation period prior to the act?

Mr Hogg: Prior to the act I don't think there were any necessary consultations, but so far as the regulation was concerned there is a mandatory period. The RIS has got to be available for 21 days, I think.

Mr Elferink: What I am driving at is, at the risk of having a crack at the Chief Stipendiary, what he has done is waited for the horse to bolt and then he has come in saying: 'You should have fixed the lock on the gate ladies and gentlemen.' The consultation process is out there and there is nothing stopping the judiciary from walking across the road and saying: 'By the way, please consider the following.' It's useful to know. Perhaps when these sorts of committees are going through their consultation processes, the magistracy might be consulted as well in that process. I think it's a little bit clever or cute for them to say, 'This is dreadful, you should have done it right in the first place,' when they'd had a bite of the cherry.

Mr Hogg: I don't know that they did, actually, in this case. I think they would just refer it as part of the normal consultation program under the *Subordinate Legislation Act*. As I mentioned, it has got to go out for a minimum of 21 days. Then submissions have to be appropriately considered and only then can a regulation be made. So I think ...

Mr Elferink: So it's somewhere there in the public arena?

Mr Hogg: Well it is, but I don't know what approaches were made on the principal legislation. There may have been extensive approaches on the principal acts. But judging from that letter, I think you can make your conclusion.

Ms Gillett: Thanks, Greg. We will move right along.

NATIVE TITLE
Effect on NT Legislation

Ms Gillett: Ladies and gentlemen, it is now my pleasure to introduce our host. Steve Balch is Chairman of the Subordinate Legislation and Publications Committee of the Northern Territory. He is going to talk to us *[inaudible]* native title and the effect that that has on NT legislation.

Mr Balch: Thank you, Mary. I have invited Tim Joyce, who is our expert officer here on this particular subject, so that if we get into any technical – and it's a very technical area, as you will see by the paper - Tim will be able to assist me in covering some of those areas.

The purpose of this paper is to provide the meeting with an information statement about the current status of the Northern Territory's proposed alternative provision schemes pursuant to section 43A of the *Native Title Act* of the Commonwealth and related matters involving the legislative relationship between the Territory and the Commonwealth parliaments.

Delegates may be aware that the provisions of the *Native Title Act* as they relate to states and territories provide a number of different ways land development applications can be processed. States and territories can use the national scheme of the *Native Title Act*, they can replicate the scheme in their own legislation or they can seek to legislate alternative provisions subject to the strict standards set out in section 43A, subsections (4),(6) and (7) of the act. In fact, this involves the whole gamut of model, template, mirror and, as we will see later on, it even involves a little bit of reference of power. So it is all contained in the one package.

With regard to an alternative state or territory scheme, the Commonwealth minister, the Attorney-General, has to consult the representative bodies about the proposed schemes. After considering any submissions received pursuant to section 43 of the act, the minister may make a written determination that the scheme complies with required standards. The written determination of Commonwealth minister is in fact a disallowable instrument. Under section 46A of the *Acts Interpretation Act* of the Commonwealth, the determination is treated like any other disallowable instrument.

The Northern Territory legislated in accordance with the requirements of section 43A of the *Native Title Act*, carefully reviewed the submissions received by the representative bodies and made a number of changes to address their concerns. It has been generally acknowledged that the Territory's schemes comply with the standards previously determined by the Commonwealth parliament and were so endorsed by the Commonwealth Attorney-General. However, as it turned out, the Territory's legislation was disallowed by the Senate for reasons other than non-compliance. The NT government is of the view that its proposed alternative schemes are reasonable and balanced and should not have been disallowed by the Senate.

Why is this important to the Northern Territory? The issue of what land administration regime is to apply is of particular importance to the Territory because approximately 50% of the Northern Territory already comes within the control of the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act 1976*. About 42% of the Territory is Aboriginal land and a further 8% is under claim under that act.

The *Land Rights Act* has its own land administration procedures that apply instead of those in the *Native Title Act*. While the *Land Rights Act* has been very successful in returning land to Aboriginal Territorians, it has not in my view been successful with regard to promoting indigenous employment and creating development opportunities.

In addition to this 50% under the control of the *Land Rights Act*, a further 49% of the Territory is pastoral leasehold land over which there may be coexisting native title. The land administration procedures that apply to Aboriginal land under the *Land Rights Act* are different from those of the *Native Title Act*. The *Land Rights Act* prevents any acquisition by the Territory, even for government purposes, and essentially allows the landholders to veto all mining and development.

The combined effect of the Commonwealth's *Land Rights Act* and the *Native Title Act* is that special restricted land administration laws apply to over 99% of the Northern Territory. It is argued that this has retarded development in the Territory and has a detrimental effect on employment opportunities for Aboriginal Territorians. Given these constraints on Aboriginal land, it is of critical importance that the Territory has the best possible land administration system for the 49% of the Territory covered by the pastoral estate.

I will give you some historical background to properly appreciate the current issues of concern: the development of native title in Australia; the capacity and procedure for states and territories to create their own schemes to deal with the native title in certain circumstances; and the Northern Territory's alternative provision schemes - how they were implemented and their current status.

In respect of native title, in 1992 the High Court determined in *Mabo* that native title survived colonisation and that it may still exist in parts of Australia provided that it had not been extinguished and that the necessary connection to the land had been maintained.

Because native title was an interest relating to land, the existing laws meant that if it existed it had to be dealt with prior to the relevant land being developed. This led to the development of the original *Native Title Act 1993* of the Commonwealth. The act set up two distinct processes, one for determining native title and one for dealing with future development applications.

The process for dealing with development applications has become commonly known as the right-to-negotiate (RTN) process. Essentially, it sets out the procedures that need to be followed before there can be a grant of a valid mining interest or an acquisition of land for private development purposes over land on which native title exists or may exist. The fact that the procedures apply over land where native title may exist - that is, before there is a formal determination of native title by the courts - is of fundamental importance. The RTN procedures nominally apply Australia-wide but in fact have the greatest application in the less developed parts of Australia.

In the *Wik* decision in 1996, the High Court determined that native title can coexist with pastoral leases and perhaps other sorts of interests. As I have already described, 49% of the Northern Territory is covered by pastoral leases.

It is generally accepted that the RTN procedures of the *Native Title Act* were only intended by the Commonwealth parliament to apply to areas such as vacant Crown land where no one other than native title holders had an interest. They were not intended to apply to areas where there were coexisting interests.

It soon became apparent that the RTN was a relatively expensive, time-consuming and inefficient process. After consultation with the states, the Commonwealth agreed in 1998 to amend the *Native Title Act*. The amendments, commonly known as the 10-Point Plan, provided among other things that states and territories could set up their own alternative land administration schemes for processing development applications, but only over land where native title may coexist. The capacity to set up alternative provision schemes is set out in section 43A of the *Native Title Act* as amended in 1998. The section sets out the process that needs to be followed to establish such a scheme and the standards that such schemes have to comply with. Once a scheme is effective it replaces the right-to-negotiate provisions.

For the alternative provisions to be effective they have to comply with the strict standards set out in the *Native Title Act,* the Commonwealth Attorney-General has to consult the indigenous representative bodies and consider any submissions received and the Commonwealth Attorney-General has to make a written determination that schemes comply. The written determination is an instrument disallowable in the Commonwealth parliament.

The Territory applied for three separate alternative provision determinations, relating to schemes under the *Land Acquisitions Act,* the *Mining Act* and the *Petroleum Act.* Since August 1998 the Territory has been seeking to put its alternative provision schemes into effect.

The process essentially required a rewriting of NT land administration procedures. It required the recognition of possible native title interests in land, and procedures for dealing with these matters. It had to meet the subjective approval of a Commonwealth minister and it had to take into account issues raised by the indigenous representative bodies. It had to intermesh the Commonwealth *Native Title Act* concept into Territory law. This has been a convoluted and complex process.

It is worth noting that the process used to address compliance issues allowed the use of regulations to make legislative amendments. The Subordinate Legislation and Tabled Papers Committee of the Legislative Assembly considered this capacity to make amendments by regulations and was informed that the government made the decision to use Henry VIII provisions in order to: address compliance issues raised by the Commonwealth; address issues arising from the consultation process; and try to implement the alternative provisions schemes as soon as possible.

There were some very critical timing issues in all of this. This meant using the regulation-making power to make amendments when the Assembly was not sitting because of time constraints and the impact of native title on NT industries and its economy.

The Senate Standing Committee on Regulations and Ordinances considered the subject of clauses that allow amendment by regulation and recommend that such clauses should incorporate the following features: (1) a sunset clause; (2) no retrospectivity before the commencement of the regulation-making power; (3) the regulations to be subject to tabling and disallowance; and (4) deal with specific subject matter. The committee considered that that the regulations complied with all of these requirements.

It should also be noted that the regulation-making power in question expired as soon as the Commonwealth made a determination that the Territory laws complied with section 43A of the *Native Title Act*. Subsequent to modifications to address issues relating to compliance and issues raised in the consultation process, the Commonwealth Attorney-General made three determinations that the Territory schemes complied with section 43A of the *Native Title Act* requirements.

The Territory government had further discussions with the representative bodies in an attempt to ensure the Territory schemes could become operative. This resulted in the passage of the *Lands and Mining (Miscellaneous Amendments) Act (No. 2) 1999*, assented to on 17 June 1999.

Essentially, the Territory acts and regulations referred to above do three things: (1) they modify Territory administrative processes to comply with the requirements of the *Native Title Act;* (2) they recognise the possibility of native title interest in land and provide (where no specific procedures are prescribed) that these interest holders have the same procedural rights as all other interest holders; and (3) they set up alternative provision schemes in compliance of the requirements set out in the *Native Title Act*.

These amendments go above and beyond section 43A compliance and were made in an effort to reach agreement with the representative bodies. Unfortunately, it was not possible to reach total agreement with the representative bodies. Senator Bolkus gave notice of motion of disallowance of all three proposed schemes on 24 June 1999 in the Senate.

At the end of the extensive consultation between the representative bodies and the NT government, there were three issues standing in the way of an agreement: the content of the legislation; security regarding future amendments to Territory schemes; and how to deal with the backlog of exploration and mining applications. With regard to the content of the legislation, the joint land councils made an initial submission some 100 pages long and about an inch thick at the start of the consultation phase.

By 22 June 1999 the outstanding matters had been reduced to eight relatively insignificant matters. Of these eight issues, the Territory government says that its legislative schemes clearly address three. The Commonwealth says that it will address one. The remaining issues were as follows.

Firstly, the representative bodies say that the requirements in the Territory schemes that claimants should give particulars of how the proposed development is likely to effect their rights and interests should be removed. The Territory government says these particulars are necessary to allow the consultation process, to minimise the impact of the activity on native title interests, to work. The provision of details will facilitate agreements being reached regarding projects.

Secondly, the representative bodies say that superior courts should be prevented from obtaining access to anthropological material filed in the Territory's Land and Mining Tribunal for the purpose of making recommendations regarding development or mining applications. The NT schemes already make provision for the protection of culturally sensitive materials and the NT government says that it is contrary to public policy to have secrecy provisions.

Thirdly, the representative bodies want the removal of a provision requiring those claiming compensation to give notice of the claim within three years. The Territory's response is that this provision applies to all those with an interest in the land, can be complied with simply by sending in a one-line letter, and is necessary to allow for orderly land administration. In any event, there is a procedure for extending the time period by applying to the Land and Mining Tribunal.

Fourthly and finally, in some circumstances the representative bodies say that compensation should be paid without proof of native title. This proposal has been debated at length and is not accepted by the NT government.

It is the NT government's proposition that the significance and merits of the outstanding issues need to be considered in the context of the schemes in their entirety and in the context of the concessions and accommodations already made to date. In this light it is argued that these outstanding legislative issues are of little consequence.

Since these discussions, the representative bodies have raised a whole range of further issues they want to address. These further issues are, in the Territory's view, equally spurious.

The two other outstanding matters were security regarding future amendments and the backlog of outstanding mining applications. The *Native Title Act* sets out the national standards that state and territory alternative provisions schemes have to comply with. There is in-built security in the *Native Title Act* which sets out the process for reviewing and revoking determinations if a state or territory scheme is amended at any stage in the future so that it falls below the specified requirements in the *Native Title Act*. Nine-tenths of the Territory schemes are reviewable under the process set out in section 43A of the *Native Title Act*. It is only those enhancements made to the schemes which go above and beyond the *Native Title Act* requirements that are in fact at issue.

With regard to the outstanding mining matters, the Territory offered to have an orderly and practical scheme to deal with these applications.

Notwithstanding the fact that the security issue involves only future amendments above the national standards set out by the Commonwealth parliament, the NT proposed a scheme to deal with these concerns. It involves: passing of legislation requiring consultation with the representative bodies prior to any amendment to section 43A; agreeing to allow at least two months between the introduction of any amendment bill and debate; consultation with representative bodies with a view to reaching agreement concerning the form of the amendment; and providing a draft bill and reasons for amendment prior to introduction.

The NT has no intention of making any amendments to its schemes. However, it has to be recognised that unforeseen circumstances and workability issues may arise. Accordingly, state and territory parliaments must have the capacity to make amendments. The Territory's proposals would make the procedure for any amendment open and transparent.

It was suggested by the representative bodies that one way of dealing with this security issue would be to abandon the section 43A schemes and place them in an indigenous land use agreement (ILUA). However, we believe this is fundamentally flawed. It is contrary to public policy and probably illegal. It would require the current Territory government to delegate legislative authority and fetter the discretion of future Territory parliaments.

Given that these schemes can only operate on co-existing land, the ILUA proposal would split land administration procedures into multiple layers: one legislative layer for non-native title issues and a private agreement for native title procedures. The concept of an indigenous land use agreement is simply not viable in these circumstances.

The NT government suggests that it has been unfairly penalised for enhancing its legislation beyond the standards set out in the *Native Title Act*. We feel it offends parliamentary propriety to set legislative standards, have a jurisdiction comply with those standards and to then say that compliance with the legislative standards previously set is not the basis upon which state and territory schemes will be assessed.

The Chief Minister, Hon Denis Burke MLA, has said he is prepared to do all that is legislatively possible to address the concerns raised, but the reality is that it is not a matter that the Territory parliament can address alone.

In summary, the NT has sought to establish its own schemes for dealing with mining and petroleum applications and private development proposals over pastoral lease land. Notwithstanding compliance with the procedural requirements and general acknowledgment that the Territory schemes exceeded the required legislative standards, they were disallowed by the Senate.

During the debate in the Senate, the Opposition and the Australian Democrats gave three reasons for voting for disallowance. The primary reason was what they saw as a fault in the Commonwealth act. Under the *Native Title Act,* once a state or territory scheme is endorsed it can be amended at will by the relevant jurisdiction, provided that the scheme always remains above the national standards. This is an important proviso. Under the current *Native Title Act,* the Commonwealth Attorney-General has the capacity at any stage in the future to revoke the endorsement of a state or territory scheme if it is amended to no longer comply with the *Native Title Act* requirements. Resolution of this issue is not in the hands of the Territory parliament. In any event, states and territories must have the flexibility to deal with unforeseen issues regarding the workability of their schemes.

The second reason cited for disallowing the Territory schemes was concern that there were adequate provisions to deal with the backlog of the outstanding mining applications. To assist in dealing with the backlog, the Territory government offered to have an ordered, staggered approach to processing the outstanding applications and proposed the development of standard exploration terms which would have resulted in a significant reduction in the number of objections lodged by potential native title claimants.

The third reason given for disallowance was that there were a number of outstanding legislative issues. The NT government was not able to reach complete agreement with the land councils as to the terms of

the Territory legislation and maintains that no responsible government in Australia could have accommodated the outstanding requests.

Since disallowance on 31 August 1999, the Northern Territory continued to try to work towards the achievement of a regime acceptable to the diverse parties. Numerous discussions have been conducted with the Commonwealth government and a joint Commonwealth/Democrat/land councils meeting was held in Darwin on 10 September 1999. These efforts have not been successful to date. If the line of the Opposition and the Australian Democrats is maintained, effectively taking the position that they will only support the Territory scheme if the land councils agree, then an impasse persists.

The NT government submits that it has done all it can to make its alternative provisions acceptable and effective. The alternative schemes comply with the national standards set out in the *Native Title Act.* Every substantial concern raised by the land councils in regard to the schemes has been addressed. There is fair and reasonable plan for dealing with the backlog.

If the disallowance stands, the Territory will be obliged to use the Commonwealth's right-to-negotiate scheme.

In some respects the legislative model in the native title legislation mirrors the national scheme legislation model. While each state and territory jurisdiction is able to legislate alternative provision schemes, there is a strict requirement to comply with the national standards set out in the *Native Title Act.* In this case, the success of the native title model approach will be dependent on the Commonwealth parliament accepting the standards which it set in the 1998 amendments.

It has been a long and arduous and difficult process, one in which sadly we see us losing the opportunity not only to properly administer the land but also to benefit Aboriginal Territorians in resolving issues of native title.

Mr Eleferink: I make one observation, just to draw a reality check into this whole operation. There are some very real consequences which flow from this, not only to Territorians but also to the rest of Australia and even potentially internationally. This whole land administration scheme that we have is entirely based on the ability to make the land work and in one fashion or another to create wealth for us all, irrespective of what your colour is.

At the moment there are some 11 000 applications before the national Native Title Tribunal as established by the *Native Title Act*, of which 450 have been resolved over several years. If this was just an academic exercise then I probably would not be too concerned about that figure. But at current rates we can expect the backlog to be dealt with by about the year 3000.

This native title stuff is a particularly sore point here in the Northern Territory simply because it does affect 99% of our landmass, including the 50%-odd which is currently freehold title. Now, native title was never supposed to effect freehold but it certainly does in the Territory. It affects Aboriginal freehold, bringing up another bizarre situation.

Unless native title legislative frameworks become workable, it's going to affect jobs and it's going to affect the common wealth of this whole nation. It's something that really should have people's attention.

Mr Homer: As a West Australian, I'm not going to go into our particular situation because it's pretty well publicised anyhow, but it's beginning to dawn on Aboriginal people that the only people benefiting from all this nonsense are usually non-Aboriginal lawyers. What we are finding is that they are coming and saying: 'Look, we want to find some sensible resolution.'

I don't really understand the situation here in the Territory, but we have areas that are quite populated in WA where unemployment among Aboriginal youth is as close to 100% as you can get. There are real opportunities for mining companies in particular, now we're getting into downstream processing, to enter into deals with Aboriginal people to start to train their young people and, having trained them, to give them jobs. But we're finding we cannot get around the obstinacy of the federal parliament. So we now have a situation where Aboriginal people are saying they want to do something, the non-Aboriginal community is saying it wants to do something too, 100% of us want to sort the problem out, and we can't. Are you finding that here?

Mr Balch: 99.9% of us want to sort the problem out. John often says that in his very vast electorate in the south of the Northern Territory he has people who are enormously asset-rich but they are living in poverty because they can't do anything with their land. Maybe, Maurice, you could echo this. The most common thing here is that Aboriginal people want to do something economically productive with their land and, where given the opportunity ... There is a very good example in the Tiwi Land Council and Tiwi people and the job they are doing over there. Compare that to some other areas. They cannot do anything with their land. It has just been locked up in all this legislative nonsense and we are going nowhere with it. And as John said, with the backlog

of applications they will be hearing them until the year 3000 to try and clear them out.

Mr Rioli: The situation differs when we talk about the Tiwi because they have their own land council. They are able to negotiate as to their interests and development on their land, whereas having the larger land councils obviously has caused a few problems, and negotiation in some cases hasn't been productive. There are vast areas of land held by Aboriginal people, but some prefer to live their own way. Development isn't something they would love to see or something that they want. It is an issue which certainly has its problems when it comes to making decisions about what they want to do with their land.

In my case, with the Tiwi Land Council, it's a small area of land that we're talking about and obviously they're really keen to do something and see their people have a bright future. I am on the other side of the fence from where Steve and John sit, and in this case our views are obviously different. But that is probably for discussion in another place at another time.

Mrs Gillett: If there was ever an issue where you need people of goodwill and a bit of luck on your side, *[inaudible]* just kept talking to one another.

Mr Elferink: I am always reminded of Aristotle in his *Arguments* where he said: 'With incidents that arouse pity and terror, therein you will accomplish a catharsis of emotions.' The very last thing that you want in these sorts of debates is this catharsis of emotions. I can tell you now that the race issues that get piled on top of native title and on top of land rights absolutely befoul and muddy the water and are so counterproductive. It is actually arguable that 'native title' is the wrong title for the type of decision that the court gave in *Mabo*. 'Recognition of prior ownership' is a far more accurate description. It is a subtle distinction, but I rely on it in trying to remove the issue of 'native'.

For argument's sake, in 1770 a ship sails up the west coast of Australia and its owner, like Peter Stuyvesant did at Manhattan, purchases a small section of the coastline. It is a good contract under law. But under *terra nullius*, the ability of the native title holder, the person who sold that piece of land to the owner of that ship, was taken away. The land was resumed by the Crown because there was never the ability for the vendor to sell the land onwards. However, if after the 1992 legislation this hypothetical ship's captain's descendent went to the bedroom drawer, whipped out his contract and said, 'I have a legitimate and good contract here for the purchase of that particular piece of land,' that contract would actually stand although he is not a native, because he had prior ownership.

'Native title' has been a comfortable way to express the form of title that the original owners of this country had, but the race issue befouls the water. That legal hypothetical that I have just put forward is a way of trying to remove the Aboriginal issue and all of those other emotive things from the argument and concentrate on the law itself. What this paper tries to do is concentrate on the law itself and the very workable, practical way that that law affects the administration of land, especially here in the Northern Territory.

Mr Balch: And it has an implication to other states as you head on to embrace it. We went forward with it early and quickly because 99% of our land is tied up in all this and it's important that we get a workable model. When we were first asked to look at any impacts of national scheme legislation I thought it was an interesting concept because, as I said at the outset, all the strategies have been used in this - model, template, mirror, reference of power. They are all there bundled up into one package. So it's a good example.

NATIONAL SCHEME LEGISLATION
South Australian Perspective

Mrs Lavarch: It is my pleasure to chair this afternoon's session. Angus Redford had the, I am sure, joy and delight of introducing me. I can now do likewise with him. Angus was a lawyer in his past life, before being elected to the Upper House in SA in 1993. So he is an old boy, actually. He has been on the Legislative Review Committee and has been the presiding member on that since 1997.

Mr Redford: Thank you, Linda. SA throughout its near-100-year membership of the Australian federation has developed a reputation as an innovative state. In many cases it has led legislative reform throughout the Commonwealth of Australia. From its early days, reforms in SA left other jurisdictions in its wake and on occasions, I suspect, dragged other jurisdictions kicking and screaming into major reform. For example, in 1894 the SA initiative of granting women the vote forced the Commonwealth into giving women voting rights from the inception of the federal parliament. Women were eligible to vote for both the SA House of Assembly and the Legislative Council in 1895, yet most legislatures granted women the right to vote in the early 1900s - and in the case of the Victorian Legislative Council, not until 1924.

Other SA initiatives included the promulgation of the Torres title system, not adopted by some states for

many decades - I think our Chair, Peter, referred to the Torres title system in his contribution - the establishment of a workers' compensation scheme and many other reforms. In 1962 we passed the *Associations Incorporation Act*, an initiative followed by Victoria and NSW some 30 years later. We led the nation in consumer protection laws in the 1970s.

Obviously, other states have also led in other reform areas. So in this sense the notion of competitive federalism in legislative reform has been around for a long time. I suspect many of these reforms would have taken much longer, at least as far as SA is concerned, if we had to obtain uniformity through ministerial councils and their ultimate creation, national schemes of legislation. This has created a culture, perhaps until very recently, of fierce independence on the part of SA as represented by the members of parliament.

On the other hand there are those who believe, particularly in recent times, that the states or at least some of them have lagged behind others. Until recent times the Commonwealth has often provided monetary incentives for states to come into line with national policy. An example of this occurred in relation to our drink driving legislation in 1991. SA, as did the NT, had a limit in the prescribed concentration of alcohol for drivers of motor vehicles of .08. The Commonwealth offered the states and territories an irresistible financial incentive to come into line with a uniform concentration of .05. SA (with the NT), being one of the last to adopt this, did so in only a modified way: we impose a fine if you're between .05 and .08. But the state got its money.

Lately, uniform schemes have come into effect without even a monetary incentive. The road rules is the most recent example. However, these schemes have sometimes required changes to make them compatible with our conditions. In the case of the uniform road rules, they had to be immediately amended because they did not permit firefighters to fight fires from the back of a utility.

From my point of view it can be useful to look at this topic through the prism of SA history. Douglas Pike in his book *Paradise of Dissent - South Australia 1829-1857* said that men who settled in SA had stated ideals of 'civil liberty, social opportunity and equality for all religions'. Some of this free-thinking attitude survives in the state. People continue to value their independence from centralised authority.

A pragmatic icon of this view was Sir Thomas Playford, who was Premier from 1938 to 1965. He was what might be called a 'states-righter' – although the state that was always in the right was SA. Called 'the holy terror' by Sir Robert Menzies, the teetotal Adelaide Hills cherry-grower had forthright opinions on the centralisation of power in Canberra.

The SA Supreme Court judge Sir Roderick Chamberlain (who has no sense of humour, I might add) passes on a story from the 1950s when he was Crown Solicitor and went with the Premier to Canberra. The Premier organised an early-morning walk with Chamberlain from their lodgings at the Hotel Canberra to see a grave. Playford told him that the grave was that of the person who discovered Canberra. After plunging through the scrub that was to become Capital Hill, they came upon a grave site. On being asked whether this was in fact the grave of the person who discovered Canberra, Tom Playford said: 'Yes, Rob, this is the grave.' Chamberlain then asked the Premier: 'What are we going to do now we're here?' The Premier responded: 'We're going to piss on it, Rod.'

In the next few minutes I am going to detail to you:

- the SA Cabinet guidelines to model, template and mirror legislation and the referral of state powers to the Commonwealth,
- the Cabinet guidelines on general principles to be used in deciding whether to participate in national schemes, and
- the SA government's attitude to the methods of implementation of legislation, the Senate and Victorian proposals for scrutiny, the national schemes of legislation position paper, and the general principle of scrutiny of national schemes of legislation.

The SA Cabinet developed a set of guidelines in 1994 that it uses to evaluate proposals for national schemes of legislation. The guidelines outline the four major methods of implementation of national schemes: model legislation, template legislation, mirror legislation and reference of power to the Commonwealth. I will go through these briefly because some people use the terms interchangeably.

Model legislation is described as legislation that is consistent but not necessarily identical, passed by each jurisdiction. Usually a model is drafted and each jurisdiction uses that model for its own legislation. The model is usually drafted with basic principles. The Cabinet guidelines state that this method has few disadvantages from the point of view of the state. This is because the legislation and amendments are always carried out by the parliament. The downside to this option is seen in the effort that maintains uniformity. The Cabinet guidelines note that apart from ministerial agreements, which are not legally enforceable, there

is no way of ensuring that all jurisdictions will continue to support the legislation.

Template legislation is where one state acts as the lead jurisdiction and passes legislation, and the other jurisdictions pass legislation applying the lead jurisdiction's legislation. The Cabinet guidelines note several disadvantages:

- It does not permit full parliamentary process to operate if the state is not the lead state. Once the initial application laws are passed, amendments can potentially be enacted by the lead state without any reference to other state parliaments.

- Subordinate legislation is not subject to parliamentary scrutiny in each jurisdiction.

- Ministerial councils may agree to amendments and an intergovernmental agreement may provide that the approval of the ministerial council is applied before amendments can be made. Parliament either has to accept that decision or withdraw from the scheme.

- The legislation can reduce the autonomy of the state and its institutions. Examples given in the Cabinet guidelines include where the law is to be interpreted according to the law of another jurisdiction, or another jurisdiction's administrative law rules are to apply to the scheme, or the law provides for appeals to a court of another jurisdiction.

Mirror legislation is where states enact identical complementary legislation to cover areas that the Commonwealth cannot cover because of constitutional limits on the Commonwealth or doubts about those limits. It is said to have been used when there was uncertainty whether the states or the Commonwealth could enact the law because of questions of legislative power. Other advantages and disadvantages of this type of legislation are not discussed in the Cabinet paper, although I will come to those later.

Finally, one or more states may make a reference of power to the Commonwealth using section 57(37) of the Constitution. When a reference of power is in force, the state is powerless to vary the Commonwealth law and the state cannot make laws inconsistent with that Commonwealth law. There are arguments that the state may not be able to legally withdraw a referred power. Indeed, in both reference and template legislation - this is the Cabinet guideline – the adoption of such laws by state legislation is seen as incompatible with the maintenance of a strong and viable federal system, particularly where state legislation, in and of itself, provides a substantive basis for law. The use of Commonwealth law in the case of referrals does not recognise it as inconsistent with the federal division of legislative powers established by the Australian Constitution.

The Cabinet guidelines recommend that national scheme legislation should only be used where there are real commercial or practical considerations that require uniformity. (I have to say that I have yet to see any minister stand up and refer to these principles in bringing forward any national scheme legislation before parliament.) The factors they take into account are: the extent to which divergence from uniformity can be tolerated; the cost of implementing the scheme; the effect of the division of powers in the Australian federal system; the effect on the autonomy of parliament; the effect on the jurisdiction of the state's courts; and the administrative law regime under which the uniform scheme will operate.

The government's view is espoused by the Attorney-General, Trevor Griffin, who was first elected in 1979 and spent some 11 years in opposition. He has always been a strong and vocal supporter of state rights and the sovereignty of state parliaments, and has long championed the right of the state parliament to scrutinise legislation if it has an effect on the state. In 1997, when opening the Biennial Conference on Delegated Legislation and the Scrutiny of Bills, he said:

> *The scrutiny of national scheme legislation is a hot topic. In South Australia the government as well as the parliamentary Legislative Review Committee both have strong views on this issue. The SA government is strongly of the view that the role of a state legislature is sidelined where template legislation is proposed and we take a dim view of pressures which are brought to bear, sometimes from federal public servants and ultimately ministers, or from public servants and governments from the east flexing their muscles, to submit to template models. Frequently, business is not interested in the constitutional issues and just wants governments to get on with the job, and brings its own pressure to bear to compromise on principle.*

In 1998 I wrote to the Attorney on behalf of our committee asking for his views on the two proposals for national schemes of legislation. His response of 17 August 1998 is annexed to the copy of this speech I have provided. The Attorney has also provided the government's current considered view on the various suggestions for the scrutiny of schemes in the last week or so.

Obviously, being in government and dealing with the associated pressures and essential and pragmatic considerations needed by executive government through the Cabinet process from time to time has occasionally tempered the practical implementation of the Attorney's views. An example of this was the promulgation of the *Financial Sector Reform Act*. The Attorney-General, the government and ultimately the parliament were subjected to enormous pressure from the finance community to pass the legislation, notwithstanding his principled reservations against template legislation.

For regulatory national schemes or national schemes affecting criminal law, the SA government prefers the model legislation approach because it allows state parliament the greatest possible control over the legislation while facilitating uniformity. For schemes requiring constitutional rearrangement between states and the Commonwealth, a limited referral-of-power approach may sometimes be used.

If a state parliament is to pass model legislation to implement a national scheme and later decides to vary or amend it in a way that contravenes the terms of the agreement, the government recognises that this may frustrate the aim of uniformity. The government's view is such that such an action would not be taken likely because it may constitute a clear indication that the scheme no longer has national support and should not be used in its current form.

I turn to the SA government's response to the Senate and Victorian proposals. The Senate proposal was put forward by Senator O'Chee and the Victorian by Peter Ryan as Chair of the Scrutiny of Acts and Regulations Committee. The reports arose from concern that the role of state and federal parliaments would be adversely affected by some of the methods used to introduce those schemes and that existing legislative review mechanisms were inadequate.

Recommendations from the Senate and Victorian committees include placing of exposure drafts of primary national legislation for participating parliaments, and the establishment of a national committee of scrutiny with representatives from the scrutiny committee of each state, territory and the Commonwealth. The Senate proposal is not supported by the Commonwealth Attorney-General, apparently because it was unclear and did not have unanimous national support. (I might say that if you adopted that on a regular basis you'd never get anything through.)

The SA government has indicated that it has number of reservations about the Senate and Victorian proposals. In summary they are:

- the potential cost and delay inherent in the proposed scrutiny procedures (and I might say that is always the case when you have any scrutiny of any government activity);
- the fact that the scrutiny committee proposed by the Senate would only deal with regulations promulgated under a national scheme, and not the legislation itself;
- the threat to the ultimate aim of uniformity;
- the very limited nature of state and territory participation in the scrutiny envisaged by the Senate committee;
- the fact that South Australia could not participate in the national scrutiny committee as proposed by the Victorian committee unless the powers of the SA Legislative Review Committee were changed;
- notwithstanding any scrutiny under the scheme, endorsement by COAG would be required before the government considered a proposal to establish a committee.

My comment is, so much for the concept of parliamentary sovereignty!

The Attorney-General has noted the position paper on the scrutiny of national schemes released by the working party of representatives of scrutiny of legislation committees throughout Australia. South Australia does not have a specific scrutiny of bills committee, unlike other states. Such committees in other states have been set up to take an active role in the examination of national scheme legislation. However, our committee can scrutinise bills specifically referred to it by either house of parliament.

The state government preference for the model legislation approach is because the legislation can be scrutinised by the SA Legislative Review Committee and parliament like any other legislation. Further, the SA committee can scrutinise legislation referred to it by either or both houses of parliament or on its own motion under the *Parliamentary Committees Act*, although its resources provide a break on its ability to do so. Accordingly, the SA government's view is that it is unnecessary to establish a scrutiny of bills committee dedicated to dealing with national schemes of legislation.

To its credit, the state government does acknowledge that the proposal could allow for parliament to have a greater role in policy formation than it does at present. The government, however, is not convinced,

other than scrutiny, what role the committee might have to influence the outcome of the legislative process.

The government notes that the proposal by the working party is that a national scrutiny of legislation committee have regard to 'the expected social and economic impact of the subordinate legislation' in deciding to recommend disallowance. The government in responding to that suggestion notes that that would give the SA Legislative Review Committee (and I might say similar review committees around the country) a policy function that they do not currently exercise in regard to local legislation. They assert that in the interest of equal treatment of local and national scheme legislation that is undesirable.

In summary, the government considers that the scrutiny of national scheme proposals may have some benefit in relation to scrutiny of template legislation. The proposals were also considered to have value where there was general referral of powers to the Commonwealth by the state. However, because it is the government's general policy not to use template legislation or an unlimited referral of power, it is contended by the SA government that specific scrutiny of national schemes of legislation is not necessary in SA.

Now for my own view. Firstly, I appreciate the Attorney detailing his response to this matter, particularly in time for me to present it to this gathering. I acknowledge that all schemes may require further consideration and refinement, and that in the case of the Senate proposal the scope for scrutiny is limited.

I am confident that the Attorney and his department are fierce protectors of the policy – that is, no template legislation. However, the government's position is entirely dependent upon maintaining its policy of not participating in template schemes or general referral of powers. We all know that governments can and do change policy and occasionally subvert or surpass a policy in favour of another inconsistent policy. Further, there is the question of scrutiny of existing template legislation or existing general referral of powers that occurred prior to the promulgation of the current policy, particularly in so far as subordinate legislation is concerned.

I believe that the government's view, as expressed above, on the face of it has some merit. For example, the *Financial Institutions (Application of Laws) Act 1992* is an example of such legislation where we applied it. However, there are some gaps. The parliament passed template legislation in the guise of the *Agricultural and Veterinary Chemicals Act 1994,* which applies certain Commonwealth laws to agricultural and veterinary chemical products.

In my paper I then go through - I won't go through them now - what I have been told is the template or uniform legislation currently applying in SA. I suspect that is not an exhaustive list. And I must say, although I digress, that I think it is an absolute priority for scrutiny committees to have a comprehensive list of national scheme legislation, appropriately categorised so that you monitor them.

There is no legislative method of preventing template legislation or preventing unlimited referral of power to the Commonwealth. I am not sure, short of a constitutional amendment by referendum, that we could do that. I appreciate that the SA Attorney will be vigilant, but he is only one member of Cabinet. Theoretically the Attorney-General could be placed under great pressure to ignore that policy, particularly where draft uniform legislation has resulted from long and hard negotiations at ministerial council level.

In addition, I think the practical benefits of looking at legislation early should not be underestimated. The ministerial council process can and has overlooked matters that should be dealt with at an early stage.

That is not to say that a vigilant state scrutiny committee cannot be effective under the current process. For example, in February last year the SA committee considered regulations which were part of the national scheme of harness racing rules. Not only was this national scheme regulation, it was non-government regulation. The rules made any 'official' liable to be hauled before the stewards if that person had any detectable level of alcohol in their blood. The rules covered drivers, trainers, ticket-sellers and the bloke with the broom who followed the horses.

It was not unique that such a matter was not picked up at an earlier stage. However, the inquiry by our committee caused the Harness Racing Authority to make amendments to the new national rules to provide that 'officials' only include persons whose duties are not related to the care and control of horses or the conduct of a race. All this was brought about by sensible negotiation between the committee and the relevant authority, although the committee was dependent on the goodwill of the harness racing community - something not always enjoyed with ministers.

Another example and a consequent difficulty arose with the regulations made under the *National Electricity (South Australia) Act 1996,* which is uniform legislation designed to help develop a coordinated national electricity grid and set up the national electricity market. We were the lead state.

Despite the fact that the SA parliament originated the template legislation, the act provided that the regulations were not to go before our committee as is the case with all other regulations. This was presumably because it was national legislation.

In summary, the SA government's position can be said to be that, because it has an existing policy of not agreeing to template legislation or to general referral of powers, there is no real need for any nationally coordinated scrutiny committee. On the face of it, I laud the government's policy of not agreeing to template legislation or general referrals. But the view that there is no need for a nationally coordinated scheme of scrutiny overlooks a number of factors including:

- the scrutiny of regulations or subordinate legislation promulgated under existing template and general referral legislation;

- the ability of our sovereign parliament to scrutinise legislation and/or subordinate legislation in a timely fashion in the event that there is a policy change (and sometimes that can occur without any public notification), or the policy is suborned in favour of some other existing or newly-formed policy, or the policy is overlooked because of some government imperative or indeed a failure to scrutinise itself.

I acknowledge that in the SA context it can be argued that there are so few identified existing template schemes (two) and general referrals of power (six) that it hardly warrants the expense of such a national scheme. Further, a change in legislative policy by a SA government to introduce template legislation or legislatively refer general powers would after all have to come before our parliament.

There are arguments that this body must address if we are to convince our respective parliaments and governments of the merits of a nationally-coordinated scheme. In that regard there is much work to be done by our respective committees before some of these proposals can advance too far. My tentative views are that a well-coordinated *ad hoc* and perhaps informal system of national scrutiny should be explored. The passage of time would then demonstrate whether there is a need or not for such a committee and identify the best way of scrutinising national legislative schemes should a formal structure become necessary.

Now, I understand some discussions have taken place about what might be appropriate. I will just outline what I think are some of the things we ought to consider in relation to any national scrutiny structure that we might agree to.

Firstly, I think that if we are to move quickly it should be *ad hoc,* because we have the power to do that within our own resources and within our own *[inaudible].*

Secondly, I think that the important priority for such a committee is to ensure regular exchanges of information and views. There needs to be someone who will be accountable and responsible for that process.

Thirdly, meetings if necessary can simply be organised through telephone hook-up. We managed to have a very successful telephone hook-up, much to Peter's discomfort, organised by *[Inaudible]* not long ago. It worked very well. The cost of such *[inaudible]* are pretty minimal.

Fourthly, if we can have it within our grasp to establish such a committee now, we are then in the process of being able to start evaluating immediately, and by the time we next meet we are more able to discuss a formal proposal for the establishment of such a committee.

Finally, I think each presiding officer of any scrutiny committee of primary and delegated legislation should specifically appoint a committee staff member to be responsible for conveying any relevant information pertaining to a potential or proposed national scheme of legislation to all other committees, as and when such information comes to the committee's attention. I am sure that would be a most effective tool in enabling us to properly undertake our tasks. I don't see how a ministerial council can keep everything secret. There is always someone who is going to leak something.

While we continue to agitate for reform in this area by our respective parliaments and governments, we do already have in our hands the capacity to develop informal processes of reviewing and scrutinising national scheme legislation. We can do this by improving communication between our respective communities, by attendance at conferences such as this and, more importantly, direct communication between ourselves and the staff of our committees.

Mrs Lavarch: Thank you, Angus. You had me worried, and I'm sure there were furtive glances around the room, at one stage when you were going through the attitude of the government in relation to national scheme legislation. I think that was an excellent contribution, and agree with you that perhaps you should have delivered it yesterday morning. You have managed to encapsulate a lot of the discussions, the pitfalls, the difficulties and come up with some workable solutions.

NATIONAL SCHEME LEGISLATION
Impact on Western Australia

Mrs Lavarch: The next paper comes from Kevin Minson of WA. Kevin is doing a case study also on the scrutiny of national scheme legislation. I don't think Kevin needs an introduction. Would you like one? I understand that you're not going to seek re-election.

Mr Minson: Correct. To the task at hand, delegates. I have been perhaps a little more general in the beginning of this paper. We have covered in a general way the whole question of harmonising laws and so on, and then we looked – not in great detail, because I think people like you will be *au fait* with many of the things we talk about – at the environment, the effect that the federal government's activities have had there, native title and so on. Nevertheless we touch on them.

The harmonisation of laws aims at eliminating obstacles and disparities between states and countries for a number of reasons, and not for the least of which are economic and health reasons. There is no doubt that there are enormous benefits from the free flow of goods, services and information across our state boundaries. However, laws that are designed to be uniform must take into account the effects of application and their practicality in all parts of this vast continent.

International trade agreements as well as other international treaties have impacted on state laws and have sometimes led to national legislation to ensure compliance with international agreements. However, state legislatures need to be kept informed of international and national agreements and accords are caused which impact on their area of jurisdiction. I think we are going to see an acceleration of this type of treaty-making. Rather than less treaty-making, I think there's going to be more. So what we have been talking about over the last day or two, I think, will become more imperative as time goes by.

The scope of government functions in the 20th century has evidenced considerable diversity. Activities have expanded relating to international relations, the functions of the global economy, the expansion of government and social activity and the relevant expansion and operation of the legal system. This is requiring federal and state governments to consider adopting a more cooperative approach. It has also evidenced the trend and demand for more uniform standards and laws in a variety of areas, including those that were considered exclusively within state jurisdiction. This drive for the convenience of commonality is increasingly being driven by the pragmatics of industry and commerce and the needs of a very mobile population. I don't think we should underestimate that requirement from the population.

National harmonisation of laws consists of laws regulating a number of sectors including social policy, agriculture, transport and environmental protection. State legislatures and state governments should actively participate in providing input to proposed legislative measures. Requirements that state legislature should be informed would ensure a measure of accountability to the legislature and ultimately the people, and further can even generate considerable goodwill between governments. I must say I am surprised that the federal government has taken so long to start to realise that.

The Australian Constitution confers on the Commonwealth parliament the powers set out in the Constitution, most of which will be found in sections 51 and 52. The itemised grant of powers includes areas where the Commonwealth parliament has exclusive powers as well as concurrent powers – that is, where the Commonwealth or state parliaments have the power to legislate for the same areas. Other powers are left to the states, but federal law prevails where there is a conflict over concurrent powers.

Section 109 of the Constitution also established the legislative pre-eminence of the Commonwealth parliament over state parliaments by providing that, where laws made by state parliaments conflict with laws made by the Commonwealth parliament, the laws of the Commonwealth parliament prevail.

Increasingly, international agreements and treaties have impacted on state laws and have sometimes led to national legislation. In Australia the power to implement treaties is primarily within the authority of the Commonwealth government. There is no established procedure for state parliaments to be informed and participate in the treaty process.

Intergovernmental agreements are political compacts which represent agreements reached by executive branches of government, at the Council of Australian Governments and/or ministerial councils, to a scheme involving the passage of uniform legislation in different jurisdictions. The agreement usually describes the substantive principles upon which the legislation will be based.

Once COAG or the relevant ministerial council has approved a proposal in principle for a scheme, the matter is usually referred to a working party for detailed development of the structure of the scheme and drafting of the legislation. After consultation the working party makes recommendations to COAG or the ministerial council, and this may be a lengthy process.

The increasing number of intergovernmental agreements is a gradual yet significant element in transforming the Westminster system of government in the Australian federation. Intergovernmental agreements have been introduced for a variety of reasons. There, is however, no procedure or opportunity to make governments more accountable with regard to the creation and implementation of these agreements. The result is often most unsatisfactory, the state legislatures feeling frustrated and the federal parliament making some huge, costly and embarrassing errors.

In Australia, increasingly, the move towards national scheme legislation has evolved a method of law-making which involves ministers at ministerial councils agreeing on national uniform legislation. Ministers at the federal and state level have established close contacts and work towards agreement on issues within their portfolios.

Ministerial councils do not regularly report to parliament after meetings on intergovernmental matters and on proposed national legislation. I have to say that in Western Australia they virtually never report to the parliament. Although many parties interested in proposed intergovernmental agreements or proposed uniform legislation are consulted about the proposals, parliaments are rarely informed.

Scrutiny of legislation committees in Australia have expressed their concern that individual parliaments and their committees have been effectively excluded from the scrutiny process of much national uniform legislation. In its 10th and 21st reports my standing committee stressed the need for parliamentary accountability and scrutiny:

The reality of a federal system requires governments to liaise and develop common policies and laws. Intergovernmental relations depend on consultation, negotiation, bargaining and conflict resolution in forums such as ministerial councils. The need for federal and state governments to cooperate to ensure efficient provision of services to citizens, as well as the globalisation of the economy, has accelerated the demand for the harmonisation of laws. This development towards intergovernmental agreements and uniform legislation has resulted in a reduction in the role of state legislatures and effectively diminished parliamentary scrutiny in Australia.

I now look at some of the effects on WA. As indicated at the beginning of this paper, laws that are designed to be uniform must take into account the effects of their application and their practicability in all parts of the country. The impact of some uniform legislation has been far from uniform in its application because of quite unique regional differences.

Discussed below are a number of case studies where such legislation has had a significant impact on WA because the application of such uniform standards did not account for regional geographic and demographic differences. The three case studies of national legislation involve native title legislation, environmental laws and national transport laws - and if I am brave, I might even say something about the gun laws before I finish – all of which have been introduced by various legislative means under different constitutional powers.

I think native title is one of the most glaring examples of political expediency. It has resulted in WA largely losing the ability to administer its own land. Aboriginal and non-Aboriginal people are the losers. The Commonwealth *Native Title Act 1993* is an outstanding demonstration of what could happen when national legislation is constructed without recognition of regional differences.

The existence of native title is not disputed, simply because the High Court said it did exist or might exist in other parts of the country. However, the efficiency of the *Native Title Act 1993* as a means of managing native title has exhibited continuing problems due to the lack of definition and the element of uncertainty that just won't not go away.

The act was conceived as a special law for the descendants of the original inhabitants of Australia. The preamble of the act also recognised that many indigenous people, because of dispossession of their traditional lands, would be unable to assert native title rights. Thus the act conceived that some Aboriginal people would have native title rights and many might not. In that respect the act inferred from the outset, without a great deal of detail, that it might not have a uniform impact.

The design of the *Native Title Act 1993* did not take into consideration a vast range of non-uniform factors across Australia which have influenced where and how native title claims are made. For example, the act does not take into account the land-tenure histories of the different states and territories. The history of land grants differs remarkably and markedly from the south-east of the continent to the north-west. Furthermore, the legal status of a pastoral lease, for example, in one jurisdiction is not the same as pastoral leases in others.

The different land administration and mining tenement management systems have different potential implications for the statutory extinguishment of native title rights and interests. There is no standard national Aboriginal heritage management system. The different jurisdictions have adopted different definitions and means to manage

Aboriginal heritage, each with different potential impacts on native title management.

The list of variations in the statutory frameworks for land and mineral title management in different states and territories is virtually unlimited. This is vividly demonstrated by the fact that the amended *Native Title Act* was forced to include a schedule for each state and territory listing thousands of different types of leases and land grants which are recognised as having extinguished native title. I think it's worth pointing out here that even though there are thousands of them listed the list is still incomplete and full of inconsistencies, having been compiled in a hurry without any thought for the ramifications.

WA's land and mineral tenement systems reflect the high volume of land and mineral titles granted annually. In other words, the management of land and mineral title is pivotal to the state's economy. In comparison with other jurisdictions, WA issues more titles and requires a higher level of turnover of mineral title, and has vast areas of unallocated Crown land. I want to stress this: we require the people who take out our mineral leases to actually do something with them, so there is a very high turnover. One that has been in existence for a long time, by virtue of the sunset clauses falls off the shelf. Once they come back to renew the lease, they suddenly find themselves involved in the native title process.

It should be not lost on any of us that WA now produces, mainly from the mining industry and downstream processes, some 30% of this nation's exports. So eventually what I am talking about here is going to have some pretty dramatic ramifications in the boardrooms of the east coast.

In this context, a national law which makes land tenure a fundamental factor in determining if native title rights survive, and which makes the resource industry the most vulnerable to native title compensation for any effect on alleged native title rights, is bound to have an impact. As a consequence, the state has had the highest proportion of claims, the most overlapping claims in areas of high mineral interest, and the highest level of disputation between indigenous interests.

In simple terms, the *Native Title Act 1993* has had a highly non-uniform impact in Australia, with the most impact on the western and northern parts of the continent. And it's interesting that within WA it has also, even within the one industry, had a much-differing impact.

I think it's true to say that the unfettered right to negotiate has led in WA, rather than to resolution, to corruption, bribery and blackmail. By way of example, there is one claim in WA where a mining company had called for expressions of interest and settled with the person who they thought was the traditional owner, only to find all of a sudden that he had lots of brothers, sisters and cousins. None of them, of course, would tell the others what the settlement was. It has become an almost explosive situation in some parts of WA.

Let us look now at the environment. Through the use of the external affairs power, the Commonwealth has legislated in the environmental area. Commonwealth legislation impinges on the state's responsibilities in conserving and managing biodiversity, land, water, vegetation and the sea on an ecologically sustainable basis.

Under the *National Heritage Trust Act 1997*, funding from the part-sale of Telstra was allocated to projects which improved Australia's environment and natural resources. But I think it's reasonable to say that in the main funding does not always follow the interference that comes from the central government. A good example of that, I think – other states have felt this but particularly WA – is the use of the *World Heritage Properties Protection Act* to legitimise control being transferred of large areas of World Heritage-listed land. It has in the main not been accompanied by great amounts of funds except at election time. The fact of the matter is that responsibility to look after that land still remains with the state. The federal minister in the end has control, but no responsibility at all to transfer funding.

Setting national environmental goals, standards, protocols or guidelines is through national environmental protection measures which relate to matters such as ambient air quality, motor vehicle noise and emissions, and environmental impacts associated with hazardous wastes under the *National Environmental Protection Council Act 1994*.

Most recently, the Commonwealth *Environmental Protection and Biodiversity Conservation Act* has been developed to provide a national scheme of environmental protection and biodiversity conservation. The act was passed by the Commonwealth parliament in 1999 and will commence in July 2000. There are a number of implications of this legislation in WA.

The initial expectation was that the implementation of the Commonwealth legislation would lead to the streamlining of the environmental assessment and approval processes relating to matters of national environmental significance. This was to occur by relying on state processes as the preferred means of accessing proposals and by providing for the development of Commonwealth/state bilateral

agreements which would enable accreditation of state processes under Commonwealth legislation.

There are now concerns regarding the practical implications of the legislation - particularly that it may enable Commonwealth intrusion into an area of state assessment and decision-making. Of main concern to WA is that the proposed threshold test for projects of national significance is set too low. The matters of national significance identified in the act as triggers include World Heritage properties, wetlands, nationally threatened species and ecological communities, migratory species, Commonwealth marine areas and nuclear reactions. A greenhouse trigger is also being considered.

This means that it is possible that actions with only modest impacts will be caught in the Commonwealth regulatory framework. And I suggest that in the future a capricious minister might well wreak some mischief using this particular legislation.

In the Australia system of government, road transport is an area of state responsibility. Over time each of the states has evolved its own systems of standards, practices and laws governing such issues as the carriage of dangerous goods, vehicle and driver registration, vehicle and load mass limitations, management of driver fatigue and vehicle roadworthiness.

With developments in road transport technologies and the growing economic importance of the transnational movement of vehicles and goods via Australia's road transport network, it was perceived that significant economic benefits could accrue to the states and to the nation as a whole from developing a more uniform approach.

The national road transport reforms originated with two intergovernmental agreements, the heavy vehicles agreement and the light vehicles agreement, signed in 1991 and 1992 respectively. The heavy vehicles agreement provided for the development of uniform or consistent national regulatory arrangements for vehicles over 4.5 t gross. It also established under Commonwealth law the National Road Transport Commission to develop the road transport reform program, and the Ministerial Council for Road Transport to oversee implementation of reforms and the NRTC. The light vehicles agreement extended the national approach to cover light vehicles.

Originally the scheme to achieve national uniformity was to be by the introduction of template legislation to be passed by the Commonwealth, applied in the ACT and then automatically adopted as law in all states and territories. WA does not generally support the template model as a means of achieving national consistency. Rather, WA prefers to enact its own substantive state legislation so that the WA parliament maintains control and accountability to its electorate over its laws. National consistency can be achieved by ensuring that the key elements of such legislation, and its outcomes, are substantially similar to a nationally-agreed model, and that mechanisms for changing the legislation over time are agreed in advance via an intergovernmental agreement.

The national scheme for road transport reform was that the proposed reform projects and legislation were to be approved by a simple majority of the voting members of the ministerial council. In other words, WA could be overruled on any particular reform by five out of nine other jurisdictions. WA has a unique geographic and demographic transport context, and the common interests of the more populous eastern seaboard states and New Zealand could take precedence over WA concerns and issues.

In 1995 all Australian governments agreed to implement the national competition policy (NCP) reform package. The National Competition Council was established among other things to assess states' progress in implementing the reforms, and there would be penalties for slipping behind. The transport reforms which had begun in 1991 were incorporated into the NCP. However, the NCP intergovernmental agreement referred to 'effective observance of the agreed package of road transport reforms' without clearly defining what these were.

For WA the problems in the national road transport scheme were compounded. A dynamic, integrative process involving a three-year rolling strategic plan of reform projects suddenly became subject to NCC scrutiny and assessment. Rather than promoting ongoing transport reform, these developments had the potential to inhibit further reform.

Many of the problems have now been resolved. For example, the original focus on the need to adopt template legislation was overtaken as the different jurisdictions employed combinations of legal instruments to make their own road transport laws achieve the consistent operating conditions for road users intended by the national model. In 1997, as the result of the review of the NRTC and its legislation, the ministerial council agreed not to require a formal template legislative process for every reform. Also, a framework of priority reforms for NCC assessment purposes was agreed.

Before I leave this area, I will refer to the gun legislation - not because it is particularly important in the great scheme of things, but simply to point out that this is a very good example of a silly knee-jerk reaction that is not going to achieve what the federal government said they wanted to achieve by it. It

could have been a plus for everybody had we taken perhaps six months longer to do it and involved the states in a more meaningful way in trying to outline what the aims were and trying to come up with a recipe to achieve those aims. Instead of that, as one who lives in a rural though not remote area of WA, I have to say that it has resulted in a seething resentment which is not going to go away in a hurry. If we wanted to look at a national scheme of legislation that was ill-conceived and not properly worked out - even its aims were not properly considered - I think the gun legislation would have to be a prime example.

These case studies illustrate that while a harmonisation of laws is desirable it is important that there are sufficient prior negotiations and cooperation, and also scrutiny of the legislation to ensure that the legislation does not have unintended adverse effects in a particular jurisdiction or region.

In most federal nations there is an emphasis on more complementarity and cooperation rather than separation and autonomy between constituent authorities. This type of cooperative federalism has encouraged cooperation to develop in many different, often informal, ways such as intergovernmental conferences and agreements to achieve objectives. It is this development in Australia, which has not seen complementary change in procedures to ensure parliamentary involvement and scrutiny of those legislative measures, which has been the concern of my committee.

Procedures proposed by the Australian scrutiny committees would ensure that state parliaments are informed of intergovernmental agreements negotiated at ministerial councils. Under such procedures background materials and legislative drafts would be tabled in state parliaments, ensuring the legislature's role in providing a degree of scrutiny and providing accountability to the parliament by the executive.

My standing committee has been looking at the problems posed for parliamentary scrutiny in a time of dynamic change not only nationally but globally, and has proposed minor institutional changes which would allow the parliament to perform its functions within this changing global environment.

In conclusion, I am a bit puzzled that a government that has caused problems for itself – I am referring to the federal government – would ignore an opportunity to find a better way to achieve what it wants to achieve, and that is a certain degree of harmony and commonality across Australia as and when required. So I am hopeful that the discussion and decisions we make in the next hour or so might actually put forward some very helpful and constructive suggestions to our federal colleagues. If we can agree among ourselves, I'm sure it will lead to the sort of approach that I believe is required.

Mrs Lavarch: Another thoughtful and considered paper from Kevin Minson. Actually, the paper from the July conference up here on the national competition policy is coming up for debate by a private member's bill in our House in June. So what I am saying is your paper ...

Mr Minson: You're not going to embarrass me in front of your parliament as well?

Mrs Lavarch: Absolutely!

Mr Minson: I must apologise. I didn't follow what was actually written. I always scrawl all over it. But I think there's an official version.

Mrs Lavarch: We've got 10 minutes before the next session starts. Any more discussion at all?

Excerpt: ***The Death of Common Sense***

Mr Redford: I think it should go on the record that Peter Nagle has given us an extract from *The Death of Common Sense* by Phillip Howard, on how the law is suffocating America. There's a lovely quote in there which I'll read. It says at page 8:

> *Politicians spend their lives apologising for government and they all promise to fix it, but the slogans are so tired and performance so dismal that the overall effect is more like propaganda ... So far in my adult life, nothing significant seems to have changed, except that government has become increasingly distant.*
>
> *'The characteristic complaint of our time seems to be not that government provides no reasons', said former Justice William Brennan, 'but that its reasons often seem remote from human beings who must live with the consequences.'*
>
> *Government acts like some extra-terrestrial power, not an institution that exists to serve us. Its actions have an arbitrary quality and almost never deal with real-life problems in a way that reflects an understanding of the situation.*

I think that that sums up a lot of what we have to do in dealing with some of these national schemes of legislation.

Mr Nagle: A handy little book if you can get it. There are lot of little gems in it – parliamentary debate, a lot of things you can quote.

Commonwealth/State Relations

Mr Elferink: I think it's worth looking at the history of how we've ended up in this situation. Complementary federalism, I think, is an excellent idea and an excellent phrase to use to describe what should be happening. But ultimately, the committee that we're talking about, the committee that Victoria put forward yesterday, is going to pick up the role that the Senate should always play.

Now, I'm not going to be so naive as to believe for one second that the Senate's suddenly going to say: 'Oops, sorry! We realise we've made a mistake. We're doing what we never intended to do. We're going to start protecting our states' rights.' However, it shouldn't be forgotten that that's roughly what we're organising in this room. We're talking about organising a body of people to do the Senate's originally-perceived job.

There was a time in this country, just before federation, when there was a very great likelihood that the continent of Australia was actually going to be a group of nations. And there was a time when Western Australia was going to be a separate nation and New Zealand was actually going to be part of the Commonwealth of Australia.

The processes that we've all got so used to over time, with power being dragged away from the states and towards the Commonwealth, has been so subtle that barely anybody else has noticed it. The High Court has always been pro-Canberra. It has consistently thrown a pro-centralised government slant on nearly every decision that's come about.

The states certainly haven't done themselves any favour by devolving income tax rights to the Commonwealth in times of war and never really asking for them back again. Eventually what the states were doing was saying: 'Here, you take the ability to raise revenue and we'll come cap-in-hand every year to you and say, "Please, Mr Commonwealth Grants Commission, can we have some money? Please, sir, can I have some more?" '.

The Adelaide Steam Ship case - correct me if I'm wrong, somebody - in relation to taxation also drew power to Canberra. The Tasmanian dams case, when we're talking about international treaties. Kevin, the last time I checked, Australia had now signed up to 2227 international treaties, all of which affects the state parliaments' powers to be able to pass legislation.

Ms Saliba: They're not all *[inaudible]* instruments and various agreements that *[inaudible].*

Mr Elferink: I stand corrected. The point is that we are starting to have to protect ourselves as states, in spite of the fact that it's the Senate's business to look after those interests for us.

You'd be naive to believe for one second that we live in a world where we can simply isolate ourselves and say: 'We're not going to talk to anybody else. We'll do it our own way.' I think Europe has discovered that you can't do that. Certainly the rest of the world through the GATT process has discovered that you can't do that.

But by the same token, template legislation, as SA rejects it and as WA struggles with it, is a real problem child. It is part of this insidious process of drawing power away from the states. Somebody flippantly said before: 'Why not abolish the states?' Well, that's been seriously suggested. Bob Hawke suggested it.

Ms Gillett: And Gough Whitlam.

Mr Elferink: And Gough Whitlam suggested it. Thank you very much.

General discussion – inaudible.

Mr Elferink: In that case, I suggest those people who believe that should resign from their respective parliaments and go and run for federal seats or local councils.

At the end of the day, you're seeing power being drawn away by Canberra. And I can tell you the dissatisfaction and disaffection with Canberra are directly proportional to the distance from Canberra. The farther you are away, the more you have problems with them. That's a consistent rule - it's almost mathematical.

While we're considering all these sorts of issues, I think it's something that the states and the delegates here should really turn their attention to. We're not being glib. We're not just talking about tinkering around the edges. There are some pretty fundamental issues involved here, and I would like to see them considered in this process.

Ms Gillett: One of the most instructive accounts was that part where Kevin dealt the process of how ministerial councils work. First we start here, then we go to there. That's just so helpful to a relative learner who is a backbencher, who has just gone from opposition to government. It made me think, listening to John's comments - I understand your

view and appreciate it, but understand mine is a genuine view as well – that the same people who worry about power going to Canberra, to a federal system, also say that we are overgoverned. My concern about the number of levels of government we've got is basically due to the fact that I think that we are overgoverned. But it made me consider that it's not power going to Canberra that's the real problem.

The problem we've got is that all parliaments - including the federal parliament - are losing their sovereignty, losing the role that they ought to play, because increasingly the executive is running the show without reference or with very little reference to the democratic institutions, our parliaments. I don't know that it's so much of a problem that power is being centralised in the federal parliament. I think power is increasingly being centralised in the executive of government, which excludes a lot of people who are elected representatives of the people. I understand what you're saying, but I have that slightly different view. There's a centralisation of power but it's at the top of the tree –the executive tree.

Mr Elferink: The only answer I have to that is that I suggest you sit in a parliament which from time to time has its decisions overturned without any appeal whatsoever.

Ms Gillett: I appreciate your position.

Mr Minson: I'll be interested to see whether your opinion changes in three years time.

Ms Gillett: It could well do.

Mrs Lavarch: Of course, the executive would say it's out of their control because it happens at a global level. So, that is something as, that's it's probably ...

Mr Redford: I have to say that Mary is correct. You're talking about template legislation. Quite frankly, when the Commonwealth does occasionally stand up, they are a creature of the executive arm of government. And they use in their respective party rooms in parliament the desire by some parts of our community for uniformity to push this stuff through. So we need to be cautious about what we say and how far we go, because there is a desire out there among our constituents in certain areas for uniformity.

In some respects we are probably the victims of the failure on the part of this country for so long to properly address issues of federalism without making political capital out of them. The redesigning of our federal structures and the shifting of powers about - some back to the states, some state powers to the Commonwealth - so that we can better deliver government is not before time. Unfortunately, the political realities are such that that won't happen. The ministry would say: 'We're dealing with the practical consideration of the demand from the community for uniformity'. That's the prism through which they look. The prism through which we look is: 'Well, if you do that we don't have any say and we feel powerless. And if we feel powerless, imagine how our constituents feel?' It's a real tension. We need to be conscious of what the other side is thinking, so that we can come up with something that they can live with as well as we can.

Mrs Lavarch: Angus, we're not trying to overturn national schemes. We're only trying to get access so we can exercise ...

Mr Redford: No, I didn't say that. But we need to be cautious that we don't get too antagonistic. If we present an unacceptable approach from this meeting to our respective executives, they will slap us down very quickly and as a group we will lose credibility, which we'll find difficult to grab back. Whereas if we come up with a sensible and reasoned response, one which causes ministers to think, 'Gee, we can't criticise this. We'll have to be a lot more careful', we will not only gain respect, we'll also achieve something that might address some of our concerns. trying to change the subject.

INTERGOVERNMENTAL AGREEMENTS ACT Legislation

Mrs Lavarch: Before we have the resolutions, do you want to get a bit of a briefing on the ACT attitude in relation to intergovernmental agreements and what they've come up with ?

Mr Wiese: Yes. Reading the act, it's quite simple. How it works in practice will be very much in the air.

Mr Bayne: I wasn't going to say a great deal more than to try to summarise the point of the act. Those of you who are vets will probably not learn a lot from this. So I will say a little bit about how it's working.

We have an ACT law, the *Administration (Interstate Agreements) Act*, which was enacted out of a concern by the ACT parliamentarians that they simply didn't know what was going on in ministerial councils and they wanted to find out. The key concept in the act is that an interstate agreement is defined as an agreement between governments that <u>could</u> require legislation to be passed by the Assembly. So it's fairly widely defined.

When a minister proposes to participate in negotiation - so it's telling you at an early stage - for

interstate agreement, the minister must inform each member of the Assembly about a number of matters, including the nature of any legislation that may be proposed. The minister must also at that stage consult the relevant subject matter committee of the Assembly. We have a number of subject matter committees dealing with various sectors of life. And the minister must also consult with the scrutiny committee 'so far as its terms of reference are relevant'. That could be where we suspect there might be a bit of a *[inaudible]* our authority, I'm sorry, because we haven't actually been given that information. But given our rights, our heads of reference, *[inaudible]* are relevant to our terms of reference.

When it is proposed to enter into an agreement, he or she must have regard for any recommendations that have come forward from either the subject or the scrutiny committee. And then when agreement has been reached, each member must be informed within seven days of the terms of the agreement *[inaudible]*. There are escape clauses from those obligations, but not in respect of notification of an agreement and the *[inaudible]* have been made.

Now, what the scrutiny committee proposes to do is include in its reports the fact and extent of the consultation we have, any recommendations made to the relevant minister, and the effect of those recommendations. So we *[inaudible]* provide information in each report about consultations and the end results of those consultations which would include, of course, the fact that agreements are being made *[inaudible]*.

Looking at that law, its main object, I think, was really not to directly *[inaudible]* concern of the scrutiny committee. The main object of it was to empower each member of the Assembly to bring whatever influence they might on this process of law-making by intergovernmental councils.

One shouldn't discount the fact that in some situations members might have a great deal of leverage at that stage. For example, we have a Green member. Given the state of play in the Assembly, with a minority government, the government have an interest in keeping her happy so far as they think it's consistent with their policies. If she were to become aware that at the intergovernmental council level there was an agreement being proposed on ecologically sustainable development, she'd be in there like a shot saying to the minister: 'What are you doing? I don't want you to do anything like that. Bring it into the Assembly.' One can imagine situations where a single member, armed with knowledge of developments at a council, could bring a good deal of leverage on the ACT minister. In turn, that person may feel that they need to do something at the intergovernmental level.

But the second dimension of it, of course, is that the committee is informed of what's happening. Now, the severely practical question is, what difference is it making, if anything? In our last meeting of the scrutiny committee, attention was drawn to the fact that we're not being informed of consultations that are taking place. We suspect that there are, because of the number of councils and the like. Our Chair is writing to the minister to remind him of *[inaudible]*.

That's of interest to this group in this sense. If it turns out that we are able to inquire and we include it in our reports, once those reports are public in the sense of being tabled and no privilege issue arises, then that information can immediately be transferred to each of the committees represented here.

That's the nub of the ACT scheme. It has the potential, which I have to say is not yet realised, to inform our world of what's happening and therefore achieve, I think, the aims that are being expressed, or go some way to achieving them.

Mr Hogg: You were saying you might make the information available to committees generally. There's no sanctions on disclosure of any of this consultation that you've had?

Mr Bayne: That was my last point. I think if a matter can be legitimately included in our report - in fact, we have a section heading in the *State Agreements Act [inaudible]* mentions one or two things under that. That's legitimate. There'd be no subterfuge involved there. Once the matter is included in our report and once it has been tabled in the parliament, then that's a matter of public knowledge.

Mrs Lavarch: Does your committee have a website?

Mr Bayne: No. The Assembly has, but the committee doesn't itself have a website.

Mrs Lavarch: Do your reports go up on the web site?

Mr Bayne: They're about to, I think. I was speaking to Tom Duncan before. That's certainly something that's uppermost in our minds. But we can simply e-mail them out, the relevant parts anyway.

Mr Hogg: Has your committee thought of broader public consultation as well, so that you could be more properly informed of the impact out there? You put the material that you've gained under the act

out for broader public consultation. Is that a possibility?

Mr Bayne: Well, I think in so far as that the reports are available to the public and the press, that in a sense would be possible now. But I think that within the Assembly they'd see a bit of a problem, in that the relevant subject committee is really seen to be the main place in which a discussion about these regs should take place. Our interest in those is somewhat subsidiary to theirs. So I think the scrutiny committee could find itself in difficulty if saw itself as a vehicle for people to offer comments about the substance of an agreement. That's really the job of the relevant subject committee. They under the legislation are entitled to know more than we are about the consultation process.

It's a matter for the press. It may happen, of course, that if we end up having in our reports information about the state of negotiations at intergovernmental level, that will be taken up by interest groups in the ACT. We have quite articulate and vocal lobby groups spanning a whole range of issues. I suppose it remains to be seen whether it will have the effect that you *[inaudible].*

Mr Squibb: From your practical experience, can you see it being applied without any great changes in a bicameral system?

Mr Bayne: I haven't thought about that, but I don't see why not. It's prime purpose is to arm each member of the legislature with information about what's happening. And that would apply as much to *[inaudible].*

Mr Squibb: It's probably just a matter of changing 'Legislative Assembly' to 'the parliament', and having reference to a joint standing committee.

Mr Wiese: From a purely practical point of view, you've already got the role of scrutinising primary legislation and secondary or subordinate legislation. You would then have, potentially, a role of scrutinising everything that goes onto the agenda of every ministerial conference - bearing in mind there's 43 different groups. I know in police ministerial conferences we used to have something like 40 different matters to look at. How, physically, could you ever handle that sort of workload, bearing in mind that the great majority of the things that you're looking at in those conferences do potentially lead to legislation? So they would be matters that would require disclosure under this legislation.

Ms Saffin: It's only agreements, though. Is it every agreement they have to be notified about under this legislation?

Mr Bayne: No, they have to be notified of a proposal to participate in negotiations. So they're informed at a very early stage. But it's not contemplated, I think, that once being notified, the scrutiny committee will do much more than report on the fact. We haven't yet had to face the question of how much farther we'd take it. If the notification to the scrutiny committee was of some detail, say in the form of a draft, then there might be an argument that it's contemplated that we will then at that stage comment on the draft bill. But we haven't yet had to grapple with that, because we haven't really been notified of anything.

There's a letter going out from our Chair now, I'm not sure to which minister, asking: 'Why aren't you telling us?' We've allowed them a period of grace because we figured there was a lead time *[inaudible].* The bill was to come in in 1997. We figured that, given the obligation to come in at an early stage of the process, it might take a while for us to actually operate. We figure now the time is up.

Mrs Lavarch: They haven't decided it seemed like a good idea at the time, but ...'?

Ms Gillett: John's story was that the ministers when the new members first came in knew that the new members didn't know about the legislation. So they decided not to tell them. John, ever-vigilant, found out about it and started the ball rolling again.

RESOLUTIONS

Mr Wiese: Ladies and gentlemen, I think I can say we've done well so far. We're now really going to try ourselves out and see if we can actually achieve at the end of this conference. There's been a little lobbying going on to try and pull together South Australia and Victoria in this so-called shotgun marriage. While that's being put into a more formal form, Peter Nagle has resolutions that we can proceed with first.

WORKING GROUP MEETING DATES

Mr Nagle: Mr Chairman, I move that the following dates be the future meeting dates of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees: May 2000 – Brisbane; October 2000 - Alice Springs; February 2001 – Tasmania [of course, that's the conference]; May 2001; October 2001; February 2002; May 2002; October 2002; May 2003.

You'll note that Brisbane has been put in there, and Alice Springs and Tasmania. We have those

confirmed for meetings of Chairs and Deputy Chairs, subject to your approval.

Seconded **Mr Elferink.**

Mr Wiese: At the end of that there's still the conference?

Mr Nagle: Yes, that's right. There'll be a conference in 2003.

Resolution carried.

Mr Nagle: If people can give some thought to any of those dates that they might like to host, we'll be available to talk to you before you depart.

WORKING GROUP NATIONAL EXECUTIVE

Mr Nagle: Mr Chairman, I move that we formalise the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees to elect a national executive.

Seconded **Mr Elferink.**

Mr Nagle: The last conference occurred in March 1998. With great respect, and modesty being one of my great virtues, it wasn't for me this conference wouldn't have got started. We need to formalise a group of people who can be in constant contact with everyone. This does not deal with scrutiny of legislation. It's got nothing to do with that. It deals just with this body of Chairs and Deputy Chairs. The scrutiny resolution is different from this. This only deals with us, to be able to keep the momentum rolling. That's the reason for doing it, so that we've got people we can contact. We can contact one another and have discussions about it, then have our 6-monthly or whatever it is, 5-monthly, meetings.

Mr Wiese: So the executive's role will be to pull it all together. Anyone got any problems with that?

Resolution carried.

NATIONAL EXECUTIVE COMPOSITION

Mr Nagle: Mr Chairman, I move that the national executive shall have a national chairperson, one senior vice-president and four vice-presidents.

Seconded **Ms Saffin.**

Mr Redford: In effect that enables the national chairman and one vice-president to be from the NSW Right, so he doesn't have to praise himself.

Mr Nagle: I'll treat that with the contempt I think it deserves. I might just explain something. There probably will be another vice-president attached at the May meeting because we'll talk to the feds and include someone from the federal parliament, either a Labor person or the Liberal chairperson of those committees. But it would be a presumption for us to put them on when we don't have any authority to do it. We don't want to be presumptuous.

Ms Saliba: But aren't they included as being one of the committees represented here?

Mr Nagle: Yes, but we want to talk to them.

Ms Saliba: If you make this special position for them, then perhaps you should be including every state again.

Mr Nagle: Basically, at the end of it everyone is included.

Mr Balch: Could you amend this to include the two territories as well?

Mr Nagle: Yes, OK.

Resolution carried.

PARTY AFFILIATIONS OF EXECUTIVE

Mr Nagle: Mr Chairman, I move that after the election of the national chairperson the senior vice-president be a member of another political party and thereafter the other four vice-presidents be members of other political parties.

For example, if the chairman was Liberal, then the senior vice-president will be ALP, the first vice-president will be National, the second vice-president will be ALP and so forth, whichever way you decide - or independent. Don't worry, you're the 'so forth'.

We don't have to do it that way. It's just open for discussion. You can do it any way you want to do it.

Mr Redford: The difficulty with the party affiliation thing is that if you have a change of government, the general rule in our state and I assume in others is that the Chair of the committee, who is most able to come to these things, is usually from the government party. So you would lock yourself into a position where, if you had a change of government, as we just saw with Victoria, if this had been in then Peter Ryan, much as we all love and adore him, would have to come along, or one of the Nats. And I'm not even sure there's a Nat on the Victorian committee.

At the end of the day, we generally reflect the results of elections around the country, and we don't often divide on a Labor/Liberal thing. I don't think we need a reference to political parties at all. It's more an issue of whether your state is appropriately represented. There might be occasions, probably more often than not, when we'll all be Liberals. That's just the way it is. At the moment, there's an imbalance the other way. We all appreciate that it could be temporary, but we'll live with it.

Mr Minson: What if we went about this in a more general way? I'm trying to think on my feet here. What if we said, 'that after the election of the national chairperson a senior vice-president and four other vice-presidents be elected to adequately represent, um ...'

Mr Redford: The federation?

Mr Minson: Yes, the federation. That gets away from that, because over time ...

Mr Wiese: Is it essential to actually spell it out? Are you happy as a group to accept that that is the concept on which you're going to work? I think it's basically a concept on which most of our committees themselves work.

Mr Redford: Well, if you just say the make-up of the committee shall reflect the federation, full stop, that gives the Commonwealth a guaranteed response which is fair. You would obviously want a fair geographical spread between the smaller and the larger states. And possibly you'll want one of the territories represented on a regular basis.

Mr Minson: I think you should just leave it to the group. The fact of the matter is that if you cut somebody out they'll get disgruntled and walk away and the whole thing's going to collapse anyway. It will take care of itself.

Ms Mikakos: This might be an irrelevancy, but why are we even considering this when we're talking about an executive of six people, when essentially we're having all the chairs of each committee in every jurisdiction in a total vote? It's probably easier just to have the chair rotate among the chairs of the jurisdictions' committees.

Mr Nagle: Because it keeps pushing the agenda. It keeps getting the meetings up and running. There's always somewhere there who's going to push it. Otherwise we go back to our respective ...

Ms Mikakos: My concern is that the jurisdictions that might be represented on that executive won't be up to speed with what's happening. We have the situation at this conference. Obviously I am coming up to speed, being a member of my committee. I'm just saying that we have a situation where we have effectively *[inaudible]* those people having to come up to speed with it each time.

Mr Nagle: The purpose of this, Jenny, is simply to get these conferences going. We're not going to be making any major decisions. It's just so we get the meetings of the Chairs and Deputy Chairs moving, so this happens. Otherwise we're going to end up going away all with a nice feeling in our hearts and we're back in March 2003. What has happened from 1998 to now? The idea is to keep it going.

Ms Saliba: Jenny's got a point there. You're saying there'll be six representatives plus you might add a federal one in May. That will cut out a couple of states or territories from being represented on this executive.

Mr Nagle: It doesn't matter. The executive's only there to organise. It's an administrative working group to keep things going.

Ms Mikakos: Perhaps the Chair should be the committee Chair of the jurisdiction hosting that particular meeting that's coming up, given that they'll have the running of most of the organisational aspects of that meeting anyway. And it would be rotated on that basis. I would hope that if we did have an executive, it would have a slightly broader role, given the resolutions that we'll be debating shortly. I think we hope to have some sort of trial. That national executive could be used as the basis for taking forward that proposal on that trial basis.

Mr Wiese: Jenny, I think you've lost what the role of the executive is. The role of the executive is purely to make sure that we actually have a conference to bring the Deputy Chairmen and the Chairmen together. Once you've done that, once you've got somebody who's pulled together the Chairmen and the Deputy Chairmen to meet, all the work that they have to do then occurs.

Mr Elferink: I have great faith in the future politicians of this country. My recommended amendment to the motion would simply be to strike paragraphs (iii), (iv) and (v) and let them set their own conventions. That would be a lot more sensible.

Mr Redford: You probably need (iv). Delete (iii) and (v) – they're the trouble.

Mr Elferink: OK then, I amend my amendment and say we strike (iii) and (v).

Seconded **Mr Redford.**

Mr Wiese: It has been moved that we strike proposed (iii) and proposed (v) from the list of resolutions, and (iv) becomes (iii).

Motion agreed to; resolution, as amended, carried.

DEPUTATION TO CANBERRA

Mr Nagle Mr Chairman, I move that up to four members from this meeting attend Canberra while the national parliament is in session and before the end of March to apprise Senator Cooney's and Senator Coonan's respective committees of the deliberations and resolutions of this meeting .

That is something that James asked that we do. Janice, I think it would be a good idea if we did that.

Ms Paull: I think we should give you the dates of the sittings.

Mr Redford: Two questions. Why four when three can do it, or even two?

Mr Nagle: Or whatever. I just picked a number between 1 and 10.

Mr Redford: Secondly, given the extraordinary generosity of the Australian taxpayers' largesse lavished on our senatorial colleagues, which on occasion is not extended to their state counterparts, why can't they travel and visit you in Sydney? Why can't the motion be flexible, in other words?

Mr Nagle: The reason for that, Angus, is that their committees will be in session. All their members will be there. We go and address their members because we really want to get them on side, instead of Barney coming up to Sydney and going back and trying to tell them.

Mr Wiese: Hence the four, so that two can go to each.

Ms Paull: There is a possibility we'll try to get the two committees together so that you wouldn't have to double up your briefing. You may not need to bring four people. It might give you a bit more flexibility.

Mr Wiese: Can we put 'up to 4 members'?

General discussion.

Mr Wiese: Peter, you've moved that up to four members blah-blah-blah.

Seconded **Ms Gillett.**

Resolution, as amended, agreed to.

NATIONAL NSL SCRUTINY SYSTEM

Ms Gillett: Mr Chairman, in the resolution that's here, I hope everybody has had their views represented. But because it was done with much haste just towards the end, I suggest everyone takes five minutes and has a look to make sure that everything they wanted included is there, and stuff that they specifically did not want included has been taken out.

Seconded **Mr Redford.**

Mr Redford: Is there any particular reason why you need the word 'formal'?

Ms Gillett: At the last conference, in Sydney in July - I wasn't there but I'm taking advice from those who were – apparently the resolution was moved and carried to establish a formal system. So to have a debate about the word 'formal', you really needed to have had it in July and knocked it off there. All we're essentially doing is saying that we reinforce and recommit to the resolution that was taken and carried in Sydney in July.

Mr Wiese: Really what we're doing is picking up what we've already resolved to do at a previous conference. My reaction was exactly the same. I'd put 'informal' in there. But in view of the fact that we've already done it, I think we'd be ...

Mr Redford: Do we need the word 'formal'?

Mrs Lavarch: We don't need it in there as long as everyone understands that we still remain committed to that resolution made in July last year.

Mr Elferink: Mr Chairman, I propose we omit the word 'formal' and substitute the word 'accepted'.

Mr Redford: What about just leaving it as 'a system of national scrutiny'?

Mr Wiese: Would everybody be happy to delete 'formal' so it would read 'to establish a system of national scrutiny'? OK.

Mr Redford: The second question is that in doing the actual drafting of it, was any thought given to having a clause similar to the one that I thought of, which is that each presiding officer of a scrutiny of primary or delegated legislation committee appoint a committee staff member to be responsible for conveying the relevant information pertaining to a potential or proposed national scheme of legislation,

so that we all commit to doing that. All our staff are here. We've got the instrument permits. Make it part of the resolution so that it's on the record, because changes in personnel happen, particularly with smaller committees.

Ms Gillett: That's the only thing that I worry about slightly. I'll take some advice from Andrew on this. I suppose we can commit our staff in the parliamentary committee system to take on board that additional level of work. And it's important that we back up our words with our bodies and their bodies. To tell you the honest truth, it was just a bit *[inaudible]*. What could you say that makes it a bit simpler? Just say that each committee will make the appropriate ...

Mr Balch: You've got 'with a view to', and then you've (a) to (f). You add another one, (g), establishing a national cooperative communication ...

Mr Redford: What I want, Steve, is a commitment by us all agreeing to this, so that as Chairs we're committed to formally giving the responsibility to one of the ...

Ms Mikakos: Tack it onto the end of (b).

Mr Redford: You can tack it wherever you like, but something along the lines that each presiding officer of a scrutiny committee appoint a staff member to be responsible for conveying any relevant information pertaining to potential or proposed national scheme legislation to all other committees as and when such information comes to that committee's attention.

Mr Elferink: It works for me.

Ms Mikakos: Mr Chairman, I suggest something a bit simpler. I think we should have that commitment stated on the record. We amend (b) so that it reads at the end of the (b) - indulge me here, I'm working on it - 'and appoint ...'. What were the words you used there?

Mr Redford: 'Commit a staff member.'

Ms Mikakos: ... 'and appoint a staff member for such a purpose'.

Mr Wiese: Jenny, I suggest to you that all of what we're addressing here is talking about the role of the working group, and what you're talking about and what Angus was suggesting is a mechanism within our own jurisdictions, within our own state organisations, to ensure that there is an exchange of notifiable information. So it's a stand-alone clause.

Ms Mikakos: Yes, but unless we have such a mechanism, this is not going to work. So what I'm suggesting ...

Mr Redford: Jenny's drafting will work. She's right.

Ms Mikakos: What I'm suggesting, taking on Angus's point, is that we amend paragraph (b) on the end there, so that it says at the end of the paragraph 'and appoint a staff member for such a purpose'.

Mrs Lavarch: It's not appointing a new person. What we're doing is assigning the task of the sharing of information to an existing staff member, isn't it?

Mr Redford: Yes, that's right.

Mr Wiese: Jenny, can you run your words past the group again?

Ms Mikakos: At the end of paragraph (b), add, 'and appoint a staff member ...

Mr Redford: From each committee.

Mrs Lavarch: You're not appointing, as I said.

Ms Mikakos: 'and assign a staff member from each committee for such a purpose'.

Ms Gillett: Then all that staff member is committed to doing is ensuring ...

Mrs Lavarch: Informing of proposals.

Mr Redford: Yes, that's what it's about.

Ms Saffin: Later on we could develop terms of reference about how we operate *[inaudible]* and that sort of stuff.

Mr Bayne: The Working Group of Chairs and Deputy Chairs meets at the following times and places. Then it says 'with a view to ...' The way this reads is that the group is going to meet to do those things. On that basis, it's not appropriate to have this particular objective placed in this sort of resolution. In order to make this a more intelligible piece of English, what is now proposition 10 in Angus's draft, if I understand it right, really needs to stand alone as a subset *[inaudible]*, not incorporated into (a) to (f).

Mrs Saliba: You could just put it in there somewhere at the top that each committee assign a staff member ...

Mr Hogg: Obviously, if you're going to ensure that each state and territory receives the earliest possible

warning, you're not going to wait until those meetings.

Mr Bayne: I suggest a new stand-alone clause, after (f), that each state and territory committee assign a staff member for the purposes of section (b).

General discussion.

Ms Saliba: The federal committee should be included in each of those.

Mr Balch: From a committee's point of view, maybe 'with a view to' is not the appropriate cover. Looking at some of those other points, we don't only want to *[inaudible]* regular exchange of information. We're talking about things we want to do on an ongoing basis, not only at the meetings. The meetings are part of it. We need something like: 'The purpose of this national group is ...'

Mr Wiese: We'll vote on Janelle's first.

Mrs Lavarch: We'll be changing that because we won't need the meeting times. We've already resolved those. Perhaps we could have that this meeting resolves that the functions, or the words you used there, Stephen, were that ...

Mr Elferink: 'To (a) ensure that a regular exchange of information and views takes place'.

Mr Robinson: I think Peter was right when he suggested that this needs to take effect from tomorrow, so it needs to be stand-alone. I suggest it goes up above where the dates were being put - those dates are going - and that the ...

[Gap between tapes]

Mr Wiese: Can you put that in writing and give me some indication of where you think we should be putting it? We're going to have great difficulty. We're all talking about a whole raft of different issues.

Ms Saffin: What we're trying to do is make it make sense - total sense. We've all committed to a certain principle and process, and it's reflected in what we've got in front of us. In the next half an hour we're probably not going to get it exactly how we want it. I suggest that the working group be empowered to develop terms of reference of operation so that some of this stuff can be clarified. We're going around in circles with 'enabling' and 'enacting' and 'facilitating' ...

Mr Redford: But we're not far from it, Janelle.

Mrs Lavarch: Taking on board what Peter said, and Jenny and Angus, I think what confuses this resolution has been giving the group a name. I suggest that at the end of the third paragraph, where we have, 'Being mindful of the divergent views expressed at this meeting but wishing to move forward as a group on the establishment of such a national committee, this meeting resolves to ...', and then take out all that section on the dates and times and put (a) to (f), and then we do it as individuals ...

Mr Redford: That's what Tony just said. Tony's working on it. He'll come up with an answer.

Mr Wiese: OK, so 'this meeting resolves to', and then go straight down to (a), (b), (c).

Mrs Lavarch: You can incorporate Jenny's bit in there as well, because then we all walk away from ...

Mr Nagle: One of the things that we should be mindful of is that there are going to be Liberal-National governments, there are going to be Labor governments, and they're all doing this. We need to have both parties. If we only have Chairs and Deputy Chairs as part of this, then in our case that's the two Labor people. That excludes my colleagues in the Liberal and National parties and my independent colleague here. So we may want to appoint two people from our committee, one Labor and one Liberal, to work on it together. Or one Labor, one independent, or one Liberal, one independent - whatever.

Mr Wiese: Is everybody happy that we go to the third paragraph? It will read: 'Being mindful of the divergent views ... but wishing to move forward as a group on the establishment of such a national committee, this committee resolves to ... So you're happy to go from there down to: '(a) ensure that a regular exchange of information and views takes place'? No problem with that? '(b) ensure that all [we've put in federal] federal, state and territory committees receive the earliest possible warning of any proposed or potential national scheme legislation'. And we can go back and put in then, 'and assign a staff member from each committee for such a purpose'. All happy with that?

Delegates: Yes.

Mr Wiese: Moving on to (c) 'make further recommendations ...' Are you happy with that?

Delegates: Yes.

Mr Wiese: (d) 'enable the federal, state and territory committees to address the issues identified'?

Delegates: Yes.

Mr Wiese: (e) 'report on their activities and present further recommendations at the biennial conference'?

Ms Gillett: Now, that one might be more a working group one.

Mr Wiese: OK, we're all right down to (d).

Mrs Lavarch: Can I go back to (b)? Can we take out 'warning' and insert 'advice'? 'Warning' is a bit inflammatory.

Delegates: Yes.

Mr Wiese: OK, is everybody happy with that? I think that's a very good bit of advice. Now, we're still happy with (c) and (d)? Now (e).

Ms Gillett: Does yours say, 'report on their activities and present further recommendations at the biennial conference'?

Mrs Lavarch: That was it.

Mr Wiese: So you're happy with (e)?

Mrs Lavarch: The only thing is, (e) is actually what the working party will do. It specifically refers to the working party. Perhaps that needs to either stand alone or you have to spell out what 'their' means.

Mr Balch: 'Report on the activities of the working party'.

Mrs Lavarch: Or 'that the working party report on ...'

Ms Gillett: So it reads, 'report on the activities of the working party and present further recommendations at the biennial conference'?

Mr Wiese: Has everybody got that wording? Is everybody happy with it?

Mr Redford: It's not this meeting that's going to report on the activities. That's someone else. This meeting is not going to do anything after it stops.

Ms Gillett: We should put it last and say, 'and call upon the working party to report on ...' - something like that.

Mr Wiese: So 'resolves that the working party report ...'.

Ms Gillett: 'And further, the meeting resolves that the working party will report on their activities and present further recommendations at the biennial conference.'

Mr Wiese: Can I just read what I've got and you can correct me if I've got it wrong. We're now talking about (e). Going on from the 'this meeting resolves to' above: '(e) request that the working party report on the activities ...

Mr Redford: Their activities.

Mr Wiese: ... on their activities and present further recommendations at the biennial conference'. All happy?

Ms Saffin: We actually don't want to 'request', though. It's assumed that they'll do it. So probably what you said, 'and further resolves' ...

Mr Wiese: (d) is 'Request that the working party report on their activities and present further recommendations at the biennial conference.'

Delegates: Yes.

Mr Wiese: Now, do we still need (f)?

Mrs Lavarch: That was in the other resolution, wasn't it? We've voted on that.

Mr Redford: No, we're only reporting in the other resolution. In this one we're seeking their support.

Mr Wiese: We've basically done it already. So you're happy if I delete (f)?

Delegates: Yes.

Mr Wiese: We've got it well spelled out. Is everybody happy with it?

Mr Minson: Mr Chairman, that was my addition, and as long as it's covered I don't mind. But it's pointless, absolutely pointless, continuing without the support and cooperation of the federal committees.

Mr Redford: And the previous resolution didn't ...

Mr Wiese: We've already resolved that up to four members from this meeting attend Canberra to apprise Senators Cooney and Coonan ...

Mr Minson: To apprise them. It didn't seek their support.

Mr Nagle: I think it goes without saying. Let's not get too bogged down with it.

Mr Minson: I don't mind.

Mr Wiese: And we have included, wherever we are talking about the committees, 'federal', so in (b)

we've got 'federal, state and territory committees' and in (d) we've got 'federal, state and territory committees'. OK?

Mr Hogg: *[Inaudible]* go back and revisit (c) with the thing about seeking support.

Mr Minson: Look, I don't care. It's just that I thought we might be going to pass one lot of resolutions and not the other. I just wanted you to understand that you're going nowhere unless you can achieve that.

Mr Hogg: Yes, absolutely. I understand that. That's why we're going to talk about it.

Mr Wiese: Are you prepared to vote to accept the resolution as it's been worked on and amended down to this?

Ms Gillett: Is (f) in or out?

Mrs Lavarch: Out, and we're going back to revisit the third one.

Mr Wiese: Everybody has agreed. Are there any dissensions? You're happy. Peter has suggested that for the benefit of the record of *Hansard*, I need to read the whole thing again. I should condemn him to do the same. The resolution that we have just voted on reads:

> This meeting remains committed to the resolution carried by the July 1999 Sydney conference to establish a system of national scrutiny of national scheme legislation (NSL).
>
> This meeting accepts national scheme legislation as any legislation which is enacted or made or proposed to be enacted or made in more than one Australian jurisdiction as a result of an intergovernmental agreement.

Did we actually discuss 'accept' or 'define'? You're all happy with 'accept'?

Members: Yes.

Mr Wiese:

> Being mindful of the divergent views expressed at this meeting but wishing to move forward as a group on the establishment of such a national committee, this meeting resolves to –
>
> (a) ensure that a regular exchange of information and views takes place;
>
> (b) ensure that all federal, state and territory committees receive the earliest possible advice of any proposed or potential national scheme legislation and assign a staff member from each committee for such a purpose;
>
> (c) make further recommendations concerning the establishment of a formal national committee;
>
> (d) enable the federal, state and territory committees to address the issues identified;
>
> (e) request that the working party report on their activities and present further recommendations at the biennial conference.

Full stop.

Mr Bayne: Mr Chairman, there is actually a problem, sorry. (c) doesn't make any sense either, for the same reason as before, that this meeting is not going to make further recommendations.

Mr Nagle: 'Resolves that the working group make further recommendations.'

Mr Wiese: Can I just make sure we've got that? So we've altered (c) - Peter, thank you for that - to read: 'the working group make further recommendations concerning the establishment of a formal national committee'.

Now, we've all voted and accepted it. Has anyone got any quibbles whatever?

Resolution, as amended, carried.

Deputation to Canberra

Mr Nagle: Mr Chairman, I move that we reopen item (c) of the resolutions so that item (c) would read: 'that up to four members from this meeting attend Canberra while the national parliament is in session and before the end of March to apprise Senator Cooney and Senator Coonan's respective committees of the deliberations and resolutions of this meeting, for the purpose of seeking their support and guidance with regard to our endeavours'.

Seconded **Ms Gillett**.

Mr Wiese: Is everybody happy that I ignore all protocols and that we go back to the original motion and pass it as worded by Peter?

Motion agreed to.

Mr Wiese: You're a most understanding group of people.

PREPARATION OF NSL LIST

Mr Wiese: I have a resolution that I would like to run before you. It proposes: that a comprehensive list of all national scheme legislation which currently exists be drawn up by committees to enable ongoing monitoring of proposed amendments to primary and subsidiary national scheme legislation in the future.

Mr Nagle: And sent to the convenor or the president of our committee.

Mr Wiese: Would everybody be happy if we put it in there?

Seconded **Mr NAGLE.**

Resolution carried.

CHAIR OF WORKING GROUP

Mr Wiese: We've already agreed that we need to have a convenor. Would delegates be prepared to appoint a convenor now, at this meeting? Is anyone prepared to nominate a convenor?

Mr Redford: I nominate Peter Nagle.

Seconded **Mrs Lavarch.**

Mr Wiese: Does anybody have any further nominations for that position? It gives me a great deal of pleasure to say, Peter, you're the convenor from here on.

Applause.

VICE PRESIDENTS OF WORKING GROUP

Ms Gillett: I move that the senior Vice-President be the Honourable Angus Redford MLC and that three of the four Vice-Presidents be: Mrs Linda Lavarch MLA; Mr Bob Wiese MLA; and Mr Steve Balch MLA.

Seconded **Mr Blach**.

Resolution carried.

Applause

Mr Nagle: Ladies and gentlemen, to reiterate what we said at the very beginning, we thank Stephen, we thank Terry, we thank the parliamentary committee, the Speaker and the Clerk of this parliament for the hosting of this conference. We're indebted to you, mate. Thanks very much.

Mr Balch: It's been a great pleasure. Just before we go, my colleagues are moving around at the moment. We're giving the ladies a nice scarf in our Territory colours and a tie for the gentlemen. Take those away with our compliments. We're delighted that you were all able to come here and hope that you've enjoyed yourselves. Please come back, next time to Alice Springs. Thank you.

FINAL RESOLUTIONS

The following resolutions were passed at the meeting:

1. This meeting remains committed to the resolution carried by the July 1999 Sydney Conference to establish a system of national scrutiny of National Scheme of Legislation (NSL).

2. This meeting defines NSL as any legislation which is enacted or made, or proposed to be enacted or made, in more than one Australian jurisdiction as a result of an inter-governmental agreement.

3. Being mindful of the divergent views expressed at this meeting but wishing to move forward as a group on the establishment of such a national committee, this meeting resoles to—

   (a) (i) ensure that a regular exchange of information and views takes place;

   (ii) ensure that all Federal, State and Territory Committees receive the earliest possible advice of any proposed or potential NSL and assign a staff member from each Committee for that purpose;

   (iii) request that the Working Group make further recommendations concerning the establishment of a formal national committee;

   (iv) enable the Federal, State and Territory Committees to address the issues identified;

   (v) request that the Working Group report on their activities and present further recommendations at the Biennial Conference.

   (b) That the following dates be the future meeting dates of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees:

   May 2000, Brisbane
   October 2000, Alice Springs
   February 2001, Tasmania
   May 2001
   October 20001
   February 2002
   May 2002
   October 2002
   May 2003.

   (c) (i) That the meeting formalise the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees to elect a National Executive;

   (ii) that the National Executive shall have a national Chairperson, one Senior Vice-President and four Vice-Presidents;

   (iii) that the National Chairperson hold office for a period of two years and that the position rotates.

   (d) That up to four members from this meeting attend Canberra whist the National Parliament is in session and before the end of March, to appraise Senator Cooney and Senator Coonan's respective Committees of the deliberations and resolutions of this meeting for the purpose of seeking their support and co-operation.

   (e) That a comprehensive list of national scheme legislation be prepared.

   (f) (i) That the national chairperson of the Working Group be:

   Mr Peter Nagle, MP
   Chairman
   Regulation Review Committee, New South Wales.

   (ii) That the Senior Vice-President be:
   The Honourable Angus Redford, MLC
   Presiding Member
   Legislative Review Committee, South Australia.

   (iii) And the three other Vice-Presidents be:

   Mrs Linda Lavarch, MLA — Chair
   Scrutiny of Legislation Committee, Queensland;

   Mr Bob Wiese, MLA — Chairman
   Joint Standing Committee on Delegated Legislation, Western Australia;

   Mr Steve Balch, MLA — Chairman
   Subordinate Legislation and Publications Committee, Northern Territory.

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