Power Versus Practice — the Role of Convention in the Senate's Ability to Hold the Executive to Account

Jeanette Radcliffe[*]

In August 2006 the Australasian Study of Parliament Group released a discussion paper entitled *Why accountability must be renewed*. In it the authors argued that

> [m]inisterial accountability fails as governments seize and hold political advantage. … The Senate, which until recently was a major instrument of accountability, has been quickly rendered impotent by the rare election of a Government majority that makes impotency possible.[1]

This discussion paper echoes wider concerns that the Senate's ability to operate as a 'house of review' is compromised by its dependence on unenforceable conventions.[2] In releasing the discussion paper, Kevin Rozzoli and Ken Coghill suggest that one of the key reasons for this failure in accountability is the fact that the principles and practice of accountability are rarely spelt out clearly and so are difficult to enforce.[3]

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[*] Committee Secretary, Department of the Senate.

[1] Australian Study of Parliament Group, *Why accountability must be renewed*, 2006, pp 1–2.

[2] Young, Liz, *Parliamentary committees: The Return of the sausage machine? Democratic Audit of Australia*, Discussion Paper 28/06 (August 2006), http://democratic.audit.anu.edu.au; Tynan, Daniel and George Williams, *Accountability: Senate scrutiny more necessary than ever*, Australian Policy Online, 2 October 2006, www.apo.org.au, (accessed 18/10/2007); Evans, Senator Chris, *Two Years of Government Control*, Speech to the Subiaco Branch of the Australian Labor Party Irish Club, Subiaco, WA, 28 June 2007, http://www.chrisevans.alp.org.au/news/0607/seantespeeches29-01.php (accessed on 25/09/2007)

[3] Rozzoli, K and Ken Coghill, Renewing accountability, *The Age*, 9 August 2006, http://www.theage.com.au/news/opinion/renewing-accountability/2006/08/08/115480 (accessed on 26/09/2007)

Australasian Parliamentary Review, Spring 2009, Vol. 24(2), 164–181.

What has become known as the AWB affair offers an opportunity to consider this point. This paper will examine the powers and practice of the Senate as they apply to the estimates process. It will consider the extent to which accountability could be said to have failed in the AWB affair.

Background

The AWB affair had its origins in the United Nations' oil-for-food program. This program was established by the United Nations in 1995 and terminated in late 2003. It was intended to allow Iraq to sell oil on the world market in exchange for food, medicine and other humanitarian needs for ordinary Iraqi citizens without allowing Iraq to rebuild its military. As the programme ended, revelations surfaced of a vast network of kickbacks and surcharges involving companies registered in a wide range of member states. A report by UN investigator Paul Volker, released in October 2005, found that the Australian Wheat Board (later AWB Limited) had been a significant source of kickbacks to the Iraqi government. In releasing the Volker report on 27 October 2005, the Secretary-General of the United Nations, Mr Kofi Annan, stated that he hoped that 'national authorities will take steps to prevent the recurrence of such practices in the future and that they will take action, where appropriate, against companies falling within their jurisdiction.'[4]

On 31 October 2005, as the Senate began its supplementary Budget estimates hearings, the Prime Minister announced that he believed there should be an independent inquiry into whether there was any breach of Australian law by those Australian companies referred to in the Volker report and that he had sought advice on what form of inquiry would be appropriate.[5] In the estimates hearings senators turned their minds to the context within which the AWB affair was being played out. Questions were asked on a range of matters including advice to the executive, cooperation with the Volker inquiry, the extent to which officers of departments were aware of the allegations of kickbacks and the role of various agencies in monitoring Australian involvement in the oil-for-food program.[6] The first signs that the government might try to limit the Senate's scrutiny of the affair emerged in the estimates hearings of the Rural and Regional Affairs and Transport committee (RRAT). During that committee's questioning of the Wheat Export Authority, the Chair of the committee drew senators' attention to the

[4] United Nations Secretary-General, Office of the Spokeperson, Statement attributable to the Spokesperson for the Secretary-General on the Final Report of the Independent Inquiry Committee on oil-for-food, New York, 27 October 2005.

[5] Howard, the Hon, John, House Hansard, 31 October 2005, p 25.

[6] Senate Finance and Public Administration Legislation Committee, Committee Hansard, 31 October 2005, pp 141–144, Senate Foreign Affairs, Defence and Trade Committee, Committee Hansard, 3 November 2005, pp 3–56, Senate Rural and Regional Affairs and Transport Committee, Committee Hansard, 1 November 2005, pp 54–57.

forthcoming inquiry, suggesting that it would provide the appropriate forum for examination of these issues. As questions proceeded, the Chair attempted to inject a further note of caution into the proceedings: 'We have got to be careful not to corrupt or interfere in any way with what is going to be a seriously compulsive inquiry into this issue, and we are on limited time'.[7]

While the RRAT committee curtailed its examination of the affair, the Foreign Affairs, Defence and Trade committee undertook more extensive questioning of officers from the Department of Foreign Affairs and Trade, surprisingly with the assistance of the Chair of the RRAT committee.[8]

On 10 November 2005, the Australian government appointed the Hon. Terrence Cole as Commissioner to conduct an inquiry into and report on whether decisions, actions, conduct or payments by Australian companies mentioned in the Volker report breached any Federal, State or Territory law. This appointment was followed by extensive debate about the terms of reference for the inquiry and concern that many significant matters would not be examined by it.

By the time the Senate resumed in January 2006, the debate on the affair had settled into a pattern with non-government members and senators pressing for information and seeking a broader terms of reference for the Cole inquiry and the government warning about the risks of pre-empting or compromising that inquiry. At the start of the additional Senate estimates hearings of the Finance and Public Administration Legislation Committee in February 2006, the Minister for Finance and Administration, Senator Minchin, brought matters to a head when he advised that:

> the Government has directed that officials appearing before Senate legislation committees should not answer questions directed to them on matters before the commission of inquiry being conducted by the Hon. Terrence Cole into certain Australian companies in relation to the oil for food program. While examination of officials by the committees might be appropriate in the future, the government considers that Mr Cole should be able to proceed with his inquiry and present his findings without parallel public questioning that would not assist the consideration of complex issues.[9]

This was a bold step, made possible by a government majority in the Senate and tight party room control, no small thing, as the impact on Australian wheat farmers of losing an $800 million-a-year contract surely tested unity within the coalition. The extensive debate which followed focussed attention on the

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[7] Senate Rural and Regional Affairs and Transport Legislation Committee, *Committee Hansard*, 1 November 2005, p 56

[8] Senate Foreign Affairs, Defence and Trade Legislation Committee, *Committee Hansard*, 3 November 2005, pp 3–21.

[9] Senate Finance and Public Administration Legislation Committee, *Committee Hansard*, Monday 13 February 2006, p 35

accountability role of the estimates and the ability of the government to flout Senate convention because of its majority in the Senate.

In the first instance, as Senator Ray observed at the time, a significant factor in the decision to issue the directive has to have been the success of the estimates process in placing information on the public record. In Senator Ray's view, the government's directive to public servants was borne out of concern at what might come to light in the estimates environment. He notes

> They were worried about what might come out. Let us accept none of the nonsense that, in fact, they were worried about impinging on the Cole inquiry, because the ban only applies to estimates. It does not apply to any other committee. A reference committee tomorrow considering an annual report could call the same public servants in, cross-examine them, and there would be no ban. So the government's fear was of the estimates process, not the parliamentary process.[10]

As details of who was aware of what and when surfaced, together with copies of cables from Australian diplomatic posts, the government may have felt that it faced a very real threat of being embarrassed at estimates.[11] Close examination of departmental officers may not have helped preserve the government's claim that responsibility for supervision of AWB Ltd's oil-for-food contracts lay with the United Nations or its claim that it had done everything it possibly could to meet its international legal obligations to combat bribery of foreign public officials.[12]

Secondly, this unprecedented action was only possible because of the government's majority in the Senate. As will be discussed below, while the Standing Orders and resolutions of the Senate offer certain remedies for dealing with such a situation, each of these requires the collective will of the Senate in order to be effective. As the Clerk of the Senate noted at the time, if the government's declaration had been made before 1 July 2005 some action in the Senate would certainly have followed.

> The government was able to make its declaration secure in the knowledge that the majority of the Senate would not take any remedial action. The government could also be secure in the knowledge that the majority of the Senate would not initiate a separate Senate inquiry into the matter. Senate committees, with some

[10] Ray, Senator Robert, Senate Hansard, 28 February 2006, p 54.

[11] Overington, Caroline, Everyone in Canberra knew of kickbacks, The Australian, 22 February 2006 http://www.theaustralian.news.com.au/story/0,20867,18232462-601,00.html (accessed 11 October 2007)

[12] Kurtz, Jurgen, *A look beyond the Cole inquiry: AWB Ltd, bribery and Australia's obligations under international Law*, Democratic Audit of Australia, Discussion Paper 16/06, May 2006, p 2. http://democratic.audit.anu.edu.au (accessed 16 October 2007).

> exceptions not relevant here, can only inquire into matters referred to them by a resolution by the Senate.[13]

The government directive continued in force throughout the 2006 Budget Estimates hearings. Committee's were still able to examine departments about their response to the Cole commission's request for documents and the monitoring role of the Wheat Export Authority, but questioning was punctuated by reminders from ministers and committee chairs. Despite the assurance by at least one minister that there would be an opportunity to pursue questions once the commission had completed its work, senators were clearly frustrated.

The Estimates Process — a Victim of its Own Success

Since their introduction estimates hearings have consistently been very successful in shedding light on government programs and policies. Senator Faulkner, a former Leader of the Opposition in the Senate, has described the Senate estimates process as 'the best accountability mechanism of any Australian parliament'. In his view, there is 'not a better mechanism available for us to thoroughly scrutinise the government and its agencies'.[14]

Senate estimates hearings were initiated in 1970 as a means for senators to put questions to ministers and public servants about government activities. They were intended as an improvement on the previous method of asking questions on the appropriation bills in the committee of the whole stage. The estimates hearings were seen as a means of contributing to informed debate when the committee on the whole considered the appropriate bills. Like many accountability mechanisms, estimates hearings may not have been introduced at all had the government of the day been able to command the votes of its senators and had it held a majority in the Senate.[15]

Not surprisingly, the scope of the estimates has been the subject of on-going debate. From their inception estimates hearings appear to have ranged widely over the operations of the government of the day and successive governments have argued that the estimates have strayed too far from their original function.[16] The Senate has always held to the principle that the estimates have a broad remit. From 1971 onwards, the Senate passed a series of resolutions declaring the

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[13] Evans, Harry, *The Senate Estimates hearings and government control of the Senate*, Australian Policy Online, 12 April 2006, p 1. http://www.apo.org.au/webboard/print-version.chtml?filename_num73481 (accessed 26/09/07).

[14] Senator Faulkner, Senate Hansard, 13 May 2004, p 23209.

[15] Evans, H, *Senate Estimates Hearings and the Government Majority in the Senate*, 12 April 2006, Australian Policy Online p 1. http://www.apo.org.au/webboard/print-version.chtml?filename_num73481 (accessed 26/09/07).

[16] Evans, H, 12 April 2006, p 1.

principle that persons responsible for the expenditure of public funds are accountable for that expenditure. In 1998 the Senate passed the following resolution:

> The Senate reaffirms the principle, stated previously in resolutions of 9 December 1971, 23 October 1974, 18 September 1980, 4 June 1984 and 29 May 1997, that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the Parliament has expressly provided otherwise.

In 1999, after a concerted effort by ministers to restore the estimates hearings to their original purpose, the Senate, by adopting a report of the Procedure Committee, determined the following test of relevance: 'Any questions going to the operations of financial positions of the departments and agencies which seek funds in the estimates are relevant questions for the purpose of estimates hearings'.

This test of relevance still stands, despite numerous invitations to ministers and chairs of committees to move to repeal it. Nevertheless, ministers continue to resist disclosure of information where possible and senators frequently push the boundaries in their attempt to expose mistakes and poor governance.

As Bruce Stone observes, this broad mandate is one of the reasons Senate estimates have assumed such a major role in Senate scrutiny of the executive. The estimates offer a significant opportunity for individual senators to gather information over and above the opportunities to pose questions to ministers in the Chamber. The ability of the senators to use the estimates to delve into the implementation of government policy and programs, in sometimes excruciating detail, has the capacity to greatly expand the amount of time the Senate spends on scrutiny of public administration and results in a significant amount of information being placed on the public record.[17]

The estimates also offer an opportunity to pose questions about programs and expenditure directly to departmental officers. While it is generally accepted that the defence of government policies and administration is the preserve of Ministers, in practice the majority of questions posed at estimates hearings are

[17] Stone, Bruce, *A Powerful Senate: the Australian Experience*, University of Western Australia, 23 April 2007, p 6.
http://democracy.ubc.ca/fileadmin/template/main/images/departments/CSDI/conferences/BruceStoneUBCSenateConferencePaperPDF (accessed 28 September 2007).

directed to and answered by officers of the department or agency proposing the items of expenditure under consideration.[18]

The Rules of Engagement

Estimates hearings are inevitably a contest and, as the Clerk of the Senate has observed, not a particularly refined one.[19] While the process is governed by rules and orders determined by the Senate, the casual observer could be forgiven for thinking that it is an ill-disciplined process.

These rules and orders derive from Section 50 of the Constitution which authorises the Senate to 'make rules and orders with respect to the mode in which its powers, privileges and immunities may be exercised and upheld, and the order and conduct of its business and proceedings'.[20] These rules and orders are set out in the standing and other orders of the Senate.[21]

The rules and procedures for the committees considering estimates are the same as those which apply to the operation of committees generally except where these have been varied by standing order 26, which deals specifically with the conduct of estimates hearings. Thus, the powers and obligations of committee's hearing estimates include:

> the power to send for persons and documents (standing order 25(14));
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> the power to print any of its documents and evidence (standing order (16)) and the requirement to publish a daily Hansard of its proceedings as soon as practicable after each day's proceedings (standing order 26(7));
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> the broadcasting of hearings (standing order (19));
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> the obligation to hear evidence in public session (standing order 26(2));
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> the power to ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure (standing order 26(5));
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> the ability to propose the further consideration of any items in its report to the Senate (standing order 26(6));

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[18] Stone, Bruce, *A Powerful Senate: the Australian Experience*, University of Western Australia, 23 April 2007, p 6.
http://democracy.ubc.ca/fileadmin/template/main/images/departments/CSDI/conferences/BruceStoneUBCSenateConferencePaperPDF (accessed 28 September 2007).

[19] Evans, H, *Senate Estimates Hearings and the Government Majority in the Senate*, Australian Policy Online, 12 April 2006, p 1. http://www.apo.org.au/webboard/print-version.chtml?filename_num73481 (accessed 26/09/07).

[20] Australian Government Solicitor and Parliamentary Education Office, *Australia's Constitution*, 2003, Canberra, p 22.

[21] The Senate, *Standing Orders and other orders of the Senate*, September 2006.

> the authority for any senator to attend a meeting of a committee in relation to estimates, question witnesses and participate in the deliberations of the committee at such a meeting and add a reservation to the report (standing order 26(8)); and
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> the ability to determine the number and duration of any supplementary meetings (standing order 26(11)).

The Senate's power to require the giving of evidence and the production of documents is reaffirmed in its resolution of 16 July 1975:

1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by Section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.
2) That, subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.
3) That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.
4) That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim.[22]

Established Conventions for Withholding Information

As discussed earlier, it is not unusual for ministers or public servants decline to provide information sought at estimates hearings and the Senate has acknowledged that some information held by government ought not to be disclosed because it would be harmful to the public interest in a particular way.[23] This principle is known as public interest immunity. Privilege resolution 1(10) of 25 February 1988 provides:

> Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the questions to the committee's inquiry and the importance to the inquiry of the information sought by the

[22] *Journal of the Senate*, 16 July 1975, p 831.

[23] As Michael Brissenden notes, gagging bureaucrats was common during the Hawke/Keating years. Brissenden, M, *Federal Politics: A Senate Majority Was Meant to Be Easy*, New Matilda, 28 June 2006, www.newmatilda.com (accessed 25 October 2007).

> question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.[24]

Another significant limitation on the scope of questions is set out in Privilege Resolution 1(16) which provides a special rule relating to the questioning of federal or state public servants:

> An officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. However, this provision is interpreted to only prohibit questions asking for opinions on matters of policy, and does not preclude questions asking for explanation of policies or factual questions about when and how policies were adopted.[25]

The Senate's resolutions of 1975 and 1988 implicitly acknowledge the right to make claims for public interest immunity. At the same time, paragraph (4) of the Senate's 16 July 1975 resolution makes it clear that a claim that particular information should not be produced must be based on a particular ground that such disclosure would be harmful to the public interest in some way and that the Senate reserves the right to determine whether any particular claim will be accepted.[26] Convention requires that claims of public interest immunity be based on one the accepted grounds.

Over time a number of grounds for public interest immunity claims have achieved a measure of acceptance by the Senate. The possibility that production of certain information may disclose cabinet deliberations, prejudice national security or law enforcement operations, or adversely affect Commonwealth–State or international relations has been accepted as grounds for a claim of public interest immunity. The Senate has also favourably considered some claims of commercial confidentiality, although the Senate has been reluctant to accept broad interpretations of confidentiality. The Senate's resolution of 30 October 2003 makes it clear that a claim on this ground must be based on specified potential harm to commercial interests.[27] Similarly, the Senate has not been prepared to accept broad claims of legal professional privilege or attempts to invoke the sub

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[24] The Senate, *Standing Orders and other orders of the Senate*, September 2006, p 104

[25] The Senate, *Standing Orders and other orders of the Senate*, 2006, p 104.

[26] Evans, Harry, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p465.

[27] Parliament of Australia, Brief Guides to Senate Procedure, No. 11, *Orders for production of documents*, September 2006, http://www.aph.gov.au/Senate/pubs/guides/briefno11.htm.

judice convention. In both cases, the claim must relate to proceedings before the courts. Legal professional privilege has only been applied by the Senate in a very restricted sense to protect the relationship between legal advisers and their clients. In the case of the sub judice convention, the Senate must be satisfied that there is a real danger of prejudice to those proceedings by public canvassing of issues in the Senate and that this danger outweighs the public interest in the issues being discussed. The Senate has also accepted that the danger of prejudice is greater when the matter is before a magistrate or a jury.[28]

The government's decision to prevent public servants answering questions in relation to the AWB affair takes the Senate outside these established conventions. Senator Minchin made it clear in his statement to the Senate Standing Committee on Finance and Public Administration that this was not a claim of public interest immunity. Nor was it an attempt to limit the questions which might be posed at estimates, it was simply a refusal to answer.

There is no established convention for this in the Senate. The justification for this refusal was that 'parallel public questioning' of departmental officials by committees would be unhelpful for the Cole inquiry's examination of the matters before it.[29] The Clerk of the Senate, in responding to questions at the additional estimates hearings in February 2006 advised that:

> In relation to courts, there is the sub judice convention of the Senate, which provides that an inquiry should not be entered into if is going to cause prejudice to proceedings before the courts. The committee concerned has to weigh the danger of prejudice, particularly having regard to whether there are jurors involved who might be influenced by the inquiry or publicity arising from it and so on. In relation to royal commissions and other commissions of inquiry, the practice which has been followed in the Senate for many decades now is that there is not inhibition on inquiry into or debate on matters before such commissions, because they are not courts and are not trying cases.[30]

In seeking to justify its stance, the government drew parliament's attention to the estimates hearings of October 1989 in which the Minister for Arts, Sport, Environment, Tourism and Territories, directed a departmental secretary that departmental officers were not to answer any questions on the subject of Coronation Hill, which had been referred to the Resource Assessment Commission for consideration.[31]

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[28]Evans, Harry, 2004, pp 199–200

[29] Senate Finance and Public Administration Legislation Committee, *Additional Estimates 2005–2006*, March 2006, p 3.

[30] Senate Finance and Public Administration Legislation Committee, *Committee Hansard*, 13 February 2006, p 3.

[31] Prime Minister, the Hon. John Howard, *House Hansard*, 13 February 2006, p 24.

The senator attempting to question the department made his frustration plain to the committee:

> This committee, being a committee of the Senate has asked for that information and, very properly, the Secretary is in a position where he simply repeats the instructions which he has been given by his Minister. Under those circumstances the whole purpose of an Estimates committee is entirely set at nought by a ministerial instruction not to answer questions which arise from written material provided to a committee of the Senate. I want simply to indicate my understanding of the Secretary's position, but also to draw to your attention that I will require that matter to be properly reported by you or by the Chairman to the Senate in order to determine, by resolution of the Senate, what is the capacity to refuse information publicly stated in the Estimates Committee documents as being matters of public record.[32]

The minister subsequently advised the Senate that, by coincidence, the estimates committee's examination of the matter coincided with cabinet's consideration of the matter. The minister stated that he did not believe that it was appropriate for the officers of his department to be arguing his case in a public forum while he was making that case in Cabinet, and had therefore issued the direction.[33] No further action appears to have been taken on the matter.

A more high profile example of a Ministerial direction to departmental officers, which ultimately resulted in a reference to the Privileges Committee, is the Whitlam government's direction to Treasury officials not to answer questions in relation to what has become known as the loans affair. In this case the Prime Minister and certain ministers claimed public interest immunity in connection with the summoning of public servants to the bar of the Senate to answer questions and produce documents in relation to the government's overseas loan negotiations, in what has become known as the loans affair.

The Prime Minister advised the President of the Senate:

> I wish to inform you, however that each officer will be instructed by his Minister to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.[34]

Each minister also directed departmental officers that if the Senate rejected this general claim of privilege, the officers were to decline to answer any questions addressed to them on matters contained in the Senate's resolution or to provide any documents.[35]

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[32] Puplick, Senator Chris, *Estimates Committee D Hansard*, 5 October 1989, p 123.

[33] Richardson, Senator Graham, *Senate Hansard*, 6 October 1989, p 1836.

[34] Quoted in Evans, Harry, ed., *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate, 2004, p 471

[35] Campbell, E., *Parliamentary Privilege*, The Federation Press, 2003, p 158.

Again, unlike the AWB affair, each of the ministers concerned claimed public interest immunity on the ground that the answering of questions on the matters referred to in the Senate resolution, together with the production of relevant documents and files, 'would be detrimental to the proper functioning of the Public Service and its relationship to government and would be injurious to the public interest'.[36]

The government majority on the Privileges Committee found that there had been no breach of privilege, while the opposition minority concluded that the claims of executive privilege were misconceived, but recommended that no action should be taken by the Senate.[37]

Remedies for Failure to Produce Information

Despite the clear frustration on the part of many Senators and the apparently clear departure from established convention in the AWB affair, the Senate was not moved to take any formal action in relation to the refusal. This is not particularly surprising. Notwithstanding the government majority, while the Senate has the power to investigate and potentially punish failure to provide information or evidence as a contempt such formal responses are rare.[38]

In practice, most ministerial refusals to produce information are resolved through more political means according to the circumstances of the case. For example, Senators may resort to a range of punitive remedies which make it more difficult for ministers to operate in the Senate and which may impede the government's legislative program. Such measures might include censure motions, motions to delay the consideration of particular bills, motions to extend question time or other elements in the routine of the business of the chamber, thus taking up time that would otherwise be spent on government legislation.[39] Of course the effectiveness of each of these remedies, like more formal sanctions, requires the support of a majority of the Senate.

Senators are more likely to resort to more coercive remedies and seek alternative means of obtaining all or part of the information to which access has been refused. In an estimates environment, the senator asking the question may choose not to pursue the question or may reframe it. Alternatively, the committee may

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[36] Commonwealth Parliament Debate (Senate) 15 July 1975, pp 2729–30 quoted in Campbell, E., Parliamentary Privilege, The Federation Press, 2003, p 158.

[37] Senate Committee of Privileges, *Parliamentary privilege: precedents, procedure and practice in the Australian Senate 1966–2005*, 125th Report, December 2005, p 7.

[38] Senate Committee of Privileges, *Parliamentary privilege: precedents, procedure and practice in the Australian Senate 1966–2005*, 125th Report, December 2005, p28.

[39] Brief Guides to Senate Procedure, No. 11 Orders for Production of Documents, February 2005.

seek to determine if the material can be provided in a manner which would not raise the perceived public interest problem.

With a government majority even less formal remedies were closed off and all that the committee's could do in such circumstances was to seek to report the matter to the Senate. While each of the committees concerned did report the events as they were played out in the committee's hearings to the Senate, none of these reports sought any action on the part of the Senate.[40]

The reports tabled in March 2006 after the additional estimates are notably factual, despite the frustration expressed by individual senators in the hearings themselves, perhaps reflecting the moderating effect of government chairs. However, when the directive carried over to the Budget estimates, some committee's were moved to express their concern at the continuation of the directive and its longer term impact. The Finance and Public Administration committee commented on the lack of clarity regarding the reason for the extension:

> The committee's report noted that 'the continuation of the ban *after* the adjournment of the commission's hearings suggests that the ground had shifted, presumably to an undisclosed concern to avoid scrutiny of the matter while the commissioner prepares his report'.[41]

The Foreign Affairs, Defence and Trade Legislation Committee expressed concern about the future availability of officers to answer questions, noting that 'once the directive was lifted, relevant officers may have moved to another area of the department and may no longer be available to the committee to examine'.[42]

The Significance of Power and Practice in the Senate

This response by the Senate reflects the significance of the distinction between power and practice in the operation of the Senate. While the Senate clearly has the power to investigate and punish an alleged contempt, the procedure for raising matters of privilege in the Senate, as set out in Standing Order 81, underscores the difficulty of pursuing such action without wide support within the Senate. As John Uhr observes, the performance of the Senate, as with any parliamentary institution, depends on both formal powers and on informal practices. The way in

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[40] Senate Finance and Public Administration Legislation Committee, Additional Estimates 2005–06, March 2006, pp 2, 3 and 5; Senate Foreign Affairs, Defence and Trade Legislation Committee, Additional estimates 2005–6, March 2006, pp 2–3 and 6–9; Senate Rural and Regional Affairs and Transport Legislation Committee, Additional estimates 2005–06, March 2006, pp 25–26;

[41] Senate Finance and Public Administration Legislation Committee, *Budget estimates 2006–7*, June 2006, p 3.

[42] Senate Foreign Affairs, Defence and Trade Legislation Committee, *Budget estimates 2006–07*, June 2006, p 3.

which Senate practice operates to manage and moderate the use of the Senate' powers is a matter of political convention.[43]

This in turn can be expected to have a moderating effect on the behaviour of individual senators and the executive. Most actions in the Senate involve some degree of political judgement as to the risk of formal or informal repercussions. Clearly in the AWB case, the risk was considered manageable. Stanley Bach sees this interplay between power and practice as reluctance on the part of the Senate to assert itself. In his view 'if the government has "dissed" the Senate … the Senate itself must accept some of the responsibility for allowing it to happen.[44]

Rather than an outright accountability failure, the AWB affair exposes what the Clerk of the Senate has described as an accountability gap. He notes that the government was forced into establishing the Cole Royal Commission as a result of pressure initiated by the US Congress and followed up by the United Nations. Without this pressure a great deal of information about the matter would never have been disclosed, if indeed the matter had come to light at all. Such as accountability gap will be of greater concern in circumstances where this type of external pressure is not present and a government with a double majority is not forced to conduct its own inquiry.[45]

This accountability gap lies not just in the risk that similar affairs might not come to light, but that the AWB affair and other matters like it will not be subject to rigorous examination at the estimates. A double majority offers the opportunity for the executive to determine the terms on which it will be scrutinised, to decide how much of the picture will be revealed to the Australian public. There real risk therefore is that systemic failures in governance, on the part of the executive and the departments and agencies that serve it, will continue unchecked. Where there is non-governing party control of the Senate, opposition Senators are able to use accountability mechanisms, like estimates hearings, to uncover and publicise administrative bungles and cover-ups.

The government maintained that there was no attempt to limit the examination of this matter.[46] Ministers and Senators assured the Parliament that the matter was the subject of a full royal commission and that the terms of reference were

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[43] Uhr, John, *How democratic is parliament? A case study in auditing the performance of Parliaments*, Democratic Audit of Australia, June 2005, p 4, http://democratic.audit.anu.edu.au (accessed 16 October 2007).

[44] Bach, Stanley, Mandates, consensus, compromise and the Senate, Australian Senate Occasional Lecture Series, October 2007, p2.

[45] Evans, H, The Senate Estimates hearings and government control of the Senate, 12 April 2006, Australian Policy Online, www.apo.org.au/webboard/print-version.chtml?filename_num=73481 (accessed 26/09/07)

[46] Brandis, Senator George, *Senate Hansard*, 2 March 2006, p 94.

sufficiently wide to permit inquiry into all matters pertaining to the oil for food program and AWB's involvement in the program.[47] However, others in the parliament were not similarly satisfied and expressed concern that a range of areas were excluded from the Cole inquiry terms of reference.[48] Despite the political rhetoric, there is a very real concern at the heart of these concerns that wider questions of accountability, particularly within public service departments, would remain unanswered by the Cole Royal Commission. Senator Ray expressed concern that the government would continue to use its numbers to stymie wider scrutiny of the issues. 'We need to know what responsibility lies with the public service in these matters, why they did not pick up the signals and why they did not act on them.'[49] Senator Siewert similarly expressed concern at the future of Australian aid programs if the parliament failed to 'actually get to the bottom of what happened in this instance and never allow it to happen again.'[50]

Stephen Bartos makes a similar observation in his analysis of governance in the AWB affair. He observes, that the important issue is not 'who in the short term might have to take a fall' but why it happened. The AWB affair does not come down to an isolated action by a few rogue individuals. Of greater concern is the 'systemic failure of the government, the industry, the oversighting bodies and the public service to take action to deal with the illegal activities, and associated subterfuge, even when alerted to the possibility that it was going on.'[51] In Bartos's view '[T]he sources of a problem of this nature lie in governance: corporate governance arrangements within AWB, national regulatory arrangements for the oversight of the AWB, and underlying both of these, a failing in national governance standards as they apply to agricultural politics.[52]

The AWB affair would probably have not passed the estimates test, and it remains to be seen whether it will ever really be subjected to it. While there is no doubt that the Cole Royal Commission has shed a great deal of light on the AWB affair, many of the most important governance issues raised by the affair fell outside the

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[47] for example Senator Minchin, *Senate Hansard*, 7 February 2006, p 21; Senator Coonan, *Senate Hansard*, 9 February 2006, Senator Ellison, *Senate Hansard*, 13 June 2006, p 16; Mr Mark Vaile, MP, Minister for Trade, *House Hansard*, 1 March 2006, p 86; Mr Alexander Downer, MP, Minister for Foreign Affairs, *House Hansard*, 27 March 2006, p 23;

[48] Senator Chris Evans, *Senate Hansard*, 7 February 2006, p 21, Senator Robert Ray, *Senate Hansard*, 28 February 2006, p 54; Senator Siewert, *Senate Hansard*, 1 March 2006, p 46

[49] Ray, Senator Robert, *Senate Hansard*, 7 February 2006, p 54.

[50] Siewert, Senator Rachel, *Senate Hansard*, 1 March 2006, p 46.

[51] Bartos, Prof. Stephen, *The AWB Scandal — Matters of governance*, National Institute for Governance, University of Canberra, 1 May 2006, p 3

[52] Bartos, Prof. Stephen, *The AWB Scandal — Matters of governance*, National Institute for Governance, University of Canberra, 1 May 2006, p 6.

scope of the inquiry. Despite Commissioner Cole's invitation to public servants and others to volunteer information to the Royal Commission, Bartos concludes that it is more likely that public servants would provide such information in an estimates hearing where convention requires answers to questions. As Bartos notes, in previous incidents, such as the children overboard affair, the most telling observations came from the estimates hearings and not from the Senate's inquiry into 'a certain maritime incident'.[53]

To date the government direction has limited the extent to which the estimates process can add to the picture revealed by the Cole Royal Commission, though it would be wrong to deny that it has made a contribution. However, regardless of whether the AWB affair represents an accountability gap or an accountability failure, parliamentary accountability should not amount to an executive choosing the forum and terms within which its actions will be scrutinised. Accountability has to be a multifaceted process, where the risk of rigorous public scrutiny has a moderating effect on the behaviour of the executive and the public service.

The ASPG discussion paper is not the first call for greater codification of the Senate's powers and responsibilities. The introduction of non-political safeguards to protect existing accountability mechanisms might seem desirable, but to date attempts to introduce such mechanisms have been resisted by the parliament itself. The Senate in particular appears to have strenuously protected its ability to determine its own rules and procedures and has been reluctant to cede any of its power to another authority.[54]

In the absence of a political will to strengthen or maintain the Senate's powers, we must rely on what Stone observes as a tacit agreement that the conflict between the governing and opposition parties should be kept within bounds. 'The opposition takes the view that the government should be allowed to govern because the opposition hopes to be in office after the next election and will want the favour returned.[55] As Senator Ray so eloquently summarised this: '[w]hat ever they do to us now we'll do back to them. And if they think that's a threat — well, it is.[56] ▲

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[53] Bartos, S, 2006, p 22.

[54] Campbell, Enid, Parliamentary Privilege, the Federation Press, 2003, pp159-161.

[55] Stone, Bruce, *A Powerful Senate: the Australian Experience*, University of Western Australia, 23 April 20072007, p 11.

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