

Throwing Light Into Dark Corners: Senate Estimates and Executive Accountability

CHAIR (Mr ELLIOTT) — Welcome back to the next session in our commemoration of the first 40 years of Senate committees. As has been mentioned this morning, there are two major planks to the establishment of this sequence of committees back in the 1970s. The second plank is the establishment of estimates committees, and this session is entitled ‘Throwing light into dark corners: Senate estimates and executive accountability’. My name is Cleaver Elliott and I am the Acting Deputy Clerk of the Senate. I am going to try to keep a very enlivened panel to time this morning. I would like to introduce, again, Senator John Hogg, President of the Senate, who will be speaking first, followed by former senators Professor Robert Hill and Robert Ray. They will share their thoughts on our estimates committees and executive accountability. Please make them welcome.

The PRESIDENT — My views come from 14 years experience in this place, and I say that most people in the real world outside know nothing of Senate estimates. Those who know just a modicum about estimates would describe it as people being in a room for the day, in the rarefied atmosphere of Parliament House, and the participants exchange mumbo-jumbo for 11 to 12 hours and at the end of the day there may be a storyline. To the uninitiated, unwashed, estimates is akin to some secret ritual, with only those immediately involved understanding what is happening. It should not be thus, of course. Estimates provide the opportunity for the people to understand the government of the day’s Budget and programs and provide a forum for the government of the day to be held accountable for its actions. The estimates process highlights the need for openness and transparency in government.

Throwing light into the dark corners, though, is not easy on all occasions. There are a whole lot of rabbit warrens, as my two colleagues may well describe them, that we can go down at estimates. Many of these are not fertile searches as far as the questioner is concerned. That result is generally good for the government and the bureaucracy, but it is not good for the questioner at all. Then, every now and again, the questioner finds their quarry and it is on for young and old alike.

But, if this is all you might believe that estimates is about, never despair—there is another side. There is assistance to help one through the maze of openness, transparency and accountability of the executive and the departments and agencies of government. This comes in a number of forms and provides the tools of trade for the conduct of estimates. These are not exclusive, of course, but just representative. I speak of some of the fundamentals of the tools of trade that are used—the Portfolio

Budget Statements (PBS), the Portfolio Supplementary Estimates Statements and the Portfolio Additional Estimates Statements (PAES) form the basis. There are also annual reports—nice, weighty documents—ministerial statements, department-generated material, ANAO (Australian National Audit Office) reports, media reports and importantly, last but not least, leaks.

The participants are, on the one side, ministerial departmental agency officials, and, on the other, the Opposition, minor parties, independents and government backbenchers. Contrary to some perceptions, estimates is not just a process for non-government senators but a process for everyone to throw light into a dark corner—and I have seen that practically happen in Senate estimates.

The real challenge in estimates, though, is to break down the barriers between the participants. In doing so, one comes to understand what the ‘maybes’ of this are—what the government is spending its money on, how the department or agencies are handling the spending of that money and whether the government program or programs have delivered what it was claimed they would. To achieve this, one must come to grips with a few things. First is the jargon being used. Undoubtedly, it is very central to the organisation that is appearing before you, and it is probably unique—the bureaucratic speak that comes out at estimates, the semantics and the obfuscation, of course. At the end of the day, though, all one really wants is the plain English version and something that is simple to understand and easy to model.

Keen students of estimates will know that this is not simply achieved by a single, straightforward question and answer. The truth is accomplished only after long and protracted questioning. The drip treatment can really work at estimates if you make it do so. Knowledge underpins all of this. To be able to throw the light into the dark corners, one must know one’s subject. The only way to do this is to read the source documents I have mentioned—and there are more that I have not mentioned. In the case of the actual accounts themselves, as contained in the PBS and the PAES, this can be challenging. I can show you a page of my very own work. As you can see, it is littered with my own comments, notations and so on. It is a matter of understanding what is there in the first instance.

One also has to find the thread or the link between all the documents that exist. There has to be a trail that you must be able to follow—money, staffing or the examination of a specific project. Every now and again, obstacles have temporarily been thrown in the way of seeing the light. I call this the translucent period. In the translucent period there was a change from cash accounting to accrual accounting, which of itself was a long-term initiative and benefit but in the short term caused great difficulties indeed. Trying to link the dots together—trying to follow the trail—was not all that easy. And

there is nothing like the restructuring of the program format, or moving to outcomes and outputs, for muddying the waters. Of course, we are now past that, and there has been a stabilisation of the process, which allows for proper review.

In the couple of minutes left to me, I will briefly refer to one of my experiences. We had this thing called the Defence Efficiency Review, which came about for the 1998–99 Budget. It relied on the PBS and it relied on two reports. Here are the two reports it relied on; these later became known as the ‘purple books’ during the estimates process. Just to show you how it has a language all of its own, this one became known—surprisingly—as the ‘little purple book’, and this one became known as the ‘big purple book’. So there were constantly references during the Senate estimates to the little and the big purple books and also to the PBS itself. That set about a process all of its own, which I will describe.

The government of the day set about transferring resources to the pointy end of defence. To say the least, that was a major upheaval in defence and the defence community, so coming to an understanding of it was going to be a painstaking task indeed. There was, of course, jargon. We had to deal with the jargon. You can imagine that you would be no sooner talking about what was happening in the PBS than you would find yourself referred to the little purple book or the big purple book and you would have to find which page and so on. To navigate it was difficult indeed. Then there was bureaucratic speak—a lot of good little phrases that were chosen there—and semantics. There was not much obfuscation but a little bit at the start.

Much to everyone’s relief, we—the royal we of the Senate’s estimates committee—settled on tracking what was happening within defence using ‘major, easy-to-understand matrices’. I say that with tongue in cheek! The matrix occupied a number of A3 sheets of paper, but at least it put down what was happening in, we hoped, a sensible and logical way. To get to that point took a great deal in itself. But that was designed to take the mystery out of what was contained there and in the PBS and make it, hopefully, relevant at least to the committee members and the department so that we were both speaking in the same terms about the same things and then also to try and make it relevant in the broader public sense.

There were two matrices in effect. One was to follow the money savings in one area of defence and show us where it was transferred in the other, and the second was to follow what was happening to personnel so that we could see personnel being transferred and used properly as well. The real trick, of course, in all of this was to make the figures follow sequentially from one estimates to the next—in other words, from the estimates to the supplementary estimates to the additional estimates, and then we used to have a supplementary additional estimates at that time. To have the figures

sequentially flow so that there was a logic to it and one could find what was happening was a major challenge indeed. Had that not happened—and I am not casting any aspersions on those people who contrived the program—no one really would have known what was happening and whether the outcomes were being achieved.

In the end, I think we showed that no one really knew what they were doing, because we used to have some enormous arguments about this process. That it looked and sounded good for the defence forces and that they were still in reasonably good shape in spite of everyone's attempt to go down this path was a major commendation to our defence forces and their resilience, because even our people—whether they be on the government side, the bureaucrats or the senators at estimates—could not dent the resilience of our defence forces in any way. It certainly added to the thrills and spills of life. But I do think that what happened on this occasion did make those driving the process stop and think, and that was important. Without this, there would have been no transparency really in the process, because people would have had to accept it at face value, not really understanding what was taking place. The fact that at least a number of us could get down to some understanding of what was taking place was important indeed. It did cause some real light to be thrown into the whole process of the Defence Efficiency Review, and it did cause people to question some of the things that the executive of government and the Department of Defence of the day were doing and, of course, I think, added to the transparency, openness and accountability of government. I will stop there. I think I have given you an example, and I have got plenty more if you need them.

Prof. HILL — Thank you for the opportunity to contribute to and participate in today's discussions. It gives me an opportunity to reflect on some experiences of the past and a rare opportunity to make a few comments that hopefully might be useful in contemplating the Senate of the future. Sitting here with Cleaver brings back lots of memories. Looking at him, at Rosemary and at the other staff of the Senate reminds me of the dedication and commitment of the officers of the Senate that in many ways has perhaps contributed to its high standing in the eyes of the Australian community beyond the performance of the elected representatives. So thank you, and thank you for your continued commitment to the institution.

It is good to be here with the President of the Senate, who used to question me for hours in estimates on defence matters, always on the issues—which was not necessarily the case for all his colleagues. And it is good to be here with former Senator Ray. We came in here at the same time and had the same experiences but from opposite sides of the chamber. Comparing his views and mine might in fact be interesting. It is also good to catch up with other former colleagues in the room.

I started by saying how important the institution is and how commendable it is that the clerks do their best to maintain its standing in the eyes of the community. Politicians who enter the Senate obviously think that the institution is important also. Their focus is on the politics, and I think that that is not always widely understood. If it is understood, people say that there is something wrong with that, because there should be some other motive. You enter politics because you have a view of government and governance and because you have ideas on how you would like to see governance work better in Australia, and you then seek to find a seat to implement that through the political process. You might choose to stand for the Senate over the House of Representatives in the case of the Commonwealth, for a range of different reasons. One might be that you do not think you will be able to win a seat in the House of Representatives. Another reason might be that you think you have got a better chance of getting in on a list and therefore you stand for the Senate. A further reason might be that you are an independent or a member of a small party, and the proportional representation system would give you a better chance in the Senate. There would be a range of reasons.

But some politicians do actually favour the Senate because they think it fits their particular skill sets and that they might be able to contribute more effectively through the Senate and its mechanisms. Those mechanisms are distinguishable from those of the House of Representatives and that is, apart from the structure et cetera, largely through the committee system and the consideration of matters of detail. Matters of detail are important if you are interested in the issues of government and in more effective government. That, of course, was not the reason that the Senate was set up. When it became apparent in very early times that the real objective of representing the states would be somewhat overwhelmed by the political reality of the strength of the parties and the discipline within the parties, it seems that there were some who were wise enough to believe that if the Senate was to play a worthwhile role in that new environment then it needed to be distinguishable in some ways from the House of Representatives. I think it was they who started this process of building the Senate committee systems, of which the estimates are a very important part.

Most parliaments around the world have some form of estimates committee system, including the state parliaments in Australia. Even our House of Representatives sort of flirts with it from time to time. But there are very few parliamentary institutions in the world that have taken the concept and issues of financial scrutiny quite as far as the Australian Senate has through an estimates committee process. It is important to recognise that the estimates committee process is just part of a broader process of scrutiny and an opportunity for at least some public involvement in that scrutiny at

some depth. I think you are also looking at the other Senate committees today in that light.

There is scrutiny, yes. There is a mass of financial material available to senators to assist them in that financial scrutiny. I have to say that I think some senators have never read one of those books in the whole of their parliamentary careers. This does not necessarily mean that they are less effective in estimates. If you come back to my overriding thesis that for a politician it is all about politics, when they go into an estimates committee they may be interested in the structure of the Budget but generally there are also some political issues on their mind. The form of estimates and the fact that there is always a financial aspect to those political issues give them the opportunity to question in a way which is rarely given elsewhere. The point that I am seeking to make is that you, as a parliamentarian, as a politician, have the opportunity to question a minister and/or senior officials on your particular issue, which you dress up in terms of a particular budget issue at some length—sometimes too much length—and in some depth. That is an opportunity, as I said, that is rarely available anywhere else.

How effective it is in terms of scrutiny is a debateable thing. The extent which the public gain any greater knowledge or benefit from it is a debateable thing. Basically, the public will generally only learn from the estimates committee what one or two journalists think is worth reporting, and that tends to be the titillating bits—for example, Paul Keating's dog kennel at the Lodge, the extent to which Mrs Howard influenced the paintwork in Kirribilli House, or Robert Ray asking about the wine cellar at Kirribilli.

Mr RAY — That was John Faulkner.

Prof. HILL — Yes, John Faulkner. I had to cop Robert Ray and John Faulkner as a tag team for 10 years in these things. In actual fact, they were probably not matters that shed light in the corner to matters of greater importance.

From a minister's perspective, the issues that I was questioned on when I was environment minister which were probably most important from a public perspective were the processes by which I determined grants of public money. I was responsible for some very large grant programs—the Natural Heritage Trust was \$1 billion, the Federation Fund was a lot of money. There was a very legitimate opportunity for me to be questioned in some depth on how decisions were reached. Cleaver, who has always been helpful from the first day I met him, said that this was set up as a whiteboard just to remind me of experiences about ministerial accountability and what might be taken from a committee, whether it is an estimates or a select committee or

whatever, in regard to ministerial accountability that could have grave consequences. When I think back over my time answering questions as opposed to having to ask the questions, that transparency was important for the public but the public may never have really known the detail.

When I was defence minister, there was lots of serious discussion about wars and the like, but probably the most important issue for the estimates process was the procurement budget, which is a very big, complex budget—as Robert and I both know. There are lots of interests playing different roles in how decisions are made in relation to the acquisition of defence materiel. There is no other opportunity within our parliamentary system to really question those issues in depth—the billions of dollars that are spent every year, how the decisions are made or the role of the parliamentarian or the lobbyist or anybody else within that process. I think that was probably the most important process.

When I think what the public read about defence it was not so much titillation. I came in after the children overboard affair. It probably got the most coverage because of the drama and the interesting issues concerning lines of communication between the defence personnel and the military on the one hand and the civilians on the other hand, and how that message passes through to the political masters, who have an ultimate decision-making role, and then how that is communicated to the public and the consequences for getting it wrong. Then there is the issue in defence and when a mistake is recognised how it all happens again in regard to who tells somebody what and the level of public accountability through that process.

The other one that I remember, because it was all in my time, was the events in Abu Ghraib, the notorious prison in Iraq, and what role Australian military or non-military personnel had in relation to operational decisions in prisons. In many ways it was the same issue. It was very embarrassing for me because the defence establishment informed me that Australians had no knowledge of these events and then I told the prime minister and the prime minister told the Parliament, the House of Representatives, and told the public. Then a certain military officer said actually he did bring back documents from Iraq but he had decided he would not own up to that and he then changed his mind and told the hierarchy, and the hierarchy passed it up again. So I go in to see the prime minister in the morning and say, ‘Prime minister, I have a little problem I want to discuss with you’. That is at eight o’clock in the morning and then at nine o’clock in the morning I am before defence estimates with Faulkner and Ray. That was actually quite a hard day at the office. There was a financial aspect to it but it was not the key aspect. But it was a legitimate way of getting into the debate particularly under the liberal interpretation that the clerks give to estimates—and I see the smiles of those in the front row.

This business favours oppositions. The Senate is all about oppositions. It is never good to be in politics and to be in opposition but if you have to be, and I had 14 years of it, it is better to be in the Senate than in the House of Representatives because at least you have got the opportunity to do the sorts of things that Ray and Faulkner did to me and feel that you have not had a bad day.

So what I am really saying is that there is an element of transparency. It might not have been part of the original design. It has been part of an evolution of process and it is useful even if we might not think it has yet got to the stage where the focus is on the matters that are of the most importance or that we have got to a way in which those matters that are of most importance are properly developed and made more transparent through the Senate process and to then, most importantly, a way in which that can be effectively communicated to the broader public, which, hopefully, then influences the health of our parliamentary process and our democracy. I will leave it at that point and I look forward to your questions.

CHAIR — The next speaker on the panel is former senator Robert Ray.

Mr RAY — Thank you, Chair. Somewhere, someplace in Canberra right now public servants are making an administrative or a policy decision and one of the key questions they are going to ask is this: will this survive scrutiny at estimates? This has happened day in and day out in Canberra for the last 25 years. What higher testament can a set of Senate committees have than that being in the minds of every public servant? I am sure that often arose when administrative decisions were made in a minister's office, including Senator Hill's office or mine. We wondered if we would be able to survive a cross-examination on this and if we would be able to justify it. How many billions of dollars do you think have been saved simply by having the threat of Senate estimates committees?

You bring in visitors, parliamentarians from overseas, to watch an estimates committee and they are gobsmacked. They have never seen anything like it—not even the Americans, with their strengthened congressional system. Time and time again state upper houses have tried to replicate the Senate estimates system, but with very limited success. On two occasions estimates have been set up in the House of Representatives but only to wither on the vine through indifference. So who designed this great scrutiny process? I have to tell you it is more a case of evolution than creationism. It evolved in the seventies, rolling into the eighties and right through to today. It evolved and gathered pace and effectiveness as it went. Every time a senator pushed the boundary out, it might not have gone that far out but it never came back to where it was before. So you have this immensely effective scrutiny.

It has been nurtured by Senate staff. It has been exploited by oppositions and it has been reluctantly endorsed by government. Most ministers find the process either draining or infuriating but, with the prospect of trying to fight it out, they eventually give in. They eventually answer that question or they sit until six o'clock in the morning, as my colleague here did one day—never again, I noticed—just to try to break the committee. They do all those things but, in the end, they give in.

Of course, the process is underpinned by standing orders but it really relies on accrued conventions. Unless you have conventions in politics and in the Senate chamber and in these committees, they do not work. If people basically abide by these conventions, you get a very effective system. It is totally sustained by history and traditions but it is also underpinned by a lack of a government majority in the Senate. These estimates committees would not have evolved if there had been a government majority in the Senate. Sure, there was a majority for two or three years, but the traditions and the conventions overwhelmed that government majority in the end and people saw the light. Senate leaders and others saw the light and said, 'No, we can't cut off this process', and on it went.

All sides are exasperated by the Senate estimates committee process. Former Senator Hill said that 'they are for oppositions'. That is dead right. They are for oppositions, but that is just part of the balance between executive and Parliament and is counterbalanced in other areas. Of course governments get frustrated by the estimates process. When some senator starts asking questions about what happened to the chickens at the Lodge when the government transitioned from Rudd to Gillard, it does actually demean the thing. But a lot of this is political payback. Former Senator Hill probably got annoyed when we asked questions about all this, but he recalls me being asked questions about the dog kennel at the Lodge. So, naturally, in 1996 we get into political payback and we do the same thing. We would have desisted after two years except that the feedback we got was that the occupants of the Lodge hated us for it, so how could we give it up when we were creating so much joy for ourselves and so much hatred elsewhere?

Governments get frustrated by the time. From nine in the morning until 11 at night is a long time to go through a committee process, often over four days. It is resource intensive. It occupies the time of public servants in preparation for and attendance at the committee and, then, in following up the questions taken on notice. But just compare the estimates process with question time in Parliament, which is really about government and not about oppositions. The government gets half the questions, so they know the answers in advance, and the other half they avoid answering and spend half their time slagging off the person who asked the question. So it is not a balanced

system. Fortunately, in the Senate we have supplementary questions and noting of questions, which balances up between the executive and the Opposition far more than in the House of Representatives.

I will go through a couple of simple facts about estimates. There are eight estimates committees. They meet four at a time and meet three times a year. There is nearly always a minister or a parliamentary secretary in attendance, and what they should be is adversarial to the minister and inquisitorial to the public servant. That is the golden rule of estimates committees, with one exception: if a public servant is dissembling, if you know the public servant is deliberately misleading or distorting the truth, you can then move over to adversarial. But, as a general rule, it should just be inquisitorial. There are a number of truth-avoidance mechanisms embedded in our estimates system. The first one is taking a question on notice: 'I'm sorry, Senator, I don't have that information available to me'. That becomes a bit red hot when I have the leaked advisory note that they are going off and all the details are there; therefore, you press in those instances. But, often, questions are taken on notice that could be answered on the spot. They are taken on notice to prevent follow-up questions.

The second excuse is that it is a commercial-in-confidence matter. Quite often it is and, therefore, it is an area where the Senate estimates committee cannot transgress. But when you ask for a document in which only two lines are commercial-in-confidence and the other 10 pages are not, you should be provided with that document with the commercial-in-confidence area blocked out.

The third area of avoidance is advice to ministers, and estimates committees are gradually getting more into this area. It is a tough one. We do not actually want to inhibit public servants giving frank and earnest advice to their ministers before a decision is made on the basis that that will have to be exposed at estimates committees. I just urge all current-day senators to treat that with some sort of balance.

Of course, you have cabinet-in-confidence, which in my view is inviolate unless a government starts creating every document it can and calling it cabinet-in-confidence. That is not on, but a genuine cabinet document should be protected from scrutiny at an estimates committee. Then there is national security, which is in a lot of areas. I cannot remember the Australian Secret Intelligence Service being cross-examined at an estimates committee; the Parliamentary Joint Committee on Intelligence and Security does that. This is not necessary.

Finally, of course, you are blocked from asking questions if there is a judicial inquiry: 'Whoops! The government's a bit embarrassed about paying \$300 million worth of bribes to Saddam Hussein. We'll set up a judicial inquiry and we'll answer no

questions at all, either at question time or in Senate estimates'. When you got round to it at Senate estimates, after Cole put in his weak report 18 months later, it was too late. So basically there are quite a few mechanisms that stop exploration at estimates.

The organiser of the conference said, 'Can you give us a few examples of estimates issues', so I might give you examples of a success, a nil-all result and a failure. The first one was that in 1998, at the height of the goods and services tax (GST) issue, the government decided to direct mail every Australian elector with their proposition on GST. It was to be direct mail rather than household delivery, because we all know it is a far more effective political way of getting your message over, and they were to use the Electoral Act. That all came out at an estimates committee a couple of doors up the road, and it was one of the more acrimonious estimates committees I have ever attended, I have to say. It is the only time in my entire time at estimates that I lost my temper, as opposed to feigning losing my temper. I had a massive clash with the Electoral Commissioner, who threw the Electoral Act at me and demanded that I point out to him where he was wrong and I was right. I tried to point out that I was one of the authors of the 1983 changes to the Electoral Act, but to no avail. From there we took our battle to the Attorney-General's Department. The senior counsel of Attorney-General's ruled against us. The Electoral Commission and the Taxation Office said we were wrong, so we went to the Federal Court—or we prepared to go to the Federal Court. We hired a senior counsel (SC). The Electoral Commission got to him 10 minutes after us, and he said to them, 'I am otherwise engaged in this case', which really rocked them. So eventually it went to the Solicitor-General, who wrote a one-page opinion saying, 'This is an illegal act; you cannot proceed with it'. This would have been an illegal act committed nine million times, and the estimates committee process prevented it happening. The fact that the letters were pulped was expensive. The fact that I was left with the legal fees would have been very expensive, except that the SC and the solicitor said: 'Great victory! We'll just write that on our CV. No charge'. So that was good. That was one aspect that I would say was successful.

Let me give you the nil-all draw, and it is going quite a way back into history—back to 1997. There was controversy over Senator Mal Colston at the time, and certain newspaper articles alluded to, maybe, some faults he had. The prime minister of the day demanded that Kim Beazley, as Leader of the Opposition, give permission to release documents from the previous government. He had no choice; he was right over a barrel and he did so. So those documents went from the Attorney-General's Department to the Attorney-General, who read them all and signed them off. They then went round to the prime minister's office, and then they went to Kim Beazley and were released for publication. A few days later, Prime Minister Howard accused Kim Beazley and Gareth Evans of being perverters of the course of justice, on the basis that their failure to prosecute Mal Colston back in 1983 had no support from

either the department or anyone else. It did not look too good for us at that stage, but it turned out, of course, that the two key documents—the one where the Solicitor-General agrees with the two ministers and the one where the department secretary signs off advice to act that way—had disappeared in the prime minister’s office. They did not reappear until about 10 months later, when the prime minister’s department fessed up and passed them on. That did get pursued at estimates but never finalised, and I describe that as a nil-all draw.

The last one, the biggest failure in my time at estimates, has some resonance today because it concerns the new Member for Denison, Andrew Wilkie. I do not know how many of you remember that he left the Office of National Assessments (ONA) probably in about 2003 or 2004 giving the government a great spray on the way out the door. A couple of weeks later an article appeared in the Melbourne *Herald Sun* quoting inaccurately an article or a submission from Andrew Wilkie done for ONA on Iraq that then showed that, whatever spray he gave on the way out the door, here were his real opinions. That is a pretty good get but the problem is that the document quoted from was top secret, code worded and AUSTEO (Australian Eyes Only)—one of the highest rankings that you can get. How did that get to a Melbourne journalist and actually—I am sorry to say, and I hope you do not take offence, Senator Hill—a lickspittle of the Liberal Party, basically, and into the Melbourne *Sun*? You try to establish that through the estimates process and you are constantly told: ‘You are dealing with national security issues. We cannot help you there. We have put it in the hands of the police’. This went on for years. We never got to properly explore how a top-secret AUSTEO code-worded document had got to one of the favoured sons of the government of the day to put in print. The Federal Police of course put out a very constrained statement at the end of the investigation saying that they had insufficient evidence to proceed with a prosecution. In other words, they did know who leaked it—I know who leaked it now—but we could never ever pursue that properly at estimates because it was a national security issue. I am not criticising the government of the day for so categorising it but I think it is a pity that there is a traitor walking around today that leaked this document and we were not able to pursue it.

I was also asked and I will just finish on this note: how do you prepare for estimates? I have to tell the truth here. I use to meet with John Faulkner on a Sunday night in my office. We would have dinner and we would spend about an hour discussing what was going to come up for the next two weeks. If the cricket was on, we would reduce that back by at least half an hour. Somehow, we had to perpetuate the myth that we spent every living breathing minute of our lives researching and pursuing ministers—the truth is otherwise. You use as your source material previous estimates hearings and committee questions taken on notice. Every time there is a newspaper clipping referring to some area you are interested in, just throw it in the estimates box. You

forget about it and on the Sunday night you dig it out and you start writing some notes. Annual reports are very valuable especially at additional estimates because you can ask any question on annual reports, it does not have to be an additional estimates item. There are sources of course—every now and again you get a whistleblower, who is unhappy, or some malevolent leaker and you use their material, but you always follow the principle: never trust a rat. Never assert that what they have told you is true, say you have been advised but never take it as absolute truth.

The other thing is to just do it on instinct. You would be there at an estimates committee and you would be asking 10 questions in a row and suddenly some public servant would smile and you would think, 'This is the one to go on'. You would drop the rest and just pursue that one. There were techniques that you had to use. You would get a taciturn witness and I can remember a person I admire, a former head of the ONA, who would never really tell you anything. What you would do is to start asking him easy questions and he would start hitting sixes and fours all over the place. Then you would start bringing the ball gradually back onto off stump and by the end of the day you could not stop him talking about sensitive material. So technique was always important. You need luck too. I asked one question simply because in looking at Mal Colston's travel records I saw him opening a conference in the Gold Coast and claiming travel allowance in Canberra. I threw a spear at that, just asked the question. The panic that then ensued was immense—three ministers lost their jobs, both the government and Opposition were massively embarrassed, a department was abolished, a deputy president was replaced—you could go on. We all got smeared, even the honest ones amongst us, Senator Hill and I and everyone else, we all got covered in a bucket. One spear thrown on one day as an offhand comment led to that, so you need luck and I do not know whether it was good luck or bad luck.

Of course, finally, you need reputation. If you have a reputation for being a ruthless cross-examiner on a merciless team, it carries you through. I can remember one classic occasion when, finishing probably with Senator Hill, he wanted to leave a fraction early, and we thought, 'That's good'. We wheeled out of Senate committee room one, and I said to John, 'The estimates are going on next door; let's pop in and ask Kerry O'Brien what he wants from Portia's', because he was joining us for dinner. So we marched in with our folders and thumped them down on the table. The minister gagged, two deputy secretaries ran into the room and everyone waited for the assault—and I was getting an order for shantung lamb! Then we got up and left and confused everyone. So reputation does help.

My last point, and it has been hinted at by John Uhr and others, is: this Senate committee system is gold and needs to be preserved, but the biggest danger is trying to expand it too much. Within five months of the Rudd Government, we had seven

select committees established in the Senate, which I regarded as a disgrace. We as an opposition under the Howard Government kept the number of select committees to two throughout those 11 to 12 years. To then suddenly expand them puts pressure on senators. They cannot read all the material. They cannot attend all the meetings. The secretariat itself in the end cannot write the reports and has to get consultants in. You cannot delegate it out that far. We have enough committees already to cover the workload, and no more than two select committees. You do not just continually set up committee after committee. You will just destroy the system itself.

I want to end with an anecdote about the effectiveness of the Senate. A few years ago, a House of Representatives member ran into my office. He was so excited. He said, 'Guess what? The Reserve Bank governor is going to attend the House of Representatives economics committee twice a year. See how important we are?' I said to him: 'Look, he just regards you as a bunch of Uncle Toms. He can avoid Senate scrutiny this way. Piss off'. Thank you.

CHAIR — It has come to the time when we can take questions or comments. Are there any questions in relation to this segment of the panel's discussions?

QUESTION — Thank you very much. It has been a very interesting session in terms of developments in Western Australia. My biggest frustration is the fact that the annual reports are never ready for our October estimates. That is something I would like to put on the record. It is very, very annoying. It makes it very hard for us. Would you care to comment?

Mr RAY — Quite often, because the reports are not certified in time by the Auditor-General—and it is such a tight process—it means that in a technical sense you cannot use them. But, from an estimates sense, additional estimates are always in February, and this is where annual reports are to be used—used both for real reasons and as an excuse to get into a policy area that there is no additional appropriation for. In the end, it does work. I know it is frustrating to other people. I am on an organisation in Melbourne, and they have been absolutely churning over getting their annual report accurate and out in time. I said to them, 'Only 10 people ever read it; what are you worried about?'

QUESTION — You made a comment about the House of Representatives and the role of committees. Under the arrangements for a new parliament, a better parliament, there is a lot of discussion about what the House of Representatives might do in terms of greater scrutiny. Do any of you have any comments about potential roles?

Prof. HILL — I think they would do better to just leave it to the Senate. One of the tricks of the business is that when you get asked a question, you answer another one. I was sitting here thinking, while Robert Ray was speaking, about the mysteries of the estimates process. I had an experience once when I was a very young senator. It was in the Old Parliament House and the late John Button was the industry minister at the time. He was in government, I was in opposition and I was at the estimates committee. Things were going very slowly and I got this note passed down to me from the minister, John Button, saying, ‘Ask him about this’—that is, the note was asking me to ask his official about a particular matter. I never worked out whether Button was trying to give me some practice or whether he had been trying to get the answer out of the official and been unsuccessful.

Mr RAY — I might as well tell my John Button story now. In government, some of us, being backbenchers, used to play tennis at lunchtime, take a late shower, have a bit of lunch and get to question time halfway through. In those days, the Senate President, you will be pleased to know, Senator Hogg, was not given a list of the questioners, just who was due. On one occasion at about eight minutes to two, Senator Button’s staff arrived at the tennis courts and said, ‘Senator Button wants a question asked and you are first up’. So I had eight minutes—no lunch of course—to shower and change. I raced down to the chamber and read this question out and Senator Button turned around and said, ‘Well, thank you, Senator Ray, for that Dorothy Dixier’. He then proceeded to give a very erudite answer and sat down smugly. But then he heard the horrible words he never expected: ‘Supplementary question, Mr President’. And had no idea about it whatsoever.

Prof. HILL — I thought you were going to say that Button answered by saying, ‘That is a silly question’.

QUESTION — The panel spoke of the nature of the conventions, similar to constitutional conventions, and how they are guiding the practice of the Senate committees. Are they recorded anywhere or are they in the bosom of the Clerk of the Senate?

Mr RAY — To an extent they are required in the Senate bible, *Odgers*—not every one of them, but to an extent. Most of them are not recorded; most of them are just acceded to—‘Yes, we will do that’. From time to time, a Senate estimates committee will say, ‘We are only allocating one hour for the weather bureau’. You get to the end of the hour and you still have questions—guess what? You keep going. It is just a guide, but everyone knows it is just a guide. So most of these things are accepted.

From time to time people have decided to defy estimates committees. We had one classic case where a witness—not a minister, but a witness in the area of information technology—defied a Senate committee from 4.30 to 6.30, refusing to answer any questions. The Labor senators concerned rang me and John Faulkner and said, ‘Can you come down at 7.30?’ We came down and by 8.30, having gone over the top with bayonets, we had this person talking. Three weeks later he quit and went back to Canada. There is an example. That should not have been allowed. It should not have been allowed to occur by the chair of the committee or the minister. But the witness just sat there and said, ‘I am not going to answer questions’. It is simply not part of the process. The conventions do not allow it and the witness should be overridden.

Prof. HILL — It is not a convention but, if you do believe in the system, you should believe that it should work as effectively as possible. As an example, when I was a minister I always insisted that the departmental secretary attend. Most departmental secretaries do not like it. Sometimes those that had ministers from the House of Representatives got the wink and the nod not to attend. I think that that leads to a less effective system. You cannot make them—technically, you might be able to, but in practice you cannot—so you do need a certain amount of goodwill to make it work effectively. As I said: there are conventions, but I always found that the Clerks interpreted them in favour of the Opposition.

Mr RAY — This is where we differ. I never, ever wanted the secretary of my department at the estimates committee, initially. I said: ‘Leave it to the others, and when they totally stuff up we can bring you along to pull us out’. Then Tony Ayers once asked me: ‘What happens when I stuff up?’ I said: ‘I’ll bring the new secretary along’.

QUESTION — What do you see as the advantages or disadvantages of the Senate inviting ministers from the lower house to appear at estimates?

Mr RAY — The only person I have ever known who was really keen, who watched every minute of defence estimates—every second of it—and who would have loved to have been there himself, was Kim Beazley. Therefore, I think that proves my case that we should not have them. There is a thing called the comity between the two chambers, and it has virtually never been breached by these committees. It has two aspects. Do they have the power to call ministers from another chamber? Yes, they do, if the House of Representatives agrees to release them to come. I am pleased to say that is never going to happen, because it leads to a circus. It is all very well for the Senate with a non-government majority to demand that the prime minister and the Treasurer turn up. What would happen next? The House of Representatives would set up a committee and start demanding that the Leader of the Opposition and others

attend. So you would get payback style politics from misuse and abuse of committees from both chambers. The same applies to the calling of staff. I would have loved on occasions to cross-examine ministerial staff. That lunatic asylum in Victoria, the Legislative Council, is constantly demanding that staff attend. You don't think a Liberal government anywhere else in Australia is going to condone that? I am sure that Senator Hill would not have condoned Liberal ministerial staff turning up to committees. So whilst it sounds good, I really do not think it is good for the comity between the two chambers to be able to call witnesses from one to the other. There is one exception: if there is a committee of inquiry, not estimates, and an invitation goes to a House of Representatives minister who says they want to attend, fine, that is good.

Prof. HILL — I basically agree with that. I remember we went through the political process of demanding on some occasions that ministers from the other house appear before committees. We were never really upset when they refused to do so because we knew that it would lead to undermining of the workability between the two chambers.

QUESTION — My name is Wayne Tunnecliffe. I am Clerk of the Legislative Council in Victoria. My question concerns cabinet documents. We keep hearing from the government quite often that a reason not to provide a document in response to the council's order to do so is that the document is a cabinet document, commercial-in-confidence or offends against the confidentiality provisions of various Acts. My question about cabinet documents is that it seems to me that more and more documents are being brought by government within the ambit of a cabinet document. Nobody has ever had a real go at defining it except, perhaps, Justice Spigelman in the *Egan v. Chadwick* case in New South Wales. So I ask both Mr Ray and Professor Hill: what are your views as to what is a proper cabinet document that therefore justifies not being provided to either a house of parliament or its committees?

Mr RAY — I think it is a document that is used in support of cabinet submissions or decisions before Cabinet. I did warn in my address that extension beyond that—to protect all documents—is a very bad thing, and in the end it will bring down that protection. Every time you abuse one of these things and extend the definition out, the closer you are to bringing it down one day. But, in many cases, where do you draw the line and say, 'This cabinet document can be released and this one can't'? It is very, very difficult. You can give reasons of commercial-in-confidence, national security and all these others. But it will affect the advice from public servants to ministers if they think it has to be accountable publicly. It has to be a narrow definition, but how do you define that? Do you put it in legislation or, again, do you

have a decently recognised convention and behavioural pattern? I cannot answer your question on that.

Prof. HILL — I think the test is whether it will unreasonably undermine the effectiveness of government. If a document is going to be put forward and it would mean that an official would not again give you that advice, there is a pretty strong argument for it not to be made public. I did not have many problems in this area. Basically, if you are the minister, you are being questioned on the decisions that you make and you are supposed to be able to answer those questions. So I did not have to hide behind cabinet-in-confidence documents. But I have to say, if we are allowed to have a bit of a go at the bureaucracy, that some parts of our bureaucracy have a habit—almost a convention—of grossly overclassifying documents. The Department of Foreign Affairs and Trade (DFAT) is appalling in that regard. DFAT officials slam ‘In Confidence’, ‘Secret’ or ‘Restricted’ on everything so that they do not have to justify the contents. For 99 per cent of it there is no reason that justifies that classification. Mind you, it is not just Australia’s foreign service that does that; all foreign services do it. Maybe politicians are more comfortable with public scrutiny and parliamentary scrutiny—they just accept that as part of life—whereas others are less comfortable with it.

Within the estimates process, that is an important role of the minister of the day in relation to his or her public servants. There is an element of needing to protect them in their role and of where to draw the line. Beyond that, although it is probably not said as often, is the fact that the committee itself is aware of the conventions and, generally speaking, will respect the interests of the public servant—provided, as Robert Ray said, that the public servant is not him- or herself abusing that privilege.

CHAIR — Let us thank the panel for an excellent presentation.