APPLES AND ORANGES: COMPARISON OF THE WORK OF THE VARIOUS AUSTRALIAN DELEGATED LEGISLATION COMMITTEES

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Introduction

A quick search through the papers and proceedings of the Delegated Legislation Conferences held over the past 14 years reveals that, to date, no-one has attempted to do a comparative assessment of the work of the various delegated legislation committees. While there have been at least 2 attempts to assess the performance of committees - the most recent being Bill Wood's "performance indicators" paper delivered at the Adelaide conference[1] - there has been no attempt to assess the performance of the various committees against each other. Why is this so? The most obvious reason, of course, is that it is a dangerous task for anyone to undertake because, out of necessity, it would end up as a competitive exercise, destined to make the assessor unpopular with most of the committees. Another reason, however, is that it is difficult to envisage *how* to make a comparison because the various committees operate very differently and under very different conditions. In many ways, it would be like comparing apples and oranges.

Having said that, the comparison that I would like to present is a "scorecard" that focuses on what I regard as some of the more important features of the work of the various committees. To a large extent, this scorecard focuses on differences between the work of the committees, rather than similarities. I should also say that many of the features that I have selected are very much the product of my own prejudices, as someone interested in following the work of the committees. In particular, they relate to the accessibility of information about the committees and their work.

"Parliamentary" Factors

The first set of features that I would like to touch on are features about whose value I am unsure. They relate to what I would call the *parliamentary* environment in which the committees operate. Three committees - those in the ACT,[2] the Northern Territory[3] and Queensland[4] - operate in unicameral legislatures. Of the remaining committees, all but the Senate Regulations and Ordinances Committee operate as joint committees of the upper and lower houses. In all but the ACT and Tasmanian jurisdictions, the chair of the committee

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1 Wood, B, "Scrutiny: What a performance! Scrutiny Committees and performance indicators", reproduced in Parliament of South Australia, *Proceedings of the Sixth Australasian and Pacific Conference on Delegated Legislation and Third Australasian and Pacific Conference on the Scrutiny of Bills* (July 1997).

2 The Standing Committee on Justice and Community Safety.

3 The Subordinate Legislation and Publications Committee.

4 The Scrutiny of Legislation Committee.

is a member of the government party. In the Commonwealth, NSW, the Northern Territory, South Australia and Victoria, the government party has "the numbers" on the committee, either absolutely or because the chair has a casting vote.

Before I go any further, I should state clearly that I am well aware that a feature of the operation of these committees is said to be the extent to which their operation is bipartisan and apolitical. I do think, however, that these parliamentary factors are an interesting point of comparison, particularly because there is no obvious correlation between the features that I have identified.

Jurisdictions with a Scrutiny of Bills Committee

While my identifying the existence of a scrutiny of bills function as being a factor for comparing the work of committees almost certainly reflects a prejudice developed by virtue of having been the secretary to such a committee, I do feel that it is relevant. Scrutiny of bills committees have a significant role by virtue of their opportunity to scrutinise the primary legislation under which the power to make delegated legislation is given. One of the roles of scrutiny of bills committees is to ensure that bills do not inappropriately delegate legislative power and do not result in the exercise of legislative power being insufficiently subject to parliamentary scrutiny. As such, they operate as a “bulwark” against proliferation of the kinds of quasi-legislative instruments that I have written about elsewhere.[5]

The scrutiny of bills function has been established in the ACT, the Commonwealth, Queensland and Victoria (and recommended in Western Australia). How is this significant in a comparative sense? I would argue that it is important because of the capacity mentioned above to ensure that legislative power is not delegated inappropriately and also that delegated legislation properly attracts the mechanisms that ensure notification, publication and parliamentary review. In that sense, they can operate to maintain a flow of work to delegated legislation committees. The flaw in this argument is, of course, that the jurisdiction that has had a scrutiny of bills function for the longest time - ie the Commonwealth - has (in my view) been relatively unsuccessful in its “bulwark” function.[6] This may be one of the reasons why jurisdictions such as NSW have (at previous conferences) pointedly and consistently eschewed the scrutiny of bills function. Whatever the reasons - and despite the reservations that I have expressed above - I remain firmly of the view that a scrutiny of bills function is an advantage, if only because legislation needs all the scrutiny it can get and legislative scrutineers need all the help that they can get. Those jurisdictions that have *not* established a scrutiny of bills function should not, however, be regarded (simply on that basis) as being the poor cousins of those that have. Any analysis needs to be made on the basis of an assessment of the overall effectiveness of whatever review mechanisms are available in keeping under control the kinds of problems that (at least in my mind) a scrutiny of bills committee might address.

Jurisdictions with Committees Performing the Dual Function

The discussion above leads into a consideration of the significance of committees performing the dual function of scrutinising both delegated legislation *and* bills. As delegates to this conference are well aware, this dual function was first bestowed upon the committee established in the ACT but it was subsequently embraced by Victoria and Queensland. I am not at all sure about the significance of the dual function as a factor of comparison, though I should admit that my initial doubts about whether the dual function would work effectively have been allayed by the fact that it appears to have worked without problem in each of the

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5 See Argument, S, “Parliamentary scrutiny of quasi-legislation” 15 *Papers on Parliament* (May 1992), pp 43-6).

6 See, further, Pearce and Argument (Note 2), at p 91.

3 relevant jurisdictions. I should also say that the way that the Victorian committee has organised its operations - with the scrutiny of delegated legislation function being undertaken by a subcommittee of the "main" committee - has some practical attractions (principally in relation to the division of work and subsequent concentration of effort).

The Role of the Independent Legal Adviser

Currently, the ACT, Commonwealth and Queensland committees are assisted in their work by an independent legal adviser. In the first edition of *Delegated Legislation in Australia*,[7] there were comments about the relevance of the existence of an independent legal adviser in the effectiveness of the work of the various committees. At that time, it was suggested that certain committees may have suffered from their lack of an independent legal adviser. This comment was particularly directed at the (then) NSW committee,[8] which was adjudged to have suffered from the lack of an independent legal adviser. While the value of "independent" legal advice is not to be underestimated, current indications are that the existence or not of an independent legal adviser is of no particular relevance in judging the work of committees. The fact is that the NSW and Victorian committees, in particular, apparently do very good work without recourse to independent legal advice. They do so, however, because they have established a high quality source of advice within their own secretariats.[9] The same can be said of other jurisdictions. It is trite (but nevertheless important) to observe that the quality of advice available to such committees depends largely on the particular adviser and that "independence" is not necessarily the issue, particularly at a time when parliamentary bureaucracies are themselves assertive of their independence from the mainstream bureaucracy.[10]

Regulatory Impact Statements

One of the most significant developments in delegated legislation over the past 20 years has been the growth of "regulatory impact" as a criterion for scrutiny and the capacity for public input into the content of delegated legislation. There are presently statutory requirements that regulatory impact statements be prepared for delegated legislation in NSW, Queensland, Tasmania and Victoria. I have (eventually) come to the view that the extent to which these mechanisms produce "better" delegated legislation cannot be under-stated. There is no doubt that input from affected persons or bodies (including through avenues provided by parliamentary review committees) can only lead to an end product that is better than what might ordinarily be produced by government departments and agencies left to their own devices. In that sense, this is a criterion for comparison that I am reasonably comfortable in identifying as a "plus" for those jurisdictions that actually have it.

I cannot leave this topic without making some reference to the position in the Commonwealth. In *Delegated Legislation in Australia*, I commented on the fact that the Commonwealth had been singularly unsuccessful in introducing regulatory impact requirements, by virtue of the unhappy history of the various versions of the Legislative Instruments Bill.[11] It led me to make the following comments:

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7 Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths, Sydney).

8 The Regulation Review Committee.

9 In this context, the advisers to the Victorian committee would also point out that they are employed on a contract basis, for an agreed term, which may also be relevant to their "independence". I should point out, however, that it is the *outside* nature of the resource that I was meaning to focus on, as much as its *independence* from the committee.

10 See Pearce and Argument (Note 2), p 92.

11 Ibid, pp 12-4.

> [T]he Commonwealth is no longer leading the way for the other jurisdictions. Particularly as a result of the failure of the Commonwealth government(s) to secure the passage of the Legislative Instruments Bill, the Commonwealth can no longer be said to be leading the way on scrutiny of delegated legislation, as it was 20 years ago.
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> The fact is that the Commonwealth is now very much behind several other jurisdictions, particularly in relation to regulatory impact assessment and staged repeal of delegated legislation.[12]

These comments have attracted further comments, most notably in a review by David Creed.[13] Mr Creed suggested that I was unaware of the requirements of the Legislative Review Program, which applies to all Commonwealth legislation (including bills, delegated legislation, treaties and quasi-legislation) restricting competition or affecting business, and the role of both the Office of Regulation Review (a part of the Productivity Commission) and the Senate Standing Committee on Regulations and Ordinances in supervising and scrutinising the preparation of regulatory impact statements in relation to that legislation. In fact, I am aware of those requirements but (at the risk of attracting the ire of the Office of Regulation Review) regard them as a poor substitute for the requirements that the later versions of the Legislative Instruments Bill would introduce. The fact is that (as Mr Creed states) these are *administrative* requirements and, as such, can only be enforced administratively. The fact is that the Commonwealth *needs* the Legislative Instruments Bill, which I understand the Government is hoping to be able to introduce in the coming sittings of the Parliament. It will be the *fourth* version of the Bill.

In a similar context, I should avoid speculation that I am apparently unaware of other things by briefly mentioning the recent *Report of the Public Management Service of the OECD on Regulatory Impact Assessment in New South Wales*.[14] That report contains a comprehensive assessment of how regulatory impact assessment operates in NSW, with some comparative references to other jurisdictions. I hesitate to mention that, at one point, the report suggests that Victoria appears (in some ways) to undertake regulatory impact assessment to "a higher standard" than NSW!![15]

Staged Repeal of Delegated Legislation

Another feature of the Legislative Instruments Bill that already operates in other jurisdictions is the staged repeal or “sunsetting” of delegated legislation after a set number of years on the statute book. Those jurisdictions in which this currently applies, together with the relevant repeal period, are as follows:

New South Wales	5 years
Queensland	10 years
South Australia	10 years
Tasmania	10 years
Victoria	10 years

It is generally accepted that there is too much legislation currently operative and that much of it is (in its present form) neither relevant *nor* useful. What automatic repeal or revocation forces upon those responsible for administering delegated legislation is an assessment of

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12 Ibid, p 95.

13 See (1998) 19 *AIAL Forum* 32. The other review, by Robin Creyke, is to appear in a to-be-published edition of the *Canberra Bulletin of Public Administration*.

14 The Regulation Review Committee of the NSW Parliament has published this report as Report No 18/51 (January 1999).

15 Ibid, at para 256. Unfortunately, this Report was published after the manuscript to *Delegated Legislation in Australia* had gone to the printers.

whether or not it is needed and whether or not it does what it is intended to do. That being so, it is difficult to argue against staged repeal as a useful tool in managing the volume and effectiveness of delegated legislation, particularly when you consider that, in NSW, for example, the total number of rules "on the books" has fallen from 976 (as at May 1990) to 531 (as at May 1998), a reduction of 45.59%. I am sure that the other jurisdictions can report similar reductions. Again, I am reasonably comfortable in identifying staged repeal as a "plus" for those jurisdictions that have it.[16]

Other Features

There are some other features that present themselves as being useful in comparing the work of the committees but that are so unique that I offer them as no more than as possible "best practice" or as a "wish list" of what an ideal delegated legislation committee might have available to it. I do not pretend that the list is exhaustive (or that it represents any more than a list of mechanisms that I think are useful).

Scrutiny of explanatory material

The ACT and Queensland committees have a formal, statutory role in relation to scrutinising the explanatory material accompanying delegated legislation that comes before them. While other committees have, informally taken on a similar role, in an ideal world, all committees would have a formal responsibility in this regard, as it puts the bureaucracy very clearly on notice that explanatory material is important.

The capacity to amend delegated legislation

It is fair to say that, in most jurisdictions, the principal weapon in the committee's armoury - moving that a piece of delegated legislation be disallowed - is one that it uses sparingly, because it is very much a blunt instrument. That being so, the capacity to *amend* delegated legislation - which is available only in the ACT and Western Australia - is a desirable feature of any review framework, with the (more prevalent) capacity for partial disallowance as a second-best option.

The capacity to take action out of session

While I have no direct evidence of it actually being a problem, the fact that delegated legislation invariably operates until such time as it is disallowed means that regulations etc, promulgated immediately prior to a parliamentary recess can operate for a considerable period of time, despite there being obvious problems with them. That being so, a mechanism such as that which exists in Tasmania, under which the Tasmanian committee[17] can cause regulations to be amended, rescinded or suspended during periods of parliamentary adjournment or recess, is desirable. Again, a second-best option is something similar to the capacity of the Western Australian committee[18] to report its concerns on a regulation to the department or agency that made it, despite the fact that the parliament is not sitting.[19]

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16 The Victorian Office of Regulation Review have kindly provided statistics that indicate that, between 1992 and 1998, in relation to regulations that impact on business, there has been a 38.8% reduction in the number of regulations in force and a 51.4% reduction in the number of new regulations made. Figures for other jurisdictions were not available to the author.

17 The Standing Committee on Subordinate Legislation.

18 The Joint Standing Committee on Delegated Legislation.

19 In NSW, the Regulation Review Committee has the power to "sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament" (*Regulation Review Act 1987*, subsection 8(8)).

An effective bulwark against avoiding legislative scrutiny?

My final point in this wish list relates to my particular concerns with quasi-legislation and the possibility of the bureaucracy avoiding parliamentary scrutiny of their delegated legislation by the simple mechanism of ensuring that it is *called* something other than "subordinate legislation", a "regulation", a "statutory rule", or whatever the term is that attracts the jurisdiction of the relevant scrutiny committee. My preferred mechanism is that proposed by the later versions of the Commonwealth's Legislative Instruments Bill, which would apply to "instruments of a legislative character", with that term being defined. Such a mechanism would ensure that parliamentary scrutiny would attach to what an instrument does and not to what name that the bureaucracy gave it, thereby avoiding a lot of the problems that currently exist.

This is, very clearly, a selective wish list.

Workload of the Committees

I now turn to more problematic issues. When I started this exercise, I had in mind to do some sort of comparison based on numbers of regulations, etc scrutinised, number of reports issued, numbers of regulations disallowed, etc. I started to devise some tables that set out this information but ran into problems, largely because I found it difficult to get the statistics for *all* the committees for the most recent financial year (ie 1998-99). The bigger problem, however, is that measuring the work of committees by numbers of reports is a dubious exercise in any event. There are significant factors beyond the raw figures that need to be taken into account. Again, these factors highlight the differences between the work of the committees.

First, if we are to take the figures as being an indicator of the respective workloads of the committees, it also needs to be remembered that the ACT, Queensland and Victorian committees carry the dual function and that the ACT committee (in its new configuration) has, in addition, a function in relation to scrutinising policy issues in the subject area of justice and community safety. Similarly, the Northern Territory committee has a scrutiny function in relation to annual reports and “miscellaneous instruments and documents”.[20] These committees have an additional workload.

The second factor to consider is what level of assistance the respective committees have in performing their work. It needs to be remembered that the ACT, Commonwealth and Queensland committees have the advantage of being able to rely on advice from an independent legal adviser. As discussed above, this does not mean to suggest that access to an independent legal adviser necessarily makes the performance of one committee better than that of a committee that does not have such access, the fact is that the value of that dedicated resource needs to be taken into account. Similarly, the level of staffing available to committees is a key factor. In making any comparison between the work of committees, it is surely relevant to take into account that the NSW and Victorian committees, on the one hand, each have a secretariat of 5, while the Northern Territory and Tasmanian committees each have a secretariat of one.[21] It is useful, therefore, when comparing the statistics relating to the numbers of regulations, etc examined by the respective committees, to compare also the number of staff available to assist the committee in examining those regulations.

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20 In 1998-99, the Northern Territory committee scrutinised 78 annual reports and 48 miscellaneous instruments and documents, in addition to 88 regulations.

21 It is also relevant to note that the Secretary to the NT committee is, in addition, the secretary to the Legislative Assembly’s Public Accounts Committee.

For similar reasons, I have not even attempted to compare the committees on the basis of disallowance motions moved and passed. For those who are interested, however, there are some details included in the various chapters of *Delegated Legislation in Australia* as to the number of disallowance motions moved and passed in the various jurisdictions in recent years.

Accessibility of Information

I now want to make some comments about accessibility of information of the work and procedures of the various committees. In my view, just as it is important that legislation be accessible, so too should information about the work of delegated legislation committees be accessible. If it is not, there is a likelihood that not only does the valuable work of the committees go unnoticed but also that an invaluable educative opportunity is lost.

Reports of committees

If there is a to be a comparison of the work of the committees, the most important tool (for an outsider) is the availability of regular reports on the committees' work. This is, of course, another instance of the prejudice of the writer in making the comparison. Obviously, it is easier for someone to complete the sort of exercise that I undertook for *Delegated Legislation in Australia* if reports of the committees' work are readily available. In that sense, one measure of comparing the committees' work might be to compare the number of reports tabled by each of the committees in the most recent financial year. Again, this proved to be a difficult exercise because of the difficulty in getting figures for *all* the committees in relation to the same period. In the end, I abandoned the exercise because, again, I think that these figures are, for several reasons, of limited value as a performance measure (though, again, recent figures are included in the various chapters of *Delegated Legislation in Australia*).

First, the Northern Territory and Tasmanian committees both have a practice of reporting to their respective parliaments as required, rather than on a regular basis. This is analogous to the practice of the Senate's Regulations and Ordinances Committee and of the NSW, Queensland, South Australian and Western Australian committees, except that, unlike those committees, the Northern Territory and Tasmanian committees do not produce formal reports, as such. This practice is also similar to that of the Regulations and Ordinances Committee in that much of the valuable information about that Committee's work is disseminated by way of statements to the Senate, rather than formal reports.

The second problem with using the number of reports as a performance measure is that the figures for the ACT committee are inflated by the fact that the committee's reports include reporting in relation to its scrutiny of bills function. This is different to the 2 other committees with the dual scrutiny of bills and scrutiny of delegated legislation function, namely Queensland and Victoria, in that reporting in relation to the scrutiny of delegated legislation function can easily be identified. The distinction is enhanced in the case of the Victorian committee,[22] in that the delegated legislation function is handled by a subcommittee that reports to the parliament as a "separate" exercise.

Assuming that committees only report as is necessary, what does it *really* mean if a committee reports more rather than less? A committee that does not report very often might be regarded as "inactive" or as not performing its legislative scrutiny function as diligently as it might. Equally, however, this might be an indication that, given the resources available to it, the committee is flat-out performing the scrutiny function and that it simply has neither the time nor the resources to produce reports on its work.

22 The Scrutiny of Acts and Regulations Committee.

On a slightly more positive note, the absence of reports might be an indication that delegated legislation in the relevant jurisdiction does not contain material about which the committee needs to be concerned. This could, in turn, be a reflection of the fact that lawmakers in the jurisdiction are so skilled in their work or so frightened of attracting the attention of the committee that their delegated legislation is perfect. While this is unlikely, the fact is that it is possible. I have said before that it is my experience, as a person who now has to get legislation "through" legislative scrutiny committees, that (in the Commonwealth jurisdiction) the Office of the Parliamentary Counsel and the Office of Legislative Drafting operate as *de facto* assistants of the legislative scrutiny committees. They do this by telling people like me "If you put a provision like that in the legislation, Scrutiny of Bills/Regulations and Ordinances will make an adverse comment". This fact has been alluded to by Professor Margaret Allars.[23] I suspect that the same happens in other jurisdictions. If this is the case, a lack of reports might be an indication that a committee is doing (or, rather, in the past *has done*) a terrific job, rather than that it is doing nothing.

Annual reports

Of similar relevance (and with similar caveats) is the availability of annual reports on the work of committees. The Commonwealth, Queensland, South Australian[24] and Victorian committees have adopted a practice of tabling reports of their activities on a financial year basis. These reports are a veritable goldmine of useful information about the work of the committees. For other committees, this sort of information is only available either through the annual reports of parliamentary departments (in which case, it is much less detailed and discursive) or by direct approach to the committee secretariats. Again, however, the capacity of a committee to produce annual reports is presumably limited by the resources available to it. I speak from experience when I say that, when resources are limited, this sort of work is something that tends to be given a fairly low priority.

Availability of material on the Internet

The final point that I would make about accessibility of information is, again, both based on a personal prejudice and is something that is presumably limited by resources. It relates to the availability of committee material through the Internet. I have found it extremely valuable that the committees in all jurisdictions except South Australia were in some way accessible through material on the Internet. In the case of the Commonwealth, NSW, Queensland, Victoria and Western Australia, reports and other written material on the committees are available through the Internet.[25] As the Internet increases in its importance as a research and information dissemination tool, it is useful that committees ensure that their material is available through it. Again, however, I acknowledge that resources are an issue for committees and that, in some jurisdictions, it is simply a case of them not being able to stretch as far as providing Internet access.

Conclusion

I mentioned at the outset that there had been 2 prior attempts at assessing the work of committees, with the most recent being set out in a paper given to the last delegated legislation conference. The other attempt was made in 1989, by Professor Dennis Pearce, in a paper to the Second Conference of Australian Delegated Legislation Committees.[26] Since

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23 See Allars, M, *Introduction to Australian administrative law* (1990, Butterworths, Sydney), p 341.

24 The Legislative Review Committee.

25 I also acknowledge that 1 report of the ACT committee is available through the ACT Legislative Assembly web-site.

26 Pearce, DC, "Legislative quality control by scrutiny committees - Does it make administration better?", reproduced in *Second Conference of Australian Delegated Legislation Committees - 26-28 April 1989* -

it was Professor Pearce who dobbed me in for this exercise, I would like to point out that, apart from initially answering "Of course" to the question as to whether legislative scrutiny committees make for better administration, I do not believe he got any closer to addressing what lies at the nub of this exercise than I have.
I would re-iterate that this is probably in large part a reflection of the fact that the committees operate so differently and, therefore, it is difficult to make any sensible, qualitative comparison. To make a final point, I will, however, repeat an observation that I made in *Delegated Legislation in Australia*.[27] My final point is about progress and development. In probably all jurisdictions except the Northern Territory, the role of parliamentary review committees is very different to what it was 20 years ago. More controversially, however, what can also be said is that the Commonwealth is no longer leading the way for the other jurisdictions. This is largely the result of the failure of the Commonwealth government(s) to secure the passage of the Legislative Instruments Bill.

The fact is that the Commonwealth is now very much behind several other jurisdictions, particularly in relation to regulatory impact assessment and staged repeal of delegated legislation. Experience with the Legislative Instruments Bill does not promote optimism that this slide will be arrested in the near future. This is not to suggest that the quality of the work of the 2 Senate committees has fallen away. Rather, it is a reflection of the fact that, at present, the Commonwealth jurisdiction probably has more to learn from some of its state counterparts than they have to learn from it. It also means that, until such time as the Commonwealth passes the kinds of amendments contained in the Legislative Instruments Bill, the state and territory jurisdictions will be setting the example that had previously been set by the Commonwealth.

My concluding message is more positive. Despite my glib comments about Professor Pearce's 1989 paper, I have to agree with Professor Pearce that the obvious answer to the question as to whether legislative scrutiny committees make administration better is "Of course". The challenge, however, is to ensure that people appreciate the good work of committees and, in so doing, to build on that good work. While I have said that I appreciate the constraints that limited staffing and resources place on committees' ability to do so, I must stress that, in my view, regular reporting on committee activities is the key to this. It is all very well for us to demand that legislation be (in every way) accessible but, unless our demands are publicised to the wider community (including the bureaucracy), we are wasting our breath. It is all very well for your committees to do great work with limited resources but, unless this work is known about and recognised, you are, to a significant degree, wasting your time. You are also wasting an excellent opportunity to get your message across and, in so doing, (hopefully) to make your lives easier.

Report and transcript of proceedings and conference papers 1989, Senate Procedure Office, Canberra), at p 345.

27 See Pearce and Argument (Note 2), at p 95.