COMMONWEALTH OF AUSTRALIA

SENATE COMMITTEES AND GOVERNMENT ACCOUNTABILITY

40th anniversary conference

THURSDAY, 11 NOVEMBER 2010

[UNEDITED TRANSCRIPT]

Conference met at 9.30 am

SENATE COMMITTEES : THE FIRST 40 YEARS

Good morning. I am David Sullivan from the Department of the Senate and I am the conference convenor. If anybody needs any assistance today, or tomorrow at Old Parliament House, please come and see me or one of my Senate colleagues and we will do our best to assist you. It gives me great pleasure to welcome to the microphone the President of the Senate, Senator John Hogg. The President will make a few introductory remarks and then he will officially open the conference.

PRESIDENT—Thank you very much, David. Honourable senators, former senators, parliamentary colleagues, distinguished guests, ladies and gentlemen, I am very pleased to be here this morning among former and current colleagues from the Senate to open this much anticipated conference on the committee system of the Australian Senate. Originally scheduled to be held at the end of July, it was postponed due to the federal election. I must say I feel particularly at home today being in the main committee room, where I have spent so much time in Senate estimates, but even more warmly at home because of the presence of a number of whiteboards, as you will see in this room.

I would like to start my remarks by acknowledging the traditional custodians of the Canberra area, the Ngunawal and Ngamberri peoples, and by paying my respects to their elders past and present.

This conference is being held to celebrate 40 years of the modern Senate committee system. In preparing to speak to you today I looked back at the proceedings of the conference held in 1991 to mark the then 20th anniversary of the Senate committee system, opened by my distinguished predecessor the Hon. Kerry Sibraa. In his opening remarks, the then President quoted from a report in the *Courier-Mail* of 3 April 1971, and it is worth quoting again from that same article:

For some time the Senate has been trying to emulate its United States counterpart as a public watchdog, through the development of special committees.

Its bark has been heard as the fondly-nurtured puppy grew.

Now its mature bite has been felt.

Describing the work of the then Senate Select Committee on Securities and Exchange, the article went on to state:

Whatever it finally reveals in its report, the fact remains that a Senate committee has begun to look as important as its elder United States brother.

If committees become televised, as is mooted, they will over-shadow the Senate itself.

The article continues:

No longer can Senators be given a scornful blanket label of 'those elderly gentlemen in another place' by members of the House of Representatives …

How things have changed.

The Senate is, of course, one of the most important democratic institutions. It is a house of review and a place where, particularly through the Senate committee system, much of the real work of the parliament is undertaken. At 2 pm on each day, all sides of politics, as we know, gear themselves up for that part of the parliamentary schedule that most people are familiar with: question time. This is certainly one of the most visible parts of my role as President. Most people only see a small proportion of the work of parliament, such as question time, yet there is much other productive work that goes on—in committee work, in debates in both the House and the Senate, and behind the scenes.

Of course, if something is worked out through careful debate and compromise, it rarely merits a headline. So the media is much more likely to cover the theatre of question time than the work of the committees. The role of Senate committees in particular is an area of work of the parliament that sometimes does not get the full recognition it deserves. I hope that this conference, celebrating the first 40 years of the modern committee system, goes some way towards rectifying that.

Parliamentary committees are as old as federal parliament itself, dating to 1901 when a Senate select committee reported on steamship communication between Tasmania and the Australian mainland. I still think we are waiting for a government response on that! The Senate Regulations and Ordinances Committee was established in 1932 following a dispute between the Scullin government and the Senate over the government's power to make regulations. However, it was not until 1970 that a system of standing or permanent committees was established.

The modern committee system was established following a resolution of the Senate on the evening of 11 June 1970. Two groups of committees were established—the legislative and general purpose standing committees, and the estimates committees. At the time, a *Sydney Morning Herald* editorial predicted:

The introduction of a wide-ranging committee system will make the red-carpeted Upper House potentially the most powerful parliamentary chamber in Australia.

The decision made in June 1970 brought the Senate into line with other modern legislatures. Ultimately this influenced the development of a similar committee system in the House of Representatives. Whilst I do not wish to comment in detail on the House committee system, I will note that many of the changes now taking place with their committees under the new paradigm are modelled on committee processes in the Senate.

The legislative and general purpose standing committees and estimates committees continued to function as envisaged through the 1970s and the 1980s. During much of this period, the Senate made little use of the committees to consider bills. In fact, before 1970 only three bills had been referred to committees, and all three were select committees. A significant development, therefore, was the establishment in 1990 of a formal process for the referral of bills to committees—the Selection of Bills Committee. Some 20 years on, the Senate now routinely refers approximately 50 per cent of all bills to Senate committees for detailed scrutiny.

The committee system was restructured in 1994, with the establishment of a paired system of legislation and reference committees, with both government and non-government chairs and with estimates functions being absorbed by the legislation committees. This system remained in place until 11 September 2006, when the government of the day, enjoying an absolute majority in the Senate, restructured the references and legislation committees into single committees with government chairs—in effect, returning to the pre-1994 system. This experiment was short-lived, and the system has again reverted to the arrangement of paired committees, coming into effect on 14 May 2009.

There are huge pressures on the Senate chamber, as we know—76 senators, all vying for time to either promote or prosecute their issues. As a result, the Senate chamber delegates certain activities to committees. It is important to remember that Senate committees do not have powers of their own. Their powers and proceedings are creatures of the Senate standing orders. A great deal of the Senate's business is carried out by committees. During 2009, for example, Senate committees met for two and a half thousand hours, whereas the Senate chamber itself met for 500 hours. Some 1,000 of those committee hours were taken up with public hearings. That is something that is generally completely lost, out there in the real world of politics.

The scrutiny of policy and legislative and financial measures is a principal role of the committees. Senate committees can be thought of as multipurpose bodies undertaking policy related inquiries, examining the performance of government departments and agencies, and considering the details of proposed legislation. Specialist scrutiny committees—Regulations and Ordinances and Scrutiny of Bills—enable the Senate to properly monitor delegated legislation made by the executive government and to ensure that all proposed legislation does not trespass against fundamental personal rights and liberties. Committees also provide an opportunity for senators to pursue special interests and gain expertise in aspects of public policy, enhancing the quality for debate and providing a solid grounding for backbenchers who aspire to be committee chairs or to hold ministerial or shadow ministerial positions.

An important theme of this conference is the recognition of the community as a participant in the legislative process, not least through submissions to committees. While many bills that come before the parliament implement government policies, it is worth remembering that they often have their genesis in events or concerns in the wider community. The Mabo legislation and the gun control measures in the wake of the Port Arthur shootings are good examples. The Senate committee system is a vital part of our democratic process. The important opportunity it gives to members of the public to have an input into legislation or issues crucial to them before the parliament should not be underestimated. It is an opportunity for their voice to be heard. I have felt this personally and in a very open way with people, long after an inquiry has been the concluded, in a very public place coming up and throwing their arms around you and very emotionally telling you how that was their opportunity to have closure on the death of a loved one. We do have an impact and we do make a difference but, unfortunately, as I say, I do not really think that that difference is recognised.

This clearly is one of the aspects that makes parliament directly relevant to the people—directly relevant, and that is not understood. It is most commented on by people who have never been involved in a committee inquiry before and come to know and understand the interface between the public and the parliament. I note that with one or two exceptions all those speaking at the conference today and tomorrow are either former or current senators, which is testament, I believe, to the importance in which the role of a Senate committee system is held within not only

the Senate but also the broader community. I also take this opportunity to pay tribute to those former senators who have joined us at this conference for their contribution to the Senate and to the development of the committee system over the years. It is not just something that is simply a manifestation of one or two people but of a whole range of people who have contributed to its success.

I congratulate the Department of the Senate for organising this conference and I take great pleasure in formally welcoming everyone here today and in opening the conference. I look forward to participating in a session at 10.45, when I will give my own view on Senate estimates itself. I now officially declare the conference open and I invite the first panel up to the table. Thank you.

[9.44 am]

The Senate committee system: historical perspectives

Mr REID—Ladies and gentlemen, good morning. I am Acting Clerk Assistant (Committees) in the Department of the Senate and I will be chairing this morning's first session, 'The Senate committee system: historical perspectives'. We have two presenters to kick off the proceedings: Dr Rosemary Laing, the Clerk of the Senate, and Professor John Uhr, who is Professor of Public Policy and also a director at the ANU Crawford School of Economics and Government.

The housekeeping arrangements are as follows. Dr Laing will present the first paper and she will immediately be followed by Professor Uhr. You will be invited to ask questions at the conclusion of Professor Uhr's paper. Each presenter will speak for an allocated time.

Dr Laing was appointed as the 13th Clerk of the Senate in December 2009. She is also the principal adviser to the President of the Senate, the Deputy President of the Senate, the Chairman of Committees and all senators generally. She is also the administrative head of the Department of the Senate and performs a function similar to that of a secretary of a department. She is a 20-year veteran. Her first foray was as director of research, similar to Mr Sullivan, who opened proceedings this morning. In fact, one of her first assignments was to arrange for the first conference of this type, the 20th anniversary of the Senate committee system. So 20 years later she appears in a slightly different capacity. During that time, Dr Laing has also served as a committee secretary, a clerk assistant to the Table Office, the Procedure Office and the Committee Office and also as Deputy Clerk of the Senate for five years from 2005.

Professor Uhr, Professor of Public Policy at the ANU, is also the Director of Policy and Governance at the ANU Crawford School of Economics and Government. Prior to this he was a founding director of the ANU's Parliamentary Studies Centre, which also undertakes a number of research projects, including ARC linkage grants, working with both departments, the House of Representatives and the Senate. Prior to that Professor Uhr worked in the library, was a committee secretary for the Senate Scrutiny of Bills Committee, the Senate Regulations and Ordinances Committee and a number of Senate estimates committees. I am sure you will agree that both of our presenters are very well qualified to kick off proceedings.

With no further ado, I invite Dr Laing to the microphone. Please make our speakers welcome.

Dr LAING—Thank you very much, Chris, and good morning everybody. It is wonderful to see such a good crowd here to celebrate the 40th anniversary of the Senate committee system. My role this morning is to set the scene and, together with John Uhr, provide some historical perspectives on the current system and the state of play. There will be a paper available at morning tea, and attached to that paper is a chronology of procedural developments affecting committees and a list of our earlier select committees, which is quite interesting.

The events of 11 June 1970 marked a watershed in the history of the Senate. By the narrowest of margins the Senate found itself with not one but two new sets of committees, the legislative and general-purpose standing committees and the estimates committees. How it arrived at that point is my first focus, and then I will take up the story from 1970. Of course we know that committees were not invented in 1970 and, as in any other house, committees were always an essential part of the Senate landscape. The usual range of domestic committees were set up within the first few days, and the first select committee of the Senate on that perennial topic of steamship communication between the mainland and Tasmania, which the Senate, being a good states' house, has revisited on a number of occasions, was its earliest select committee. It was that select committee that brought the first witnesses before Senate committees within the first few months of its commencement. As early as 1904, the first bill was referred to a standing committee, only one of a very few before the 1990s.

When I look at that list of early select committees, what strikes me is the number of committees that were concerned with individual cases, the cases of particular veterans or public service employees who had suffered some kind of mistreatment or maladministration. I am also struck by the relatively small number of policy inquiries, which is an indication that perhaps we now take for granted the modern system of administrative review—the existence of bodies like the Ombudsman, for example. Back then, that function was still being performed by parliaments, and it recalls a time when petitions actually meant something and had a purpose.

I briefly mention in the paper the federal Parliamentary War Committee, which operated during the First World War. It was purely an advisory committee. It had a very high-level membership and it had some particular focuses, particularly on ways that the parliament could assist the war effort through promotion of recruitment campaigns and, very importantly, through looking after the welfare of returned soldiers. It was also a conduit to the parliament from the executive about the conduct of the war. But the potential of committees for this new style of upper house was something that was very much in the minds of the senators of the 1920s, and in December 1929 the Senate established a select committee into the advisability or otherwise of having standing committees in a number of areas in order to improve the legislative work of the Senate and to increase the participation of senators in that work.

A focus of the Senate's legislative work was the scrutiny of delegated legislation. The President mentioned that the early 1930s were the time of the infamous dispute between the Senate and the Scullin government over the waterside transport regulations. On a dozen occasions over 1930 and 1931 the government made and immediately remade regulations which the Senate repeatedly disallowed. So it is not surprising that one of the select committee's recommendations was for a mechanism for formal scrutiny of delegated legislation. So we had the Standing Committee on Regulations and Ordinances established in 1932. Shortly afterwards, the Acts Interpretation Act was amended to prevent governments in the future engaging in such perfidious acts of defiance of the parliament and the Scullin government was out of office by December 1931.

That select committee looking into a Senate committee system also recommended changes to the standing orders to facilitate the referral of bills to committees, which from this distance seems quite a surprising thing. But there was a contemporary context to this as well. In July 1930 a select committee was established to examine the recently controversial Central Reserve Bank Bill and ask, 'Should we have an independent central bank?' It was a committee that ran into trouble fairly early on because government members appointed to the committee declined to participate and resigned from the committee. They were replaced by opposition members, so it was an exclusively opposition committee. The committee's report was not supportive of the bill and the bill was actually defeated shortly after the committee reported. So it is little wonder that at the time governments regarded referral of bills to committees as a fairly hostile act. Although the standing orders were amended in 1932 to facilitate referral of bills, it would take many decades before that early stigma was neutralised.

A third recommendation of the select committee in 1929 was also ahead of its time because it recommended that a committee be established in the area of foreign affairs. This caused such consternation that the Senate sent the committee back to the drawing board to try again and come back with more sensible recommendations. Why was a committee on foreign affairs such an outrageous thought at the time? I guess it was because Australia's foreign policy then was dictated from dear old mother England. It would be at least another decade before Australia adopted the Statute of Westminster and accepted legislative independence conferred by that act on dominion parliaments and governments. But, like the referral of bills to committees, a parliamentary committee on foreign affairs was an idea whose time would come eventually.

During World War II some joint committees were established—again, largely of an advisory nature—but they really played no significant role and, according to Robert Menzies, were simply a way of keeping parliamentarians in the loop at a time when the parliament itself was meeting much less frequently.

After the war, I think the single most important event for the future development of the Senate was the increase in the size of the Senate from 36 to 60 senators and the adoption of a system of proportional representation from 1949. More senators meant more backbenchers with more time and possibly looking for a greater role. Proportional representation also led to a greater diversity of membership and the ultimate emergence of minor parties.

In 1955 the newly promoted Clerk Assistant JR Odgers won a study grant to travel to the United States to study the congressional committee system. His report recommending that the Senate adopt a similar system was tabled in May 1956, but it was met with an exhortation for patience: 'All in good time, my son; all in good time.' But, at a time when most parliamentary officers automatically made a pilgrimage to Westminster, the fact that Odgers travelled to Washington to study the different model was really quite significant. We also have to bear in mind that he had recently completed the first edition of *Australian Senate Practice* and had therefore studied the constitutional foundations of the Senate and its partial basis in the United States institutions.

In the meantime, during the 1950s, select committee activity recommenced. Some less-than-model experiences were experienced during the 1950s, and perhaps the early select committees were not encouraging, but the select committees established in the 1960s could be said to have heralded the dawn of a new era by showing how careful, bipartisan inquiries could highlight directions for policy development. Reports of select committees on such topics as road safety,

the encouragement of Australian production for television, the container method of handling cargo, the metric system of weights and measures, offshore petroleum resources and later inquiries into water and air pollution were well received and were influential in the development of policy in these areas. Most importantly, they tapped into sources that had hitherto been largely ignored in government policy-making efforts.

At the 20th anniversary conference in 1990 the late Senator Gordon Davidson recounted the opposition of Prime Minister Menzies to this spate of select committees in the 1960s. 'Backbench senators,' Menzies is reported to have said, 'will have access to matters not meant for them and to material which is inappropriate for their role in parliament.' To the Senate's benefit, backbench senators ignored this assessment. They participated enthusiastically in what came to be seen as work of fundamental importance to their role as senators.

Estimates committees also had their origins in the early 1960s, when the Senate began to examine the estimates of proposed expenditure in the Committee of the Whole—in other words, in the chamber—before the appropriation bills themselves were received from the House of Representatives, therefore giving senators the maximum amount of time to explore the government's expenditure proposals. At the time, this was a pretty radical move. It was alleged that it was a subversion of bicameralism, it evaded the spirit of the Constitution and it contravened numerous standing orders. This alleged abomination was, however, the kernel of the estimates process as we know it today.

The particulars of proposed expenditure—in other words, the details of expenditure—were examined in the chamber, line by line, and senators could ask questions of Senate ministers about the proposals for expenditure. You can imagine that it was a fairly frustrating process, with senators asking questions and ministers trotting over to the advisers' benches, getting the detailed information from the advisers, coming back to the microphone and giving the information, but the potential for future development was apparent. By the end of the decade it had developed into proposals for estimates committees covering the various departments of state and in which senators would have face-to-face access to public servants in order to question them directly about financial and administrative matters.

Of course, individuals also played their part in promoting committee work, and it is well known that Senator Lionel Murphy, then Leader of the Opposition in the Senate, was a great fan of the US congressional committees and the work that they were doing in exposing what was happening in the conduct of the Vietnam War. At his behest the standing orders committee produced several reports on various options for committee systems for the Senate, but no particular recommendations were made.

There were three proposals before the Senate on 11 June 1970. There was Murphy's motion to establish legislative and general purpose standing committees. There was government leader Senator Anderson's motion to establish estimates committees, which would only be part-time bodies and therefore containable—which is something that governments like to do with committees. And then there was DLP leader Senator Vince Gair's motion for a hybrid system, that combined features of the two, together with some statutory oversight committees. Only this last committee failed to get majority support, but the voting was very, very close.

The system started out slowly and incrementally, with only two committees established at first and the others joining in later. The first reports started being presented from May 1971.

Estimates committees met as required supported by staff drawn from all over the department on an ad hoc basis and early reviews suggested that expectations for committees were being met. The pattern of committee work throughout the 1970s and 1980s was similar. Legislative and general purpose standing committees undertook reasonably lengthy inquiries by today's standards and they inquired into significant policy areas, usually on a bi- or multi-partisan basis, usually involving extensive travelling around Australia—taking parliament to the people—and reports were often the subject of lengthy deliberation in committees. Very few bills were referred but those that were were significant ones.

Those involved in the operations of committees today would be very surprised to hear that committees almost never met while the Senate was sitting, and motions to authorise them to do so were relatively rare. There were senators then who would argue on principle that it was wrong to allow such practices because senators could not be in two places at once, and their first duty was to the Senate. To place this in context, however, the sitting day then used to include things that are unknown today, like meal breaks during which committees could hold meetings.

Another indication of changing times is early versions of the committee office manual, which advised secretariats to set aside three weeks for the printing of a report. That is a far cry from today, when sometimes whole inquiries are completed in less time than that, and anything other than camera-ready copy churned out of the secretariat computers is absolutely unheard of.

As well as holding inquiries into policy matters committees also gradually expanded their accountability work, and in the paper I mention the groundbreaking work of the Senate Standing Committee on Finance and Government operations. I also mention the growing assertiveness of the Senate in requiring statutory bodies to be accountable.

It was important that the daily routine of business in the chamber should provide adequate opportunities for committee reports to be considered in the chamber and there is a bit of a history about how those opportunities developed. But equally important was what happened to reports afterwards. Efforts to encourage governments to produce timely responses to committee reports began in 1973 and have continued more or less continuously. The President's report on government responses that are outstanding after three months is another mechanism that dates from that time, which assists the Senate to keep tabs on overdue responses.

Despite the legislative and general purpose standing committees providing apparently comprehensive subject area coverage, select committees also continued to be established for other purposes. Some of these were on controversial subjects, such as those on the Human Embryo Experimentation Bill 1985; two committees on the conduct of a judge and the airline pilots' dispute in 1989, and the infamous political ad ban bill. Others were long-term inquiries that did not fit readily into the portfolio structure of the existing committees. One of these was the Senate Select Committee on Animal Welfare, which ran for many years and eventually metamorphosed into the present Senate Standing Committee on Rural Affairs and Transport. It was famous for undertaking an inquiry into the welfare of animals in the thoroughbred racing industry, and just happening to arrange a field trip to Melbourne in the first week of November.

The system was never a static one. Adjustments were made over time to adapt to changing requirements. A particular challenge occurred after the double dissolution election in 1987 when a system of standing committees was also proposed for the House of Representatives. A government caucus committee developed a scheme for parallel standing committees in each

house that would be empowered to meet as joint committees. However, canny senators saw through this and amendments moved in the Senate to the resolution ensured that joint meetings could occur only in accordance with a resolution of the Senate in each case. So in practice the idea of joint legislative and general purpose standing committees has never taken off, although there are now plenty of joint committees in other areas.

There is no doubt that the biggest impact on the committee system in recent times was the decision in 1989 to put the referral of bills to committees on a more systematic basis. Twenty years later it is now a commonplace and an absolute staple of the committee system. It is so entrenched that ministers in the House of Representatives frequently refer to the work done by Senate committees in improving bills. We are even seeing second reading amendments moved in the House calling for further consideration of the bill in the House to be delayed until the Senate committee has reported. I think bicameral purists would be choking, but I am sure I will not be the last person during this conference to refer to the new paradigm—not, as the President mentioned, that there is anything new about it for the Senate in most respects.

Although detailed scrutiny of individual bills has become a hallmark of Senate committee operations, in its early days the referral of bills did expose some strains in the system. In the first instance, committee workloads increased dramatically and there was correspondingly less time to spend on the longer term inquiries into matters of policy and accountability. Examination of government bills also led to much higher incidence of minority and dissenting reports, leading to some cracks in the hitherto highly collegiate operations of committees

But, while committees remained as fact-finding bodies, there appeared to be general acceptance of the idea that they should be chaired by government senators. Their engagement in more partisan work, however, caused this assumption to be questioned. By 1994 there were concerns that the existing committee structure was not delivering optimal outcomes. Multiple select committees were being established to carry out particular inquiries, often with non-government chairs. There was pressure from the opposition for a share of the chairs of standing committees, and all of this resulted in the procedure committee being tasked with a major reference to redesign the committee system. I know that will be the subject of a later paper, so I will not go into the redesign, except to say that we now have a system of paired committees, one half with non-government chairs undertaking inquiries into matters referred by the Senate and the other with government chairs inquiring into bills, estimates, scrutiny of annual reports and a number of other matters.

As the President mentioned, that system endured until 2006, when a government majority in the Senate saw it returned to the unitary system. We have a session tomorrow on the impact of the government majority in the Senate on committees during that time. To conclude, the system has now returned to what could be called normal practice and I look forward to the analysis of this practice during the course of the conference and future directions that will unfold over the next couple of days.

Prof. UHR—It is a great honour to be part of this two-day event. It is a matter of professional pride for me to be here on the opening panel with Rosemary. These are just remarks. There is no formal paper so I apologise for that. It is the end of the academic year, as some of you will know. If you are not writing papers ready to be examined, you are examining papers that have just been written or sort of written. There are all sorts of academic processes that are not as important as parliamentary processes but have their own urgency that I have had to pay attention to.

Lots of names of senators have already come forward, and I want to add to that list. My first job in Parliament House was working with the Parliamentary Library as a research officer holding a parliamentary fellowship. The selection committee included two senators—Senator Harradine and Senator Colston. I knew something about Senator Colston from my home state of Queensland and I knew something about Senator Harradine. They were both quiet and studious and were almost silent during the selection process but they had formal power over my appointments. My first job here in Canberra goes back to those two remarkable senators, each distinctive in his own way.

I then joined the Parliamentary Library after a while going to work with the Joint House Department. It is probably news to some of you that it housed the Joint Public Accounts Committee and the Public Works Committee. I worked with the Joint Public Accounts Committee, which had Senator George Georges here and here. He was the deputy chair at the time, again from Queensland so that is worth remarking upon. Why was that committee with the Joint House Department? The Joint Public Accounts Committee and the Public Works Committee ran away from the power of the clerks. They decided to find a zone of independence and autonomy within the parliamentary bureaucracy. They took their own procedural advice from other quarters in Canberra and they had a kind of flowering of independence and creativity there for some time until, I guess, in the mid-eighties they were mainstreamed back into the parliamentary bureaucracy.

It was a kind of unusual orientation for me to be entering the parliamentary committee system and never to see a clerk at all. I then joined the Senate and worked with the Scrutiny of Bills Committee. Alan Missen was then the chair of the committee, this was under the Fraser government, at a time when he was trying to be the ginger within the governing party to make the committee a permanent committee. He had a real battle on his hands because the Fraser government was prepared to tolerate the experiment of the Scrutiny of Bills Committee but not to keep it as a permanent feature of the Senate committee system for fear that it would deliver all of the kind of evils that Rosemary has just identified—a kind of continuous scrutiny of legislative policy in relation to the drafting and composition of bills. Michael Tate then succeeded Alan as the chair of that committee and I had the pleasure of working with Michael as a new member. Robert Hill, who is on the program, today or tomorrow I notice, was also an incoming senator working then with the committee. He looks as young today as he was then because he has returned to his natural niche in the university sector. That is good.

My work was supervised by Harry Evans and Anne Lynch, who were then the heads of the procedure office, so I had good training. I worked then with the Regulations and Ordinances committee as well. Austin Lewis was the chair of that, again under the last years of the Fraser government, and then John Coates, known to some of you, was the first Labor chair of that. I worked with estimates committee A and I cannot remember who the Labor chair of that was after the Hawke government was elected but Peter Rae was the traditional chair of that under the Fraser government. These were wonderful training grounds for a kind of dumb academic coming into the system, who had been warehoused in a part of Joint House where you were not getting proper supervision and then suddenly to be working with talented parliamentary officials like Harry and Anne and wonderful gifted politicians on both sides of the House. I am looking forward to Helen Coonan and Amanda Vanstone this afternoon telling us more about legislative scrutiny committees because that is where my story began—my engagement with parliament.

I have three comments and then some concluding predictions of where I think I would like to see the Senate committees go. My three comments are all historical, one going back to the constitutional origins, one, again, the 1930s story about the origins of the committee system and its first tentative steps during the 1930s and then a comment about the 1970s—the establishment of the committee system that we are now celebrating—and then my daring concluding comment. The first comment is really the historical one that there are no Senate committees without the Senate and somebody has to make the comment that there is a Senate and that is a remarkable achievement. The constitutional system that we have owes a lot to constitutional pioneers who historically innovated in ways that we can truly admire. They were kind of global innovators in constitutional government to establish the Senate, the like of which we now have, which is almost legislative equal in powers with the House of Representatives and fully elected.

There was no model. They could not take a model off the shelf. They had the United Kingdom to look at and that was not what they were choosing. The United Kingdom certainly had a bicameral parliament but the House of Lords was not the model that the Senate was based upon by any means. They had the United States to look at and that is where the name of the Senate came from. They were, as Rosemary indicated, empowered and emboldened by a kind of envy of the power of the United States Senate. They had the Canadian Senate to look at as a kind of model to learn from but again it was not an elected chamber and they wanted something that was equal to the House of Representatives in its public legitimacy and they chose that. Only with that as a remarkable, bold, innovative choice do we get to the topic that we are now looking at—the committees. First of all we have to have a Senate.

I have two comments about that original design. The pioneers who established the Senate in the constitutional system had a kind of anticipation that the electoral basis for that chamber at some stage would take on proportional representation. It was anticipated right at Federation and in lots of debates in the early years of the Senate that it should not simply replicate the House of Representatives in its electoral system; it should complement it and bring to it certain qualities that the House does not bring. Proportional representation was eventually delivered, as Rosemary said, in 1949 but the anticipations, the expectations, the kinds of original hopes, go right back to the constitutional foundation

The implication for us that comes out of that is that they were welcoming not just proportionality to come into the Senate but parties—the more parties the better. The expectation was not that the Senate would be a non-party house. Some people have that as a kind of model for what an effective house of review is. In fact, the choice for proportional representation was to spread the parties around—to have more rather than fewer. Independents are good too, but the diversity of representation included an embrace of partisanship and a blending of it in a kind of balance or proportionality. We should take note of that.

The second historical component of the design of the Senate that I think we should reflect upon because it is really significant is the welcoming of ministers in the Senate. Over the last 20 years or so we have had about a third of the ministry drawn from the Senate. It is not by accident. It was part of the original design. Again there is a view of the Senate as a house of review that says it would do its job much more effectively if there were no parties and no ministers. I disagree. I think parties are wonderful and I think government ministers in the Senate are wonderful. They add value to the Senate because they give a kind of edge to the ambition of senators that it is a house of government and not just a house of review. Also then in opposition they have the experience and the detailed understanding of the processes of

government that lead into the review process. So I am all for the retention of government ministers in the Senate. I do not want to see that pale, anaemic image of the Senate as a house of review of all independence and no government ministers to take over. I am happy to debate that.

I will turn to the second point about the 1930s. The President has made a very useful contribution to this, as has Rosemary. The only point I want to add is that the Regulations and Ordinances Committee is really the foundation stone of the system that was expanded in the 1970s. There is still a component of the regulations and ordinances story that I think we should observe. The Regulations and Ordinances Committee helps advise the Senate on disallowance processes. It looks at proposed regulations and has a standard or a template against which it assesses or evaluates regulations issued by government and then advises the Senate as to whether they should be left in process or whether the Senate should move to disallow them, basically on civil liberties grounds, when the government is accumulating to itself too much unfettered power to interfere with the civil liberties of ordinary citizens.

The disallowance power itself had to be fought for. It is not in the Constitution. It is not in the rules established in the Senate Regulations and Ordinances Committee. As part of that early struggle in the first three years of the Commonwealth parliament senators had to identify a role for themselves, monitoring the increased use of regulation—the understandable and important use of regulation—by governments. Robert Walsh and I looked at the history of this many years ago. Robert was a colleague of mine working in the Senate who then went to work as Senator Sibraa's chief of staff I think. We tried to track through the origins of the disallowance procedure and we found that it was a kind of year by year, month by month struggle in the first life of the Commonwealth parliament to work out ways in which the Senate could monitor and, if necessary, amend/disallow government regulations. First of all, by amending the Customs Act to provide a provision within the Customs Act that allowed ministers to issue regulations to implement and give effect to the customs law but to allow either house of parliament to disallow. The original provision was for both houses of parliament to disallow. The Senate in its curious wisdom decided that either house should be sufficient, which then empowered the Senate, gave it the power.

These are political struggles. It took forgotten senators now the courage to give themselves power and to recognise the power that is required of executive government but have that balanced somewhere within the system so the Regulations and Ordinances Committee, which is quite rightly the foundation stone and the model of the committee system that we are now celebrating, itself depends upon that power being entrenched and embedded in the law and the Acts Interpretation Act, which is where the Senate finally put this systemic power to disallow government regulations. That itself is a reflection of the kind of capacity building that goes on when people whose names we can no longer recall did something important for us by committing themselves to a kind of open government model.

After the establishment of the Regulations and Ordinances Committee, it became a kind of pioneer, similar to the kind of global innovation spirit that established the Senate in the first place, having the power to disallow and having an institution within a parliamentary chamber to professionally advise a parliamentary chamber on when to press the disallowance button. It has taken the rest of the parliamentary world 50, 60, 70 years to put together the packages that were quietly innovated at Old Parliament House, way down here in the forgotten part of the globe.

On the 1970s and the establishment of the committee system that we are now celebrating, just think of the unintended consequences attached to that. Think of the establishment of the Senate estimates committees. Think of the kind of gameness of a Senate saying that it will actually engage in legislative review of a government's budget. Where could this possibly lead? One of the places it has led to, identified by Rosemary, is absolutely increased Public Service accountability. It was not necessarily part of the original design, which was to allow senators an opportunity to sit with their Senate government ministers to examine more closely the proposals in a government's budget. But opening up the Public Service to much greater direct parliamentary accountability possibly was a kind of faint hope of those early years and it has become part of the unintended consequence which is now locked in. Again, it was a kind of innovation for the rest of the world—for public servants to acknowledge direct parliamentary accountability, to sit with somebody who was not their minister and who may know nothing about them and for they themselves, the public servants, to answer directly to the estimates committees on matters relating to the government's budget.

It does not stop there. The innovation that has come out of this unintended consequence of establishing the estimates committees and putting so much of the burden of accountability onto public servants has been, over the last decade, the remarkable focus of Senate estimates committees on the accountability of public servants for the provision of policy advice. Nowhere else in the world has there been a parliamentary body with the kind of dare and willingness to actually open up policy advising processes as an aspect of parliamentary accountability. Typically you can imagine the government's response: 'The advisory processes are confidential to government; the advice comes to us as a government and it is up to us to divulge as we see fit any public consequences or public matter that might come from that advice.' With regard to Senate estimates committees, you go and sit and just watch and listen to them and look at their reports. They have another agenda that they are working to, which is the public accountability of public servants in their advisory capacity—in the advice they give to ministers and the quality of that advice. This is astonishing; it is a kind of global innovation. It is understandable that the public servants are reluctant. It is understandable that ministers are sometimes reluctant, sometimes actually quite open. They would like to see it on the record as well, because they have inherited these wonderful officials from times gone by.

A connection with Regulations and Ordinances: when that was established the evidence that the select committee was taking on the likely public benefits of having a Regulations and Ordinances Committee included wonderful early promotion of the committee by Robert Menzies, about which we have heard some reservations in his later career. There was lots of public endorsement from Maurice Blackburn for the Labor Party. The negative view was put by the Public Service: 'Why would the Senate want to look at government regulations? They are matters of advice that we give to government. There is no public mischief at work there at all, no public downside.' Robert Garran himself went out of his way to say the Senate would have no interest in it—that it was subterranean stuff, of no public significance all. 'Just leave it to the Public Service.' Robert Menzies and Maurice Blackburn knew better.

My last comment is about where the committee system should go, not just after the next two days but now. My first comment about the future is that we really have to acknowledge the limits. The Senate began as a tiny chamber of 36 members—there are limits to what 36 people can do—and left Old Parliament House with 60 or 64 senators, so it was still very small. Now what do we have? We have 76 senators, which is still tiny. Give them credit for what they do. Don't ask them to do too much. It is remarkable that we get so much from it.

I have two observations where I would like to kind of nudge and press the system to see it do a little more, but of course it will come at a cost and something would have to be dropped. One of my observations regards federalism. Rosemary mentioned that the Senate is a state house. There is no Senate committee on federalism. If I were a senator, Senator Hogg, I would say, 'Well, federalism is mainstream; it operates in every Senate committee. It's part of the ethos of the Senate; it's always there.' But I think we could do more. We could have a Senate committee on COAG. COAG is where the heads of government for Australia all meet. It is a public process—sort of. It would be wonderful to see a Senate committee monitoring the COAG process.

This is my very last comment. Internationally, the Prime Minister is away now, she was away last week and she is away again this week. Senate committees really have an important story in the international contribution to parliamentary cooperation and parliamentary strengthening. Lots of senators do lots of international cooperation. It would be nice to have a Senate committee working in a dedicated way on parliamentary strengthening. The Senate is already a kind of international model on power sharing. The Senate committees have so much to contribute to other parliamentary bodies in the region—the Pacific and countries to the north of us—and there is so much for us to learn. It would be nice to have a parliamentary committee acting as a bridge. Thank you so much.

Mr REID—Rosemary and John, that is food for thought, certainly. I invite anybody from the floor or the gallery to pose a question to either of our presenters.

QUESTIONER 1 (Dr KLUGMAN)—I am Kris Klugman from Civil Liberties Australia. My question picks up on the last point that Professor Uhr made in the historical perspective. How do you see the Senate committees relating to the increasing rise and influence of the 40-plus ministerial councils, including COAG and SCAG? From the community point of view there seems to be a change in the governance—the way in which Australia is being governed—and it is of concern to some community groups. I wonder if either of the speakers could elaborate on that.

Prof. UHR—Rosemary has just pointed out to me that there is a Senate committee on the future of the Australian federation. Is that a select committee or a standing committee?

Dr LAING—Select committee.

Prof. UHR—What I would like to see is a standing committee that has a kind of continuous watch over COAG and ministerial councils. COAG of course is heads of government; ministerial councils are all the other ministers who quietly engage in national cooperation—Commonwealth and state. You are absolutely right: it is absolutely central to the way Australia governs itself. I am thinking of the early days of uniform legislation, when Australian governments decided to use their parliaments as fast tracks in order to get uniform legislation on a whole range of important social activities. Community groups suddenly felt: 'Things are happening too quickly. Once you get uniform legislation there is no way any one parliament can adapt and change so it suits our circumstances.' Executive government said: 'Don't worry, we'll look after that. We'll have it suitably flexible so that ministers can work out where the adaptations should take place.' So we have already had a kind of rehearsal of the downside risks of this new form of governance, which started with the embrace of national uniform legislation. But, as you quite rightly point out, ministerial councils are now a kind of habitual component of government—not just ministers at the Commonwealth level working with ministers at the state

level but also bureaucrats at the Commonwealth level working with bureaucrats at the state level. None of that is transparent to either state or Commonwealth parliaments, so, if there is anything the Senate can do to build upon this interest in the Federation to establish a kind of COAG-monitoring process that also looks at ministerial councils, great! But there are limits to what 76 senators can do.

Dr LAING—I agree that there is a growing black hole in accountability in relation to ministerial councils and cross-jurisdictional decisions. We see it all the time in the Senate when senators move amendments to bills and the response is: 'Oh, no, we can't change it; it's been agreed with the states.' It is an area to watch and one of growing concern.

QUESTIONER 2 (Mr CONSANDINE)—I am Peter Consandine of the Republican Party of Australia. My question is to John. I take issue with the viewpoint you espoused about the fact that we have ministers in the Senate and that by virtue of having ministers in the Senate parliament works better. I posit the view that the Senate as a states' house properly would work better as a house of review and there could be contributions from all the parties that make up, with proportional representation, the componentry of the Senate. I wonder if you could expand on why you think we get more value from our senators when some of them are ministers and they are acting as reviewers of policy and legislation. I would really like to hear why you really believe that to be a great outcome.

Prof. UHR—Part of the evidence is having worked on the inside and having seen the value that Senate inquiries get from having people who are former ministers, who are now working maybe in government or maybe not in government, and from the detailed knowledge they have of the process. You are right that there is a danger that these processes then become hijacked by people whose ambition is solely to be in government and that the independence that you might expect from a house that had no government representation is lost. To me it is a kind of balance that there is more to be gained by having ministers here—partly as hostages, partly as experienced elders—than there is to be gained by not having them here at all.

You are right: my position is compromised. I am endorsing proportional representation and endorsing the Senate as a house of government or a house involved in government. I am sure there is a purity that can be attached to separating those two: either have it as a house of government with no review or have it as a house of review with no government. My knowledge of the history is that compromised balance provides more benefits than losses. I would not want to see the Senate walk away from having that government presence in it.

QUESTIONER 3—I only make one claim. My people came here in 1834. I look at where we have put ourselves and wonder. 1834 is my claim to speak. Here is the question. It was wonderful to hear the USA mentioned, and I thank our first speaker for bringing that aspect. Here is how I am trying to put it: I watch Foxtel day after day after day after day, and they hammer their constitution. They know their constitution. I am going to leave that as the question about Australians. I wonder: have we stopped the independence of Australians coming through the political system?

Dr LAING—I certainly hope not. We do our best here to educate people about the Constitution and to show that it is a living, breathing document. Perhaps we should take that as a comment and break for morning tea.

CHAIR—Put your hands together for both of our presenters and join us for morning tea.

Proceedings suspended from 10.32 am to 10.50 am

Throwing light into dark corners: Senate estimates and executive accountability

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 Professor Robert Hill, a former senator of many years experience—you can read his illustrious biography in your notes—and then Robert Ray, also a former illustrious senator with an extensive biography, also in your notes. They will share their thoughts on our estimates committees and executive accountability. Please make them welcome.

The PRESIDENT—I am aware that we will be breaking for Remembrance Day at 11 o'clock, so I will try to get through the things I need to say before then. 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, the portfolio supplementary estimates statements and the portfolio additional estimates statements form the basis. There are also annual reports—nice, weighty documents—ministerial statements, department-generated material, ANAO 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 'maybe's 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 portfolio budget statements 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, after we observe one minute's silence for Remembrance Day, I will describe.

One minute's silence having been observed—

The PRESIDENT—Lest we forget. That is the most silence I have ever had in one of my addresses, but I think it was the most important silence that we can have.

I was referring to the purple books. The government of the day set about transferring resources to the pointy end of defence; that is what it was about, essentially. 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 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 issues 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 child 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.

Mr ELLIOTT—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 ASIS 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 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 an 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 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—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 1, 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 Reps 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.

Mr ELLIOTT—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?

QUESTIONER 1—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?'

Mr ELLIOTT—Any other questions or comments? You are going to let them off that easy! We have another question.

QUESTIONER 2—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 Dixer.' 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.'

QUESTIONER 3—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.'

QUESTIONER 4—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.

QUESTIONER 5 (Mr TUNNECLIFFE)—My name is Wayne Tunnecliffe. I am Clerk of the Legislative Council in Victoria.

Mr RAY—I did see you there! I was looking at you.

QUESTIONER 5 (Mr TUNNECLIFFE)—I was going to save my question on ministerial advisers for the session on parliamentary privilege this afternoon. I will do that.

Mr RAY—I will be back.

QUESTIONER 5 (Mr TUNNECLIFFE)—I know you will. My question, now, 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. 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.

Mr ELLIOTT—Let us thank the panel for an excellent presentation.

[11.59 am]

Senate committees and legislation

Ms LE GUEN—My name is Roxane Le Guen. Until very recently it was my privilege to serve committees every day. We have here to speak about Senate committees and legislation two distinguished panel members, Ms Sue Knowles and Ms Vicki Bourne. They both have served on committees for many years. Sue Knowles was a senator for more than 20 years. During that time she was the chair of the Senate Community Affairs Legislation Committee. She also served as deputy chair of that committee on many inquiries. As Deputy Opposition Whip in the Senate, she served on the Selection of Bills Committee, and she has a good understanding of how bills go to committees. She will also be able to talk to you about the effect of inquiries on the debate in the chamber.

Vicki Bourne has worked on both sides of the Senate process, as a research officer to former senators Colin Mason and Paul McLean and then entering the Senate herself. She has served on many committees. She was always an active participant on committees. She was also the Australian Democrats whip and therefore served on the Selection of Bills Committee. She will also be able to talk about the process.

Please welcome Sue Knowles in the first instance.

Ms KNOWLES—Thank you, Roxane, for your very kind words and for the invitation to be here today. It is interesting to sit here as former senators and hear about Senate committees. As Roxane said, I served almost 21 years in the Senate, and I was a stickler for the Senate committee process and a bit of a traditionalist. I did not like to see some of the changes that were being made that I believed negatively impacted upon the Senate process.

One of the changes that was made in the late eighties and early nineties was the referral of bills to committee. Part of the reason for that was to overcome the logjam that was happening within the Senate chamber in the Committee of the Whole process. If anyone has sat through the debate of a controversial bill in the Senate chamber through the Committee of the Whole stage, they would know what I mean when I talk about sawing sawdust, because it can be a very long and exhaustive process that just goes around and around and around in circles.

So the reference of bills to committee was to take the more controversial bills and the parts thereof at the Committee of the Whole stage and look at them in a committee and look at the possible types of amendments that could be used back in the Senate chamber in the Committee of the Whole. Back in days gone by—in the Old Parliament House and even when we moved up here—Friday was a sitting day for the Senate, and so it was decided to sacrifice Friday and make it a committee day, for the reference of bills to committee.

That worked exceptionally well for a period of time, because senators and ministers understood that the committee process was in lieu of a sitting day. It was usefully then put to the community. Those who were affected by various pieces of legislation could be called upon as witnesses, the departmental people could be called as witnesses and the committee had an opportunity to do that examination that would otherwise be done in the Senate. The senators

would then draft potential amendments and they would be taken to the chamber. So it saved a considerable amount of time. I think everyone agreed that it was a terrific idea and worked exceptionally well.

Over a period of time, the change in senators became more rapid. When I came in, the new ones were with the old fossils, and then I became an old fossil myself and the change was minimal. But, during the early nineties and beyond, it was like a revolving door. Asking new senators to have Friday as a committee day at the end of the sitting week was just as though you were asking them to pull their teeth out. So they said, 'No, no, I have more pressing engagements.' Ministers had more pressing engagements. The system slowly but surely started to fall apart.

It also started to fall apart because they became full-blooded inquiries on the bill not necessarily the controversial sections of the bill but the broader bill content itself. It then became a process whereby we would not just have the hearings in Canberra on a Friday of a sitting week; we would trot all around Australia and we would get submissions from every Tom, Dick and Harry wherever we went, and they started to draw out further and further. The whole thing degenerated into somewhat of a farce. There were no draft amendments put together. It all came back to the chamber, and the Committee of the Whole in the chamber then became as long and as exhaustive as it ever was.

I think it is a good idea, but there needs to be goodwill on all sides. There needs to be a will and goodwill on all sides for it to work. I do not just say oppositions and governments because now, with more Independents and minor parties, they all want to have their say. They are all very committed to various other committees and, if this is to ever happen again, it needs to be a formalised arrangement whereby people know that that is the day for that inquiry. It should not be a long drawn-out inquiry and there should be a given time by which people can make submissions, attend an inquiry and the committee report back to the Senate.

As has been said previously, the demand now on committee secretariats is absolutely enormous. When they have parallel inquiries going on, there is only so much the secretariats can do. They are wonderful, dedicated people who want to make sure that things are right. To make sure that this system works well, it probably needs to have a rethink as to the time frame. For example, I would suggest that if this were ever to come about again that there would not be a referral of a bill to a committee on a Tuesday or Wednesday—I think, Vicky, was it?—for an inquiry on a Friday. Therefore you would not only get senators in a flap; you would get the committee secretariat in a flat and witnesses in a flap because suddenly the various interested witnesses would get a call from the secretariat: do you want to attend to put your case on X, Y and Z parts of the legislation this coming Friday? You can imagine what that would do to various people's diaries.

Maybe if it were to work again, we would need a longer lead-in time to ensure that people had time to carefully consider the process—and I mean that from all parties concerned. Sometimes even the senators were not across the legislation. It might be their minister or shadow minister and their relevant staff and members of their backbench committee who would know the detail of the legislation. A longer lead time would give the party rooms a different time frame in which to consider those controversial elements of the legislation. It would also give them time to consider the viability and practicality of various amendments that might make the legislation better.

I focus on that part of making the legislation better because invariably with the original system it did in fact improve the legislation, and ultimately governments and opposition alike would say that the upshot of the process has made the legislation and its intent better.

So if the process is to be reintroduced then maybe that lead-in time gives an opportunity to have more thoughtful consideration from all parties including those who wish to make submissions. It is important I think in this day and age to ensure that the community is involved as much as possible in the legislative process. People do appreciate being asked to attend committee hearings and they do appreciate their views being heard. While one might not agree with all their views, it is nonetheless important to hear them and to consider them. They invariably raise things that have not been considered before and they also raise the unintended consequences of a piece of legislation.

So I do think it is a very, very good process. It is an initiative that has worked well in the past. While it fell down, there needs to be an education process that makes sure that the various party leaders inform the members of committees that this is a process that needs to be adhered to. It is a process that needs to be treated very seriously and it is a process that can work very, very effectively. But I think that when this started to fall apart there was a generational change and turnover of senators and there was no formal instruction, if you want to put it that way, for new senators that this was a part of their commitment to the Senate in lieu of sitting in the Senate on that given Friday. So senators who are genuinely interested in the legislation can have an opportunity to attend such inquiries and such hearings and sometimes throughout the process of the Senate they can also be committed to doing other things while the Senate is sitting—and they cannot be in 10 places at once.

All in all, I think the committee process is one that must be valued. It must be one where people take the blinkers off and look at it objectively and say, 'This is a way in which we can enhance the system.' If senators looked at that process seriously from time to time to see how they can improve the Senate inquiry system or the scrutiny of the legislation, then I am sure that there are ways in which that can be achieved. There is no doubt at all that there is an intention by all senators to get the best out of legislation but sometimes the Senate is so focused on getting legislation through according to a timetable that some things are not considered probably as much in detail as they could otherwise be. This process enables that scrutiny to take place.

I would dearly like to see a system similar to that that was designed way back then reintroduced to give people a different opportunity to look at legislation, not one that makes a Senate committee travel all around the country—it is not that type of inquiry. I think the classic example was the reference of the GST bills to Senate committees. That ended up just a complete and utter circus, because all committees had their own little section and off they went all around Australia, listening to the most outrageous submissions at times. But once again, it is part of people's rights to express their opinions to the Senate, but the process was not necessarily designed originally to take that type of inquiry on an Australia-wide tour. I do hope that it gives an opportunity for senators in the future to look at options and the way in which Senate committees can work effectively and efficiently and so contribute more time back into the Senate chamber in a constructive way as opposed to just consuming time going around and around in what can usefully be done in a committee environment.

Ms BOURNE—I thank Rosemary and the committee office for inviting me to this. I must say I am a major fan of the Senate. I always have been. I remember that when I left the Senate I said

I could not understand why anyone in their right mind would want to go into the House of Representatives. What was wrong with all those people? Unfortunately, there were a couple of people from the House of Representatives who had come to listen to valedictories. They were a little unimpressed. But I still maintain that view. I am a big, big fan of the Senate committee system as well.

I was asked by David to have a look at the Senate committees and legislation from a minor party point of view. I did have quite a bit to do with that while I was in the Senate from 1990 to 2002, but I should tell you that from 2002 till now I have had very little activity, and I have not really kept up with any of the minutiae of what has been changing within the Senate. So I may be well out of date, but I can only tell you what has happened from my own experience. First of all, I have been on many, many committees as a Democrat, as someone from a minor party. I can see Dee Margetts is here. She will agree with me on this. It is remarkable how many committees you do have to get onto. There are not that many of you to go around. If you want to be a part of legislation then you are just going to have to do that. I always found that I could only handle two portfolios reasonably. I have absolutely no idea how, when Dee and Christabel were the only Greens in the Senate, they could handle everything. But I am sure Dee will be interesting about that when the time comes.

As far as I was always concerned, there were three basic types of bills. There were the very, very simple ones, and those are the ones that we used to do on Thursday lunchtime. They may still—yes. They were the ones like changing levies. It would happen every year. Everybody would agree on it. In fact, I can only think of one instance where a bill that I thought deserved a little more scrutiny was put on at Thursday lunchtime. That was the bill when East Timor became independent and we had to change our agreement on the gas fields in the Timor Sea. That came up on a Thursday lunchtime. I did not complain at the time but I did remember the first time that bill came around to put the agreement in place. It was not one of the first set of non-controversial bills; it was not one of my second set of bills; it was one of my third set of bills that sort of made your hair stand on fire, and fireworks went off everywhere when somebody mentioned it. It was a bill that was incredibly controversial. However, by the time we got to the second time around, everybody just got up and did five minutes on Thursday lunchtime—except me, I have to say. They were all saying, 'Yes, this is perfectly reasonable.' I got up and said: 'I think we've all forgotten what happened in the first place with this. You were all telling me how silly I was and that this would never happen. Guess what? It has. And here we are changing it now.'

So that is the first type of bill. The second type is more complex usually. I think these are the ones that Sue was talking about. They are the types that have some amendments or some controversial aspect to them that people will want to talk about but they are not hugely important basic changes to legislation. That is the third type that you come across. The one set of inquiries I can think of on the third type of bill—the really basic changes—was when we had two Senate inquiries into the legislation to change the broadcasting legislation to go over to digital, to bring in pay TV. They were huge. They were absolutely enormous. They could not possibly have been handled in a very minor way. They had to be handled in a very big way.

I think the one thing that came out of my being on those two committees was that I learnt that it is such a technical area. It is such a complex area. John Hogg was talking about the jargon earlier. It was something I had never heard of before in my life. It was something you really had to get used to and you really had to have experts telling you about it, starting from scratch. The

attitude was: 'Here I am in kindergarten on broadcasting and digitisation. Tell me what it is all about.' If I had not had all the submissions to the committees and had not been able to question all those witnesses—and we had witnesses coming in on that from all over the world—there is no way on the face of this earth I would have been able to handle those bills as I did. I am sure it was exactly the same for everybody else who was handling them in the chamber. It was not just the Democrats; it would have been the same for all the parties. They were immensely useful committees to have into what turned out to be immensely complex bills that nobody got right. I should say the government did not get them right. I am sure I got most of them right! I think the pay TV bill was the one time a minister got up in the chamber and said, 'I would just like to say that I should have listened to Senator Bourne when she brought this amendment up.' I thought, 'Thank you! Thank you!' And it was true; he should have, and so should all the rest of them.

I think committees hold a very, very important place, although I take what Sue says too. It can be very frustrating—or it could be when I was in the Senate—that where we had meant to do all the committee stage of a bill on that Friday all you got really was an extra committee stage because you would get back to the Senate and do another committee stage. The amendments had been written, but they had usually been written by that Friday anyway. It was two discussions: one with people out from outside the Senate and one inside the Senate. I think there is a lot of value to that because you get that democratisation of legislation, where anybody who is interested can come in and tell you. However, the three-day reference was very difficult for anybody who was interested who was not in Canberra. I do not know how the Senate committee system is working now, but it may be that it is worthwhile just having another look at it and seeing if it can be better suited by some small changes that could go on.

The other thing that I wanted to talk about from a minor party point of view is the changes of 1994, when we changed the Senate committee system. I was asked on a radio program after I left in 2002 what was the thing I was most proud of in the Senate and I said the 1994 changes to the Senate committee system. Much as I would like to tell everybody they were all my own idea, they were not, sadly. There was a lot of discussion. There was a lot of unease. That is probably not the right word. But many people in the Senate were thinking by that stage, 'We've got a house here that has so much more input than you have in the House of Reps,' where there were two main parties and some Independents. We had a couple of other smaller parties and we had Senator Harradine as the Independent. We did have a very useful and very comprehensive Senate system at that stage. One of the main things that used to frustrate me hugely—I know it frustrated Christabel and Dee as well and it certainly frustrated Senator Harradine—was that if you were a Democrat then you probably had one person on a committee that was looking into anything. But if you were not then you were very lucky to get onto any committee at all. You were very lucky to have any input at all.

The change that we made to the rule as far as that goes was that we brought in participating members. That meant that any senator, not just the ones who could not be on the other committees but any senator from any party who had a particular interest in a bill or in any other inquiry, could nominate themselves as being a participating member of that inquiry. They would have all the rights of the normal members of that inquiry, of the ones who would have been there before, except for the technical aspects like 'when will we meet next' and 'when will we finish this off'. That did not really matter because you were able to put in a dissenting report, you got all the submissions and you were able to ask questions of witnesses, so you had pretty well all the rights of the ordinary members of that committee. I note that, even when other things were

changed, that system of participating members never changed. It has been in place from 1994 until now. I hope it never changes. I think it is one of the best things we have done.

I remember having a discussion with Senator Hill at the time, and others, about this next point. We had a Senate that had about equal numbers of government and opposition senators, and on top of that it had the Democrats—I cannot remember how many of us there were at the time; about eight—there were Greens and there was Senator Harradine. It seemed to us that we were not the House of Representatives and it was only reasonable that half the chairs of committees would be government and half would be opposition, and the ones that had government chairs would have government majorities and the ones that had opposition chairs would have opposition majorities.

I put forward a motion to the Procedure Committee, which was accepted, and then we formed a subcommittee of the Procedure Committee. 'Reasonable' might not be the term people thought of for Senator Faulkner and Senator Ray but as far as I was concerned they were very reasonable on that subcommittee and they were prepared to talk about anything; they were prepared to consider everything. There was Senator Ray, Senator Faulkner, Senator Reid, who was the President at the time, Senator Kemp and me. We had really reasonable discussions. We came up with a set of amendments for coordinated committees, estimates would be put in with legislative committees and the general purpose committees would stand by themselves.

I wanted to have, purely thinking from a completely independent point of view, half of the general purpose committees and half of the legislative committees to have opposition chairs. In fact, Senator Ray talked me over on that one. He was very concerned about oppositions manipulating legislative committees, in particular estimates. He and the Labor Party were in government at the time. It was the end of 1994 and we knew the election would be fairly soon. The general consensus at the time was that Labor was not going to get back—but you never know. It looked like everybody had something to win after the next election. Whether you were in government or in opposition you would have half the chairs; whether you were in government or opposition you would have half the majorities; and no matter who you were in the Senate you would be able to nominate yourself for a place on a committee. We talked it all through, and Senator Ray eventually convinced the rest of us that his point of view was very reasonable. I still think it actually was—that you should have legislative committees with government chairs and general purpose committees with opposition chairs.

That system remained in place until the government took over the numbers in the Senate, which I think was 2005. Then it changed. It went back to virtually what it had been before 1994, except that there were still participating members. The chairs all went back to where they had been. Then, I am very pleased to say, in 2008 the system changed back to virtually the 1994 system. I still think it is a much better system. It gives the government the ability to look after the legislative side and non-government—all the opposition parties—the ability to look after the general purpose side. I think it was a real breakthrough for the Senate and it made the Senate into not only a much more democratic institution but also a much more inclusive institution where, if you did not belong to Labor or Liberal, there was not a problem with you being on a committee.

I would just make one more point: as a Democrat senator I had a terrible time getting information out to the voters—if the press did not want your views to get out, they did not get out—unless people were listening to the parliament on the television. An astonishing number of

people actually did at the time and an astonishing number of people listened to Senate question time when it came on at midnight or 1 am or something. I could not believe it.

As an aside, I once went to the Philippines and there were clubs of people who got together and watched Senate question time on the international television. They could not have cared less about the House of Representatives question time. There was a Bronwyn Bishop cheer group and a Gareth Evans cheer group—the rest of us were sort of by the bye. But they would get together and yell and scream at each other when one of these two made a point. It was the most bizarre thing. But that is beside the point.

Unless you were one of those people who watched the Senate, unless the media were interested, you would not know anything about what the Democrats were doing. We could put out press releases, we could advertise, but we could not afford it. We could have public meetings and 15 people would work out what we were on about. But one of the main things we could do was be really effective on a committee. If you were the chair of a committee then you were the one who was asked what the committee was up to now. If you were just on a committee, especially the big inquiries, many of the big inquiries were covered by the media and your point of view would get out there. I found that was one of the best ways to let the voters know what I was doing, where I was going, what was happening. I would be surprised if it were not the same now for the Greens. I think the Senate committee system is really worth while evolving constantly. I do not want to see any of my changes changed again, so do not change any of them. They are brilliant and will last till the end of time. But everything else is open.

I think we should all be looking at where things can get better. I would love to see a new evolution of where the Senate committee system is going, just to make it better. I agree with the other speakers who said, 'We do not want it too much bigger, because it is very hard for everybody to cope.' But with the eight paired committees—I assume we still have those; we always thought three or four select committees was what we could cope with—I think we have a committee system that is well and truly the envy of many other parts of the world and it is something that we can be really proud of. Thank you.

Mr TUNNECLIFFE—In the last sitting week before the dissolution, prior to the election, the Legislative Council of Victoria voted to establish a standing committee system, based wholly and solely on that of the Senate—and unashamedly so. In fact, our new standing orders look remarkably similar to those of the Senate. I did warn the standing orders committee against plagiarism, but it did not seem to care.

I think our biggest challenge in getting the new system up and running will be the legislation committees, which, like the Senate committees, will be chaired by the government. I say that because, in our parliament we trialled a stand-alone legislation committee but it was rarely used, principally because the two sides of the house had different views about how it should be used. For example, the opposition saw it as an opportunity to have a wide-ranging inquiry into a bill, whereas the government saw it principally as a substitute for the committee of the whole. In fact, they took the view that if we had a bill referred to a legislation committee then it should not go to the committee of the whole at all. So I guess a number of us are very fortunate to have had 40 years of Senate committee experience to draw on; hence, this conference is very timely.

I would like to ask both the presenters: in relation to making our legislation committee system work, what do we need to do? For example, should there be minimum or maximum times for

inquiries? Should there be parameters for the inquiries? Should the government modify its legislative program so that it brings in bills earlier in order to have them introduced at the time they would otherwise have wanted to? Based on your experiences, what are the sorts of things we should do?

Ms BOURNE—I think that is a really keen question. It is one that the Senate is still looking at. You have a problem, which I am sure you are aware of, in that whatever you bring in, the government of the day, if they have the numbers—or whoever has the numbers—can override it. That has happened in the Senate several times I can think of. When we started off I looked at three types of bills. There was the type of bill that you did not need to refer; there were the middling ones, where there was one complex area, a couple of complex areas or a couple of controversial areas; and then there were the really big earth-shattering bills. You will probably end up with earth-shattering ones having a big committee inquiry anyway and going around all over the place to lots and lots of people. There will be many people interested and many experts who can give you lots of good information.

They are the middling bills that you have to watch because, as Sue said, they can blow out of all proportion, particularly if you have an interest group who really want to either stop the bill or change it to their advantage. If we ever had a bill to do with family law and it went to a committee you would know that you would have a huge influx of submissions. The first one we had I remember that all the submissions said exactly the same thing with exactly the same wording on exactly the same paper but with different signatures. Of course they did not all go out to you because would have been silly. You would were given one and then instead of giving you another 400 the next day, you would be told 'There are 400 more of A.' That kept going and made no impression on us whatsoever.

Then they thought better of that and said, 'Say in your own words something like this.' Most people just wrote whatever it was that was 'something like this'. Then those people will ask to speak and that can really take a huge amount of time. It is incredibly stressful. It is incredibly time consuming—unbelievable time consuming—for the staff. You know what those types of bills are, of course, but you really have to watch them. In my opinion you do not need a long time for those hearings. It is very difficult not to put a long time on them, and you will get into trouble from the people who want you to put up a long time, but they are always in a minority.

There is a problem, though, with bills that do have some complexities or some controversy in them, where there are differing points of view from differing experts. You will have to leave more time for those sorts of bills. If you get this area right I hope that the Senate looks at what you do because I think it is one area where the Senate can—it would be very valuable to the Senate—have another look at what sorts of bills need what time and how far you should go.

When we first brought in those Friday sittings for committees the main idea was not that you would get people from around the country, but that you would look at the low level of the medium bills. All you really needed were people who were in Canberra anyway. You needed the public servants and the minister to come and talk. You would have all the parties in the room and if there was anybody else around in Canberra who had a view on it then they could come and speak. They have just blown out of all proportion. Sorry, I am taking too much time.

Ms KNOWLES—I think that one of the main things you would need to consider is making sure that you have a time frame established by the chamber. It is as simple as that, in many

respects. The chamber then decides what the reporting date is and the committee has to work within that, and as long as that is established in a reasonable, bipartisan fashion then it generally works all right. If the bill does tend to attract more attention, then they can always go back to the chamber and seek an extension of time for reporting. Vicki said that governments can always override it. I would just say that they do that at their own risk. Just listen to what Robert Ray was saying earlier on: 'There is payback.' If a government decides, 'No, we are not going to have an inquiry on this,' then watch this space because it will take an eternity in the chamber. So it is better to have that communication going and to make sure that there is a priority given to the length of time that the bills need for proper scrutiny. I do not know whether or not it would be necessary for them to do anything other than make sure that there is enough communication between all parties within the chamber, to make it work. If that communication is established right from the beginning, it is better than trying to patch it up as it all unravels.

QUESTIONER 2 (Ms MARGETTS)—I was interested in what you were saying about the necessity to work out how legislation can and should be looked at in committees, and I will be talking about that in some of my presentation. I thought I would give you an interesting example. Having been an upper house member in the Senate and also an upper house member in the Western Australian state parliament, one of the things that was really interesting was that state agreement acts in Western Australia were major acts, giving government support to major corporations—which potentially should not have been accepted under competition policy—but there was an agreement within the legislative council that there should have been a proper assessment of the public interest of how those agreements were put together. Nearly every time such agreements were put together, at the last minute, when they finally made the agreements between the industry and the government, they told us it was so quick they had to just shove it through—so there was virtually no means by which we had the ability to properly assess public interest. To me there were some serious problems there, so it is going to be a really interesting process to work out how better to do that from legislative levels.

Ms BOURNE—That must have reminded you of Christmas in the Senate, where many bills came up for debate over two days—

QUESTIONER 2 (Ms MARGETTS)—To give you no time to look at them properly.

Ms KNOWLES—That goes to our previous questioner, in terms of scheduling the legislative process to make sure that it is a reasonable legislative process and not one that just cannot be achieved without this cramming. Many a time I drove home from here at seven o'clock in the morning and turned around after a shower and change and came back again. That is just ridiculous. People can not

Ms LE GUEN—We have time for one last question.

QUESTIONER 3—I would like to introduce the word culture. The culture I am thinking of is our Australian narrative. I put down the word democracy. Against the word democracy I put Switzerland, with its 26 cantons. I thought of Italy—that came out of a disaster and if you had four per cent you got a voice, and it is still running, about 59 years later. Overall, I feel boxed in because you are talking about a Senate group that does not represent the rest of Australia. When are you going to get Australians to say, 'I have been in that parliament. I have had my six months. I have made my contribution'? All you are talking about is an old, out-of-date system that they are trying to get rid of in England. Let me finish off with this one so that you have

something to think about. The Scots have a nationalist party. The Welsh have a nationalist party. And, from the last election, there is apparently an English nationalist party coming. When is Australia going to represent Australians with an electoral system that represents our culture?

Ms LE GUEN—Will you join me in thanking our panel members for their contribution, their interest and the light they have thrown on this.

Proceedings suspended from 12.45 pm to 2.00 pm

Role and contribution of legislative scrutiny committees

Prof. UHR—We are resuming after the lunch break with a series of two panels before afternoon tea and then another two panels. It is a very complete day and we have tomorrow as well. There is a lot to address and identify. I mentioned earlier on that I had worked with a legislative scrutiny committee so it is a privilege for me to be able to convene a panel especially dedicated to legislative scrutiny committees. They are a kind of back office operation. The Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for the Scrutiny of Bills do not typically hold public hearings, but they do that fine grained, detailed examination of government legislative proposals looking in particular at the potential impact on individual and civil liberties that is a hallmark of the value that the Senate has brought to the legislative process. Senator Coonan will be our first speaker and then Mrs Amanda Vanstone will be our second speaker. Senator Coonan of course has been a senior minister. She was elected to the Senate in 1996. She is now Chair of the Scrutiny of Bills Committee. She was a member of cabinet in the Howard government in her roles as the Minister for Communications, Information Technology and the Arts having before that been the Minister for Revenue and Assistant Treasurer. She was the Deputy Leader of the Government in the Senate in 2006. She stepped down from the opposition frontbench a year ago and had been before that shadow minister for human services, foreign affairs, finance, competition policy and deregulation.

The Senate is a small chamber so that you can see just from that biography that senators in representing government and shadow government responsibilities are forced to address a wide range of issues. They must envy their colleagues in the House of Representatives who are able to specialise a little bit more. Former senator Amanda Vanstone has now returned to Australia after a wonderful time representing Australia in Italy. Before that she was a senior opposition senator representing South Australia and then with the election of the Howard government a very senior minister, first female cabinet minister since Federation, having served in a lot of senior ministries including as Minister for Employment, Education, Training and Youth Affairs, Minister for Justice, Minister for Justice and Customs, Minister for Family and Community Services, Minister for Immigration, Multicultural and Indigenous Affairs and Minister for Immigration and Multicultural Affairs. Italy must have come as a blessed relief after all of that. We will invite Senator Coonan to speak first followed by Mrs Vanstone and then we have time for comments and public discussion after that.

Senator COONAN—Thank you very much, John. Ladies and gentlemen, I am really delighted to join you for the next session of what I hope you are finding is a very informative and interesting session on the workings of the Senate. You will have noted from the few remarks that John made about my background that, having come out of the executive and having spent quite a bit of time as a minister, I am actually really enjoying getting to grips with some of the very important work that the Senate does quite independently of the executive to scrutinise legislation and in another role regulations and ordinances. I think you will be looking at that a little later. I am currently the Chair of the Scrutiny of Bills Committee which is a very granulated and detailed technical committee that I will tell you about in just a moment for those of you who may not know what it does in detail. I want to mention that I am proceeding on the premise, as no doubt earlier speakers have today, that parliamentary committees are we think absolutely essential to the operation of modern parliaments. Australian Senate committees have for some decades been pivotal to the maintenance of government accountability to the Australian

parliament, particularly through hearings to scrutinise the budget and through public inquiries on policy issues which take place throughout the year.

The committee system is also essential to the Senate's role as a house of scrutiny and review. I am still astounded by misunderstandings that people hold on the workings and values of our various parliamentary committees. I am not referring just to members of the public; we often say that our colleagues in the House of Representatives do not know what a scrutiny committee in the Senate does. So forgive me if you are already familiar with the workings of the Senate Standing Committee for the Scrutiny of Bills because I am going to discuss very briefly the role and contribution of the committee so that the value I think it adds to our democracy can be evaluated.

The scrutiny of bills committee is a very old committee. It was established on 19 November 1981 by resolution of the Senate. Its purpose is to assess:

> ... legislative proposals against a set of accountability standards that focus on the effect of the proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

By examining all bills, every one of them—we had, I think, about 80 introduced bills that had built up the last time that parliament was prorogued—that come before the parliament the committee plays a role that complements the examination of all delegated legislation, as I mentioned, by the Senate Regulations and Ordinances Committee. It reports to the Senate on whether a bill trespasses unduly on personal rights and liberties; makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; inappropriately delegates legislative powers or insufficiently subjects the exercise of legislative power to parliamentary scrutiny. Those are the five heads against which we evaluate every piece of legislation that gets introduced into this place.

The scrutiny committee has six members, three of whom are members of the government party—nominated by the leader of the government in the Senate—and three of whom are members of non-government parties. The chair of the committee is a member appointed on the nomination of the Leader of the Opposition in the Senate. That is interesting because it is one of the few committees where the chair is in opposition.

Since its inception the scrutiny committee has also taken the opportunity to engage an eminent legal adviser to assist in its work. This adviser provides a written report to the committee identifying any of the bills that appear to infringe on one or more of the five principles that I outlined. The committee regularly publishes two documents: the *Alert Digest* and the report. The digest contains an outline of each of the bills introduced in the previous sitting week that we consider at our meeting as well as any comments the committee wishes to make in relation to a particular bill. When concerns are raised in a digest the committee writes to the minister responsible for the bill inviting the minister to respond to its concerns. Next the committee produces a report containing the relevant extract from the digest, the minister's response—which is nearly always polite—and any further comments the committee may wish to make or to draw to the attention of the Senate.

The response varies markedly, of course, but sometimes it can be as extensive as rewriting sections of a piece of legislation, sometimes it can be a tweak to an explanatory memorandum or

a better explanation that can inform why the bill appears in its current form. Reports and digests are generally presented to the Senate on the Wednesday afternoon of each sitting week and they are available on line after tabling. Occasionally the scrutiny committee also produces reports on matters specifically referred to it by the Senate. The committee also monitors penalty provisions for information offences, for national scheme legislation—because you can imagine how complex it is to implement legislation in various jurisdictions—and on standing appropriations.

Additionally, the committee has served as an inspiration, as I am happy to say, for the establishment of other scrutiny committees, both domestically and internationally. At the time the committee was established in 1981, it was the only committee of its kind in the world. Since then six of Australia's eight state and territory jurisdictions have established committees with a function to scrutinise primary legislation, with only Tasmania and the Northern Territory being the exceptions. The Scrutiny of Bills Committee's 10th anniversary seminar in 1991 had a distinguished participant, Lord Thurlow, from the House of Lords, who came to the seminar with the express purpose of examining the operation of the Scrutiny of Bills Committee in Australia. In a 1992 report the United Kingdom select committee on the committee work of the House recommended that a delegated power of scrutiny committee be established with terms of reference almost identical to ours and it was acknowledged that our workings as a scrutiny of bills committee had been influential in formulating the recommendations, and the functions of that committee still exist today. So we think we have got good provenance. That is a good example of giving back to the Mother of Parliaments, as we sometimes refer to Westminster.

Coming back to our own committee, prior to its introduction in 1981 there was some concern that the committee's work would slow down the passage of legislation through the parliament—and that was a very legitimate concern. But it moves awfully quickly once a bill is introduced and over time we have proven that this has not been the case and that the process has worked efficiently, not least due to the work of the committee's members and a very dedicated secretariat. A key point, I believe, in relation to the effective functioning of the committee is its bipartisan membership and approach. This strengthens the quality of the committee's work, and I believe that there is no way that the committee could function if it did not operate in a bipartisan fashion. It is interesting to think of what might happen. Sometimes, as you will hear, on some of our committees you do get a bipartisan approach and it is often said by people that shows the Senate working at its very best. By operating in a non-partisan and apolitical way and by making decisions on a consensual basis, the committee primarily sees its task as being to draw the responsible minister's attention to any concerns, to request clarification or to ask that consideration be given to addressing the concerns in a particular way and to advise senators and other readers of its reports—I am sure there are some—of the risk that particular provisions may infringe one or more of our five principles.

If we stop to think about the purpose of the committee, it quickly becomes apparent that the committee does have a double agenda. One is that it should be there to support the civil rights of citizens, but at the same time it should be free to criticise parliament, bureaucracies and the executive. It is the support of the civil rights of citizens that is perhaps the committee's greatest challenge and which naturally brings us to the liveliest debate that I think might exercise us this afternoon.

Any committee that has functioned well for a very long time obviously has to face the future and look at whether our terms of reference need to be refreshed or we should go on the way that we are going. The future role of the committee has been a topic of particular interest this year to

the committee members and externally. Earlier this year, during the 42nd Parliament, the committee commenced an inquiry into its future role and direction. The terms of reference for the inquiry were to inquire into and report on:

(1) The future direction and role of the Scrutiny of Bills Committee, with particular reference to:

(a) whether its powers, processes and terms of reference remain appropriate;

(b) whether parliamentary mechanisms for the scrutiny and control of delegated legislation are optimal; and

(c) what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth.

Then, on 21 April this year, the government announced, as part of its Australia's human rights framework policy, the establishment of a new parliamentary joint committee on human rights to review legislation against human rights obligations. The case for improved and comprehensive parliamentary scrutiny of human rights in Australia has been recognised by a number of international human rights bodies, a range of non-government organisations and of course by the federal opposition. The coalition's submission to the Brennan committee that looked at what Australia may do in relation to better scrutiny of human rights concluded: 'A statutory bill of rights is not the best model for advancing human rights in Australia.' I am sure that excites a great deal of different opinion and is itself rightly the subject of debate. But, for the purpose of the government's response to the Brennan report, the coalition have adopted as a preferred mechanism, as part of our policy for advancing human rights in Australia, that of enhanced parliamentary scrutiny, based on a model which includes the establishment of a new parliamentary committee—either a joint standing committee or a standing committee of the Senate—invested with the specific task of considering legislation from a human rights point of view and reporting to the parliament on any possible incompatibilities between a bill before the parliament and the international human rights instruments to which Australia is a party. It is envisaged that this committee would operate within the framework of a human rights act which would ensure greater consideration of human rights in the development of legislation and policy in the parliamentary process in general.

It is very interesting, because the question then arises: if our committee already has a remit to look at some aspects of human rights, what will this committee, if it got up, actually do? Much guidance as to how such a committee would work can be drawn from our colleagues in the UK—it is nice to see it going back the other way—where a Joint Committee of Human Rights was established in 2001. That committee has six members from each house of parliament. Its somewhat broad mandate is to consider human rights issues within and outside the legislative process, excluding consideration of individual cases. However, this idea of a parliamentary joint committee or a Senate human rights committee is not, we think, without its own weaknesses. It should be noted that a parliamentary joint committee would, in all likelihood, be House of Representatives and possibly executive dominated, although who knows with the current configuration, and may hinder its practical effectiveness. For example, the Senate may well be inhabited in amending legislation on civil liberties grounds when legislation has already been approved by a joint committee. Another question is whether this human rights remit would really look at more than just potential technical breaches of human rights, which is of course what our committee does, and whether it would actually venture more into policy.

It goes without saying that the work of the parliamentary joint committee on human rights is likely to have an impact on our remit, no matter which way it goes, and on the work of the Scrutiny of Bills Committee. In the event that it does not proceed for any reason or the establishment of a joint committee on human rights does not get up when the legislation is argued or, indeed, does not proceed for any reason, we feel that the resources and mandate of the Scrutiny of Bills Committee and the Regulations and Ordinances Committee could be augmented to undertake examination of human rights issues.

Let me just remind you that at present the committee scrutinises bills from the perspective of protection of traditional common law rights and liberties. The question is whether, in the absence of a statutory bill of rights, the committee's terms of reference are really sufficiently wide enough to enable it to scrutinise international human rights. While there is nothing in the Scrutiny of Bills Committee's current terms of reference to prevent its consideration of such rights, I think a common view held is that, if this approach were to be followed, its terms of reference would need to be augmented in order to properly safeguard the rights and liberties that would otherwise be included in a bill of rights. So, before the Scrutiny of Bills Committee develops a position on its future role and direction, we must thoroughly consider the content of the enabling legislation and, in the case of the establishment of a parliamentary joint committee on human rights, the ways in which, if any, the work of the two committees could duplicate their functions or otherwise be similar.

The scrutiny committee envisages that it would not simply repeat work that was being undertaken by a Parliamentary Joint Committee on Human Rights; it would continue to be a decision for the committee on a case by case basis whether it also needed to comment on bills and to determine the content of those comments. This is particularly relevant in view of the likelihood that the Parliamentary Joint Committee on Human Rights would be subject to control by the government, whereas the Scrutiny of Bills Committee has an opposition chair and takes a consensus approach to its work. These are big questions for us to tease out when looking at the future of the scrutiny committees.

It is also important to remember that, while some of the remit for each committee has the potential to overlap, the committees will also have some very different areas of responsibility. The Scrutiny of Bills Committee is looking forward to continuing to fulfil its role as one of the key providers of legislative scrutiny for the Senate. In doing so, as a committee of an independent house of parliament, it will strongly guard its rights to take any appropriate action to meet its charter. Therefore, the scrutiny committee plans during this parliament, with the concurrence of the Senate, to continue to inquire into its future role and direction, taking into consideration the impact of the enabling legislations for the Parliamentary Joint Committee on Human Rights.

In conclusion, it is fair to say that the Scrutiny of Bills Committee, despite its long and illustrious history, is very much a work in progress and that is precisely what it should be when you look at the role and future of Senate committees.

Mrs VANSTONE—My thanks to the Department of the Senate for the invitation to participate today and join with former and existing senators in confirming that the lower house is not called that without good reason. One example, and there are many that can justify that claim, is the Senate committee system. There can be no better group of committees than the scrutiny committees as an example of why we are so much better. I have enjoyed my time in Australia

since returning from Rome, in particular watching those dear people in the lower house talking about a new paradigm with the Independents and the minor parties. Well, the Senate has had that for donkey's years and managed it quite well. The Senate has very good systems for managing it and the experience at managing it. It is new to the Reps, I know. It is like a new galaxy for them. But they will adjust and manage, and life will go on.

But it has been of interest to me to note how few Reps people have even referred to the fact that this has been in the Senate for a long time, as if the Senate does not matter. In fact, all the bills that become acts of parliament have to go through the Senate. For all my time in the Senate, bills went through a house of parliament that was littered—and I won't say 'cluttered', that might be unkind—with minor parties and Independents. But I will move on from the lack of ability of the House of Representatives to understand how the world really works.

The benefit of these two committees is that they really do work. All the Senate committees occasionally work in a very bipartisan fashion. There would be plenty of occasions where that has happened. But it always happens with these committees. They are not there to be used for party political purposes and that has clearly been understood by the membership. Before I left, if the Regulations and Ordinances Committee had ever taken a motion before the Senate to have some regulations disallowed, they always won.

So, when I was a minister, if a new young Liberal—wet behind the ears, got a job in the minister's office, very happy, very keen, got a mobile phone and therefore very important!—came and said, 'I've got some stupid letter from some committee saying you should change such and such,' I would just say: 'Change it. Have a look at it. If it's completely ridiculous, we won't do it. But I think you'll find there will be some merit in that, and we're going to lose anyway, so let's do it.' That is not easily understood by people until they have had some experience of it.

Not so with the Scrutiny of Bills Committee—that works in a different way. It does not have that overriding threat of a committee that is not lost. I do not know if it has lost since I have been here. The Scrutiny of Bills Committee looks to point out to parliament where these problems are and, sure, negotiates with the minister through reports and correspondence, but in the end it is left up to the parliament to decide, because they are commenting on a substantive act of parliament and that is for the parliament to decide upon, whereas the Regulations and Ordinances Committee has this charter to really scrutinise the regulations and ordinances and to strongly advise parliament by moving a resolution if it thinks something has not gone the right way.

The things that these two committees look at sound similar but they are a little bit different. Let me just run you through what the Regulations and Ordinances Committee looks at: is the delegated legislation in accordance with the letter and spirit of its enabling legislation; does the legislation trespass unduly on personal rights; are discretionary decisions made, subject to adequate appeals; and does ministerial lawmaking deal with significant issues, the merits of which parliament itself should look at? They are the sorts of things that the Regulations and Ordinances Committee looks at. I have picked out just a couple of examples of things that have been looked at, because it is nice to talk in terms of principles but it is perhaps handier to have a good understanding of some of the practical issues. One was where the Health Insurance Commission sought to breach medical confidentiality by authorising the completely unlimited transfer—I am not suggesting that there could not be any transfer—to the Department of Social Security of any information held by the commission. That meant that any of your medical

records could be sent to the then Department of Social Security. As you might imagine, there was a bit of argy-bargy about this and the Minister for Health agreed to the disallowance of the regulations without debate.

On another occasion the right to trial by jury was, in effect, restored by this committee. It did only relate to the ACT—and I do not mean to diminish the ACT by saying 'only', but that is where the powers were. Magistrates had the jurisdiction to hear minor indictable property offences, but, if the property was the Commonwealth's, they might value it and that might give them the opportunity to decide whether you have got a trial by jury or not. Again, there was a bit of argy-bargy, and there was lots of commentary by lots of people, but in the end it was restored.

In another context, the committee looked at the repeal of some provisions which permitted a limited search warrant. There is a reason we have search warrants: it is so that people cannot come barging into your house or your office and go through all your personal stuff looking for anything they might be interested in—or might not be interested in in the first instance but subsequently become interested in. Anyway, there were provisions which permitted a limited warrant to be deemed to be wider than its express terms if, in the course of its execution, officials believed it should be widened: 'This is fantastic! 'We've got permission to look in the matchbox but, now that we've got here, we think there are a few things we want to look at in the cupboard and under the sink and under the bed and perhaps in those computer files so we will just deem that permission we got is wide enough to do that.' That renders completely useless the whole purpose of asking you to get a warrant. What would be the purpose of doing it?

So, these things need to be done by a committee. There are so many miles—a galaxy—between a cabinet decision for a bill to be brought into parliament and it actually becoming law in practice with all the attendant subsidiary legislation that goes underneath that. An army of people need to be brought in with special skills to decide what forms to fill out, how you apply, what happens if you have not applied on time and what appeal rights you have got. There are masses of ways in which you and I are affected by the application of the law. It is not that we necessarily disagree with the main bill and its intent but, in the implementation of it, there is plenty of risk—or opportunity—for things to go badly wrong. That is why we have these two committees.

Senator Coonan gave you the outline of the tasks of the Senate Scrutiny of Bills Committee, but perhaps I could give you some examples of how a parliament can unintentionally put undue trespass on personal rights and liberties. One can be by retrospectivity. We all understand that in tax, because there have been long issues about that. We could take hours to debate it but we understand that, if we allow it to wait until the bill passes parliament to have any effect, there will be all types of gouging and opportunities by accountants and lawyers, so we have some understanding of that. But there are other ways it can be done—legislation by press release. Abrogation of privilege against self-incrimination is an example, as is reversing the onus of proof. When you think a ship is the only one down in the Antarctic and there is an oil spill, is it okay to say, 'Well, you prove it wasn't you'? Is it fair enough to keep reversing the onus of proof because it is convenient and easy and too hard to prove that they are at fault? The temptation is to say, 'Yes, it is, because we want to protect the environment and that was the only ship there.' But if you keep nicking at the reversal of onus of proof and just keep cutting little bits in that artery of freedom then eventually, out of all the little bits, you get the flow that would come from the equivalent of a gash to that artery of freedom. Anyway, there may well be others. If I may, I will come back to some examples of some of those.

Another reference that was mentioned was the undue dependence on insufficiently defined administrative powers. I will come to an example where one body sought to give itself the capacity to delegate all its powers to a person—anybody. It could be a lunatic; it didn't matter. It could be any person. What would be the purpose in establishing a statutory authority with all the rules associated with it if it could then give all its powers to anybody? This is what you might think of as nitpicking but it is not nitpicking. It is actually protecting your and my freedom. It is making sure of what parliament intends when it does the sort of high-level debate at the second reading—I know some people think it is not always high level, but you know what I mean—on the principled issues. Parliament never intends for these kinds of little things to happen, and they do. If you do not have these sorts of committees looking at them, you will not have the protection against what is really just the might of the bureaucracy, not intending to do you and me over—not at all, because they are citizens too—but, without thinking, wanting to implement the purpose of the act and inadvertently, I hope, treading on your and my civil liberties.

I just want to come back briefly to the concept that I started on—that is, they are not called the lower house without good reason. The Senate committee system is the best example of that, and these scrutiny committees are the best examples of the Senate committee system because there is nothing party political about them. This new news where they want to have a lot of group hugs and sing *Kumbaya* or something happens every week in the Senate. People sit down and work together for the betterment of our political system. My first experience was on the Senate Standing Committee on Regulations and Ordinances, when someone said to me, 'I have a great committee for you as a new senator.' I said, 'Really?' I thought it might be legal and constitutional affairs or something I really wanted. They said, 'Regulations and ordinances.' I said, 'Oh, okay.' I was not that happy about it, but later I was really happy, because for a new senator it is a perfect committee. You get an understanding of the best the Senate can do and you get an insight across all portfolios because they all have regulations and ordinances and statutory rules and everything else.

As I recall, the chairman or acting chairman at the time was a fellow called John Coates. I think it was the education department that had been niggling: their reply would always come in at the last minute and they were never willing to come early and discuss things. They were always trying to trim down our time. In the end the committee stood firm. The department said: 'Look, the minister's inclined to agree, but we just don't know where he is. He's overseas. We can't get him.' Having been a minister, I know that is rubbish; they know exactly where their minister is every minute of the day. John Coates was not a tall man, but he rose to his full height and said, 'I don't care if you don't know where he is, but if you don't have an answer by the time we go to print tonight then this is being disallowed tomorrow; it's just that easy.' They said, 'But we don't know where to get him.' He said, 'That's not my problem.' Bless their little socks, they came back 40 minutes later and said, 'We've found him; it's all okay.' 'Good, thanks.' Why is that important? Because it is a Labor senator to a Labor government, because the committee do not work on a basis of using either their power or their commentary for party political purposes.

Another example I would like to raise with you vis-à-vis the Senate committee system involved Senator George Georges. It is admittedly an estimates example, but I think the examples that new senators get early on affect their attitude and approach for the rest of their time. I too had a Button story this morning. I had been asking him a question and I got a bit of a curt reply. I do not know whether he was just fed up waiting for lunch or whether I had found something, but if I had found something then I did not know what I had found. So I did not quite understand. I thought, 'Something's going on here; I'll ask it again,' and I got exactly the same

answer—not reworded but a bit more curtly spoken. I think that it was the third time when he got really snappy. George Georges was the chairman, and I thought, 'Okay, let that go.' Senator Georges stopped and he looked at the minister, who was Button, and looked back at me and said: 'You don't mind, do you? I don't think you're really happy with that. No, actually I don't think she's happy with that. Minister, you'll have to do better than that.' I do not know that that would happen now on an estimates committee. I do not think I saw it that often, but there again was a Labor chairman saying to a Labor minister: 'Not good enough, sport. You're in here. You were asked a question. You didn't make it clear. You're getting away with it because it's a new senator, and I'm not going to let you get away with it.' So that was a really good example.

The bureaucracy in many ways can try to fob off senators, like the people who said to Senator Coates: 'Sorry, we don't know where the minister is. We'd like to agree. Will you take an undertaking that we'll do it at the next round of ordinance or regulations changes?' Yes, I've heard that before! It is like, 'The cheque's in the mail.' I was at an estimates committee hearing, and I knew that the Attorney-General's Department had a terrible, terrible problem with the security of their emails. I knew that because I had received what the *Financial Review* described as the biggest leak in Commonwealth history, not by the content but by the size—discs and discs and discs, which I had given back to them, because I figured that this guy was not a whistleblower; he was just a crook stealing information. It was quite a story, but that is for another day. Anyway, I knew they had real, serious problems. So we were in estimates and I said to Stephen Skehill, who was then the secretary of the department, 'I'd just like to ask a question.' I had already returned the discs to him. We had the Federal Police looking at them, touching them with pencils and things. In the end they caught the guy and he went to the slammer for a while. I said, 'I have a quick question: how's the security of your email system?' I thought, 'This'll get him; there'll be a twitch or something.' There was no facial expression whatsoever. He just said: 'It's very good, thanks. We're very confident in the security of our email system.' He and I knew that up until a day and a half before they were not. They had made some changes, and it had been a complete disaster. So I knew how close that question was, and he knew. I wanted to see his face, and I saw it, and it gave away nothing. It predetermined me to understand that they do not really have to tell you anything if they do not want to.

Last but not least, these committees can only work because of the Senate secretariats and the work that they do. Do not let any senator tell you they read all the regulations and ordinances; they do not, nor do they read all of the bills. But the legal advisers do, and if you work on these committees then you get the opportunity to work with people like Professor Whalan, now deceased, and Jim Davis—I do not know if he still works with us or has retired. These are fantastically intelligent, well-trained people who know what they are looking for and can serve it up on a plate and say, 'Here are the problems; you're the guys that have to decide what to do with these problems.' The legal advisers and the secretariat do an enormous amount of work.

Let me just quickly run through a couple of these examples. Retrospectivity: a customs and excise legislation amendment bill. Everyone was happy with the Diesel Fuel Rebate Scheme until the court started to widen those who could apply, so the government of the day introduced a bill to say, 'Actually, it's only these people who could apply—back a few years.' The law had been clear up to that point. At that point, the government said, 'Actually, we don't think that's what we meant, so we're going to make a law now to change what we meant back there, meaning a whole bucket of these people in here would not get the diesel fuel rebate.' That is not something that anybody other than those who wanted the diesel fuel rebate were interested in. It

was not a front-page issue, but it was an issue about what the law was and whether you should let a government get away with changing it.

The crimes amendment bill was one. We used to allow the cops to go and let drugs run and money run and undercover people participate, until some smart lawyer from my state said: 'Hold on. You can't prosecute this guy. You had dirty hands. You were in this drug deal yourselves.' So they changed the law. They changed the law, which would have made illegal acts legal for the purposes of those controlled operations. You might say, 'Well, that's a good thing, but if it wasn't legal at the time why should it be made legal later?' Well, because we want to put druggies in jail. My time is up. Thanks.

Prof. UHR—We have another session starting in five minutes or a little bit less, so we have time for discussions, questions, queries, challenges, special ops. We can turn the tape recorders off; you can speak honestly and openly!

QUESTIONER 1—I would like to draw your attention to something that we should all have—it was there at the beginning—called the Magna Carta. That is outside of manipulation. It has come down as a safeguard against everybody. How about we read that and have an argument about it? I am saying we cannot be this bloody silly. Isn't it time we found out on what basis we are standing? That is my question. On what basis is this country standing?

Prof. UHR—Thank you. Senator Coonan, we have a charter of rights.

Senator COONAN—It is a very good point. But, if I may say so, what we are looking at today is how the Senate committees can actually safeguard individual rights and liberties, back to those very foundation principles of the Magna Carta—how we can stand up to the executive and what role these committees can play to ensure that citizens are not railroaded by excesses of the bureaucracy or by other forms of zeal, either by ministers or otherwise. It is the sort of system which I think from time to time needs to be looked at to see whether we can refresh it and whether it is actually meeting its aims and objectives. But certainly from the scrutiny perspective—I have been on both of these committees at various stages in my career—they are technical committees, but, as I think Amanda was outlining with some of her examples, you often find when you look at it that there are so many unintended consequences when you actually start to write down a piece of legislation.

When I was the Assistant Treasurer, for example, people used to say to me, 'We've got to do something to simplify the tax system.' Who could seriously disagree with that as a proposition? So you would start out to do that. You would have principles based drafting. And then you would have scores of people coming through the door saying, 'Oh, we need a carve-out because we're in the middle of doing this particular project,' or, 'We need a different time frame, so it shouldn't apply to us.' Then you would have other people saying: 'It's not certain enough. If you just base it on principles, we haven't got enough certainty to make huge investment.' So these are the sorts of things I think are critical. You try and take legislation and make it meaningful, and this Senate does such an important job to make sure that with excessive zeal or unintended consequences you do not irrevocably affect people's rights and liberties.

Prof. UHR—We can squeeze in another question.

QUESTIONER 2—You spoke about the committees as assessing new legislation for human rights implications. One of the advantages of a bill of rights is that it can be used as a lens to look at existing legislation. Would there be any scope to implement that through a committee system?

Senator COONAN—It would depend entirely on the terms of reference for the committee to look at it. The government, for example, might decide that there would be an exercise to look through the lens of how the human rights arrangements would apply to existing legislation. But I would think that, unless there was specific reference to do that or the Senate of its own motion decided that that would be something the committee should look at, you would only be looking at legislation that would be coming to the parliament in future.

Prof. UHR—Amanda, do you want to use that as an opportunity for a final comment?

Mrs VANSTONE—Yes, I do. Whether it is through a committee, any charter of rights or whatever, I think the most interesting aspect of any list of rights is how you handle it when they come to compete with each other. Most of these conventions have exemption clauses—that is, the means by which you can get out of living up to the commitment—that are justified under the particular treaty. A classic example where there might be competing rights is in relation to the right to privacy, which we cherish so much in Australia—and which, I personally think, we have gone overboard with. An example is your right to tell, as I raised earlier, the health commission something and for it not go to social security, tax or whatever. How does that right to privacy sit against the child's right not to be abused and our obligation to protect the child and therefore to share information between institutions? That is not something we are looking at or handling effectively in Australia at the moment. I think the greatest challenge is not what human rights should be but, when they compete with each other, which one you are going to put on top, because you will be put in that position one day.

Prof. UHR—Please join me in thanking the two speakers.

Work of Senate committees: minor party perspectives

Mr HALLETT—Ladies and gentlemen, we will resume. My name is Brien Hallett and I am the Usher of the Black Rod, one of the Clerk assistants working in the Senate department. It is my very great pleasure to introduce this session. Before lunch, a couple of our speakers articulated something that I have often wondered, and that is how senators who are not members of the major parties manage to get across the complexity of legislation that the Senate deals with. I am looking forward to this session very much.

It is my great pleasure to introduce two former senators. Mr Andrew Bartlett was an Australian Democrats senator for a little over a decade, from 1997 to 2008, and in that time he was a very busy fellow. He performed a number of roles, including leader, deputy leader and party whip. Since that time, he has been a consultant and a volunteer for not-for-profit organisations. He also manages to find time to be a research fellow at the ANU, looking into migration law.

Our second speaker is former senator Dee Margetts, who was an Australian Greens senator from Western Australia for about half a decade, from 1993 to 1998. She was on a number of committees during her time here and, along with another senator, held the balance of power in the Senate, which I think would be an extraordinarily difficult place to be. Following her time in the Senate she took her insights to the Legislative Council in Western Australia where she served as a councillor from 2001 to 2005 and, I think, again held the balance of power with some other Greens senators. Ms Margetts is also finalising her PhD on competition policy.

Once again, I think the wealth of experience that our speakers bring to us today is something we can all look forward to. We will start with Mr Bartlett.

Mr BARTLETT—Thank you very much and thanks to all of you for coming along and showing an interest in this very important topic. I would like also to acknowledge the traditional owners of the land we are gathered on and the presence of Rosemary Laing, the Clerk of the Senate. I have many regrets in not being in the Senate anymore, but one of them is not being able to spend much time under the clerkship of Rosemary. I endured many years of life under Harry Evans. He was a fabulous Clerk, but a fresh regime would have been wonderful to experience more of. But, anyway, you cannot have everything.

This session is about the minor party perspectives on the work of Senate committees. I would firstly like to say that, whilst in my period of time in the Senate I was in the Australian Democrats and, as some of you may know, I am now a member of the Greens and was a Greens candidate in the last election—an unsuccessful one, I might say—I am not sure I like the term 'minor party'. 'Smaller party' perhaps or 'harder working', as was probably alluded to in the introduction, by virtue of having smaller numbers, but whilst it is, I guess, a comparison to the term 'major party'—Labor and Liberal being seen as the major parties and everyone else as minor—it is, particularly in the context of the Senate, 'minor party' is probably not the most accurate term. That is not meant to big-note; it is really just to emphasise the importance of each individual senator, including Independent senators. It is not a minor role. For those of you who have heard the contributions throughout today, each of the individual perspectives of people you have heard will have made it very clear that each individual senator, whatever size party they are in—even if they are a party of one or an Independent—can play a major role.

It is a very apt day for this particular conference and this particular segment. Some of you may know, if you have had the opportunity to hear what is going on in the outside world today, that the High Court brought down a very significant decision today in an appeal over a particular aspect of the Migration Act. This is, of course, an academic occasion, not a party political occasion, so I am being purely objective in my commentary here. The court in its judgment referred specifically to six pieces of legislation which were passed one after the other in September 2001, all of which were assented to and, in most part, came into operation on the same day. What the judgment does not say—because it is not relevant for the judgment, but it is very relevant for this conference—is that every single one of those pieces of legislation was forced through the Senate without being sent to a Senate committee, against the objections of some of us in what might be called the minor parties of the time.

As I just heard Senator Coonan, I think it was, say with regard to the value of the scrutiny process, it is not just about 'my policy view didn't get up and yours did'; it is about what you find when you look at something properly. As Senator Coonan said—and I hope I am quoting her correctly—you often find when you look at it that there can be many unintended consequences. What happened with those pieces of legislation is that the Senate did not look at them. We did not get the chance to look at them. Senate committees were expressly prevented, by a decision of the majority of the Senate, from looking at them. That is what happens. It can take a long time—and we will leave aside comments, important as they are, about the people who have been subject to injustices as a consequence—but, purely from a legislative point of view, if you do not do your job properly in the first place it is not that surprising that some time down the track the courts, when they look at it, will say, 'Hang on; you've got this wrong.' It does not matter whether or not you agree with the policy; it is the process. I will not get all 'legal' on you, but the courts found that the process that was followed was not lawful.

All of the expense of that—and we will have fingers being pointed and people being blamed for the cost of that—would have been saved if we had looked at it properly in the first place. I am not saying that Senate committees get everything right all the time and I am not saying that, even when people do point out potential problems, politics do not operate in a way in which things are passed, but it as sure as hell increases the chances that, even if you disagree with the policy aim, it will at least be put in place in a way that is going to be lawful.

We heard the question earlier about the Magna Carta. One of my more ironic experiences in this place was when I took a group of people on a tour of Parliament House. They, under this law, had been locked up on Nauru for four or five years and were finally allowed in as refugees. They had a guide. As you may know, a very rare and very valuable copy of the Magna Carta is here. The guide said, 'This is the Magna Carta. It is the foundation stone of our democracy and ensures that people cannot be locked up without some form of legal process.' I am not sure how irony translates into Farsi for people from Afghanistan, but I found it ironic. It is an example of what happens of when you do not look at the detail to start with.

I emphasise the point because it is significant about this chamber as a legislature. Most of the focus on what happens in Parliament House, including, sadly, in the Senate, particularly with regard to folks in the press gallery, is on politics, including the politics of what is passed and what is not passed, and all those sorts of things. There is not really very much understanding of the primary purpose of particularly the Senate and, within that, the Senate committee process, which, as we are acknowledging here today, is as the lawmaking body. It is not the politics behind the laws; it is the laws and the bits of paper that the courts then interpret, that the

governments administer and that the law enforcement agencies enforce. They all start here with the parliamentarians, and particularly the senators, deciding whether something should become law. We really do not have enough recognition of that understanding. In that sense, I wish it were more like the US where, instead of talking about politicians so much, they call people lawmakers or legislators. That, to me, is the primary role of most of us and that is the core value of the Senate committee process. I think you got a lot of that from the last two speakers.

We can go further back. Part of legislation that was forced through without any scrutiny in the space of a day back in 2001 was built on a similar thing that happened in, I think, 1992 with regard to the area of mandatory detention. A High Court decision happened which the government of the day did not like—it was a Labor government, just in case people think I am picking on one party over another—and the government of the day said, 'We can't have that.' They rushed through a piece of legislation relating to mandatory detention the day after the court decision to retrospectively validate what would otherwise have been the unlawful detention of people. It was not until 2004 that we finally had a definitive High Court ruling that found that the consequences of the legislation that was passed without being looked at was that people could be locked up forever without any form of charge or trial. That law still stands. Again, I think that was not intended by the parliament of the day, but it was not examined.

There is another example. This might not sound like it has a lot to do with a minor party perspective, but it does in the sense of the role of smaller parties—not just about the balance of power role and the balance of power when both major parties disagree and the smaller party on the crossbenches decides whether something is passed or not. More often than not, the two larger parties will agree and the smaller party's view does not matter at all, and reasonably often all parties agree. A lot of things are not actually that controversial. A lot of things, including the legislative scrutiny committees that you heard about, operate in a non-partisan way. The key thing is that they have to get to those committees in the first place and the Senate has to show respect for what those committees find. That, to me, is the key purpose of smaller parties—parties that are not caught up in the day-to-day battle of being in government or trying to get into government. They are trying to put the focus back on the role of the Senate: to scrutinise the reality of what is being put into law.

I will give one other example. In smaller parties you are often talked about as pushing minority interests. Sometimes that is part of your role—to focus on those issues that, for whatever reason, others are not focusing on or do not agree with. The example I will give is from a legislative committee that I was involved in and that, again, happens to involve migration law. There was some Senate committee scrutiny of the relevant legislation and, again, this emphasises why the whole process can be so valuable, and often you cannot tell how and when. The piece of legislation related to character and conduct provisions of the Migration Act. I think it was examined in 1997 or 1998, and it was passed. I did not support it. I complained about it bitterly, but—democracy—in the end the majority won. But in the process of a Senate committee inquiry you get to hear evidence from a range of people who have, in many cases, expert opinion and from government officials and department officials. Because I was unhappy about this piece of legislation, I asked a fair few questions about what it meant and how it was going to apply—what does this section mean, and how are you going to interpret it? They gave all their answers.

This was nothing that could have been predicted, but it just so happened that in subsequent court hearings 10 years later, in 2008, in a case you might have heard of involving a man called Mohamed Haneef, the court ruled—I think quite wisely—that that power was used wrongly and

unlawfully by the then minister. In making that judgment—and I am not saying that this is the sole reason they came to that view—they quoted the answer given by department officials to that Senate committee inquiry 10 years earlier about what the intent of that particular section was. They contrasted that with what the minister was saying in 2007 about how they were applying it. I am not saying that that is the only reason that Mohamed Haneef won his court case. I suspect, given the case in question, that quite a few arguments could be put. But it gives an example of the importance of getting things on the public record about what is in these laws, what they are meant to be for and how they are supposed to be applied, because they can and do affect everybody—often unexpectedly. That is why you need to make sure that, whether or not you like the end product, at least some proper scrutiny is given to it. I think that is the role of every senator, and a lot of senators—including in major parties—see that as their role.

In closing, I will give the contrast of the period when the former Howard government had a majority in the Senate for three years. They prevented a lot of legislation being looked at by committees or, just as effectively, they allowed it to go to committees but provided virtually no time for things to be looked at. Even within that process, some of the government's own senators recognised the importance of the committee process and did try to use it to ensure that there was at least some proper scrutiny. It was only because of scrutiny of one piece of legislation—again, relating to migration issues and to do with Nauru—that enough government senators were convinced that this was unjust and unworkable. That was, I think, the only piece of legislation in that period of the government that did not get through because government senators indicated that they would not support it. Again, it shows what can happen when the standards of and respect for the Senate decrease.

We had a circumstance which, again, I think was worthy of criticising, in regard to the Northern Territory intervention. I am sure all of you would have heard of that legislation—emergency, urgent; that is all fine—in response to the report *Little children are sacred*, regarding child abuse in the Northern Territory. It was only after enormous outrage that the government agreed to allow the Senate one day to look at that legislation, which overrode Northern Territory law, overrode the Racial Discrimination Act and did a lot of other things. Because the government controlled the Senate committee processes, used their majority and had such contempt for the importance of the Senate, they even used their numbers to prevent the authors of the *Little children are sacred* report from giving evidence to the committee that was looking at the legislation that was supposedly in response to the report.

I guess that is a political point but it is not meant to be. It is a point about what happens when standards drop and when there is contempt for the parliament and the Senate. All of us are elected here—I am not at the moment. We are all politicians and politics apply, and I do not suggest that should not happen. But we do have to operate within a framework where some basic standards apply. If we do not, the losers are the public because it is the public who are subjected to the laws that are passed without proper scrutiny. So it is actually a point about a matter of public interest and not a political point. That is a particular focus for minor parties because, by definition, they are not in government. I hope the value of this conference today is that it reinforces the fact that it is of concern to people, whatever size the party they are in. Hopefully, it is of concern to you, the public, as you have come along today to show an interest in the Senate. It is a message that I think is pretty essential: we need to communicate more widely.

Ms MARGETTS—I also would like to acknowledge the traditional owners. I was both surprised and delighted to be invited to participate in today's conference; thank you very much,

Rosemary. Before I begin my main theme today, I would like to give a couple of examples of how, during my time in the Senate, WA Greens senators made some impact on the Senate committee process. When I first arrived in the Senate in 1993, Prime Minister Paul Keating invited Christabel Chamarette and me to meet with him. In the first five minutes, he was reasonably genial. He then said that he assumed that Christabel would not continue with her motion to enable the Senate, the media and the community to have time to assess government legislation. When Christabel said that she would continue, he threatened to call a double-dissolution election. He was surprised when we did not respond negatively so he then indicated that, if there were a double-dissolution election, one of us would lose our seats, to which we replied: 'So what.' The result was that Christabel succeeded and the Senate and improved its ability to use its committee processes to check out legislative problems. Christabel also assisted in enabling the Senate to operate committees without their necessarily being controlled by the government. In the mid-1990s, as a Greens senator from the other side of the country with considerable electorate, legislative and committee work commitments, I asked that the Senate enable its members to attend committees by video or phone links. Fortunately, Michael Beahan, the then President of the Senate, supported my request and the change was made.

Today, however, I will be explaining how and why I have spent years since my Senate term, investigating some of the problems the Senate helped to create when both major parties supported one of the most significant socioeconomic policy changes without bothering to find out what impact such a major policy direction would have, and is still having, both on the community and on Australia's democratic processes.

My theme today is national competition policy. What happens to committee processes when both major parties agree to a highly controversial policy change that the minor parties oppose? In my first Senate speech in August 1993, I expressed concern about the potential impacts of corporate globalisation in the Australian community as a result of Australia's signing up to the Uruguay Round of GATT. The impacts on Australia of corporate globalisation were not just about global so-called free trade but also about enforcing a version of corporate globalisation into the domestic economy. In the late 1980s, Paul Keating commissioned an Industry Assistance Commission inquiry, inviting corporations to come together with the economic rationalist elements of federal bureaucracy to find ways of reducing their government non-tax costs in order to increase their so-called international competitiveness.

The corporate wish lists, along with the economic rationalist goals of part of the federal bureaucracy resulting from this inquiry, became the basis of the Hilmer inquiry and national competition policy. Apart from pushing to privatise many government services, NCP was not actually about increasing general competition; it was based on enabling more market dominance by corporations. Despite concerns from the state representatives that the agreement would impact on ordinary government activities, the federal Labor government introduced the Competition Policy Reform Bill in late March 1995, before they finally managed to get the COAG NCP agreements signed in April 1995 through the use of promised tranche payments—an interesting issue.

For those who think the COAG NCP agreements were based on an understanding and support of the states and territories, the June 1996 article in the *Australian Journal of Public Administration* by Susan Churchman, from the South Australian senior executive of the competition policy division, explains how much the federal bureaucracy, particularly the structural policy division of the federal Treasury, controlled the process. I was therefore very

pleased to hear today of John Uhr's recommendation for greater assessment of COAG agreements. I believe that is absolutely necessary.

With very little explanation of its basis, and its potentially widespread impacts in promoting it by claiming that the main beneficiaries would be Australian consumers and manufacturers—not!—the Labor government aimed to push through the Competition Policy Reform Bill as soon as possible. This was an unusual situation because the normal impacts of such a major and controversial policy change would be the subject of substantial media debate and coverage but, as both Labor and the coalition officially supported NCP, there was very little media coverage. So there remained very little public understanding of what was happening—and that is still the case. By 29 May 1995, the economics legislation committee—of which I was a participating member, thank goodness—commenced the first of just two hearings on the Competition Policy Reform Bill 1995, as it had been given a timeframe of just over one week, with a deadline of 7 June, to complete its legislative inquiry into what I considered to have been one of the most significant policy changes in Australia's political economic history.

The Institute of Engineers was one of the first representative bodies to give evidence, on Monday 29 May. They indicated that there could be some important advice about the impacts of a form of competition policy in the UK, and they offered to contact their colleagues in the UK to provide the committee with information about any problems that were being experienced. In reality, just one week was insufficient time for the committee to receive and discuss that type of information, and the legislative inquiry was not extended. National Party senator Ron Boswell kept asking me to ask this question and that question to those giving evidence at the hearing. When I turned and quietly asked him why he could not ask some of those questions himself, he shook his head and said, 'Don't ask me'—indicating that those in the coalition who opposed NCP had been told to stay quiet about their opposition to such a major policy change.

One thing clear about the two hearings was that there was very little information available on what the actual impacts of NCP would be, but it concerned the Greens that NCP would be largely out of democratic control. That is definitely what has been the case. My concern about this major force policy direction has never gone away. I spent the next few years trying to get the Senate to undertake an inquiry into its impacts, but it was not until 1999 that the Labor Party, then in opposition, decided to support such an inquiry. Unfortunately, although I was a member of the Senate select committee when it began, the inquiry was not completed until after my Senate term had finished. Although the report was quite critical of the way NCP was introduced and assessed in terms of public interest, the recommendations were very mild, both major parties having supported NCP.

When my Senate term finished in mid-1999, I thought I would need months of rest because I had been so exhausted. But within two weeks I had re-enrolled at Murdoch University to produce a masters thesis on the problems in the set-up of the national competition policy and the lack of proper public interest assessment in particular for pieces of WA state agreement act legislation which were anti-competitive and for which public interest assessments were not properly undertaken. My masters thesis was accepted by 2001, the same year I was elected to the WA upper house for the Agricultural Region. During my four years in the WA upper house, amongst other things I investigated a range of problems associated with NCP in WA and other states. When my state parliamentary term ended in mid-2005, I took a few months rest but by early 2006 I had enrolled at UWA to commence a PhD on the real impacts of national competition policy. This was not because I had always wanted to be an academic, but because

when both of the major parties had failed to find out what was actually happening with some equivalent of a second constitution, impacting virtually all legislation, somebody needed to find out what were the impacts compared to the assumptions in the public statements of those pushing for major economic rationalist changes. No-one else appeared to be doing it.

I did take a year off during my PhD but I am still working on this and on several major case studies, starting with the impacts of NCP on the Australian dairy industry compared to the assumed outcomes. Anyone who wants to have a look at the kind of work I have been doing so far on my PhD can find a range of publications and committee inquiry submissions by Googling Dee Margetts's dairy. I did bring with me some hard copies of my full dairy case study, published by the UWA Global Studies Research Centre. I do not own these copies, but they can be purchased for the nominal price of $10. The money goes back to the research centre.

Late last year I was advised by Greens Senator Rachel Siewert that the Senate economics committee was undertaking an inquiry into the major problems in the Australian dairy industry, so I put together a detailed submission and was invited to give evidence to the committee earlier this year. They had received a considerable amount of information about what was happening in this industry and my submission, along with my attached academic publications, helped explain how and why those changes were happening. It was very encouraging to see that the Senate economics committee had come to the conclusion, from both the dairy inquiry and a range of relatively recent inquiries, that the federal government should commission a major assessment of the impacts of National Competition Policy and it has made a range of other important recommendations relating to the dairy industry. Their findings included a considerable concern about the manner in which the ACCC is overseeing and policing National Competition Policy with a very corporate and not public interest focus.

My second major PhD case study was on the impacts of National Competition Policy on the Australian retail grocery sector. I am in the process of organising to get that academically published by mid next year. I am currently working on case study No. 3: the impacts of NCP on Australia's water resources. It is very interesting. So what are the main committee issues on such a major policy change like NCP? There can be a major problem if there is a poorly constructed major policy direction supported by both major parties with almost none of those party members understanding what they are agreeing to. The minor parties who were expressing concern over the lack of protection for the public interest were ignored. The media also chose to largely ignore the actual impacts of such a major policy change to the point where the majority of Australians had no idea what it was about and why both federal and state governments, who are continually pushed to do things in an undemocratic way, created increasing corporate market domination.

The Senate needs very much to follow up the concerns expressed by the economics committee in order to find out a way to fix a range of NCP policy impacts which have not been in the public interest and make sure that Australia does not continue to make such major policy changes in the future without properly checking if they are going in the right direction. But do not give such an inquiry to the ACCC. In 2008 Professor Don Harding of La Trobe University pointed out that the ACCC refused to release their data from the fuel watch inquiry. He related it to the UK experience that policy based evidence rather than evidence based policy has been given as government agencies filtered out information that was inconsistent with government policy. I strongly agree that that is happening in Australia with regard to the impacts of the NCP and certainly in relation to the retail inquiry. The unique outcomes of the recent federal election must at least enable some of these serious issues to be reassessed and, hopefully, amended.

Mr HALLETT—I would like to thank both our speakers. Do we have any questions or observations on the two papers that have been presented to us?

QUESTIONER 1 (Dr LAING)—I thank you both for very interesting case studies and examples. I have a comment on the long-term impact of some of the committee work that happens here. Some of those migration decisions came 10 years after parliament looked at the legislation and NCP is obviously something that is going to go on for a long time and come under scrutiny for a long time. I am reminded of the other week when we launched volume 3 of our *Biographical Dictionary of the Australian Senate*. Some senators in that volume had been in touch with us and commented about the value of the committee work that they did as senators. It is interesting that several of them looked back to those select committees of the 1960s that I referred to this morning—things like Australian television production and container method of handling cargo. When asked what achievements as senators they were most proud of, it was interesting that several of them fingered those inquiries as being the basis of everything that they were to achieve later on during their careers. I suppose by way of a comment I say do not lose heart. All of the work that both of you have done personally in the past on committees and in the Senate is bubbling away, is going to gain importance and will bear fruit eventually.

Ms MARGETTS—I certainly hope so. From the work I have been doing, there are a lot of people in industries around Australia who are relieved that someone is doing this kind of research. There are people I know from both major parties who have background, and interest in this and this current opportunity to look at some of these issues is really important. I put up my hand and emailed as many people as possible and said, 'If you need any assistance, please ask.'

Mr BARTLETT—You cannot always tell if the question you ask at a committee hearing in 1998 is going to be scrutinised by a Federal Court judge 10 years later. Plenty of committee inquiries sit on shelves and gather dust but some are incredibly influential. You cannot tell which is going to be which. But you have to have the inquiries to start with—which is the point I made and I hope that came across—and they have to be thorough enough and provide the opportunity to explore different issues. I focused mostly on the legislative committees, but the select committees and some of the broader policy inquiries provided senators with the opportunity to have their say and the evidence presented is relied upon by a whole lot of other people with an interest in the area. The submissions, the public hearings and the reports are on the public record, and a lot of people rely on those for all sorts of policy, legislative and other social research purposes often for decades to come. Some of them, nonetheless, sit on a shelf gathering dust.

This also gives me the opportunity to mention the importance of select committees set up specifically to examine topical issues outside the general committee process and what happens when a lack of respect for the Senate's role has too much strength. During that period when one party had total control of the Senate no select committees were established at all by the government. Contrast that with the very first day after that government lost office but still had the numbers in the Senate and they thought it was suddenly a very good idea to set up four Senate select committees, all of which were controlled and chaired by them. That again reinforces the point about (a) having the inquiries in the first place and (b) having some respect for the importance of the process rather than just using everything as a political tool. That is certainly not where committees do their best work—when they are used as a mechanism for people to score political points. Of course I never did that; I have left that till now.

QUESTIONER 2—Unmistakably, we are being confronted with the monopoly of your two-party system. That is my contention. We are only discussing the monopoly of a two-party system, and the talk you are giving is from the minor parties' perspective. I will address that as an Italian story out of total ruin. Some genius said, 'If you have four per cent of the vote, you have a voice.' It has lasted 60 years. It said, 'Everybody has a voice where you are.' How about speaking up and getting four per cent, and recovering democracy in Australia?

Mr HALLETT—We will take that as a comment.

Ms MARGETTS—I would not mind mentioning a time I was flying to Canberra when I was in Senate. I had a bureaucrat sitting next to me who said, 'You have been asking a lot of questions about education and other issues in the Senate estimates committee.' I said, 'Yes, and a number of other committees as well.' He said: 'You are asking a lot of questions and a lot of them are really well put together. Where do you get them from?' I said, 'All through the community.' He said, 'How do you control that process?' I said, 'We don't.' He looked horrified. I thought the really important point out of that was that the Senate estimates committees can be not just a political process but a means by which the community can find out and provide information on political and budget issues.

QUESTIONER 3 (Senator MOORE)—I have a question about chairing. Andrew, you were talking about the fact that having the role of the chair is important. For a period of your career there was availability for the Democrats to have some chairs. I would like you to comment about what difference that made, if any. I know, Ms Margetts, in your period that did not happen for the two Greens, but you have watched the Greens now, and into the future hopefully, having an opportunity to chair committees, I would like to see whether you have any comments about whether having that option to chair a committee is important to the smaller parties in the Senate.

Mr BARTLETT—Thanks for that. In being in a smaller party and in a balance of power context at that time where the opportunity arose for smaller parties to hold committee chairs, it was the Democrats initially who had sufficient numbers in the Senate to have two committee chairs for a period of time. I was chair of the environment references committee for a little while until the government got control of the Senate and took all the committee chairs back for themselves. I think the value of that only applied in the circumstance again where no-one party had control of a committee. With that circumstance, the dynamics can apply within a committee as they do within the Senate as a whole. If no single party has majority then you have to talk to each other. You have to try to get agreement across your party lines which creates a very strong encouragement to communicate. Some people do it better than others. It is the same with committee chairs, some people do it better than others. The nature of politics is such that even amongst the smaller parties there is a bit of who gets to be the chair and who does not. It is not always done solely on the basis of merit. It can be seniority and all sorts of other things.

I cannot think of any way that it would actually work, but what would be the ideal would be if the Senate could somehow have a totally nonpartisan secret ballot and select the best chairs because there are some really good chairs from the larger parties and some shockers. I cannot speak for the Greens even though I sort of can a bit these days. In my time in the Senate I could not speak for them but within the Democrats there were some of us that were good at some things and not others. Again I think the value with the, I hesitate to use the words, 'minor party'—not just because I am trying to pretend that we are not minor, we are as major as the larger ones—is really about trying to make the whole system work. I saw that as a big part of the

Democrats' role and even though it is going further than your question I am enjoying the luxury of being in the Senate and not having a little time clock that means I have to stop talking after two minutes. To me the biggest legacy of the Democrats in their 30-year history was in galvanising the effectiveness of the Senate. Hopefully, particularly these days, I can say that without sounding too self-interested and it was really sometimes, perhaps to our political detriment, that an absolute obsession with most Democrat senators was making the committees work. The opportunity of being able to be a chair in that context with that sort of ethos behind it is something that I think enhanced the effectiveness of committees. I am very confident the Greens can build and match that legacy as they are now moving into the Democrat role.

Ms MARGETTS—At least there were some opportunities even when the Greens were deputy chairs of committees. I think from memory I was the deputy chair of the uranium mining inquiry select committee. I remember coming across Bill Heffernan in an airport once and he said, 'Do you know Rachel Siewert?' I said 'Of course I do.' He stopped for a while and he said, 'She's good.' I said, 'Yes, I know.' She was the deputy chair of the committee he was on and so I guess he was surprised to see that she had had this experience and done a lot of work in regional Australia and especially WA. In particular, with those kinds of issues where the most information, background, networking and so on has been with the minor parties, it may well be that one of the most effective ways of doing an inquiry is to have someone who knows the issues so that the inquiry can canvass a range of issues in order for everyone to have a look and make decisions.

Mr BARTLETT—Can I add to that, particularly seeing that no-one is about to ask questions or provide a supplementary response. Given this section of the conference is on smaller parties and that the evolution of the Greens has meant it has increased its numbers and moved into what will shortly be a sole balance of power role for the first time in that party's history and into a very comparable position with the position the Democrats occupied for most of that party's history, I also think that mechanism—not just being a chair of a committee but cross-party Senate committees that are not just government dominated—is a key part in the evolution of the effectiveness of smaller parties. Dee mentioned Rachel Siewert, and I can pretty confidently say, at least from the feedback I have had, that she would be very widely respected across all of the larger parties. She would perhaps be the most respected of the Greens senators in terms of the work she does in Senate committees, not solely because she has been a chair—she may be a chair now; I am not sure, and, I think, Christine Milne is now also a chair—but as you are getting larger as a party you have that extra responsibility to be a chair. And when you are from a smaller party, as a chair you still cannot tell everyone else what to do because you still do not have the numbers. As soon as you start being too much of a jerk, you lose the argument pretty quickly. But it is also a key part, again, of what I see as a central part and the purpose of cross-bench, smaller party senators, to make the system work for everybody. That extra responsibility and extra diversity comes about by enabling people from smaller parties and diverse backgrounds to play those roles. It also provides the opportunity to demonstrate—as again, I think, Dee's comment emphasises—there is actually a lot more common ground than you realise. A greenie from WA has an enormous amount in common—sometimes a disturbingly large amount—with Bill Heffernan. You often have a lot more common ground with National Party senators from Queensland and ratbags from Tasmania than you realise and, when these processes work well, that is when you demonstrate that.

QUESTIONER 4—Because this section involves government accountability and Senate committees, can you comment on when the government is not accountable—for example, with

the former committee into ministerial discretion and the former committee into a certain maritime incident, when the government were not particularly keen to assist the committee in any way with documents, with access to ministers, with access to DIAC staff et cetera? Can you comment on how you think it makes them accountable? What outcome works if the government is not assisting anybody in the committee to do their job properly?

Mr BARTLETT—Briefly, I was on the former Senate Select Committee on A Certain Maritime Incident, which is perhaps more colloquially known as the 'Children overboard committee.' It was set up to examine that and the Pacific solution and a wide range of other things. In the context of a conference like this it had some very significant and probably historic stand-offs between the committee and the government of the day about who they would allow to appear. They would not allow ministerial advisers to appear. There was a lot of toing and froing about whether Peter Reith should be called to appear and, when he said no, what steps should be taken to encourage him further and how far we could go in forcing him to appear. He was out of parliament in those days. There is a lot of, sometimes arcane, literature about the power of parliamentary privilege and that sort of thing, but the core point is the point behind the question. It is not about political argy-bargy; it is about transparency of government. That is really at the cutting edge. That was probably the only time I can recall when Harry Evans gave advice that I did not like—which I do not have time to go into now—where he did not want us to push it further to try to put the heat on Peter Reith, subpoena him and those sorts of things. So we have not tested those things.

That process and the stand-offs led to a Senate committee inquiry and further recommendations and, I think, some gradual reform about what we then do to allow some transparency to prevent that sort of Chinese wall that had managed to be built up between government and department—with ministerial advisers and personal staff stuck in the middle—and that had actually become a mechanism to prevent transparency. That process in itself and the problems that were identified at least helped to move things a little bit. I guess it is not until you come across the brick wall that prevents adequate transparency that you become aware of the nature of the problem, and that in itself provides some impetus to look for ways to fix it. I do not think we have fully fixed it now, but I think we have gone a tiny bit further.

Ms MARGETTS—One quick addition is that one of the issues that I found over time was that, when there was an issue that should have been looked at, one of the only times when the government tended to be forced to do that was when the media actually started putting that out in the public arena. But when there were occasions when the two major parties were both going in the wrong direction, a lot of the time the media sat on their hands, because they got sucked in, instead of actually asking questions.

Mr HALLETT—We will have to leave it there because we still have another session after afternoon tea. I know I have enjoyed this afternoon's session immensely and I invite you to join me in thanking our speakers.

Proceedings suspended from 3.36 pm to 3.54 pm

The power of select committees

Dr LARKIN—I am from the University of Canberra and it was supposed to be my great pleasure to introduce both Cheryl Kernot and Margaret Reynolds. However, we are one down. While we wait with bated breath for Margaret's arrival it gives me very great pleasure to introduce Associate Professor Cheryl Kernot. Cheryl was senator for Queensland from 1990 to 1997. She was leader of the Australian Democrats and famously changed sides at one stage. She subsequently has spent time at the Said Business School at Oxford University and is now the Director of Social Business at the Centre for Social Impact.

Prof. KERNOT—Thank you. I feel extraordinarily disoriented; I have not been back here for so long. When I was coming in the Senate door and I had to sign in because I do not have a pass that is up to date, I saw Dee Margetts talking on the monitor and I had this instant sense of 'Oh, my God, I should be in the chamber. Something is happening that I don't know about.' I was certainly here when Dee and Christabel made lots of speeches and contributions. And there is Robert Ray, sitting in the front row. I feel like I am at a Senate estimates, ready for the inquisition.

I have been asked to focus on the power of Senate select committees and their place in the system. I noticed that in 1991 the Department of the Senate had a conference celebrating the 20th anniversary of the Senate committee system. They discussed the revolutionary proposal in 1970, which was in fact the establishment of the committee system. They also asked the provocative question: 'Can Senate committees halt the decline of parliament?' Well, here we are, another 20 years down the track. The parliament as we knew it 20 years ago is, in my view, certainly quite different from today's parliament, and it is about to be tested in ways in which we do not know what will emerge from that.

For those of you who do not know, a select committee is distinct from a standing committee because it is created as required, not at the beginning of each new parliament. It is empowered to inquire into and to report upon a specific matter. It can be established at any time by resolution of the Senate—but that ignores the reality that resolutions of the Senate have to be by majority vote. That resolution usually involves a lot of haggling around the committee's terms of reference and that resolution also specifies the committee's composition. The committee usually has a limited lifespan. So you have an issue, you look into it and you table a report. I think it is true to say that select committees are very often a political response and sometimes a political opportunity to inquire into non-controversial or politically sensitive issues. It is usually initiated by non-government parties of the day, when often they think the issue is not being given sufficient in-depth analysis; or, dare I say, a party might have a strategic desire to prolong a focus on and an exposure of a controversial issue, just to keep it alive in the media and public domain.

Minor parties, smaller parties, alone cannot set up select committees. They have to have the votes of one of the other major or bigger parties, as we call them. It has required a combined vote to see select committees in recent times on the Lucas Heights reactor contract; uranium, mining and milling; the new tax system; children overboard, which Andrew referred to; the administration of Indigenous affairs—what a huge subject; mental health; and climate policy. I do not know how many of those issues you would put in the non-controversial basket. A current select committee, which is a joint one and managed by the Senate, is the Joint Select Committee on Gambling Reform. It will be very interesting to see what report that committee brings down.

Of the Senate select committees in existence at the moment, what about this one? Reform of the Australian Federation. That is an easy task, isn't it! Then there is Scrutiny of new taxes, Carbon tax pricing mechanisms, and National mining tax 2010. Where a particular policy area is considered really important and it merits a longer examination then a select committee can, by vote, have an extended life. I now realise that I was on the longest-running Senate select committee in the history of the Senate—on superannuation. It was first appointed in 1991 and it has been reappointed successively over several parliaments with a few little adjustments to name. But it has had the same functions and powers over 12 years. I know when I turned up for that first meeting I certainly had no idea at that committee's work would continue over a 12-year period. I was not there for 12 years. But Nick Sherry and John Watson were around for most of it. Before ceasing in 2003—it is just an astonishing thing to note—it tabled 58 reports and background papers. That is an awful amount of work; we had to read them as well as the secretariat write them. That is extraordinary. How come this particular policy issue merited this attention over such a long period of time?

When the committee was first established in June 1991, I had only been in the Senate for one year and so had Nick Sherry. We were rookies, really. The Democrats were interested in focusing on what we saw as inadequate policy responses to the long-term issue of adequate retirement income. The Senate select committee was established to inquire into and report on a really wide range of matters related to superannuation. Back in 1991—some of you are young and may not know this—the environment was about low returns and high charges from the old life insurance offices. There was a profound lack of knowledge about superannuation systems—why save for retirement?—and also the impending generational numbers imbalances. So on the one hand you have got a genuine policy issue; on the other hand you have got what Nick Sherry's account of Paul Keating's role in this.

Even though it was the Democrats driving this long-term policy goal, in fact it coincided with a government agenda. It just had not been an explicitly articulated one. Nick tells the story about how he was sitting in the Labor Party caucus room and he had only been there one year and Paul Keating was sitting next to him, which he thought was pretty amazing anyway, when Paul said to him: 'Nick, those Democrats are at it again. They want a select committee on superannuation. I understand you have some knowledge of superannuation issues. How about being chair of a committee?' This is a select committee, one year into a Senate term. Nick said he was a little taken aback at that approach and that he did think at the time that the government regarded the prospect of this particular select committee as a bit of a nuisance and maybe even a political hindrance, not a help. He told Nick at the time, 'But, behind all of this, I've got big plans for superannuation.' They were unspecified but big plans. I am reliably informed, also by Nick, that once he got over his initial concern about another committee being driven by the Democrats, and through a series of ongoing conversations with Paul Keating and John Dawkins, there seemed to be a change of view about the committee, and the committee was regarded as more of a help than hindrance. There was a lot of interaction between the committee and Treasury, for example.

Interestingly, when it started the committee had absolute carte blanche. Imagine that! It was almost a blank slate. On that slate was the general framework of huge social and economic policy matters, not just a little narrow window of retirement income, because any decisions that would be recommended by this committee would affect the lives of 10 million working Australians. So we had to think about whether this should be a compulsory system or not. What would be the economic effects if it were made compulsory? We would have this huge growth in private-sector investment and funds management companies. We, the Democrats, wanted a

national portable superannuation scheme and, gosh, I am still slightly attracted to that. Look at all the lost super. But that is history. If you have this huge investment, you have to ask what regulatory tools and mechanisms are required to protect this enormous pool of national savings. Then there is that big-picture question: what actually should be the level of savings in the economy as a whole?

Something has been written on this particular committee and its effectiveness. It was the subject of a special paper and, I think, a whole day, or at least a big workshop, of discussion here. I think it was around 2005. I was living in the UK and could not contribute, so I want to make some observations but infer through that some potential application for the current committee system. If a select committee's origins come from that coincidence of policy drivers of two players, does that spell a greater likelihood of success than if it is a political response to a situation which can be exploited?

Membership of a select committee is often completely accidental, but there was a chemistry around that membership which was really interesting. I do not know whether it was because so many of us were rookies. Nick was new, I was new and even the committee secretary had never been a committee secretary before. The deputy chair was Richard Alston. As I look back at my observations of him over 10 or 11 years on this committee, I think he might have been in touch with his small-l liberal roots, because he was quite happy to say it should not be compulsory but then be open to the evidence and to the committee's conversations and input into the writing of the reports.

It was said that everyone who served on this particular superannuation committee wanted to be on it. Goodness knows why now. It had at times the most extraordinarily technical content that I have had to grapple with on any committee. But a comparison is often made with other committees: sometimes the government of the day has to conscript some of its members to make up the numbers. Maybe we as rookies were all untainted by a long experience of that partisan point-scoring. Maybe we had genuinely open minds. Maybe, for once in the history of this nation, we were all focused on designing a really good retirement income system.

I think the third thing about the committee's success was the expertise. Sometimes I think matching individual senators' expertise to chairing of committees is really useful. In this one we had Nick Sherry and John Watson, who became the chair later. They were really deeply experienced in superannuation and accounting, and that was extremely useful. We had an extremely competent and hardworking secretariat. Imagine having to sit up till two or three in the morning, as I know they did for some of those 58 reports. I think we should always note that in 1994 this particular Senate select committee set the record as having the first all-woman secretariat in the Senate. Maybe that contributed to its success as well.

The fourth thing, I think, is that it had unusual and sometimes pioneering processes and operations. It seemed to surprise people that working together in the public interest could also be a very powerful tool for scrutiny and good policy outcomes, and a really unusual thing happened. Bills that were relevant started being referred to the Senate select committee for dissection, analysis and the calling of witnesses about them. This was particularly unusual, but I think it was because the expertise was recognised. I think so too was the need for policy cohesion and the opportunity to review—because this committee had the opportunity to review how a piece of legislation designed on its recommendations was actually working in practice. I think that is a very positive, coherent sequence of events.

Although the committee ceased in 2003, in 2010 this government has announced that we are at last going from the nine per cent, as a set way back then, to the 14 per cent. I think this says something about longevity of good design and policy need. The committee kept for the first time a really close eye—because of the need for appropriate regulation—on APRA, ASIC and the tax office. I would go so far as to say that its first and second reports on prudential supervision and consumer protection have lasted right through as a protection in the global financial crisis, in Australia's best interests. These are the things you do not know at the time. Whenever I see Paul Keating, we talk about superannuation and we celebrate that it is being increased from nine to 14 per cent, because the evidence at the time showed that it would be needed.

The superannuation select committee also pioneered many processes which I think enhance scrutiny, enhance public participation, lead to better informed legislation and hold the government accountable. Some of these processes you might not notice because they are more commonplace today, but early in the committee's life we decided that instead of waiting X years—how long is a piece of string?—to have a weighty tome of a report, it would be quite a good idea to hand down a stream of reports in specialist areas. I think that worked really well.

The second thing is that the committee decided to publish submissions when they received them rather than waiting, so you had a really interactive process where, when witnesses came, they had already had the opportunity to read what had been said. They had an opportunity to answer questions: 'This submission said this; what do you think about that?' I think that was a really excellent way to promote public input into policy making.

The third thing we did which I think was unusual for a Senate committee of any sort was that we had a brokerage roundtable process that we put in place. At the end of an inquiry, when the committee had identified certain issues that it wanted to test out, it would hold a roundtable. It would say, 'Look, this is where we think the evidence is leading; what do you think about that?' We would be able to test out solutions and gather all the interested parties in one room. Instead of just making political recommendations, I think we endeavoured to consolidate the evidence differently.

I think history does record that this has been an excellent select committee, and it did have a really big influence on shaping policy of both Labor and coalition governments. It was instrumental in achieving some quite dramatic reforms, even right down to retirement income product design. But it also, I think, played a vital role in public confidence and public education. I understand that some of its reports became textbooks at university level. I am not sure that too many of our committees have had that happen.

So today at a time when we are being told more and more that whole-of-government responses are required to fix all the really serious issues that confront us, I would like to suggest that we could emulate the capacity of Senate select committees to deliver a whole-of-government perspective. I would like to propose a new Senate select committee—Claire Moore, you are here—on intergenerational equity. I really think a whole-of-government policy response for planning for improving the quality of what we hand on to future generations is urgently required—everything from plastic bags and disposal nappies clogging landfill, to fair and flexible distribution of working hours, to childcare policy and right through to ongoing retirement income.

I would like it to be the case that there can be other committees of which it was said by a witness to this Senate select committee:

> The committee has been a light of reason over the years .... it is a matter of significant regret that the committee's term is coming to an end.

This committee showed that it is possible to have a really long, enduring select committee which can make political points but still design, shape and inform and work with governments—of both persuasions, as it has been—for a good national interest policy outcome. And I am really thrilled that I was part of it, even though I did not know when I started that that is what it would be.

Dr LARKIN—In the continuing absence of Margaret Reynolds, Andrew Bartlett has kindly agreed to say a few words.

Mr BARTLETT—I will just make a few reflections. As I mentioned before, the perfect demonstration of how significant and important select committees can be is the very fact that, when the former Howard government had control of the Senate for a brief period, that was the sole period of time that corresponded with no Senate select committees being set up. That is a pretty good example of how valuable and important a role senate select committees can play in allowing scrutiny and encouraging debate about ideas.

I will make a couple of reflections about select committees more broadly. Again, I mentioned before the abomination of the failure to properly scrutinise the Northern Territory intervention and the refusal to allow the parliament to hear from the authors of the *Little children are sacred report* when the intervention was purportedly a response to that report. Part of the recognition of that failure, in my view, is reflected in the fact that there is now a Senate select committee, established in the previous parliament but continuing, to monitor what is happening in this area. Some of these select committees—most of them not, but some of them—really have an understanding that they have a long-term job to monitor, in the case of that particular committee, the reality for Aboriginal people in remote communities. Once you shift things out of the heat of that political moment and people from all political parties have to examine the reality—not the facts of how you position each other against the nightly news, but the facts presented by people from the real world coming and telling you about their reality—you are forced to really confront that stuff. That is the value of long-term Senate committees.

Since we are talking about history here today, I suppose we should really note that my initial engagement in politics was 20 years ago when Cheryl, wisely or unwisely, allowed me to work on her staff when she first started. As some of you know, I then followed in her footsteps in somewhat unexpected circumstances by filling her vacancy in the Senate. With her going to another party and me also subsequently going to another party, there are a few other curious synergies. To her credit, Cheryl was one of the few senators who, when deciding to resign from their party and either become independent or go to another party, did not keep their seat. That is a bit of an aside.

I want to mention just a few select committees by way of examples of the importance of the role they play—sometimes inadvertently. Superannuation was going to be one, but Cheryl has detailed that very effectively so I will not reflect on it more, beyond saying this. While by no means saying that this was part of the intent at all, I would say that I think it was a key factor in

public and media awareness of just how effective a senator Cheryl Kernot was. I think it played a key part in her subsequently being seen as a really good potential leader of the Democrats, because she was able to engage not just with all that flaky environmental, social justice, cuddly stuff that the Democrats were, unfairly, renowned for, but also with hard-nosed economic stuff. So being able to perform well can also have consequences in all sorts of ways. I think the initial secretary of that committee was Richard Gilbert who—again, probably not deliberately—went on to become an extremely effective lobbyist for the superannuation industry, and probably still is.

There are two other select committees I wanted to mention by way of example. Another that is still quoted today by people who I mix with—people in animal welfare and animal rights circles—is the Senate Select Committee on Animal Welfare, now long extinguished, sadly. It was set up in about 1984. It went through, over about three or four parliaments, to 1991. It was established by a motion of Don Chipp. I know that, when that was put up, it was like—at least, this is how it was told to me by Don afterwards; I was not here, though Robert Ray may have been—'Oh God. Bloody Democrats. Animal welfare!' All the Nationals wanted to get on to it to make sure they could keep an eye on Democrats coming up with nutty animal-rights ideas.

Again, the process was of actually putting all that to one side and having to look at the evidence, the facts and the reality. One of the amazing things about that committee, frankly, was the number of unanimous reports that it came up with, given the divergence of people who were on it. Another amazing thing is that it is still relied on today by people who are active in the animal welfare area—not just activists—because of some of the information and evidence, and also partly because the Senate since then, sadly, has not really gone any further with that because there has not been a committee dedicated to it.

The only other example I would use—because I think it had a historic, though perhaps unintended, consequence—was the Senate select committee on tax. Someone mentioned it. I cannot remember the proper title. It was part of what was probably the most scrutinised piece of legislation ever: that for the GST. Three Senate committees were established and given the opportunity to look at aspects of the legislation, and there was the select committee on top of those. So there were four Senate committees all going around the country. That provided the opportunity to find ways in which the legislation needed amending, and also provided lots of opportunities to point out all the flaws in the legislation. Then, when that all wound up, we had Brian Harradine making his decision that actually this was not something he could support, which nobody expected. That left the Democrats deciding whether to support it, which, up until that moment, the Democrats had not expected either! Anyway, the Democrats are not around anymore—which probably bears no relationship whatsoever to this—but that was a select committee with its own impact on and role and place in history. I will leave it there.

Dr LARKIN—Thank you very much. We have still got some time left for questions. Could you keep them reasonably short so that we can get through a few.

QUESTIONER 1 (Ms MARGETTS)—My name is Dee Margetts; I am a former senator. Cheryl, I must confess there were some issues about the Senate Select Committee on Superannuation that always perplexed me. One of them was: did the committee ever properly discuss whether or not there was a possible option for having people participating in government funded pension additions which were like or the same as the UK. I was always amazed that there were particular people in the ACTU who were pushing for the private superannuation. Then with

the change of government that became very problematic and a lot of people lost all their money. I am just wondering whether there was ever a realistic discussion about the option of having people participating in government funded pensions to add to a normal pension amount.

Prof. KERNOT—Yes, Dee, there was a brief window at the beginning, and many witnesses raised it along the way. But, in fact, the government's proposed design was pretty much what we started with—and that is where we are today. I was one vote.

Dr LARKIN—Are there any other questioners?

QUESTIONER 2 (Mr TUNNECLIFFE)—Thank you. The experience that we have had with select committees in recent years has been considerably different to that of the Senate. The only select committees that have been appointed have been those set up to look at what are highly contentious political issues, usually opposed by the government. On one occasion, two parliaments ago, the government even refused to provide members to a select committee. So our experience is quite different to your select committees, such as the superannuation committee.

Prof. KERNOT—Although that was unusual.

QUESTIONER 2 (Mr TUNNECLIFFE)—That was unusual?

Prof. KERNOT—Yes.

QUESTIONER 2 (Mr TUNNECLIFFE)—I guess that gets me to my question: do you think that it is an appropriate role of select committees to look at politically contentious matters, simply because of the inevitability of the numbers in the House, or is it really a missed opportunity to conduct a thorough, in-depth inquiry into an important public policy issue?

Prof. KERNOT—I think it is both. I do not think you can avoid the reality of the politics of the day and the fact that an opposition might see a window for greater exposure of a particular aspect of policy. I think that is the reality of politics, but it would be good if we could have, alongside that, long-term policy outcomes. That is not to say that some of the select committees did not make recommendations which governments may or may not have responded to, but I think it is unrealistic, unless we change the entire way that committees operate. It is unrealistic to think that they will all have a confluence or a convergence of policy needs at the same time. We still do have some ideological differences. Richard Alston would say at every hearing, 'It shouldn't be compulsory', and we would say, 'Yes, Richard,' and keep going. That was a particular opposing policy view, but in this case it did not get in the way and it was not used for point scoring. But, honestly, people—citizens—feel emotionally about many issues on the current agenda as well.

Mr BARTLETT—If I could add another point to that, with every committee you can have good and bad inquiries. Select committees are the same as legislative and references committees: some of them will work; some of them will not, given the chemistry, a different chair and all sorts of other things. The reason I made that point a couple of times was not just that the previous government, when it controlled the Senate, would not set up select committees; it was more the change in culture that applied alongside that. I described it earlier on as an unacceptable level of contempt for the Senate and processes in general. When those four committees were set up on the very first day of the new Labor government by the Liberal-

controlled Senate, they were Liberal-controlled committees with Liberal chairs and they were very much driven by that. They were starting from that politicised process; they were starting from a committee makeup where the one party—the opposition in this case—had the numbers and the chair. You are more likely to be politicised if you have a committee like that. I actually do not know the makeup of the current joint committee which I think is on gambling. but I suspect that neither the government nor any other party has a majority. There is a range of different views, and I think that will be a very constructive committee. People will still have political points to make, but it will not be a politicised process.

Dr LARKIN—There is time for one very quick question and some very quick answers. No?

Prof. KERNOT—There was always a revolutionary proposal to make the Senate completely a house of committees. Now that the House of Representatives is copying some of the Senate committee functions, that might be a long-term evolving role for the Senate. Who knows?

Dr LARKIN—More committees?

Prof. KERNOT—That is their whole focus!

Dr LARKIN—If there are no more questions, I would ask everyone to thank Cheryl for carrying the bulk of the session by herself and thank Andrew for stepping in for Margaret Reynolds.

[4.30 pm]

Parliamentary privilege and Senate committees

Dr LAING—For the last session today, we are going to turn to the very important topic of parliamentary privilege and Senate committees, which is something we have not touched on so far during the program. To speak on this topic, we are very fortunate to have senator emeritus Robert Ray back, joined by Senator George Brandis. What former senator Ray's biography does not tell you is that he holds the record for being the longest serving member and chair of the Senate Standing Committee of Privileges in its history, with approximately 18 years membership and eight years as chair, so he is very well equipped to speak on this topic—as is Senator George Brandis, who is currently Deputy Leader of the Opposition in the Senate, shadow Attorney-General, a former minister in the Howard government and immediate past chair of the Privileges Committee. As the immediate past secretary I must admit, having two of my former chairs here, to experiencing a slight level of anxiety, a bit like being kept in after school, about to be asked what I have not done yet or told I have done something wrong! Notwithstanding that, I shall overcome that and keep a very close eye on the time, given that people have planes to catch and it is the last session for the day. Please welcome Robert Ray to the podium first.

Mr RAY—Thank you, Rosemary. In 1984, after the election, I was lounging in my parliamentary office over in Old Parliament House. There was a knock on the door and one of the intelligentsia from the New South Wales Right faction, just elected, paid me a visit. He said, 'Mate, mate, I want to go on the Privileges Committee. I'm a former shop steward, a former union official, and I will fight for our conditions, our wages and our entitlements.' I thought to myself: 'Well, not everyone knows about the Privileges Committee in the parliament.'

You have heard of a lot of chauvinist statements today, verging on the fact that the Senate is Camelot. I would like you to devalue that just a little. A third of the select committees are set up because serious political problems are thrown up to either government or opposition, especially minor parties; they have no solutions so they pay them off by setting up a select committee when a reference committee could do just as well for half the price. How we got seven select committees in two months after the 2007 election I will never know. Basically, they were mostly a waste of space.

Leaving Senate chauvinism aside, it is true to say that the Senate Privileges Committee is the doyen of privileges committees in Australia. It is acknowledged by the House of Representatives and by a lot of state privileges committees as having the title of being the leading privileges committee. It is okay, Wayne; I am not about to bag the legislative council again—because it is so far down the food chain it does not deserve my time! However, we have often had visitors from the various state privileges committees, and I have been very impressed by the fact that they come to Canberra to discuss issues, share information and, without being patronised, learn how the Senate committee has operated over the years. We have also had international visitors pay close attention.

You have to ask: why does the Privileges Committee have this reputation? Essentially, it has been able to accumulate what I call case law. All the hearings it has had on all the issues are documented, and all are reproduced on a yearly or three-yearly basis for everyone to see. So it is

very easy to measure the progress of all these issues we have had before us and the responses. It is all there.

The second reason the committee is taken seriously is that the last four chairs of the Senate Standing Committee of Privileges have been ministers—and pretty good ministers at that. They have all been experienced ministers who have been able to guide that committee. It shows that the political parties have taken this seriously.

I have to acknowledge something else here, otherwise I would be dissembling. The reason the Senate privileges committee has its reputation is not owing to the efforts of senators, although in part senators have been good to go along with it; it has had key staff support for 30 years. It has had the crème de la crème of the Senate staff on the committee—Anne Lynch, Rosemary Laing, and the very sage advice of Senate Clerk Evans. This was Mr Evans's great area of expertise. So this triumvirate was able to establish principles that senators were very comfortable with and which helped them to progress various issues. I do not think there is another committee in the Senate that has so benefited from Senate staff. We heard earlier today about the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances and the specialist hired consultants that helped them—and what I said earlier is true of them too—but this committee had internal support given by the Senate staff.

The committee managed, for the entire time that I was on it, to be bipartisan. That is never easy to do, considering some of the characters—including me; I have hardly been known as Mr Bipartisanship over the years—but we did have a responsibility. What we were looking after was giving the Senate guidance as to how it operated and how it protected its rights and privileges, and you cannot afford to be partisan in that particular way. That bipartisanship never once extended to the Senate chamber when it was considering these issues. If you had some senator who had been a rascal they either got referred to the Senate privileges committee or not on the basis of who had the numbers in the Senate.

There was a case of one senator who botched his returns on the pecuniary interest register time and time again. It was only after the third, fourth or fifth—or, I think it was the fifth—time that he finally got referred to the privileges committee for a hearing. Of course, in the end we looked at the rules. You had to 'deliberately' misinform the committee, and everyone knew that this senator was such a goose he could never have done so, so we found him not guilty. But the chamber has never been consistent.

What are the main issues dealt with by the privileges committee? Let's start with the best, and that is the right of reply. From 1988 on, the right was given for residents of this country, if they were defamed, libelled or otherwise fitted up in the Senate by a senator, to respond by having a right of reply incorporated in *Hansard*. The House of Representatives had the same right. At one stage there had been 49 rights of reply granted by the Senate and just one by the House of Representatives.

The other big difference was that the Senate privileges committee, and thereby the Senate itself, took the robust view: 'We've slagged someone off. They have a slash back and we'll print what they say provided it is relevant to responding to the original accusation.' So we got some pretty torrid and colourful language in the rights of reply—some very robust ones—but so what? We took the attitude as senators that if we dish it out we will cop it back. We would not start a civil war, by the way, by letting a whole new series of allegations loose in the reply. We had the

right as a committee to censor and change the reply or to negotiate changes with the person. This is the most vigorous right of reply process in any parliament anywhere on this globe. I think it is with great pride that the Senate can look back on the progress in this area. The second major area that the committee deals with is in protecting witnesses. Two or three cases have come up over the years where there have been attempts to intimidate witnesses. The committee was very active then.

But, of course, its main concentration in my time—a little less so now—was dealing with leaks: leaks from parliamentary committees about the report, about hearings or about whatever else. At one stage, 10 or 12 years ago, you used to get 10, 12 or 15 of these references a year to try to inquire into where leaks were coming from. But eventually we had had enough of that and we had the rules changed so that I think I am right in saying that nowadays the privileges committee looks only at leaks from in camera hearings, and we leave it up to the committees that are leaked from to pursue it.

Of course, there is one golden rule here that I have to reveal today: every leak from every Senate committee came from a senator. It never came from staff. We know this from our experience. It is always a senator. A lot of the time, of course, we know which senator it is, but a lot of the time we do not have sufficient evidence. It is not a reluctance to take on a colleague on either side of the aisle; it is because, as an investigative body without judicial or police powers, we cannot absolutely get the evidence.

The second problem is that these leaks are run by journalists who claim that they should not have to disclose their sources. That is fair enough. We have never called journalists before the Senate privileges committee to force them to reveal their sources. Therefore, that makes it extremely difficult to find out who the leakers are. Even if we did, we would face this dilemma: basically you are making the privileges committee judge and jury. Sure, it eventually has to go to the chamber for ratification, but it is difficult to have a committee do the investigation and then have to apply some form of sentence which could vary from jailing to fines to reprimands et cetera.

So we have that dilemma, and it has never been fully dealt with. We have limited investigative powers. How, therefore, does the committee operate when it does not really want to be a judge and jury but has to be? It does the best it can. The general consensus on the Senate privileges committee over the years is that it does not want to be in the business of jailing people. Much as we might like to, we really do not think that politically that would be a sensible way. Fines are very difficult. Finding someone guilty of contempt and reprimanding them probably will not have much effect. Of course, one of our most effective techniques is what we call the string-out. If media or other organisations have offended, we would engage with them for a couple of years, run their legal bill up to $400,000 and then just retreat from the field. It did not always please them, but at least it slowed them down.

I want to finish on this note by talking about parliamentary privilege and the press. We have been talking about leaks. The moment you criticise a newspaper for running a leak, you unleash the hounds from hell. Every media outlet will attack you. None of them will run both sides of the argument. You will be scarified if you ever raise these issues. It is like a pack of hyenas, and you never get your point of view over. What makes it worse is that you might be halfway through the case and they are continuing to vilify. You cannot respond, because you are halfway through a case. How can you come to conclusions until you hear it? The Australian media absolutely

believe that no rules apply to them. Therefore, they can print any leak from any committee, because the public have a right to know. But, of course, what it mostly comes down to is that they say the public have a right to know on Monday when the report is going to be tabled on Wednesday. All it is is scoopism: one newspaper or one radio or TV station getting the edge over their rivals. That is what most leaks involve. With the second type of leak, from in camera evidence, they are basically breaching a fundamental rule of the Senate. Committees do not go into in camera hearings lightly; they do so to protect witnesses and to maximise the evidence that they can get. If all that is published in newspapers then people will not be willing to come along and give in camera evidence.

But of course—I do not know that Senator Brandis had this particular experience—the moment the Senate refers something to you, you set up a hearing, you accord natural justice, you allow the legal representatives from media organisations to come along, you do not call the journalist and you actually find them not guilty, what is the editorial in the *Australian* newspaper two days later? 'Senator Ray, Lord High Executioner.' But that is get-squareism. It is not justice. It is not public comment. It is them trying to intimidate. This is coming from a news organisation that ran the false Godwin Grech emails and the fake Hanson photos, that broke into people's voicemail in the UK and that, for heaven's sake, bought the Hitler diary. To be lectured by them on public morality and the fact that all we are interested in is looking after our own privileged position! There is more to it than that.

If parliament is to work properly it should be accorded certain privileges, not excessive ones, and they should be protected. It is the job of the Privileges Committee on behalf of the Senate to do that job. But whenever they try to do it the whole pack of hyenas comes down and you are cut to pieces without a right of reply at all. That has been partly, I think, the weakness of the current system. I thank you very much for your attention.

Dr LAING—Senator Brandis.

Senator BRANDIS—Thank you, Rosemary. Current and former Senate colleagues, ladies and gentlemen, I am very glad to be following that very robust performance. I have interpreted the topic a little more broadly and I hope it is a neat fit with the presentation that Robert has just given about the work of the Senate Privileges Committee, which is of course the guardian of parliamentary privilege in the Senate. I am going to talk about more broadly the principles of parliamentary privilege and in particular how they bear upon the operation of Senate committees generally, so my talk is not about the Privileges Committee as such. I am going to address in the time available two topics: the sources and content of the modern law of parliamentary privilege and in particular its application to the work of Senate committees; and I want to say a few words if time permits about the 144th report of the Senate Privileges Committee in June this year which looked at—and not for the first time, I might say—legislative attempts to abrogate the operation of parliamentary privilege.

Parliamentary privilege has been defined variously. Erskine May's definition is as good as any:

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.

It is a very traditional definition of parliamentary privilege. Odgers defines parliamentary privilege in these terms. It refers to two significant aspects of the law relating to parliament, the privileges or immunities of the houses of the parliament and the powers of the houses of parliament to protect the integrity of their processes.

The law of parliamentary privilege in Australia derives from section 49 of the Constitution, which provides that the powers, privileges and immunities of the Senate and of the House of Representatives and of the members of the committees of each house should be such as declared by the parliament and until declared shall be those of the Commons house of parliament of the United Kingdom and of its members and committees at the establishment of the Commonwealth. So it was always plain that the principles of parliamentary privilege applied equally to the houses and to the committees.

Section 49 of the Constitution remained the source of the law of parliamentary privilege until parliament did indeed enact in 1987 the Parliamentary Privileges Act, which followed one of the most important reports that this parliament has ever commissioned, the report of the Joint Select Committee of Parliamentary Privilege in 1984. The most important provision of the Parliamentary Privileges Act is section 16, which provides:

> For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

Then certain implications of article 9 of the Bill of Rights are spelled out in section 16 of the 1987 act. Article 9 of the Bill of Rights, which was in effect the act of settlement of the glorious revolution, provides, if I might remind you, that 'the freedom of speech and debates and proceedings in parliament ought not be impeached or questioned in any court or place out of parliament'.

Subsection 2 of section 16 of the Parliamentary Privileges Act provides a definition of the meaning of the expression 'proceedings in parliament'. It says:

> For the purposes of the provisions of article 9 of the Bill of Rights … and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes: (a) the giving of evidence before a House or a committee, and evidence so given; (b) the presentation or submission of a document to a House or a committee; (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

That definition of 'proceedings in parliament' is an exceptionally wide one and it has been widely interpreted by the courts.

There have been, in recent years, three important decisions by Australian courts which have construed the meaning of section 16 of the Parliamentary Privileges Act. Probably the most important of them, a decision of the Queensland Court of Appeal which, appropriately, dealt with a senator, was a case called O'Chee and Rowley. Mr Rowley sued former Senator O'Chee for defamation and it was necessary for Mr Rowley to plead in his defamation case and to put into evidence certain documents upon which Senator O'Chee had relied for the purposes of a

parliamentary speech. Senator O'Chee pleaded section 16 of the Parliamentary Privileges Act and said that because the documents upon which he had relied were used by him for the purposes of a parliamentary speech they were, within the meaning of section 16, part of the proceedings in parliament.

In the leading judgment of the court Justice McPherson—who is a great scholar of these things—gave as wide a definition of the expression 'proceedings in parliament' as you are likely to find. I will quote a little from his judgment, which is an extremely erudite exposition of parliamentary privilege. He said:

Article 9 of the Bill of Rights prevents proceedings in Parliament from being hindered, impeded or impaired in a court. By s.16(2) of the 1987 Act proceedings in Parliament include the preparation of a document for purposes of or incidental to the transacting of any business of a House.

O'Chee's speech was in the chamber, not before a committee. The same principles apply to committee proceedings.

More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purposes; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to "proceedings in Parliament".

Just dwell upon the breadth of that for a moment: to assemble a document or to obtain a document with the intention that it be used in the course of a parliamentary speech or question or in the course of examination of a witness before a parliamentary committee. That act or any act incidental to it is treated as a proceeding in parliament and thereby invokes the protection of section 16 of the Parliamentary Privileges Act. Justice McPherson went on to say:

Senator O'Chee has sworn that in relation to the documents—

that is, the documents sought to be led in evidence—

he did such things for those purposes. To order him to produce those documents would be to hinder or impede the doing of such acts for those purposes. If the making of the order has not already hindered or impeded the transacting of this matter of Senate business—

this was an appeal from an order—

it is predictable that in future it will do so with respect either to this or to some other matter of business being, or about to be, transacted in a House of the Parliament.

… … …

Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here for purposes of Parliamentary debates or question time are vulnerable to compulsory court process of that kind. That is a state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 are intended to prevent.

There have been a few others, but that decision represents where the law sits in Australia at the moment in relation to the breadth of parliamentary privilege. There is little appreciation in Australia of the breadth of those principles as articulated.

There are other provisions of the Parliamentary Privileges Act 1987 which deal with and protect the proceedings of committees—section 10, which deals with the reports of proceedings of committees; section 12, a very important section, which deals with the protection of witnesses; and section 14(3), which also protects senators, members and witnesses from court proceedings that would impede their attendance before a parliamentary committee.

I want to emphasise the double aspect of the operation of the rules and principles of parliamentary privilege. Because they protect proceedings of the parliament, in their most obvious way they protect the members of parliament, the senators and the members of the House of Representatives, not in an individual capacity but insofar as they partake of a corporate capacity as participants in the parliamentary process. But, equally, they protect witnesses. Equally, they protect individual citizens who come before Senate committees. It is not entirely, but it is almost, unknown for citizens to come to the bar of either house of the parliament. So for all practical purposes the provisions of the Parliamentary Privileges Act also extend very extensive protections to witnesses before Senate committees.

I want to take the last few minutes to address one issue of particular concern. It was an issue of concern to the Privileges Committee when I chaired it and it is an ongoing issue of disputation. It comes right at the borderline, where the privileges and immunities of the parliament, including witnesses before parliamentary committees, run into executive power, and that is where there are statutory curbs on parliamentary committees by legislation, or sometimes even by administrative fiat, over the evidence that a witness may give to a parliamentary committee. This issue arose earlier this year, when the Privileges Committee was asked to examine the provisions of a tax statute, the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009. The provisions of the bill, which, as the title suggests, were intended to protect the confidentiality of taxpayers' information, contain some prohibitions in relation to officers of the taxation department responding to questions by parliamentary committees. There were narrowly defined circumstances in which officers were at liberty to respond to questions asked of them in the course of proceedings before a parliamentary committee, and then, beyond that carve-out, there was a general prohibition upon them doing so. In particular, the relevant operative section of the bill created a general prohibition and then it said:

> Subsection (1) has effect despite any power, privilege or immunity of either House of the Parliament, of the members of either House of the Parliament or the committees of either or both Houses of the Parliament, except to the extent that those powers, privileges or immunities can be invoked to compel the disclosure of *protected information.

That was a very confusing piece of legislative drafting because it had an intrinsic circularity about it—a point that was not lost on Dr Rosemary Laing, who gave a very thorough and, you would not be surprised to hear, intensely critical assessment of this bill in evidence before the committee. The committee report it is fair to say was intensely critical of the bill and, as far as I can discover from my inquiries earlier in the week, that bill has not further proceeded and the government is yet to respond to that report.

Let me close by making this observation: if there are to be abrogations to the operation of the broad rules of parliamentary privilege then those abrogations should be by way of specific amendment to the Parliamentary Privileges Act itself, which already creates certain exceptions within it. The Parliamentary Privileges Act is a fundamental constitutional statute and it is not to be partially repealed or, as Rosemary will remember some of the Treasury officers at that inquiry were foolish enough to say, impliedly repealed by a narrow and topic specific statute. If there is

a view that certain categories of information ought not to attract the protection of parliamentary privilege then let the Parliamentary Privileges Act be revisited. I would be very reluctant to concede that there are many such categories of information. The better way to handle these things is for Senate committees dealing with confidential information to act in camera.

Let me close by making this final observation: on 25 February 1988 the Senate passed a series of procedural and sessional orders which set out the circumstances in which confidentiality could be claimed in relation to certain categories of documents and set out a procedure for Senate committees dealing with such documents in camera. Those resolutions, both on their face and in the manner in which the practice of the Senate has developed in the years since, are piecemeal and inconsistent and they ought, for the sake of comity and good practice, to be reviewed and codified.

Dr LAING—That sounds like another job for the next Privileges Committee. We have a few minutes left in this afternoon's proceedings for questions. Are there any questions?

QUESTIONER 1 (Mr RAWLINGS)—I am from Civil Liberties Australia. The McPherson decision of course is entirely unworkable in the modern era because you cannot create a document on one computer and send it to another computer for your colleague to work on without breaching parliamentary privilege, which is a nonsense in formulating submissions to the parliament because that is how we all work. The definition needs reworking or relooking at. That is not my major concern though. My major concern is that when we formulate a submission to a Senate committee we lodge it and instantly, by osmosis in a millisecond over the internet, we have lost copyright, control and any use of it. It goes to the committee and the committee then decides whether it will attract privilege. So in that period, which can be a week or two weeks, effectively debate is stifled and it is a censorship process. That is my concern. What do you think of that process? Do you believe it ought to be amended?

I have one minor question for ex-Senator Ray. In relation to the $400,000 bills run up against journalists—and by the way I am a former one—is the parliament subject to the model litigant principles of the government?

Mr RAY—No, it is not—and I did not mention the word 'journalist' once; I said 'media organisations'. You have to take some account of their capacity to pay.

My problem with McPherson is not documents created but documents obtained. I have often worried—or worried then, and have ever since—that, in some way, some criminal documents could be hidden under the guise of parliamentary privilege whereas a normal civil investigation and prosecution would have obtained them. It is not that it has happened; it is just that I do not think it is defined in any particular way.

On your major point, I think it is very important that a document lodged with a Senate committee has to be approved. That takes time, and I understand the awkwardness of your position. It does not stop you arguing the general principles involved; you just cannot disclose the document. We have had, over the years, some documents submitted to Senate committees that have been deliberately defamatory documents. In one case the same document, I think, went to about eight committees from a former ex-Senate colleague of us all. It defamed the Senate, staff, politicians from both sides et cetera. And it was always knocked back.

So I do not think you can get rid of the process of lodging the document and waiting for it to be approved, obtain parliamentary privilege and be circulated. That does not stop you arguing the generality of the ideas et cetera. I am not sure that there is any other way to foreshorten that particular process without running the risk of extending parliamentary privilege to a whole range of unsavoury documents that are only meant for character assassination.

Senator BRANDIS—I think it is important to remember that these laws and principles exist to protect a process, not to censor anything. By the way, I agree, from my own experience, with what Robert Ray has said about the occasional use of the protections that parliamentary privilege affords to documents for purposes of abuse. Without wishing to be too controversial, I must say that during the so-called Godwin Grech affair, when I chaired the Senate Privileges Committee, I was appalled by a submission from Treasury, signed by Dr Henry as Secretary to the Treasury, which exhibited—and thereby attracted privilege to—hundreds and hundreds of pages of material, almost all of which was in my view gratuitous in the strict sense of that word. It had no bearing upon the inquiry at all but was highly embarrassing to individuals. I suspected at the time that it was included essentially to get square. In my view the committee, striving for a bipartisan approach, did cull some material from the annexures, but there was a lot left in there. Privilege protections were opportunistically attracted to documents that should never have been put on the public record or attracted such privilege.

Courts of law have a process for refusing to accept affidavits, for example, that contain what in lawyers' language is called scandalous material. The Privileges Committee does not have as sophisticated a process, but the use of the Privileges Committee process for overtly malevolent reasons is not just confined to a few nutters in the community. I think Treasury engaged in that during the Godwin Grech inquiry.

QUESTIONER 2 (Mr TUNNECLIFFE)—I have a question for both Mr Ray and Senator Brandis about ministerial advisers and the claim made by governments that, notwithstanding the power of committees to call for and even summons persons to appear, ministerial advisers cannot be compelled to appear, because they are responsible only to the minister. That has been described as the McMullan principle in Victoria this year. The problem as I see it is that, if the McMullan principle exists, then ministerial advisers are potentially the only group of people who cannot be called to appear before committees because even members of the other chamber can appear by leave of that house. So my question to both of you is: will governments ever concede that the claim is, to say the least, somewhat dubious and will upper houses and/or their committees ever assert their rights to call this group of people or will they simply continue to add weight to the claim that the McMullan principle exists?

Mr RAY—The first thing I would like is some consistency. You do not get that out of the Legislative Council of Victoria. You have compelled—unsuccessfully—staff to attend on the basis of political opportunism and nothing else. That is from a political party that throughout Australia—here under the Howard government—every other time would resist staff appearing before committees. We as an opposition never once—at least I didn't—tried to call staff before these committees. It is called comity. It is called tradition. It does not have to be written in laws. I do not care what is written in your Legislative Council laws. It is having two or three pretty hard nuts there just trying to get cheap publicity, calling staff and having a weak bunch of Liberal and National people go along with it when their federal leadership and that of any other state would not countenance it. It should be dismissed.

However, what we should consider is this: if staff are making executive decisions and not just advising ministers, they put themselves in harm's way. This is where the concentration has to be from an educative value over the next few years. I have done it. I have given staff introduction courses—not at your state level but at federal level. I have stressed to staff: you are there to proffer advice and assist but, if you make an individual executive decision and transmit that to the department rather than through your minister, you put yourself in the firing line and so it will be. That is where these sorts of issues have to be addressed et cetera.

The last point to make is: a lot of staff signed on and signed contracts in the knowledge they would not have to appear before parliamentary committees. If that has changed halfway through, they have a right to renegotiate their contract and get more money because of the pressure they are under or you introduce it when you are about to start a new cycle. You say, 'Look, we are employing you all as ministerial staff, but we have to warn you that you may have to front before parliamentary committees.' Just remember the point I made earlier: you do not want to get into a competition of a non-government controlled chamber and a government controlled other chamber where they set up a series of witch-hunts against each other because they have the numbers to do so. That will demean parliamentary democracy.

Senator BRANDIS—I go along with most, if not all, of that. I think you have to accept that the law protects certain confidential relationships largely for functional reasons because it is simply not functionally possible for those relationships to be conducted for the purposes for which they exist if their confidentiality is not protected. The most obvious example of that is the privilege that exists between a lawyer and a client. A client has to be able to confide in and seek and obtain advice from his lawyer, secure in the knowledge—in, for example, preparing a case in court in particular—that what passes between them is not itself going to be exposed in the court. That is a matter of common sense. People can understand why that must be so.

For all practical purposes, the lawyer is the client's alter ego. The relationship between ministers and ministerial advisers—at least where ministerial advisers, as Robert rightly says, are doing what they are meant to do and that is giving advice—is a bit like that. In fact, it is very much like that. The adviser is for these purposes—and for all practical purposes—the minister's alter ego and no advice could be given to a minister by a confidential adviser in relation to matters of great political sensitivity or matters of public policy or commercial sensitivity unless they were absolutely secure in the knowledge that that would not be exposed to public view so that they must be able to speak with complete freedom.

Dr LAING—Our time for the day is up, I am afraid. We end on a fairly sober note. I invite you to join me in applause to thank our last speakers for this afternoon. I would like to thank all of our contributors today for a fabulous day's proceedings.

Conference adjourned at 5.15 pm