

The Senate

Standing Committee on
Employment, Workplace
Relations and Education

Additional estimates 2006–07

March 2007

Membership of the Committee

Members

Senator Judith Troeth	LP, Victoria	Chair
Senator Gavin Marshall	ALP, Victoria	Deputy Chair
Senator Guy Barnett	LP, Tasmania	
Senator George Campbell	ALP, New South Wales	
Senator Mitch Fifield	LP, Victoria	
Senator Ross Lightfoot	LP, Western Australia	
Senator Anne McEwen	ALP, South Australia	
Senator Natasha Stott Despoja	AD, South Australia	

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Senator Lyn Allison	AD, Victoria
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Chapter 1

Introduction

1.1 The Standing Committee on Employment, Workplace Relations and Education presents its report to the Senate.

1.2 On 8 February 2007¹ the Senate referred the following documents to the committee for examination and report in relation to the Employment and Workplace Relations and the Education, Science and Training portfolios:

- Particulars of proposed additional expenditure in respect of the year ending on 30 June 2007 [Appropriation Bill (No. 3) 2006-2007].
- Particulars of certain proposed additional expenditure in respect of the year ending on 30 June 2007 [Appropriation Bill (No. 4) 2006-2007].
- Statement of savings expected in annual appropriations made by Act No. 66 of 2006 (*Appropriation Act (No. 1) 2006-2007*) and Act No. 67 of 2006 (*Appropriation Act (No. 2) 2006-2007*).
- The final budget outcome 2005-06 and the Issues from the Advance to the Finance Minister as a final charge for the year ended 30 June 2006.

1.3 Standing committees are required to report to the Senate on 22 March 2007.

Portfolio coverage

1.4 The committee has responsibility for examining the expenditure and outcomes of the following:

- Education, Science and Training portfolio
- Employment and Workplace Relations portfolio

Appendix 1 lists the departments and agencies under the portfolios mentioned above.

Hearings

1.5 The committee conducted two days of hearings, examining the Education, Science and Training portfolio on 14 February 2007 and the Employment and Workplace Relations portfolio on 15 February 2007. In total the committee met for 20 hours and 43 minutes, excluding breaks. The committee took into account the

1 Senator Ian Campbell, *Senate Hansard*, No. 129, 8 February 2007, p. 3414

Additional Estimates Portfolio Statements 2006-2007 provided by the departments and also annual reports for 2005-2006.

1.6 The following agencies and groups were released from the hearings without examination: Indigenous and Transitions Group, Strategic Analysis and Evaluation Group, International Education Group and the Australian Industrial Relations Commission/Australian Industrial Registry (AIRC/AIR).

1.7 Appendix 2 of this report lists the table of contents of the Hansard transcripts. These transcripts are available on either the committee's homepage under estimates on the Hansard website: <http://www.aph.gov.au/hansard/senate/commtee/comsen.asp>

Questions on notice

1.8 The committee draws the attention of the departments and agencies to the agreed deadline of Friday, 30 March 2007 for the receipt of answers to questions taken on notice from this round, in accordance with Standing Order 26.

1.9 During the hearings, the committee commented on the inadequate performance of both departments in answering the questions placed on notice during the previous round. The committee expects the performance of both portfolios to improve for the forthcoming 2007-2008 estimates rounds.

1.10 For this round, written questions on notice were received from Senators Carr, Crossin, Ludwig, Marshall, Nettle and Wong.

1.11 A statistical summary of questions taken on notice is attached at Appendix 4 of this report.

Chapter 2

Education, Science and Training portfolio

Introduction

2.1 This chapter summarises areas of interest and concern raised during the committee's consideration of the Additional Budget Estimates of the Education, Science and Training portfolio for the 2006-2007 financial year. This section of the report follows the order of proceedings and is an indicative, but not exhaustive, list of issues that received consideration during the estimates' hearings.

2.2 The committee heard evidence from Senator the Hon. George Brandis, as the Minister representing the Minister for Education, Science and Training, and from officers of the department, together with Questacon and related agencies, including:

- Australian Research Council (ARC);
- Australian Nuclear Science and Training Organisation (ANSTO);
- Australian Institute of Marine Science (AIMS); and
- Commonwealth Scientific and Industrial Research Organisation (CSIRO).

2.3 Senators present at the hearing were Senator Troeth (Chairman), Senator Marshall (Deputy Chair) and Senators Allison, Barnett, Carr, Crossin, Fifield, Lightfoot, Milne, Nettle, Patterson, Siewert and Stephens.

Australian Research Council

2.4 The ARC was questioned on matters relating to the Discovery Grants program, the Linkage International Awards program and the Research Quality Framework (RQF) panel structure. The committee was assured, in response to other questions, that there had been no ministerial rejections of grant applications except on advice from the ARC.

2.5 The ARC advised that they would have to take the RQF questions on notice as their CEO was absent from the hearing due to unforeseen circumstances.

Australian Nuclear Science and Technology Organisation

2.6 The committee followed a line of questioning on the transition between the decommissioning of the HIFAR reactor and the commissioning of the new OPAL reactor at Lucas Heights. ANSTO officers informed the committee that no reactor is currently operating in this transition period. Related to this was questioning about a

gas explosion at Lucas Heights and the issue of importing essential medical isotopes which would otherwise have been produced at Lucas Heights.

Commonwealth Scientific and Industrial Research Organisation

2.7 The committee noted the unavoidable absence of the CEO, Dr Geoff Garrett who was abroad on government business. Senator Carr pointed out that three out of the four agency CEOs were unable to attend the hearing and indicated his expectation that at the budget estimates all CEOs would be present.

2.8 Committee members questioned the Chief Financial Officer about the CSIRO's 2005-06 budget, external earnings and the flagship program shortfalls. Questions were taken on notice by the CSIRO for updated information from the 2005-2006 annual report and individual flagship budgets.

2.9 Senator Milne followed with questions on the Cooperative Research Centre (CRC) for Coal in Sustainable Development and its work on geosequestration and solar technology. Questions focussed on what work had been undertaken, the publication of research and the outcomes of the projects.

2.10 Of particular interest was the admission by Dr David Brockway, Chief of Energy Technology, that a report on carbon dioxide capture from coal-fired power plants, co-authored by CSIRO engineers through the CRC for Coal in Sustainable Development, may not be released. The committee was informed that private industry partners in the CRC may have the ability to suppress the report to protect their commercial interests. Dr Brockway also pointed out that it was not necessarily unusual for a report such as this to be withheld. Senator Milne followed up later in the day with questions for the department on the CRC arrangements. Both the CSIRO and the department took questions on notice regarding the status of the report and arrangements governing the release of publications from CRCs. Dr Brockway's comments to the committee received prominent press coverage.

2.11 Questioning continued with Senator Carr, who used various letters and emails from former CSIRO staff as well as newspaper articles to raise concerns about staff morale, payments and other human resource issues across various sections of the agency. Officers took on notice the request to provide a table outlining the number of scientists in one division who had left since 1987.

2.12 Other issues raised by the committee included:

- Consolidation of CSIRO sites
- Research support services review
- CSIRO contract with Fujitsu Australia
- Government water initiative announcement
- CRCs and the Australian Centre for Weed Research
- G-bIRD
- ECOMmodore

Australian Institute of Marine Science (AIMS)

2.13 AIMS was questioned briefly on its \$5 million increase in baseline funding and staff redundancies.

Department of Education, Science and Training

Questacon

2.14 This was Questacon's first appearance since the Additional Budget Estimates in February 2005. The committee sought confirmation of Questacon's budget allocation and whether base funding had grown over the past three years. As at previous hearings, questions were asked about private revenue raising and sponsorship arrangements. There were also questions regarding the longest running outreach program, The Science Circus.

2.15 Professor Graham Durrant, the Questacon director, also offered to give the committee a detailed written answer in order to better explain the additional measures that government could take to assist Questacon secure additional funds to expand programs.

Science Group

2.16 Senator Milne began with questions on the matter of Cooperative Research Centres (CRCs) which had earlier been the focus of extensive questioning with the CSIRO. Senator Milne was particularly interested in the arrangements governing the release of publications from CRCs and was searching for a specific report scheduled for release last year. Senators Milne, Crossin and Carr also inquired into the altering of the selection criteria for funding CRCs, and questioned the department on why the Weeds, Reef, Dairy and Tropical Savannah CRCs now did not qualify for funding under the new guidelines.

2.17 Senator Crossin then asked questions on the development of the Commonwealth Radioactive Waste Management Facility in the Northern Territory. Questions focussed on the content of discussions between the department and the Northern Land Council, and Senator Crossin was again reminded of the Northern Land Council's request to keep these matters confidential. Discussions followed on the timeline for construction of the facility, transport infrastructure requirements, job creation, the inventory and costs of the waste facility.

Cross portfolio

2.18 Senator Carr questioned the department as to the status of answers outstanding to questions taken on notice and expressed concern regarding the general late submission of answers.¹ Senator Carr noted that although all answers had been

1 See Appendix 4 for Question on Notice statistics from the Supplementary Estimates

received by the morning of the hearing, this did not allow sufficient time to study the answers.² The committee acknowledges that the department has made an improvement on previous efforts and also accepts that the Christmas holiday period had contributed to the slower than usual response time. The committee expects the improvement to continue with answers from this round answered on or near time.

2.19 Other cross portfolio matters raised were in regard to consultancies, an increase in expenditure on staffing and advertising costs.

Innovation and Research System Group

2.20 Senator Carr directed questions to the department regarding Research Quality Frameworks (RQFs) as well as issues raised previously during the questioning of the Australian Research Council.

2.21 Questions followed regarding the additional appropriation of \$1 million to the Museum of Economic Botany for proposed refurbishment, and the process for which these additional funds had been allocated.

Higher Education Group

2.22 Senator Carr began by questioning the department about the annual grant and forward estimates for the Carrick Institute. The committee was interested in the work of this body at Macquarie University.

2.23 Officers were then asked a series of questions on the university funding arrangements for 2007 and the continuing review of funding clusters. Questioning then turned to the compliance by universities with the higher education workplace relations provisions, and was followed with questions on the workplace productivity program. Officers took on notice a series of questions about cost breakdowns, productivity gains and the tabling of reports.

2.24 Other expenditure matters dealt with by the committee included:

- Voluntary Student Union transitional funding
- FEE-HELP
- Collaboration and Structural Reform Fund
- Larry Knight Scholarship in Tasmania.

Vocational Training and Education Groups

2.25 Following on from previous estimates hearings, Senator Carr asked questions on the Industry Skills Councils contracts and the evaluation report.

2 Senator Carr, *Committee Hansard*, 14 February 2007, p. 94

2.26 Senator Carr then asked the department about Australian Apprenticeship centres, specifically concentrating on the closure of a centre in Hobart and investigations into meat industry centres in Victoria. This discussion was followed with questions on the Skills for the Future work skills vouchers.

Schools Group

2.27 Senator Nettle asked a series of questions regarding national school standards and accountability in non-government schools as well as national testing exemptions given by the Minister. This was in particular a reference to schools conducted by the Exclusive Brethren. Senator Nettle continued with questions on the progress of the National School Chaplaincy Program, following on from the previous supplementary estimates round.

2.28 Senator Carr finished with questions on the Investing in Our Schools Program grant applications and the compliance auditing of schools.

Chapter 3

Employment and Workplace Relations portfolio

Introduction

3.1 This chapter summarises areas of interest and concern raised during the committee's consideration of the Additional Budget Estimates of the Employment and Workplace Relations portfolio for the 2006-2007 financial year. This section of the report follows the order of proceedings and is an indicative, but not exhaustive, list of issues that received consideration during the estimates' hearings.

3.2 Evidence was heard from Senator the Hon. Eric Abetz as the Minister representing the Minister for Employment and Workplace Relations and from officers of the Department of Employment and Workplace Relations (DEWR) and related agencies, including:

- Office of the Australian Building and Construction Commissioner (ABCC);
- Australian Fair Pay Commission (AFPC);
- Comcare; Office of the Employment Advocate (OEA); and
- Office of Workplace Services (OWS).

3.3 Senators present at the hearing were Senator Troeth (Chairman), Senator Marshall (Deputy Chair) and Senators Barnett, Crossin, Fifield, Lightfoot, Lundy, McEwen, McGauran, Patterson and Siewert.

Department of Employment and Workplace Relations

Outcome 1 — Efficient and effective labour market assistance

Outcome 3 — Increased workforce participation

3.4 Senator Wong began the questioning of the department on the budget allocations for vocational rehabilitation services and the \$22 million increase in the portfolio additional estimates 2006-07. This questioning lead to the issue of forward estimates. The Secretary, Dr Peter Boxall, declined to provide the figures, in keeping with previous decisions, citing that it is not government policy to publish them.

3.5 Other topics discussed included:

- Job Network;

- Newstart Allowance;
- Cyclone Larry wage assistance; and
- Textile, Clothing and Footwear structural adjustment package

3.6 A lengthy discussion followed on the membership of the Disability Advisory Group and the compulsory confidentiality agreement. Senator Wong questioned DEWR officials about the peak disability group—Australian Federation of Disability Organisations—not being represented because of their refusal to sign a confidentiality agreement. Senator Wong wanted to know more about this confidentiality agreement and her questions were taken on notice by the minister and the department. The procedural matters arising from this line of questioning are described later in this report.

3.7 Further questioning concerned the Community Development Employment Projects and the Australian Indigenous Leadership Centres. Senator Crossin raised matters regarding leadership training courses, capacity building plans, governance training and risk assessment.

3.8 Senator Siewert questioned the department in regard to answers received previously on Newstart Allowance, principal career and foster carer arrangements.

3.9 Final issues raised by the committee included:

- Disability Employment Network;
- Job Capacity Assessments;
- Job Seeker Accounts;
- Jobs in Jeopardy;
- Workplace Modifications Scheme;
- Disability Support Pension;
- Pensioner Education Supplement;
- Mobility Allowance; Personal Support Programme; and
- Social Security Appeals Tribunal appeals.

Office of the Employment Advocate

3.10 The OEA was asked why the committee was yet to receive a single answer to questions taken on notice at the previous estimates hearing. The Employment Advocate, Mr Peter McIlwain, explained that all answers had been provided to the department before the deadline. The responsibility of tabling the answers rested with the minister's office and not the OEA. Committee members

agreed that senators should not ask the same questions again if they were placed on notice at the previous hearing.

3.11 Much of the questioning of the OEA focussed on Australian Workplace Agreements (AWAs), dealing with such matters as the number and content of AWAs, lack of data collection and methodology for analysing that data. Senator McEwen also questioned the officers on the Agreement-Making Partnership Program and the membership of the OEA partner program.

3.12 The committee also heard that the directive to cease collecting AWA data, including effects on protected award conditions, was given to the OEA in late June 2006. The OEA further advised that there is no formal project underway as yet to develop new methodology to again collect and analyse AWA statistics. The OEA advised, however, that data is still being collected on the number of AWAs lodged by electorate. This discussion generated articles in the press relating to the absence of data on the effects AWAs are having on workers' conditions.

Australian Building and Construction Commission

3.13 Questioning commenced with Senator McEwen inquiring into the number of inspectors in each state and territory as well as the number of prosecutions since Work Choices commenced. Senator Marshall followed with questions about the details of the inspection process, covering the following matters: interview process, compliance powers, prohibited contents of side agreements and penalties incurred for breaches.

3.14 Further questioning covered compliance by employers with the Workplace Relations Act and the ABCC compliance monitoring processes. Questions also dealt with the ABCC's future compliance and prosecution roles under the new Independent Contractors Act.

3.15 Finally, questions were asked on the appointment of union officials as OH&S inspectors in the Tasmanian building and construction industry. Senator Barnett sought an update on the status of this trial after concerns were raised by the Master Builders Association and other organisations.

Australian Fair Pay Commission

3.16 The committee asked about the wage review timetable and the consultation process that the secretariat has set for 2007. Other issues canvassed included vacant positions, commissioned research, focus groups and junior wage consultations.

Office of Workplace Services

3.17 Senator Lundy asked questions about restaurant audits in Canberra, inquiring into how much money has been recovered and paid to employees. Questions were also asked on the progress of the national audit of the restaurant industry and the process for the selection of restaurants to be audited.

3.18 Senator Marshall followed with questions on the procedure for initiating prosecutions and whether the government or DEWR has any involvement therein. Questioning then moved to the current investigation of Tristar. Senator Marshall finished with questions about 457 visa workers and OWS's jurisdiction for enforcement in this area.

3.19 Final questioning revolved around general OWS operating issues and the additional appropriations allocated to expand compliance and enforcement activities in regional areas.

Comcare

3.20 There were questions on the number of investigators operating nationwide and the extent of their investigative powers.

3.21 Senator Marshall continued with questions on deeming rates for compensation claims. A document was tabled by the CEO of Comcare giving a specific example of the effect of a variable deeming rate on compensation payments.

Department of Employment and Workplace Relations (continued)

Cross-portfolio

3.22 During the day's proceedings there were a number of questions regarding the late submission of answers to questions taken on notice at the previous estimates hearing.¹ The Chairman expressed the committee's concern that some 400 answers remained outstanding. The committee acknowledged that an unusually large amount, some 800 questions, were taken on notice and requested that greater attention be paid to outstanding questions on notice.² DEWR responded by saying that answers are sent to the minister's office as soon as practicable.

1 See Appendix 4 for Question on Notice statistics from the Supplementary Estimates

2 Senator Judith Troeth, *Committee Hansard*, 15 February 2007, p.109

3.23 A discussion followed on advertising expenditure for the department, specifically the Work Choices campaign. The department responded by referring the senator to the additional estimates statements which showed that the Employer Advisory Program is the only additional funding for this financial year. Further questions followed about the participants and organisation of the Employer Advisory Program.

3.24 Senator Marshall continued with questions concerning the AWA database and the report scheduled for tabling by 30 June 2007. The discussion centred on whether the department had sufficient data to compile a report to sufficiently meet the standards as required by law. Senator Wong and Marshall asked questions at length about the content of the DEWR database and the process for analysing AWAs. DEWR took questions on notice regarding what conditions and changes tracked in the database and the date this database was designed.

3.25 Other matters raised were:

- Expenditure on Welfare to Work advertising campaigns;
- Modelling undertaken by DEWR in regards to Work Choices;
- Ministerial advice regarding the dispute at Tristar Steering and Suspension; and
- DEWR staffing issues including staff travel

Outcome 2 — Higher productivity, higher pay workplaces

3.26 DEWR was asked a series of questions in relation to mines and occupational health and safety, including DEWR research or other activities in relation to the development of a national safety scheme. Questions were also asked on mine managers' liability and the shortage of mine managers.

3.27 The committee asked further questions in relation to amendments to the Work Choices legislation, including:

- Stand-downs;
- Provision of the Information Statement;
- Redundancy entitlements;
- Disputed redundancy matters; and
- AWA duress

Matters of procedural significance

3.28 Before proceeding to outline matters examined during the hearing, the Committee draws attention to a matter of procedural significance that arose while taking evidence.

Refusal to answer questions

3.29 During the committee's examination of outcomes 1 and 3, the department again refused to answer questions regarding the timeframe in which matters are dealt with by the minister's office. The department had previously refused to answer such questions at the budget estimates hearings in June 2006, as described in the 2006-07 budget estimates report of this committee.³

3.30 This round, Senator Wong again asked questions in relation to dates when legal advice had been sought, this time about confidentiality agreements for the Disability Advisory Group. There was also an additional question about when the Minister first requested the preparation of a confidentiality document. Once again Mr Jeremy O'Sullivan, answering for the department, refused to answer these questions by invoking subsection 13(6) of the *Public Service Act 1999*. This subsection requires an Australian Public Service employee to maintain 'appropriate confidentiality' in dealings with ministers or their staff.

3.31 In pursuit of an answer, Senator Wong pointed out that it was common practice for other departments to provide answers about when legal advice was sought or given. Senator Wong tabled procedural advice from the Clerk of the Senate. This advice had been sought after the statements made by Mr O'Sullivan at the budget estimates, and is attached at Appendix 3. In this advice, the Clerk notes that in 2003 the Government accepted the long-held principle that a general statutory secrecy provision does not apply to the disclosure of information in parliament or any of its committees unless the provision is framed to have such an application.

3.32 Further questioning continued after the morning tea break where Mr O'Sullivan reiterated that he objected to answering the questions, based on his reading of the Public Service Act, and also on the grounds of a possible breach of legal professional privilege. The committee heard no basis for this latter claim. After a few more exchanges, the chairman confirmed that the committee accepted Mr O'Sullivan's objections, which provoked dissent from Senators Wong and

3 Report of the Senate Employment, Workplace Relations and Education Committee, *Budget Estimates 2006-07*, June 2006, p. 3

Marshall. The chairman called for a private meeting of the committee at a later hour to consider the matter.

3.33 At the subsequent private meeting the committee agreed to the proposal that a statement be read into Hansard to counter the possibility of the dispute arising at future estimates hearings. The chairman read the following statement:

The committee met in private before lunch today to discuss the issue which arose from Senator Wong's questioning of the department on the date on which legal advice had been sought. It notes the claim by Mr O'Sullivan that an attempt to answer the question would involve him in a breach of section 13(6) of the Public Service Act. It noted advice to Senator Wong from the Clerk of the Senate on 6 June 2006, which was tabled at the hearing, which includes advice from the Solicitor-General. However, in view of the possibility that such a dispute may arise again, the committee has agreed that in future, officers should not rely on such a claim. The committee notes that the opportunity already exists for officers to refer a matter to the minister at the table. In the meantime, the committee draws the attention of the Clerk's advice to the department.⁴

3.34 The committee will monitor proceedings at the budget estimates hearings to satisfy itself that notice has been taken of this statement.

Acknowledgements

3.35 The committee thanks the ministers, departmental secretaries and officers for their assistance and cooperation during the hearings.

Senator Judith Troeth

Chairman

4 Senator Judith Troeth, *Committee Hansard*, 15 February 2007, p. 51

Appendix 1

Departments and agencies for which the committee has oversight

Education, Science and Training portfolio

- Department of Education, Science and Training
- Anglo Australian Telescope Board
- Australian Institute of Aboriginal and Torres Strait Islander Studies
- Australian Institute of Marine Science
- Australian Institute for Teaching and School Leadership Ltd (Teaching Australia)
- Australian National University
- Australian Nuclear Science and Technology Organisation
- Australian Research Council
- Carrick Institute for Learning and Teaching in Higher Education Ltd
- Commonwealth Scientific and Industrial Research Organisation

Employment and Workplace Relations portfolio

- Department of Employment and Workplace Relations
- Office of the Australian Building and Construction Commissioner
- Australian Fair Pay Commission
- Australian Industrial Relations Commission and Australian Industrial Registry
- Comcare, the Safety, Rehabilitation and Compensation Commission and the Seafarers' Safety, Rehabilitation and Compensation Authority (Seacare Authority)
- Equal Opportunity for Women in the Workplace Agency
- Indigenous Business Australia
- Office of the Employment Advocate
- Office of Workplace Services

Appendix 2

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Appendix 3

Advice from the Clerk of the Senate



AUSTRALIAN SENATE

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6 June 2006

Senator Penny Wong
The senate
Parliament House
CANBERRA ACT 2600

Dear Senator Wong

ESTIMATES HEARINGS

EVIDENCE BY DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS

You asked for some further advice (that is, further to the advice provided by the Deputy Clerk, Dr Rosemary Laing, dated 29 May 2006) on certain answers given by the Department of Employment and Workplace Relations, and particularly by Mr J O'Sullivan of that department, at the estimates hearings of the Employment, Workplace Relations and Education Legislation Committee on 29 and 30 May 2006.

This note will be somewhat more detailed than should be necessary, because there is a great deal of ambiguity and lack of clarity in what the department put to the committee in those answers, and it is necessary to untangle various strands of the answers.

The department, in the person of Mr O'Sullivan, whose answers were not qualified by the secretary of that department, Dr Boxall, invoked subsection 13(6) of the *Public Service Act 1999* as an impediment to answering certain questions in the hearing. That subsection is one of a number of parts of the Public Service Code of Conduct, and provides:

An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

Mr O'Sullivan, and the department, believe that this provision could be breached by disclosure of some information to a parliamentary committee. He referred to it as imposing an obligation on public servants (transcript of hearing, 29 May 2006, p. 14), and twice stated that answering some questions could be a breach of the provision (30 May 2006, p. 18).

The first point to be noted is that the subsection is not a normal statutory secrecy provision, which prohibits the disclosure of particular information. Like all statements in codes of conduct, it is cast in terms of uncertainty and judgement: it refers to "appropriate" confidentiality.

Even if it were a prescriptive secrecy provision, contrary to what Mr O'Sullivan thinks an officer cannot be in breach of such a provision by providing information to a parliamentary committee. This matter was extensively canvassed by senators in 1991, and, after some uncertainty on the part of some government advisers, the considered view of the then Solicitor-General, in accordance with the established law, on the subject, was that a statutory secrecy provision does not prevent the provision of information to a House of the Parliament or its committees unless there is something in the provision which indicates that it has that application. This established principle is shared by the current government and its advisers and was expressed in the Senate in 2003:

A general statutory secrecy provision does not apply to disclosure of information in parliament or any of its committees unless the provision is framed to have such an application. (Senator Minchin, Minister for Finance and Administration, *Senate Debates*, 4 December 2003, pp 19442-3.)

Most departments and agencies are now aware of this point. It is most surprising that any officer of any department should still be referring to the possibility of being in breach of a statutory provision by providing information to a parliamentary committee. At one point Mr O'Sullivan referred to the statutory provision not providing a bar to questions being answered (transcript, 29 May 2006, p. 42), but that statement was inconsistent with his other references to his being in breach of the subsection by answering the questions. If he could be in breach of it, how could it not be a bar? There was, to say the least, a lack of clarity in what he put to the committee.

At one stage Mr O'Sullivan stated that the point he was raising was not a public interest immunity claim (transcript, 30 May 2006, p. 18). This is perhaps the most remarkable of his statements. The difficulty he finds with subsection 13(6) is, according to this statement, something other than the normal grounds of public interest immunity claims.

A public interest immunity claim, that is, a claim that it would not be in the public interest to disclose certain information to a parliamentary committee, is simply the vehicle by which issues about the sensitivity of particular information are raised. This is made clear by the *Government Guidelines for Official Witnesses before*

Parliamentary Committees and Related Matters, published by the Department of the Prime Minister and Cabinet. In the discussion of public interest immunity claims in that document the following issues are listed as issues which may give rise to such claims, which must be made by a minister:

- material disclosing cabinet deliberations
- material consisting of advice to government
- material subject to statutory secrecy provisions.

The *Government Guidelines* refer to the following categories of information which “could form the basis of a claim of public interest immunity”:

material disclosing any deliberation or decision of the Cabinet, other than a decision that has been officially published, or purely factual material the disclosure of which would not reveal a decision or deliberation not officially published

material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or ‘for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure would be contrary to the public interest* [emphasis added] (para 2.32).

In relation to statutory secrecy provisions, the *Government Guidelines* refer to them as “considerations [which] may affect a decision whether to make documents or information available”, and states that the Attorney-General's Department should be consulted when occasions arise involving such provisions (para 2.33).

If Mr O’Sullivan considered that the information for which he was asked could fall into either of these categories, or could be subject to a statutory secrecy provision, he should have raised them as possible grounds for a public interest immunity claim, which, as the *Government Guidelines* state, must be made by a minister. He should have indicated to the committee that he intended to ask the responsible minister to consider whether a public interest immunity claim should be raised on those grounds, after consulting with the Attorney-General's Department if he thought that a statutory secrecy provision was involved. Instead, Mr O’Sullivan and the department made their own decision that subsection 13(6) prevented the answering of the questions. It should be emphasised again that the stated grounds are only factors to be taken into consideration as to whether a public interest immunity claim should be made by a minister.

As indicated in the advice of 29 May 2006, questions about when advice was provided to ministers’ offices have frequently been answered in committee hearings. In these cases, if the *Government Guidelines* have been followed, and if any consideration has been given to raising a public interest immunity claim, it has been decided either that there is no basis for such a claim or that any basis for such a claim is outweighed by the public interest in revealing the required information to the committee. It is not clear that Mr O’Sullivan and the Department of Employment and Workplace

Relations realise that the issues they sought to raise are factors to be weighed by ministers in this process of public interest balance.

At another stage of the hearing, Mr O'Sullivan drew an analogy between what he regards as his obligation to comply with section 13(6) of the Public Service Act and an obligation to maintain confidentiality about a freedom of information request which might be made by a senator (transcript, 20 May 2006, p. 18). This is an unhelpful analogy. Estimates hearings, and indeed other parliamentary inquiries, are based on a constitutional premise of a great public interest in parliamentary scrutiny of how ministers and departments perform their functions, which may on rare occasions be outweighed by a public interest in not disclosing particular information. It has already been noted that this department appears not to appreciate the weighing of public interests which must occur, and the relative weight they bear. Does it think that the responsibility of a minister and a department to account to the Parliament for the minister's and department's performance of official functions has only the same public interest quota as the privacy of an FOI inquirer, or, alternatively, the performance by a senator of the senator's individual functions as a parliamentarian? Privacy is not the issue, and, on the other interpretation, the situations are hardly equivalent in terms of the public interests involved. The use of this analogy only raises more problems than it answers in relation to this department's approach to its accountability obligations.

Mr O'Sullivan and the department contended that information about when answers to questions on notice were provided to ministers' offices falls within the prohibited area (transcript, 30 May 2006, pp 17-19). It is to draw an extremely long bow to claim that such information falls within the category of advice to government. That, no doubt, is why other departments have regularly answered questions about when answers were provided to ministers' offices. The departments which answered such questions in the recent hearings include the Department of the Prime Minister and Cabinet, the Department of Finance and Administration, and the Department of Foreign Affairs and Trade.

Subsequently it was clarified that the answers had not yet been finalised (transcript, p. 19), but there was no indication that this involved any withdrawal from the position put earlier. This only serves to indicate the lack of clarity in the position adopted by Mr O'Sullivan and the department.

Mr O'Sullivan used the language of objecting to the questions. Perhaps he thinks that his taking objection to questions automatically triggers the Senate's Privilege Resolution 1(10). This provides that, if a witness objects to answering any question, the committee is to consider the stated ground of the objection and to deliberate and make a decision upon it. That provision, however, refers to witnesses of all kinds, not specifically public service witnesses, and to all possible objections to questions (the example given in the provision is self-incrimination). In relation to public service witnesses and possible public interest immunity claims, it is not triggered unless and until a minister makes such a claim. A public servant who considers that a minister should be given opportunity to make a public interest immunity claim is covered by Privilege Resolution 1(16), which allows an officer reasonable opportunity to refer

questions to superior officers or a minister. As has been indicated, the ground for not answering the questions which Mr O'Sullivan seems to have raised is one of the possible grounds of a public interest immunity claim, and if he thought that it could arise he should have referred the question to the minister under Privilege Resolution 1(16).

I suggest that this note be drawn to the attention of the minister and the department for consideration before the next estimates hearings. That course may at least achieve the goal of properly identifying and articulating any difficulty which officers see in the answering of particular questions. It should also ensure that any claims that questions should not be answered are properly considered and made by the minister.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Harry Evans', with a stylized, cursive script.

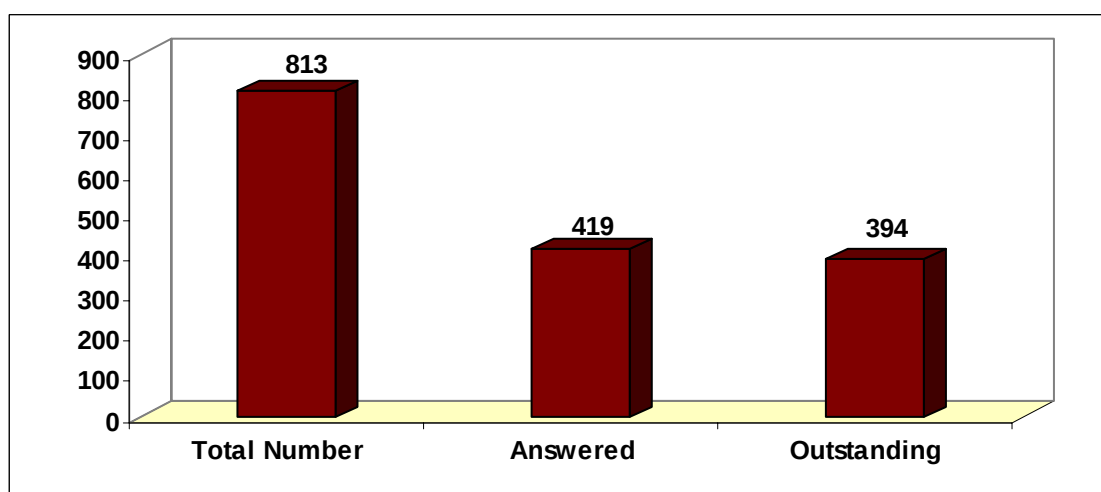
(Harry Evans)

Appendix 4

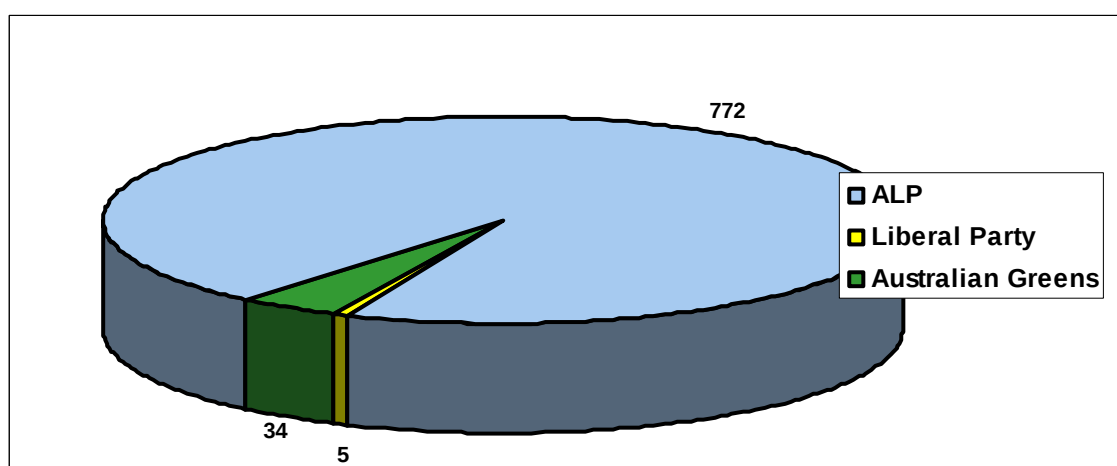
Questions on Notice Statistics

Supplementary Estimates November 2006

Employment and Workplace Relations Portfolio

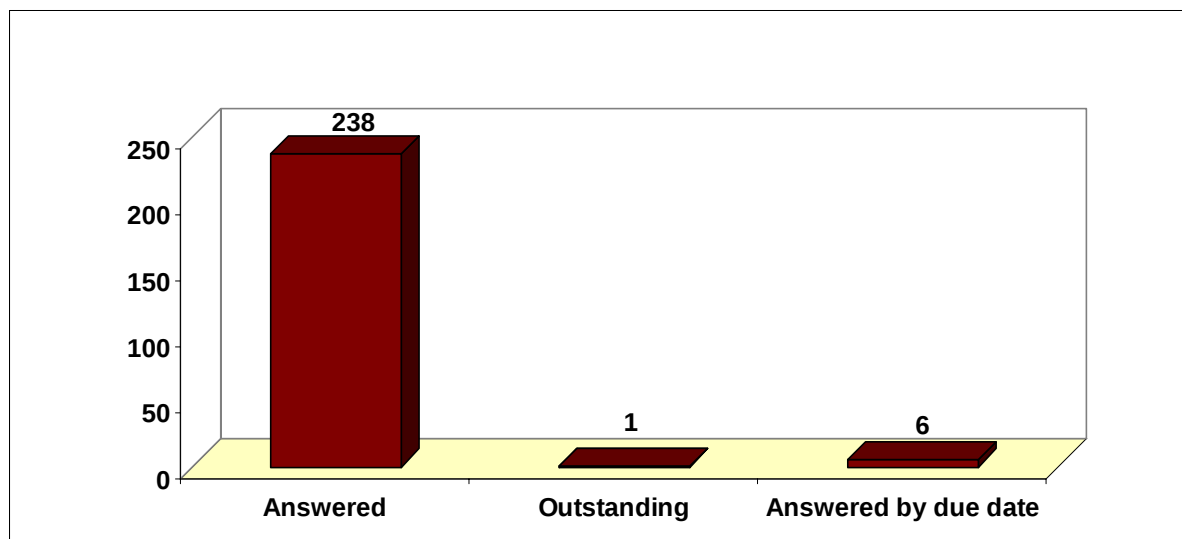


Summary of questions taken on notice

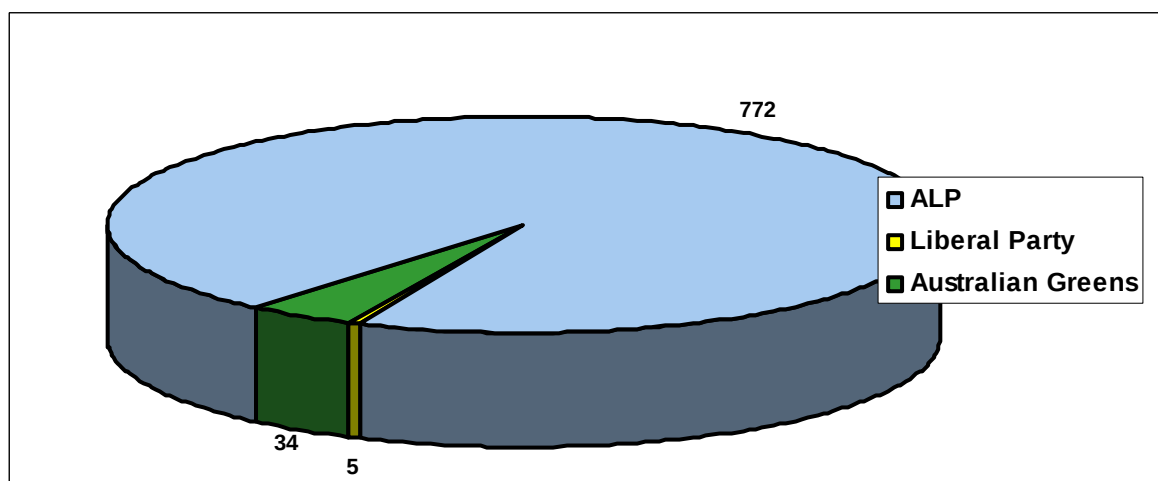


Number of questions asked by political party

Education, Science and Training Portfolio



Summary of questions taken on notice



Number of questions asked by political party