

RULE OF LAW

INSTITUTE OF AUSTRALIA

RoLIA SENATE ESTIMATES SURVEY No.3

JANUARY 2011

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INTRODUCTION

Senate estimates hearings are held three times a year for the purpose of Senate Committees examining the budget for Commonwealth government departments and agencies, including the economic regulators. Among Western democracies, the Australian Senate has been found to be likely to take its oversight function more seriously than any other, bar possibly the United States Senate.¹

On 11 June 2010 the Senate celebrated the milestone of having had Senate Committees, and therefore Estimates, for 40 years.

Harry Evans, former Clerk of the Senate, said the following words on 24 July 2009 in a speech marking the 40 years of Senate Committees:

“The continuance of the Senate committee system has meant that one House of the Parliament has been able to perform the legislative role that the theorists of parliamentary government and the framers of the Constitution envisaged, and has been able to hold the executive government more accountable than would otherwise have been the case. The committee system has also reinforced a culture of independence in the Senate which goes back to the days of Richard Baker and which has been nurtured by long periods of non-government majorities and lack of government control of the chamber...”

RoLIA repeats the assertion made in our first report that the Estimates are arguably the most critical and systematic element of the accountability mechanism applicable to our Federal regulators. The hearing transcripts and written responses for Estimates are a key record of the interaction of the Parliament and the Executive. Our regulators are independent agencies and accountable only to the Parliament. It is rare for a Minister to direct one of these agencies to take a particular course of action

RoLIA

The Rule of Law Institute is an independent non-profit association formed to uphold the rule of law in Australia. RoLIA has a keen interest in the conduct and outcomes of Senate Estimates. It receives no funds from the Government.

RoLIA's objectives are:

¹ Parliamentary Scrutiny of Government Performance in Australia, December 2009, 388.

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws and administrative application.

The economic regulators RoLIA has surveyed are:

- Australian Securities and Investments Commission (ASIC)
- Australian Competition and Consumer Commission (ACCC)
- Australian Prudential Regulation Authority (APRA)
- Fair Work Australia (FWA)
- Australian Taxation Office (ATO)
- Australian Crime Commission (ACC)
- Australian Building and Construction Commission (ABCC)
- Australian Communications and Media Authority (ACMA)
- Therapeutic Goods Administration (TGA)

A regulator's total budget is small compared to the balance sheets of some of the companies that are regulated. However, for each dollar of regulation there is multiplier effect on cost structures for these companies, and ultimately this impacts the price for goods and services. Also, the economic regulators inter alia protect and uphold the interests of the 18 or so million Australians who work, save, invest and purchase goods and services. For example, over the past few years, ASIC and APRA have been required to deal with the Global Financial Crisis, the collapse of financial institutions and flagging investor and consumer confidence. Our regulators have been conferred extensive powers to gather information and take action against individuals and corporate entities, and the Senate via Estimates plays a key role in protecting fundamental rights and liberties by ensuring accountability and transparency.

RoLIA intends to monitor and analyse each round of Estimates hearings and publish key indicators of accountability and scrutiny.

WHAT HAPPENS AT THE ESTIMATES HEARINGS?

Regulators are accountable to the Parliament on their operations and activities three times each year at the Estimates hearings of the Senate Committees. Senators are entitled to ask questions of regulators' head personnel; Senate Standing order 26(5) provides that the committees 'may ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure.' This is done after the budget comes out (May/June), again after the supplementary budget (October) and if necessary after additional estimates come out (the following February).

There are several permanent Senate committees, known as 'standing committees'. The standing committee system was brought in to subdivide the Senate, as the whole cannot do it all.² The plan was that the Senate would become more efficient as it could deal with more work.³ The Committees conduct estimates hearings into their areas of speciality.

The key committee RoLIA examined was the Economics Committee, as it covers the major economic regulators. We also reviewed the Education, Employment and Workplace Relations Committee which deals with the Australian Building and Construction Commission and the more recently established industrial relations regulator, Fair Work Australia; the Legal and Constitutional Committee which deals with the Australian Crime Commission; the Environment and Communications Committee which examines the Australian Communications and Media Authority; and the Community Affairs Committee which deals with the Therapeutic Goods Administration.

Whilst Senate Estimates hearings are held in public session, they are in some ways restricted or closed inquiries. This is so because they do not take written submissions from the general public and witnesses giving oral evidence are drawn only from the ranks of personnel employed in the Federal Public Service and its agencies.

Odgers' Australian Senate Practice 12th edition provides a very comprehensive guide to Estimates;⁴ describing them as:

"Estimates scrutiny is an important part of the Senate's calendar and a key element of the Senate's role as a check on government. The estimates process provides the major opportunity for the Senate to assess the performance of

² Senator Murphy, Senate Debates, 4 June 1970, p 2050

³ Ibid.

⁴ <http://www.apf.gov.au/senate/pubs/odgers/chap1618.htm>

the public service and its administration of government policy and programs. It has evolved from early efforts by senators to elicit basic information about government expenditure to inform their decisions about appropriation bills, to a wide-ranging examination of expenditure with an increasing focus on performance. Its effect is cumulative, in that an individual question may not have any significant impact, but the sum of questions and the process as a whole, as it has developed, help to keep executive government accountable and place a great deal of information on the public record on which judgments may be based.

Procedures currently applying to the consideration of estimates are as follows. Twice each year, particulars of proposed expenditure and tax expenditure statements are referred to the committees. The particulars are derived from the two sets of appropriation bills normally introduced twice each year. Portfolio Budget Statements, tabled in May, and Portfolio Additional Estimates Statements, tabled in February, assist the committees in their examination of the particulars. Statements of expenditure from the Advance to the Minister for Finance are also referred to the committees. For the consideration of additional estimates in February, committees also have access to other budget statements tabled with the particulars. Annual reports of agencies, required to be tabled by 31 October, are also available for consideration in the context of an agency's performance over the previous financial year."

While the Estimates are not the only oversight mechanism to which our regulators are subjected, they are, unarguably, the most important. Other examples of oversight include ASIC oversight via the Parliamentary Joint Committee on Corporations and Financial Services and the Economics References Committee which from time to time conducts hearings into certain matters including taking evidence from the regulatory agencies.

METHODOLOGY

The transcripts of the Estimates hearings were studied. Information gleaned from these reports was then put into Microsoft Excel files and compared.

We have selected to consider:

1. How many *questions were asked of each regulator;
2. Which Senator asked these questions;
3. How long were the opening statements read out by each regulator;
4. How many of the questions could not be answered and/or were put on notice;
5. How long it takes for each regulator to answer questions taken on notice;
6. How many written questions on notice were submitted; and
7. The length of each oral examination for each regulator.

****Meaning of 'question'***

A 'question' is defined as a statement or question spoken to elicit a response from a regulator. This means that statements to other Senators or the chair are not included; nor are statements such as "I agree" or "I accept that" as they are not spoken to elicit a response. Requests to repeat answers are not included, nor are statements of thanks or welcome.

Some questions are answered by Ministers and the public servants in Departments under whose aegis a regulator falls. These are included as they are asked about the regulators.

During the hearings, from time to time regulators decline to answer because a question is not in their area; because a court case is underway; or an investigation is underway; or because it is not their place to offer an answer as, for example, it is a matter of government policy. These questions are not those taken on notice and are difficult to report on.

Sometimes the number of questions taken on notice exceeds the number of answers in the Committee's answers section on their website. This is because this RoLIA survey has treated them as more than one question taken on notice, but the Committee secretariat grouped them as one.

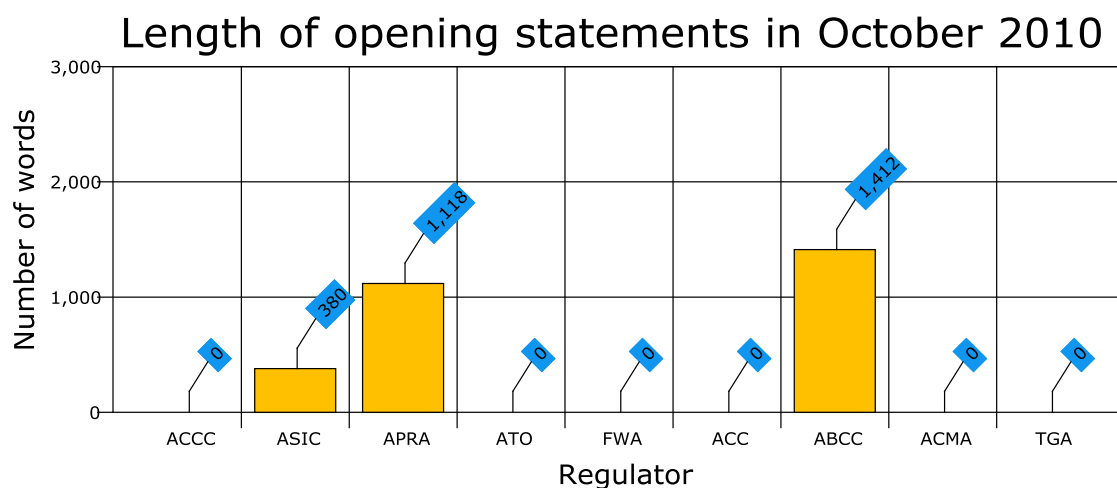
OBSERVATIONS

1. Opening statements

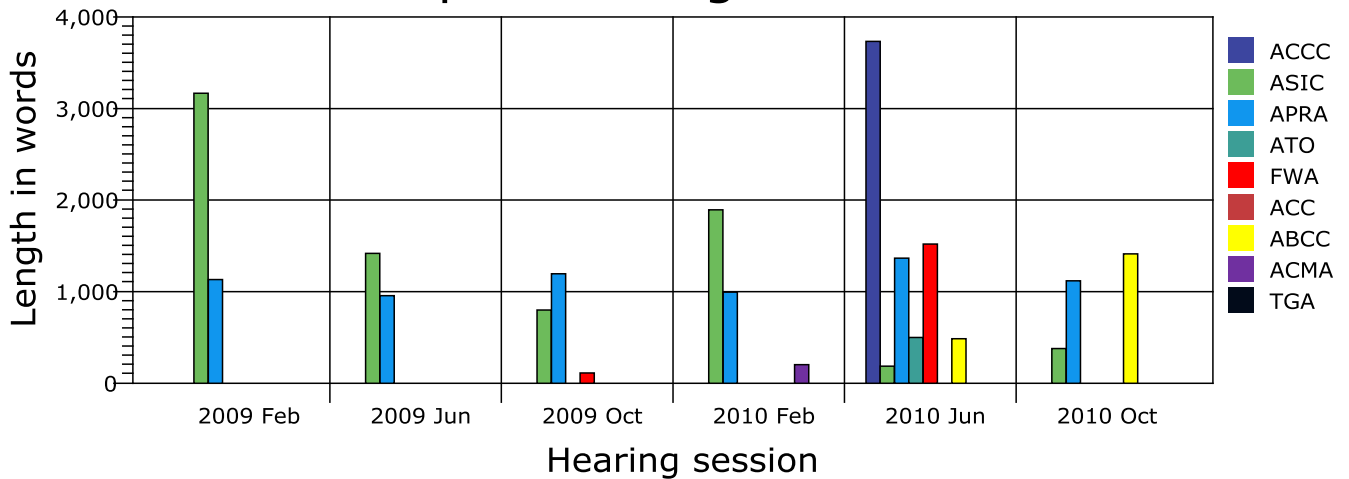
The October Hearings are considered supplementary hearings so it is to be expected that the length of and use of opening statements may be shorter than for the June Estimates.

After utilising statements for the first time in June, the ACCC and ATO did not make use of statements in October. FWA also had used quite a lengthy statement in June and did not use a statement in October. Lengthy opening statements have the potential of limiting question opportunities for Senators, and, consequently, from time to time overly-long opening statements attract criticism from committee members.

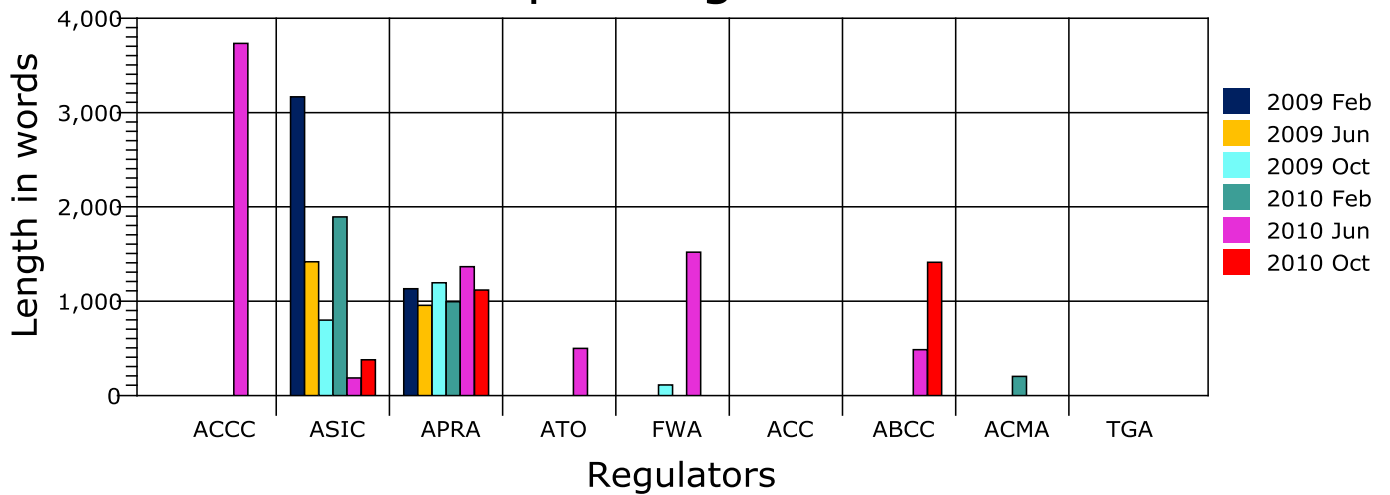
The ABCC made its longest statement yet, perhaps a reflection of its new Commissioner. ASIC had committed in June to shorter statements and this was reflected in its much shorter length of statement in October. APRA's use of statements remained much the same. The TGA has never used an opening statement and continued this in October.



Length of opening statement per hearing session



Length of opening statement per Regulator



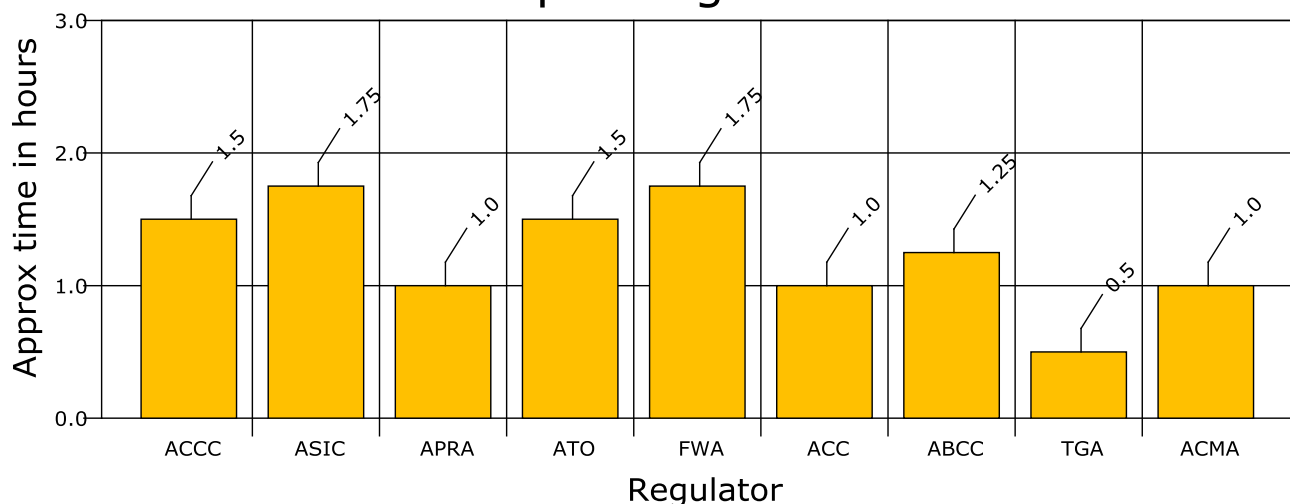
2. Allocation of time

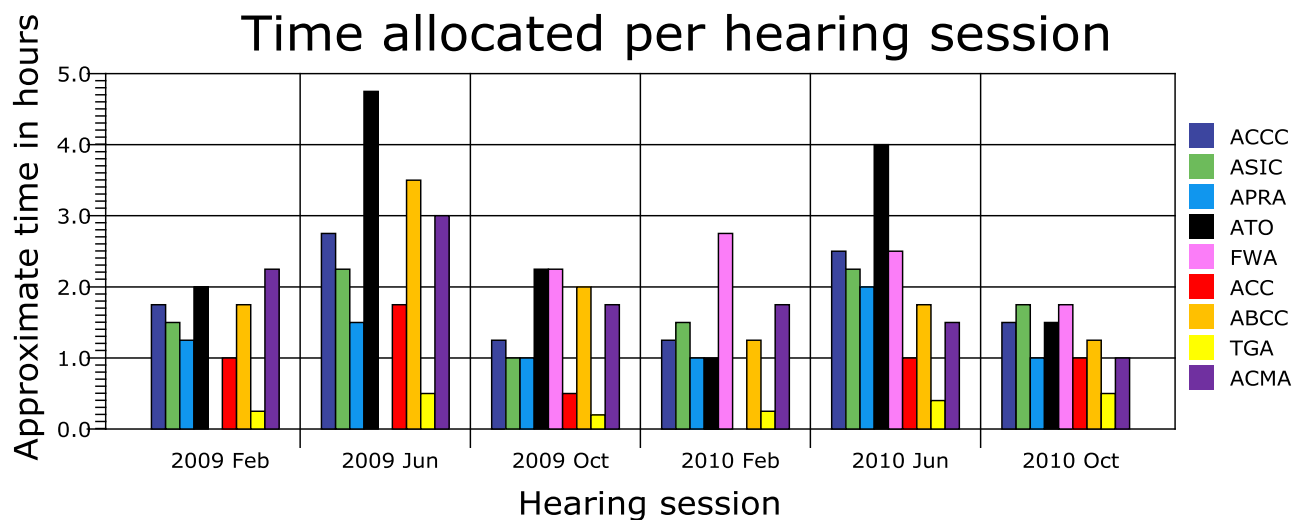
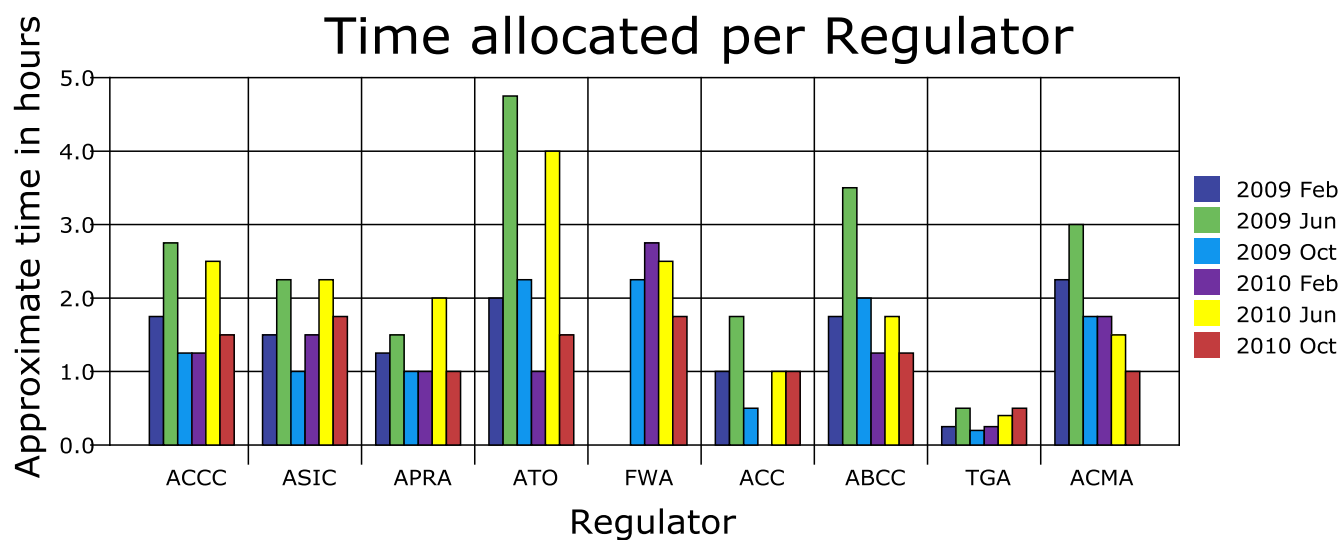
The TGA had apparently almost double the time compared with October 2009, attracting extensive questions on regulation of devices, public perception of vaccines and continual disclosure requirements. The time allocation for the TGA was difficult to identify as the end time was omitted from the transcript, so an estimate was made based on length of pages and questions. ASIC and the ACC's allocation were almost doubled also, compared with last October's hearing. In this regard the Committee focused on the matters of coercive powers, budget constraints, short selling and unfair mortgage exit fees in relation to ASIC and on deficiencies in procurement processes defined in the ANAO report, resourcing and the Fusion Centre in relation to the ACC.

The ABCC lost quite a significant amount of time compared with last October, and they had also lost time in the June hearing compared to June 2009. The ACMA also had their time halved, and the ATO appears to have lost time although as usual they shared their time allocation with Treasury, rendering it difficult to judge their total time allocation.

APRA maintained its time allocation and the ACCC were allocated slightly more than in October 2009. FWA's start time was not recorded in the transcript, so its total time was estimated and it appeared to have had a shorter hearing than for October 2009.

Time allocated per Regulator: October 2010



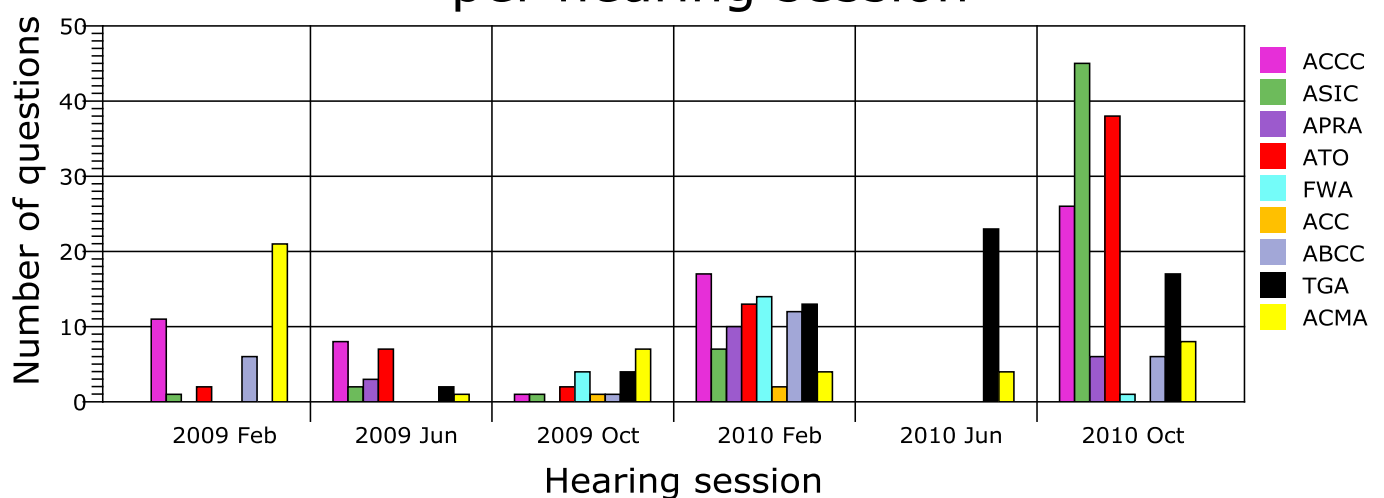


3. Written questions on notice

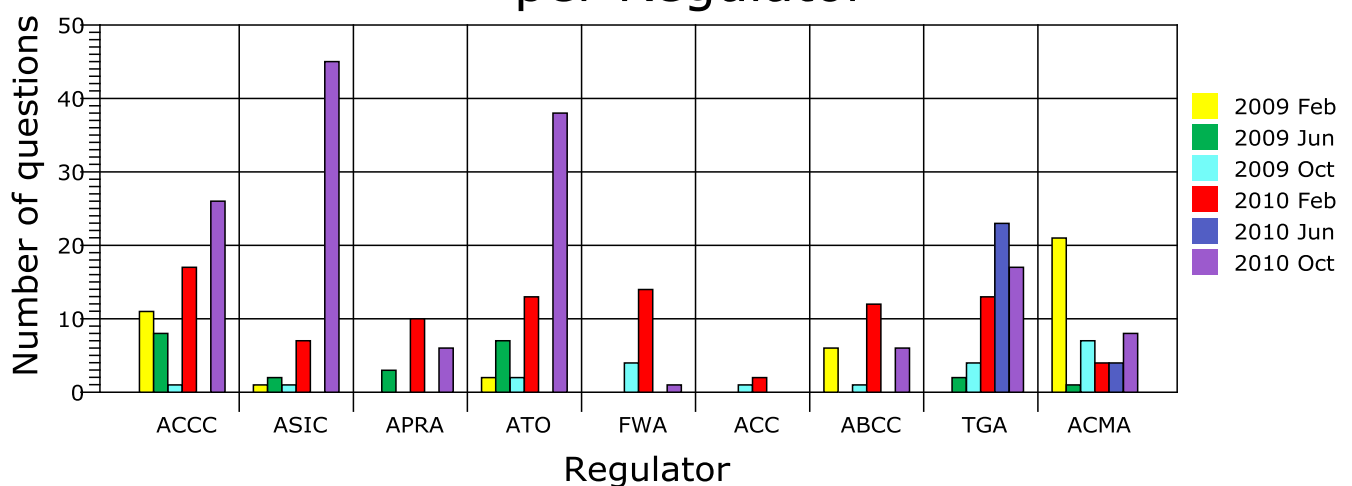
October 2010 had a substantial increase for written questions on notice for the ATO, ASIC and the ACCC.

The TGA received several written questions as usual. Given its short time allocation, this is not surprising, although they did receive more time than in October 2009.

Number of written questions on notice:
per hearing session



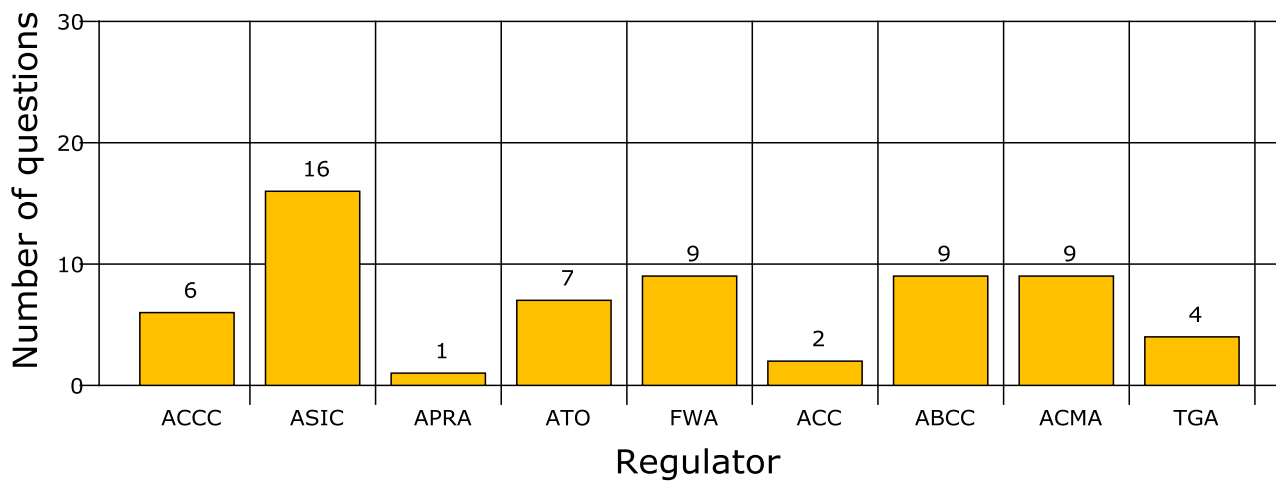
Number of written questions on notice:
per Regulator



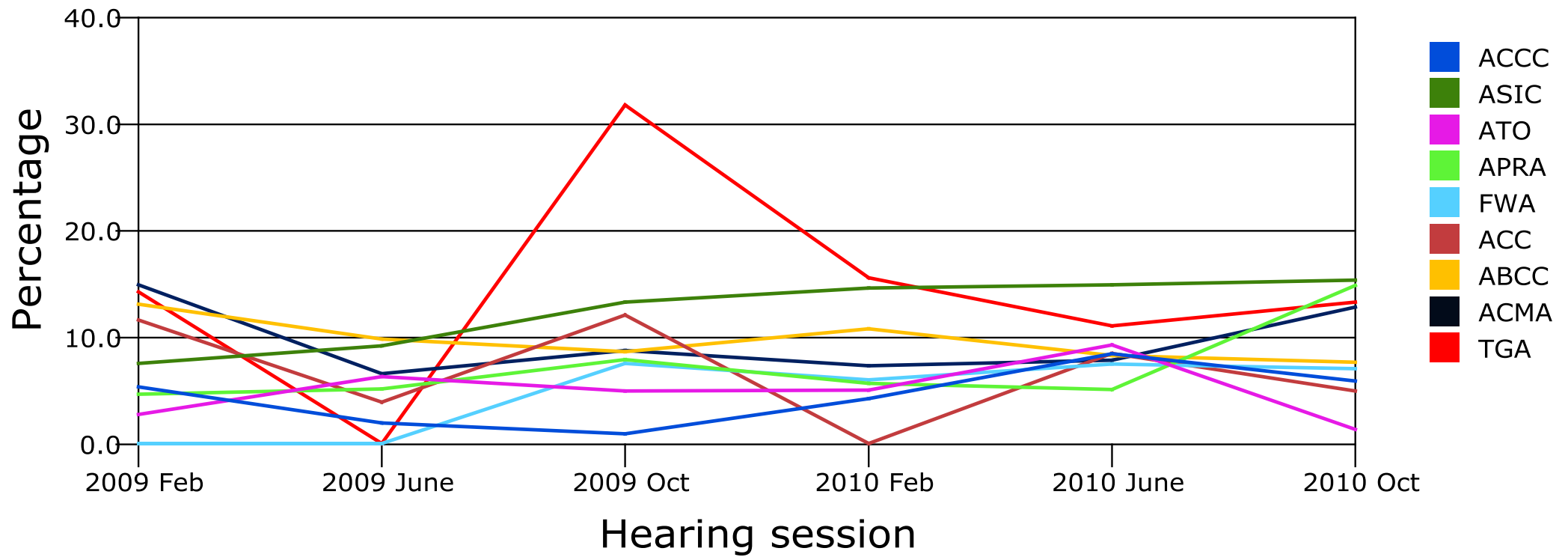
4. Differences in rate of taking on notice

FWA took the most questions on notice during October, followed by the ABCC. ASIC, APRA and the TGA continued to have the highest percentages of questions asked which they took on notice.

Questions taken on notice during hearing: October 2010



Percentage of questions taken on notice



5. Timing of answers to questions taken on notice

The Committees required answers by **10 December 2010** with the exception of the Senate Standing Committee on Environment and Communications which examines ACMA, who required their answers on **3 December 2010**. The Legal & Constitutional Affairs Committee also required their answers on 3 December but the ACC was not called to provide answers for questions taken on notice this hearing session.

RoLIA commends the Committees surveyed for providing the dates of receipt of answers, a relatively new addition, and for providing extensive indexes of questions. The answers are now presented in a uniform format across the Committees, ensuring easy analysis and cross referencing. At the end of this section RoLIA has now been able to produce graphs for the June 2010 and February 2010 submission of answers to questions on notice. Some regulators were not able to be included in the earlier graphs due to their Committees not giving dates or not defining whether the answer came from the regulator or from the outcome it is managed under. The ACC did not have any published answers for the three hearing sessions studied.

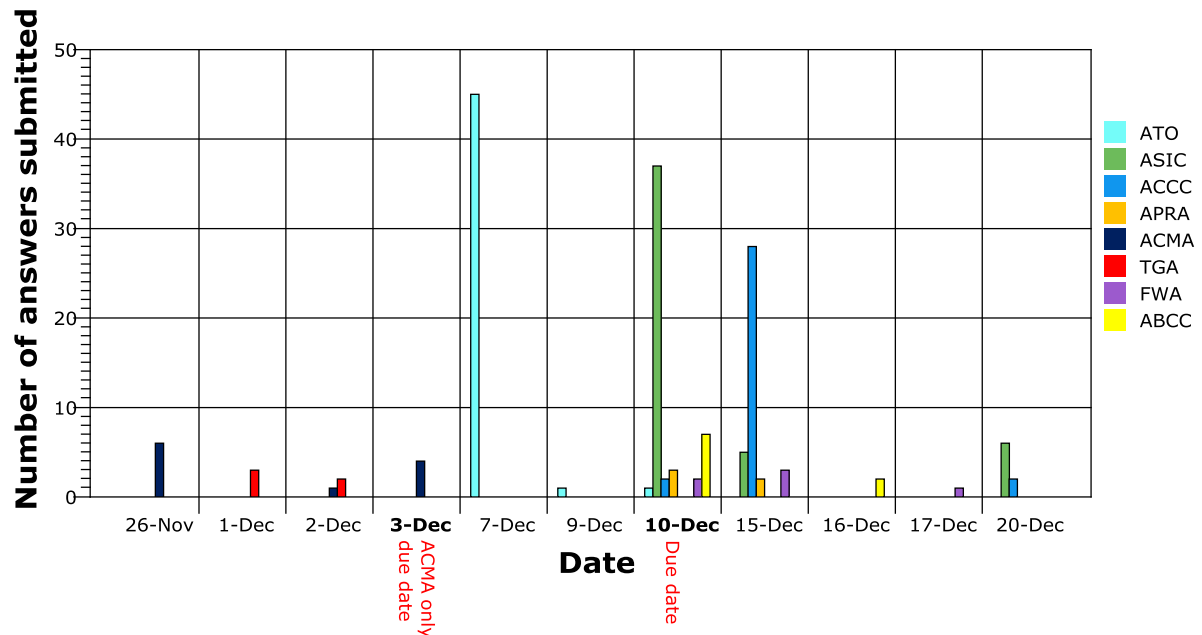
The graph below shows the dates answers were submitted to the Committee. At writing date (18 January 2011) several answers still had not been submitted with the following agencies still needing to answer questions:

- ACMA (2 unanswered questions)
- ASIC (14)
- APRA (1)

The ATO and TGA were the only agencies to submit all answers on or before the due date for the October 2010 hearing session.

During the October hearings session, several agencies were asked to explain lateness of submitting answers to earlier hearing sessions' questions on notice. ASIC has not yet submitted its answer to this question and Treasury, who undertook to investigate lateness of APRA answers, has also not submitted their answer. The ATO provided an answer on lateness which can be read in the 'Rule of Law Vignettes' section of this report.

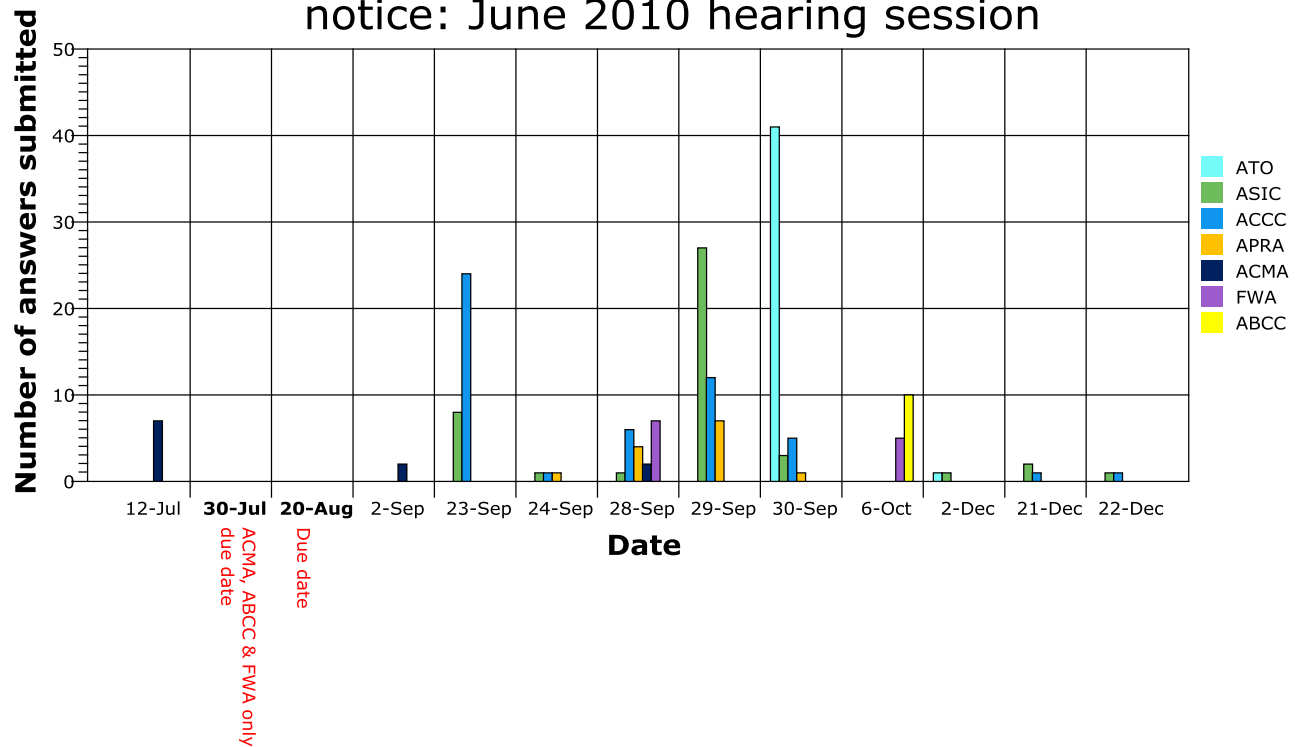
Submission dates of answers to questions on notice:October 2010 hearing session



Questions from October 2010 with answers still outstanding at 18 January 2011:

Agency	Question number	Question content
APRA	SBT 15	Business lending
ASIC	SBT 9	ASIC Guidelines
	SBT 11	ASIC Guidelines
	SBT 21	LKM Capital
	SBT 22	Section 420A
	SBT 24	Phoenix
	SBT 31	Managed Investment Schemes
	SBT 64	Late answers to questions on notice
	SBT 67	Consultation paper related to Mortgage Exit Fee
	SBT 69	Cooper Review
	SBT 141	Election Commitments
	SBT 190	Short Selling Ban
	SBT 196	Claims lodged with ASIC RE unfair contracts
	SBT 197	Supervision of market lending
ACMA	38	Referrals to rate online content
	43	Voluntary euthanasia content

Submission dates of answers to questions on notice: June 2010 hearing session

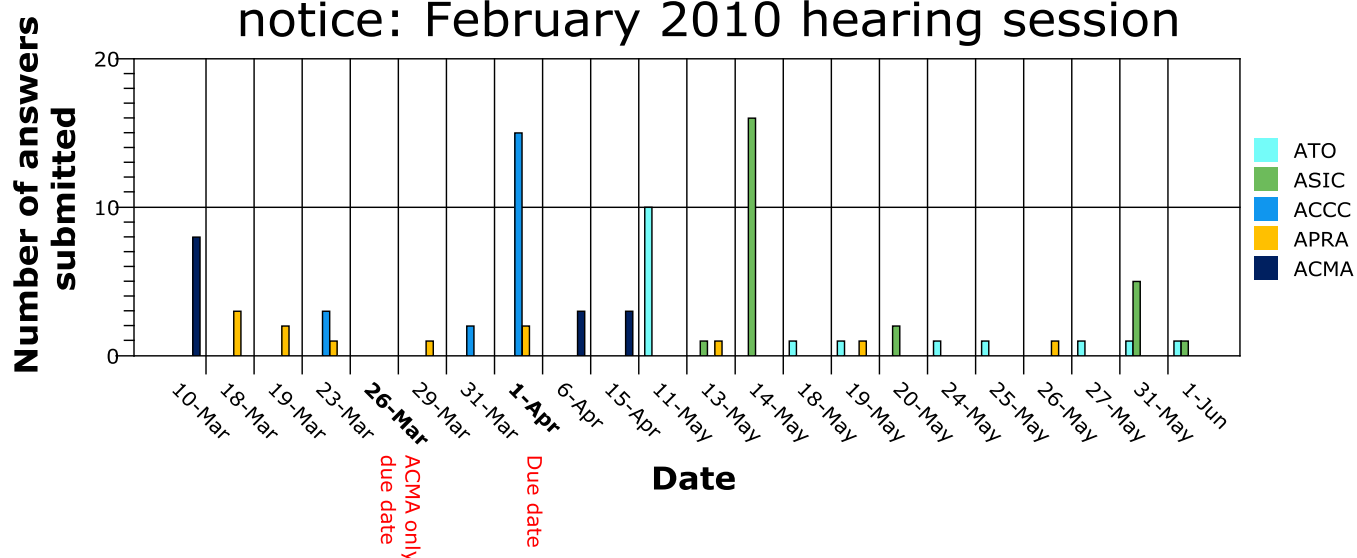


Questions from June 2010 with answers still outstanding at 18 January 2011:

Agency	Question number	Question content
ASIC	BET - 336	Frozen Funds # 3
ACCC	BET - 294	Petrol
	BET - 221	Unit pricing code of conduct
	BET - 76	Petrol Pricing

The June 2010 hearing session answers for all Committees were late for all regulators, with only ACMA submitting answers before the due date. In the case of the Economics Committee, regulators were given an extra 20 days to submit answers because of the Government caretaker period. The date in the graph, 20 August 2010, is the updated date after the extension was given.

Submission dates of answers to questions on notice: February 2010 hearing session



There are no questions outstanding for the February 2010 session. The ACCC was the only regulator to submit all of their answers on or before the due date in the February 2010 session. The ACMA and APRA also submitted answers before the due date but several of their answers were late.

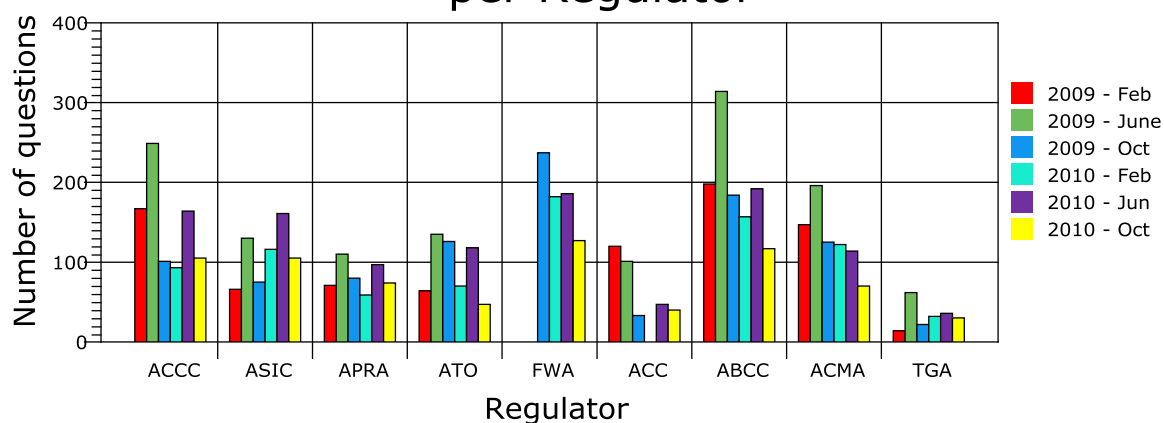
6. Differences in rate of questions asked

ACMA took approximately half the questions compared to October 2009, and this is in all likelihood the result the halving of its time allocation. The ABCC experienced a similar drop in questions.

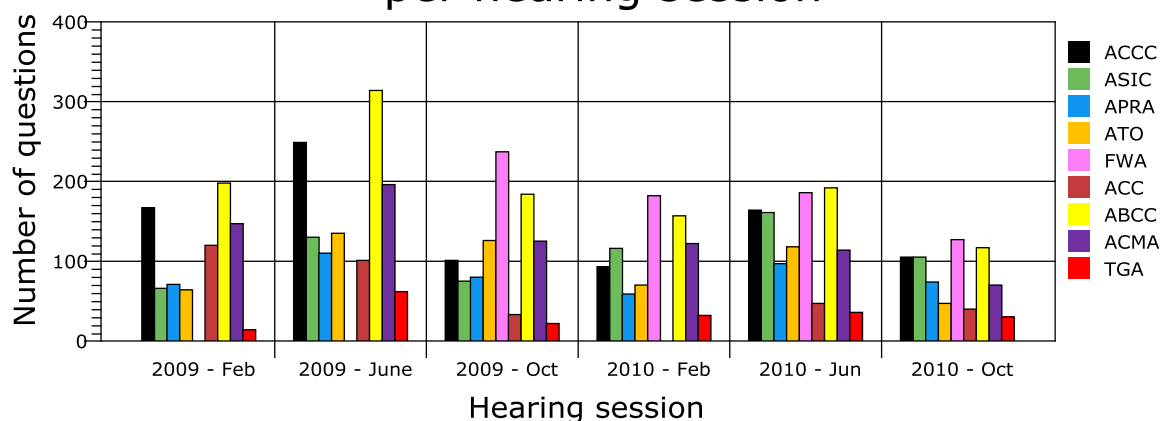
The TGA's increase in questions is likely explained by its increase in time allocated, as is ASIC's increase. APRA's question numbers remained similar to October 2009 which fits the fact they had similar time allocation, as does the ACCC's slight increase in questions fit their slight increase in time.

FWA's number of questions declined by almost 50 per cent. The ATO also experienced a substantial reduction in questions compared to last year.

Number of questions asked of each Regulator:
per Regulator



Number of questions asked of each Regulator:
per hearing session

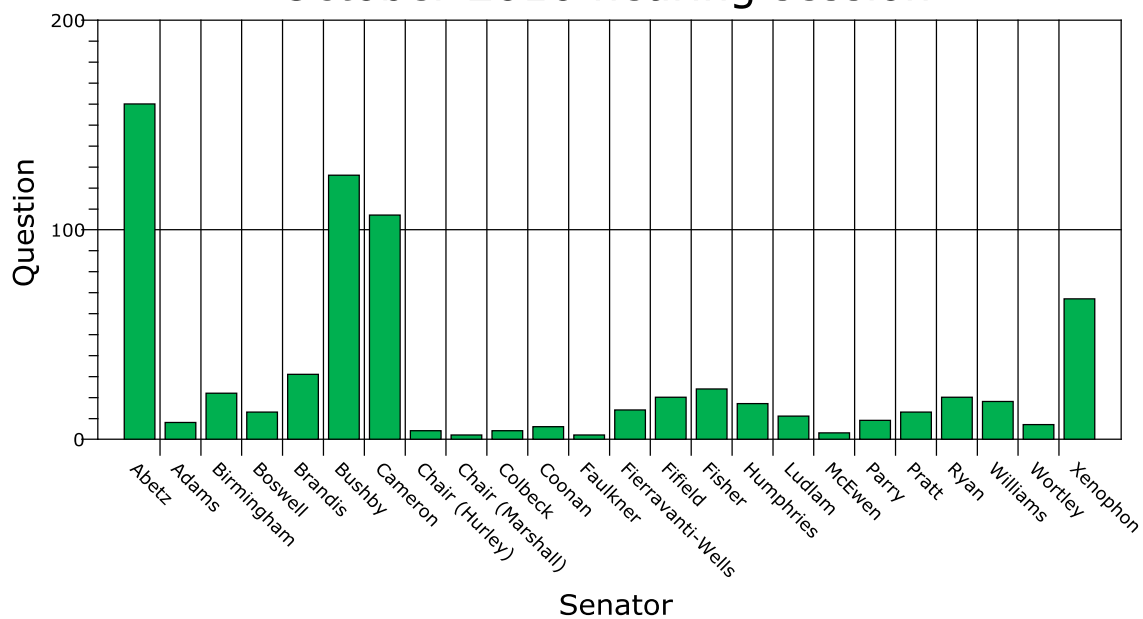


7. Total Senator questions

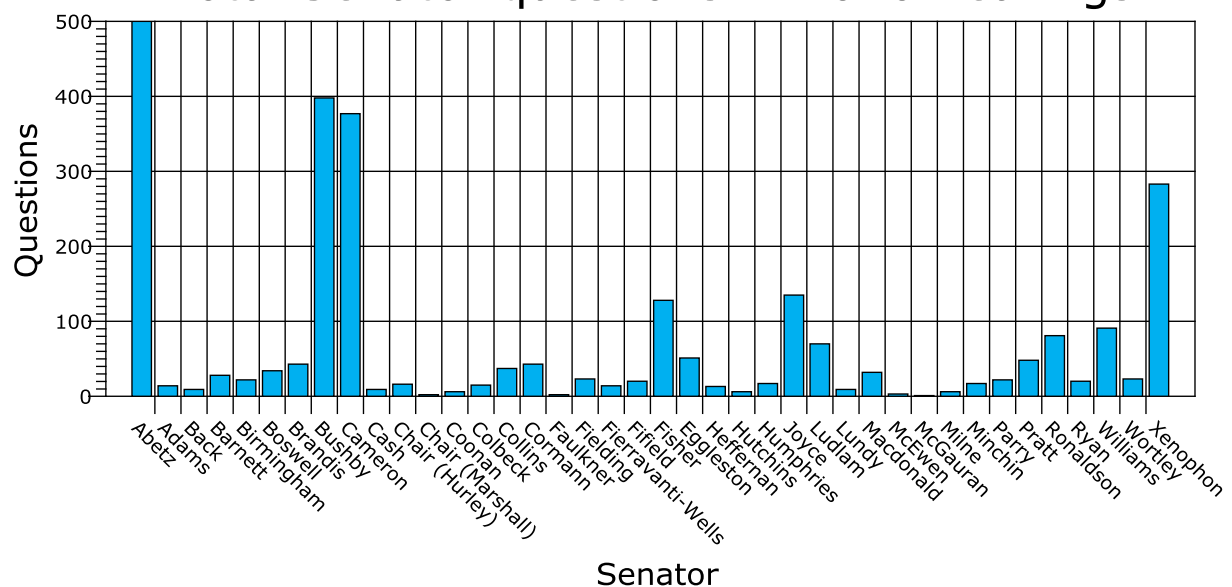
In October the Senator who asked the most questions of the surveyed regulators was Senator Abetz, followed by Senators Bushby, Cameron and Xenophon in that order. The 2010 overall graph has these same Senators in the same order leading the questioning.

The 2009 overall graph had different results with Senator Bushby leading the questioning in 2009, followed by Senators Joyce, Brandis and Cameron in that order. So in essence four Senators have major carriage of scrutiny for our regulators.

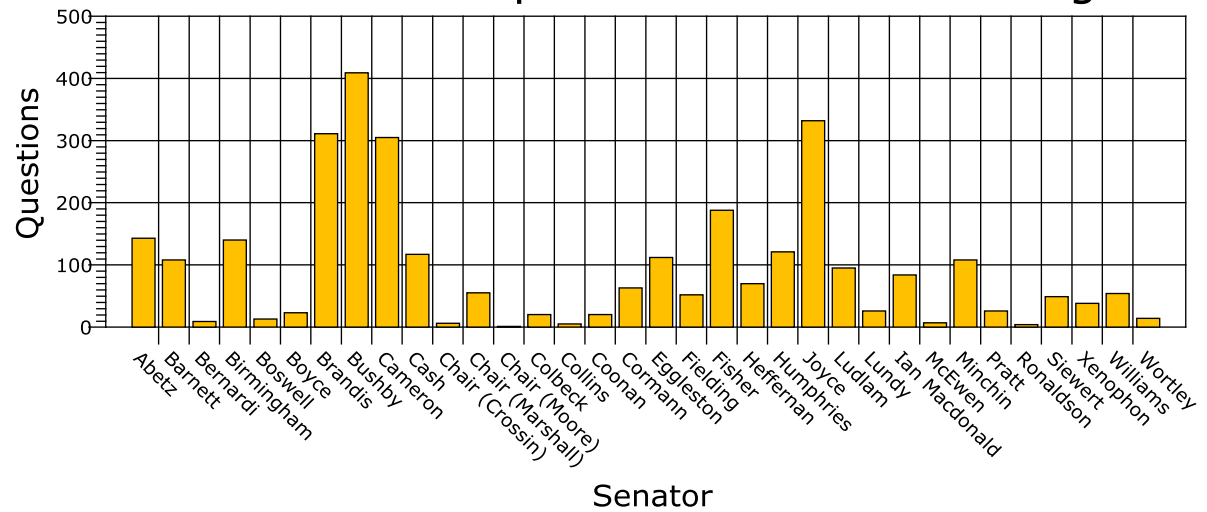
Senators who asked questions in
October 2010 hearing session



Total Senator questions in 2010 hearings



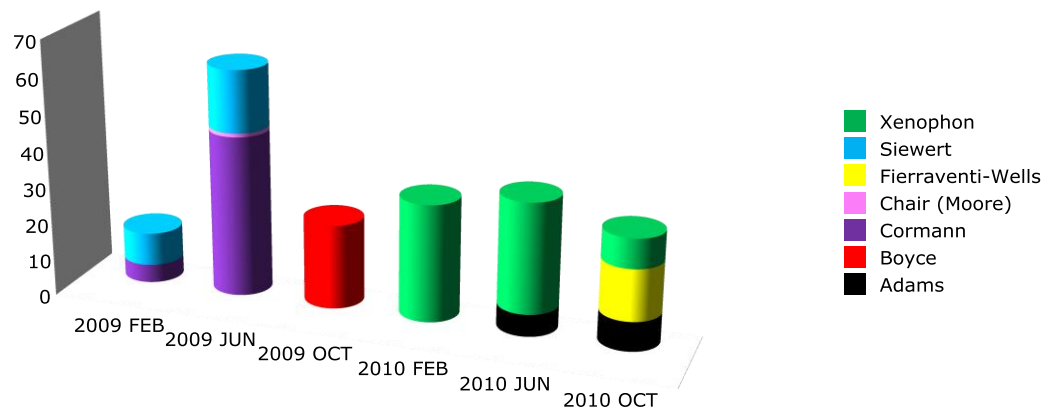
Total Senator questions in 2009 hearings



8. Which senators focus on which regulators

Senators who question the TGA

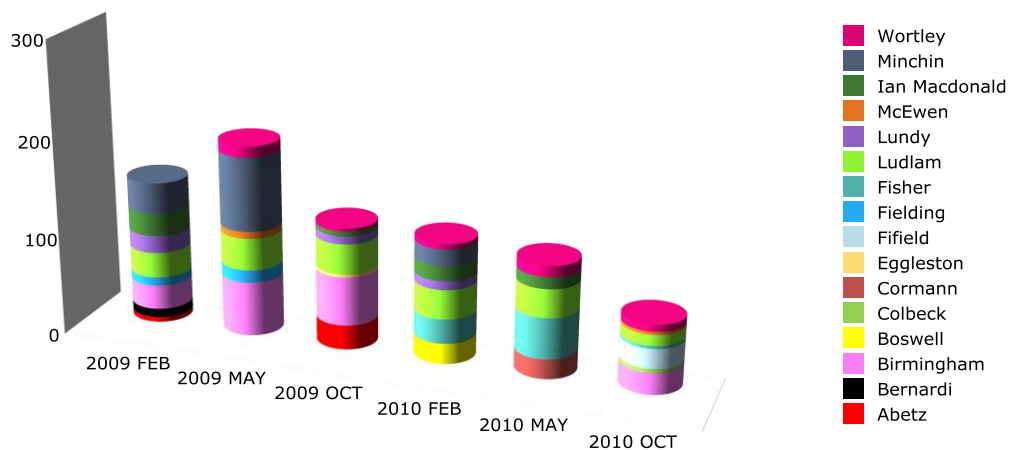
Number of questions



	2009 FEB	2009 JUN	2009 OCT	2010 FEB	2010 JUN	2010 OCT
Adams	0	0	0	0	6	8
Boyce	0	0	23	0	0	0
Cormann	5	44	0	0	0	0
Chair (Moore)	0	1	0	0	0	0
Fierraventi-Wells	0	0	0	0	0	14
Siewert	9	17	0	0	0	0
Xenophon	0	0	0	32	30	8

Senators who question the ACMA

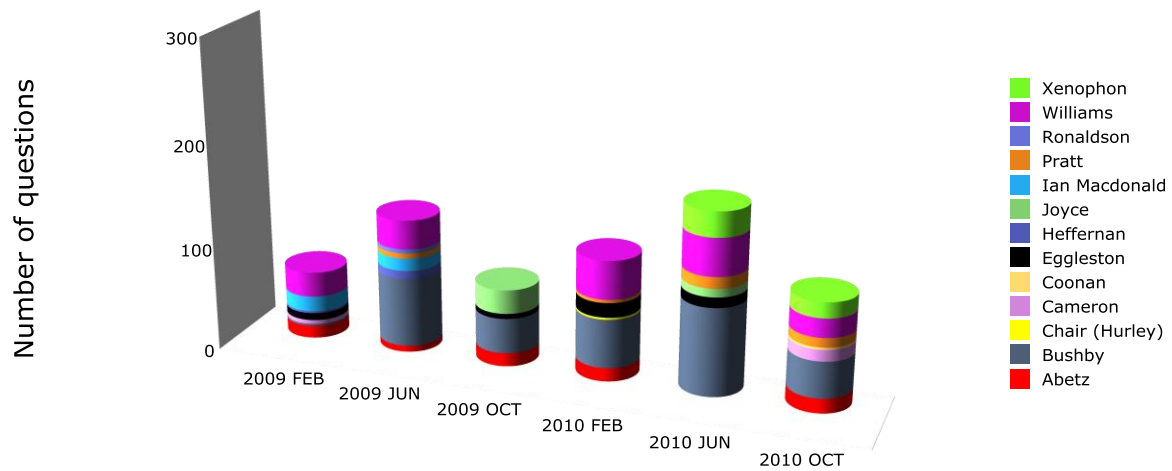
Number of questions



Hearing session

	2009 FEB	2009 MAY	2009 OCT	2010 FEB	2010 MAY	2010 OCT
Abetz	5	0	25	0	0	0
Bernardi	9	0	0	0	0	0
Birmingham	25	56	50	0	0	22
Boswell	0	0	0	21	0	0
Colbeck	0	0	0	0	0	4
Cormann	0	0	0	0	20	0
Eggleston	0	0	3	0	0	0
Fifield	0	0	0	0	0	20
Fielding	9	13	0	0	0	0
Fisher	0	0	0	25	42	3
Ludlam	26	33	31	30	29	11
Lundy	18	0	8	9	0	0
McEwen	0	7	0	0	0	3
Ian Macdonald	23	0	5	15	12	0
Minchin	32	76	0	17	0	0
Wortley	0	11	3	5	11	7

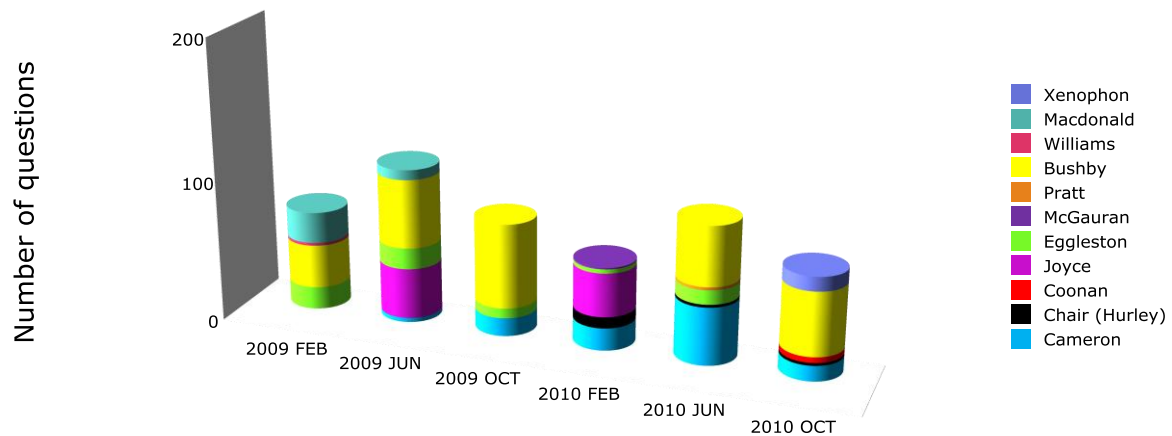
Senators who question ASIC



Hearing session

	2009 FEB	2009 JUN	2009 OCT	2010 FEB	2010 JUN	2010 OCT
Abetz	12	6	13	13	0	14
Bushby	2	67	34	47	85	35
Chair (Hurley)	0	0	0	2	0	0
Cameron	4	0	0	0	0	11
Coonan	0	0	0	0	0	2
Eggleston	7	0	5	14	10	0
Heffernan	2	8	0	0	0	0
Joyce	0	0	23	0	8	0
Ian Macdonald	15	12	0	0	0	0
Pratt	0	5	0	3	11	9
Ronaldson	0	4	0	0	0	0
Williams	24	28	0	37	36	18
Xenophon	0	0	0	0	24	15

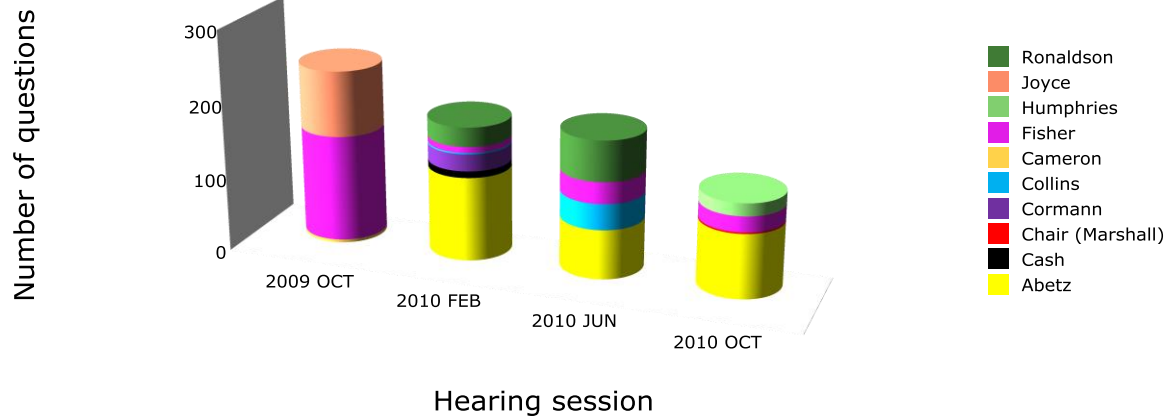
Senators who question APRA



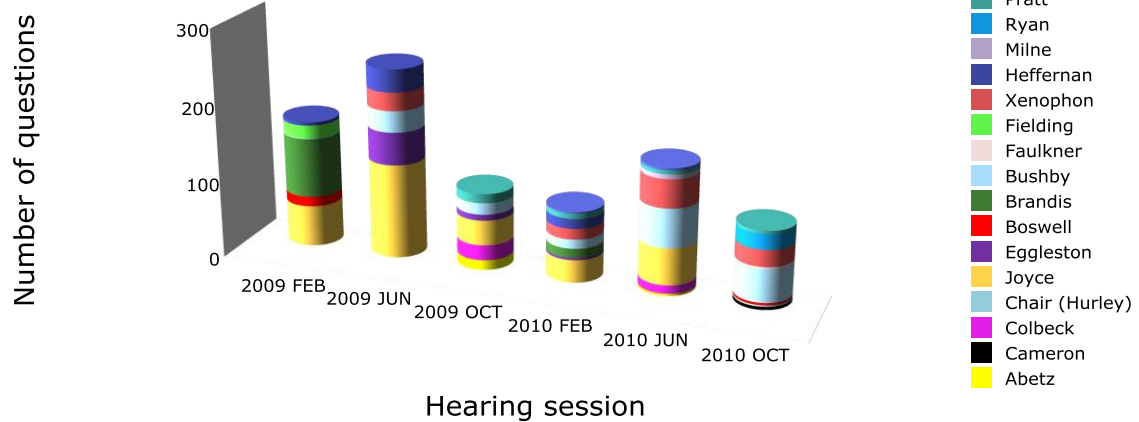
Hearing session

	2009 FEB	2009 JUN	2009 OCT	2010 FEB	2010 JUN	2010 OCT
Cameron	0	3	13	16	41	11
Chair (Hurley)	0	0	0	8	2	2
Coonan	0	0	0	0	0	4
Joyce	0	36	0	31	0	0
Eggleston	16	15	7	3	10	0
McGauran	0	0	0	1	0	0
Pratt	0	0	0	0	2	0
Bushby	31	49	60	0	42	45
Williams	2	0	0	0	0	0
Macdonald	22	7	0	0	0	0
Xenophon	0	0	0	0	0	10

Senators who question FWA

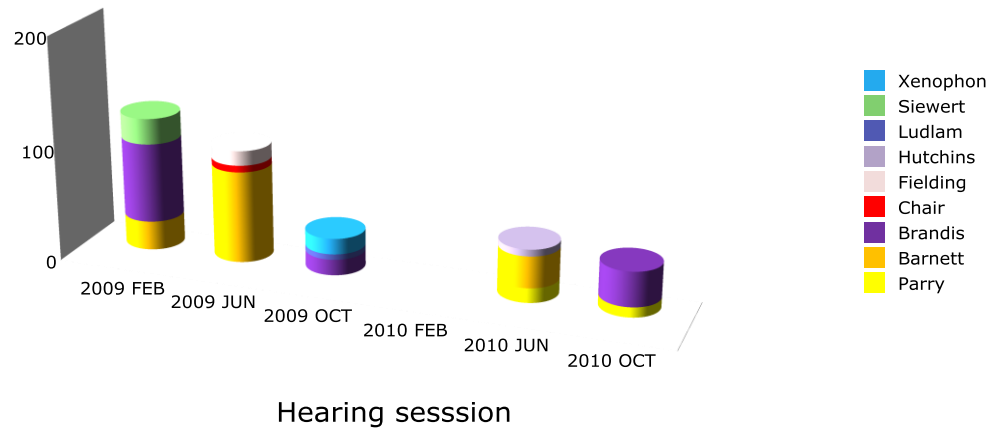


Senators who question the ACCC



Senators who question the ACC

Number of questions

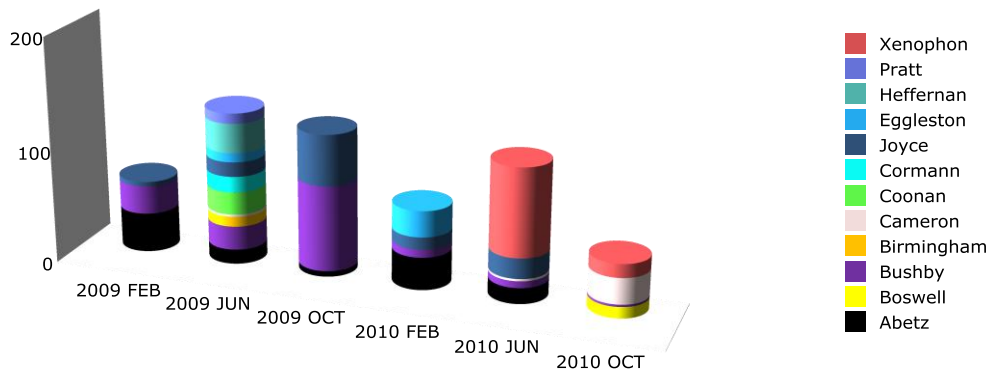


Hearing session

	2009 FEB	2009 JUN	2009 OCT	2010 FEB	2010 JUN	2010 OCT
Parry	0	0	0	0	13	9
Barnett	26	82	0	0	28	0
Brandis	71	0	14	0	0	31
Chair	0	6	0	0	0	0
Fielding	0	13	0	0	0	0
Hutchins	0	0	0	0	6	0
Ludlam	0	0	5	0	0	0
Siewert	23	0	0	0	0	0
Xenophon	0	0	14	0	0	0

Senators who question the ATO

Number of questions

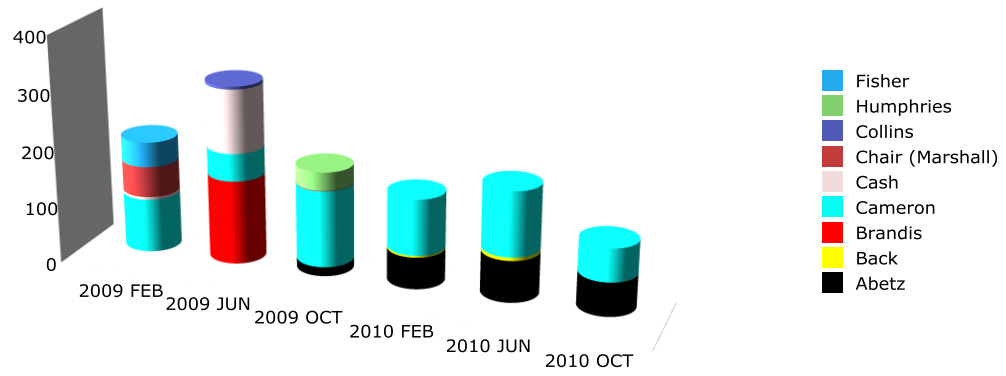


Hearing session

	2009 FEB	2009 JUN	2009 OCT	2010 FEB	2010 JUN	2010 OCT
Abetz	35	13	5	29	14	0
Boswell	0	0	0	0	0	10
Bushby	25	21	76	7	6	2
Birmingham	0	9	0	0	0	0
Cameron	0	2	0	0	2	23
Coonan	0	20	0	0	0	0
Cormann	0	14	0	0	0	0
Joyce	4	13	45	11	18	0
Eggleston	0	8	0	23	0	0
Heffernan	0	26	0	0	0	0
Pratt	0	9	0	0	0	0
Xenophon	0	0	0	0	78	12

Senators who question the ABCC

Number of questions



Hearing session

	2009 FEB	2009 JUN	2009 OCT	2010 FEB	2010 JUN	2010 OCT
Abetz	0	0	16	56	73	59
Back	0	0	0	3	6	0
Brandis	0	148	0	0	0	0
Cameron	95	49	135	98	113	58
Cash	5	112	0	0	0	0
Chair (Marshall)	54	0	1	0	0	0
Collins	0	5	0	0	0	0
Humphries	0	0	32	0	0	0
Fisher	44	0	0	0	0	0

RECOMMENDATIONS

LATE ANSWERS

Again RoLIA has identified the fact that our regulators are experiencing difficulties in complying with Senate orders in respect of timeliness. This provides little comfort to those who are subjected to regulator requests for information, which are often accompanied by inflexible deadlines and punishment for non-compliance. The problem applies to all regulators, who have all missed the deadlines on at least 2 of the 3 rounds of Estimates hearings under survey.

In fairness, however, mention should be made of the ATO who had all their answers for October 2010 in on time, as did the TGA. The ACMA would have had all their answers in on time had they not failed to turn in two answers, which at 19 January 2011 still had not been submitted. ASIC, who has 14 questions still outstanding at 19 January 2011, including a question asking them for an explanation for lateness in submitting answers for the June 2010 session, continues to experience a tardiness problem.

The June 2010 round saw every regulator experiencing a lateness problem, with only the ACMA submitting any answers before the due date. Many answers were late by several months, the latest being over three months from the due date. There are still a few answers yet to be submitted.

Special mention for the February 2010 session needs to be made of ACCC who were the only regulator to have had all their answers in on time.

RECOMMENDATION

RoLIA recommends that the Senate require agencies and departments to maintain a register of compliance with Senate Orders, including compliance with Orders relating to Estimates questions taken on notice, and that the register be published in each Annual Report.

RULE OF LAW VIGNETTES

APRA –LATE ANSWERS TO QUESTIONS ON NOTICE - SENATE ECONOMICS COMMITTEE
– WEDNESDAY 20 OCTOBER 2010 – E109

Senator BUSHBY—I thank the officers from APRA who are assisting us tonight. I have a couple of questions about questions on notice. We have had a lot of problems with questions on notice from a lot of agencies and, unfortunately, APRA is one of the ones that has been a bit slow. I am wondering: why did APRA fail to submit the answers to the questions on notice before the due date, even though the date was actually pushed back from 30 July to 20 August?

Dr Laker—I am not aware that we missed the due date in providing them to the Treasury, but I am not sure what happens after that.

Senator BUSHBY—That was my next question.

Dr Laker—I do not see those after they leave APRA.

Senator BUSHBY—So you are saying that, to the best of your knowledge—and I would appreciate you letting me know if it is any different—you would have prepared and supplied answers to all questions that were taken on notice to the Treasury by the due date?

Dr Laker—In the absence of specific knowledge about particular questions, I can only tell you that answers to questions on notice come to me for a final sign-off, and our secretary is quite diligent in making sure they go off by the due date.

Senator BUSHBY—You send them to Treasury, you do not send them to—

Dr Laker—I do not know what happens once I sign them off as far as how quickly they then become entered into *Hansard*.

Senator BUSHBY—Are you aware of where they go from you? Do they go to the Treasury?

Dr Laker—They would normally go to the Treasury.

Senator BUSHBY—Okay.

Dr Laker—Many of the questions on notice are part of broader questions for Treasury agencies and sometimes for the whole-of-government agencies, and we feed information into that. But if there were specific questions that got to you late, I would be happy to respond to that.

Senator BUSHBY—I admit that I am not asking you only. I am asking a number of agencies, as many as I can, because the record from the June estimates across the board was not very good. In fact, we have still been receiving a lot of them in the last seven days. I do not actually have it in front of me but I think, from memory, some of yours came in late September. If what you say is the case, it is probably because they have been held up elsewhere, and I would like to understand where they have been held up.

Dr Laker—I cannot confirm or deny that because I am not sure what the track record is. All I can say is that our secretary would be mortified to think that she had not met the timelines, because she is very strict on those.

Senator Sherry—Senator, As Dr Laker has indicated it, and I know APRA have a good record of providing answers, perhaps I should take on notice the date in which they were received in the minister's office. That would indicate where any hold-up occurred. Secondly, as I have said in a previous estimates, I do not believe it is satisfactory that answers to questions on notice have been late. However, I would point out there was an election and some weeks before there was government formed, so that—

Senator BUSHBY—I understand that. There was advice from the Clerk of the Senate, though, that an election intervening should not impact on the obligation of departments to comply. The date it was extended to was 20 August, which was before the election. Originally it was 30 July.

Senator Sherry—Well it should not impact, but I would certainly contend that, given there was an election and an unusually lengthy period before there was a government formed, that would have been a factor. Beyond that, as I said at the previous estimates, I do not believe it is satisfactory but I will take on notice to check the date in which they arrived in the appropriate Treasury minister's office. I am assuming APRA and Dr Laker, as in the past, passed them on by the due time. You can then identify where the hold-up occurred.

Senator BUSHBY—I am just glancing through them here. A lot of them were on time from APRA.

Without having a good look—there are four hundred and something of them—I cannot pick the ones that were not. Certainly some of them were and some of them were not.

Dr Laker—All I can say Senator, is that we take those timetables very seriously.

ACCC – SENATE ECONOMICS COMMITTEE – THURSDAY 21 OCTOBER 2010 – GRAEME SAMUELS & DFO – E26-E28

CHAIR—Thank you, Mr Samuel. Can you go into when you became aware of problems arising with the DFO group and when you excused yourself from any association with the NAB-AXA transaction since the NAB were, I understand, involved in those financing arrangements.

Mr Samuel—I became aware that there were some difficulties with the DFO group probably—look, I do not have an exact record, but it would have been sometime in June or July this year. As to NAB's involvement, again I do not have an exact recollection but I think that would have been sometime in July. I cannot give you an exact recollection of that.

Senator XENOPHON—But you would have documents or notes that would be able to pinpoint that time?

Mr Samuel—No, I do not have them because they were not the subject of communications with me as to when—the communications were on—I think I received—I am trying to recall, but there were no documents that advised me of that. It was an oral communication.

Senator XENOPHON—You would have made a note of a phone call or anything like that?

Mr Samuel—I did not make any notes. I received an oral communication that NAB were involved. The involvement of NAB was indicated to me as being a member of a syndicate of a large number of lenders and related to the group in which my family had no involvement at all. The indication was that my family interests had no relevance at that point in time to any discussions or negotiations that were occurring with the syndicate in endeavouring to resolve some of the financial difficulties of the DFO group. Then I can bring you to the time when I became aware that my family interests might have had some relevance to those discussions, which is—

Senator XENOPHON—You would know that date though?

Mr Samuel—Yes, I have managed to establish that date. It was just prior to the weekend of 14 and 15 August. As soon as I became aware—and I became aware again through oral communications—that my family interests may be becoming relevant to the discussions that were occurring with the lenders, although they were not, as I understand it, directly involved in those discussions, that was the point in time at which I then communicated to Mr Cassidy my concerns about my continuing involvement in the NAB-AXA matter.

He can perhaps take it on from there.

Senator XENOPHON—And then that went to the minister?

Mr Cassidy—No, there was a fair bit of press, particularly on Sunday, 15 August, that there were actually negotiations occurring between the DFO interests and the banks, including the National Australia Bank. So on the Monday morning the chairman suggested that perhaps I should speak with the chief executives of both the National Australia Bank and AXA, the two parties who were involved in the merger transaction, to ascertain their attitude to the chairman continuing to be involved. I did that during the course of Tuesday, 17 August. I spoke to Mr Cameron Clyne, the Managing Director of National Australia Bank, and Mr Andy Penn, who is the CEO of AXA.

I made notes on these discussions which I know have been released under FOI requests. When I spoke to Mr Clyne from the National Australia Bank he was not actually aware of the National Australia Bank's involvement in the DFO. When I explained to him my understanding from the press reports, his comments were, 'That would be a standard syndicated loan which we are probably a part of.' He indicated, as did Mr Penn, after checking with others at AXA, that they were both quite relaxed about the chairman continuing to be involved in consideration of the NAB-AXA matter. I relayed that to the chairman and, as I said, recorded it in notes that could be filed.

During the course of that day the chairman considered the matter further. On the morning of Wednesday the 18th—and the commission normally meets on a Wednesday—the chairman informed the commission at the outset of the meeting of what had happened. I informed them of my discussions with Mr Penn and Mr Clyne. The chairman indicated to the commission that, notwithstanding those discussions and what had been said, he thought it would be in the best interests of the commission and its consideration of the NAB-AXA matter, and indeed the best interests of the parties involved in the DFO negotiations, if he recused himself from any further involvement in the consideration of the NAB-AXA matter.

The chairman then excused himself from the commission meeting. Mr Kell, one of our two deputy chairs, assumed the chairmanship of the meeting. The commission considered the chairman's decision in his absence and decided that they agreed with the position that the chairman had taken. Shortly after that the two entities involved, NAB and AXA, were informed that the chairman had decided to recuse himself from any further consideration of the matter and the commission issued a short press release indicating that that decision had been made by the chairman and that the commission supported that decision.

Senator XENOPHON—So the commission was advised and the minister was advised as well at that time?

Mr Cassidy—I did not personally speak to the minister. Given that the chairman had decided that he was recusing himself from the matter, we put out a press release to that effect. I think I took the view that everyone had therefore been informed that that was the case.

Senator XENOPHON—You understand that it has been an issue in the public domain and it would be remiss of us not to properly ask questions about this.

ASIC –STORM FINANCIAL - SENATE ECONOMICS COMMITTEE –SB 26& SB 27

Senator Williams asked:

How much has the investigation into the collapse of Storm Financial cost do far?

ANSWER:

As at 31 October 2010, the cost of ASIC's investigation into the collapse of Storm Financial amounted to approximately \$20.5 million.

Senator Williams asked:

How many staff have been involved full time on the investigation?

ANSWER:

The number of ASIC staff who have been involved full time in ASIC's investigation has changed from time to time. There are currently approximately 20 ASIC staff members working full time on this matter, together with approximately 40 ASIC staff who undertake work in relation to Storm Financial as required in addition to other commitments.

ASIC-COERCIVE POWERS - SENATE ECONOMICS COMMITTEE - THURSDAY 21 OCTOBER 2010 - E25 TO E26

Senator BUSHBY—I would like to ask some questions about coercive powers. Last estimates I asked you some questions about your use of legislatively granted corrosive powers and the internal policies you have surrounding their use, and I note that answers to how often some of those powers have been exercised have now been provided. But I do not recall seeing anything in those answers about your thoughts in response to the question on whether you need to extend the record keeping and the transparency around the use of those powers. Do you have any thoughts on that now?

Mr D'Aloisio—We take the use of coercive powers seriously, because you are balancing public interest and individual rights, and we need to balance the use of those powers in the range of investigations that we have. In the last three years, I think we have had something like 792 investigations on foot, so we have quite a wide remit. The powers, as you know, fall under two key headings: the power to examine individuals and the power to require production of documents and so on. We are hearing the debate and the issues that are being raised, and, as part of that, quite clearly I would like to talk more fully to the Rule of Law Association and also to the

law councils that are raising some issues about seeing where they are, because we do not believe the powers have been abused. We believe the powers are needed.

ASIC has itself asked our staff to prepare papers for review for us to re-examine the processes we follow and to examine whether we need to be more transparent in reporting in the way that the powers are used. So from a public interest point of view we recognise the seriousness of this issue and the need to reassure the community that there is no abuse, that we use the powers properly, that there are checks and balances in place when powers are used and that individuals have the right to claim certain privileges when they answer questions. So we see it initially as an exercise in just redoing a fresh stock take on powers that have been given to ASIC over many years since the Corporations Act has been in its current form.

Senator BUSHBY—I am pleased to hear that you are—

Mr D'Aloisio—So that is what where we are at, and we will be very pleased to report further to you in future meetings about what we have done and what the outcome of those discussions has been. In providing the figures to you that we provide, we are well aware of the fact that when you see those sorts of numbers you say 'that is a lot of notices', but when we go into the complexity of the cases, the number of people we need to see, the evidence that is needed in running a case and the actual probity of that evidence that is needed to stand up to cross examination, the use of these powers is very important for ASIC discharge its functions.

Senator BUSHBY—I am pleased to hear that you are looking at the processes around it. I think the last time I asked you sort of a surprise question that did not appear—and I apologise if I am putting words in your mouth—to be something that you had thought of in terms of a process of oversight, and I am pleased to hear that ASIC is looking at that.

CHAIR—Are you still on coercive powers.

Senator BUSHBY—Yes, it will be a while before I finish on this. Currently are there any policies and procedures within ASIC to ensure internal compliance with the law and that coercive powers are only used to further the legitimate objectives of the organisation?

Mr D'Aloisio—Before an officer of ASIC can issue a notice or use a coercive power there are internal processes that have to be followed that are document in our enforcement—

Senator BUSHBY—This is for the use of all coercive powers, even the most—

Mr D'Aloisio—Yes—

Senator BUSHBY—We went through this last time, what you needed to do and I think the most commonly used one was up to the discretion of the investigator to some extent.

Mr D'Aloisio—The investigator has to make a judgement about what they need from an individual or in terms of material that has to be produced. What we say is that you make that judgement and then you have to go through a process of a form of document that is then used and needs to be settled. That becomes the request, if you like—the document of demand. In the processes leading up to that the investigator makes a judgement, a lawyer in the team generally will review that, the document will be settled, it will then be signed by the appropriate delegate and then it will be served. You cannot sort of get a bit of paper and write out, 'Please give me this'; you have to go through these processes.

Senator BUSHBY—I understand. You have these processes you need to go through.

Mr D'Aloisio—And then what comes in and how it is recorded is there as well. I am more than happy, if you like, to take it on notice and for us to outline to you just what that process is both in respect to calling individuals to come before us and calling for material. The notice needs to be used for proper investigation, but also in a lot of cases does need to be used to override possible confidentiality obligations that may exist between parties that are responding to those. So as a matter of law they are required to provide information they may regard as confidential but we do not think is confidential and it is in the public interest of the investigation that it be given to us. There are a range of reasons. As I say, we can outline those.

Senator BUSHBY—I would appreciate it if you would do that. Thank you.

ANSWER – SBT 191:

Guidance on and outline of processes in relation to s19 examinations and reasonable assistance is contained in Chapter 8 of ASIC's internal Enforcement Manual.

Chapter 6 of the Enforcement Manual provides guidance on and outlines the process for the issue of notices for the production of documents.

Power to conduct an examination (s19 ASIC Act, s253 National Consumer Credit Protection Act 2009)

The power to require a person to attend a private examination to answer questions on oath may only be used where ASIC has commenced a formal investigation, or intends to commence one. In practice, ASIC does not conduct examinations other than where there is a formal investigation on foot. The fact that a formal investigation needs to have been commenced, or is intended to be commenced (under ss13, 14 or 15 of the ASIC Act or ss247 and 248 of the National Consumer Credit Protection Act) is an important precursor to the use of this power.

A decision to commence an investigation is usually made under s13 of the ASIC Act. That section requires an ASIC officer to have reason to suspect that a contravention of the law has occurred. The decision under s13 is recorded in a file note that sets out the specific provisions suspected of having been contravened, the scope of the investigation to be conducted and a broad description of the material relied upon in formulating the reason to suspect. Decisions to commence a s13 or s247 investigation may only be made by officers responsible for an investigation who are at Executive Level 1 or higher.

Before a formal investigation is commenced a matter will have gone through a thorough assessment process (using ASIC's confidential case selection criteria) and been considered by a Senior Executive Leader as appropriate to resource for investigation. Chapter 5 of the Enforcement Manual provides guidance in respect of the circumstances in which ASIC can commence and conduct a formal investigation.

During the course of a formal investigation, the investigation team will consider whether it is necessary to formally interview people who are likely to have information materially relevant to an investigation. This is usually done after there has been a detailed review of available documentary material. The request to attend the examination is sent by notice, setting out details of the time and place and subject of the examination, and containing detailed information about the examinee's obligations and rights, including the right to have a lawyer present. In most cases, the investigator will have spoken to the examinee prior to issuing the notice to discuss the intended examination. A voluntary interview is considered as an alternative to an examination in appropriate circumstances eg, where the person to be interviewed consents and is considered to be willing to provide a statement in the future, and it is appropriate in light of the information to be obtained.

At the commencement of an examination the ASIC officer conducting the examination provides the examinee and his or her lawyer with a detailed explanation of the examinee's rights and obligations, how to claim legal professional privilege and privilege against self-incrimination. During the examination relevant documents are shown to the examinee and questions asked. The examinee and his/her lawyer have an opportunity to ask any questions, and make any statements they wish to make. There are frequent breaks in examinations. In due course, the examinee is provided with a transcript of the examination and asked to review it and sign it as a correct record of the examination.

Chapter 8 of the Enforcement Manual provides detailed guidance on the use of this power, including:

- when it is appropriate to use the power;
- how to conduct an examination;
- confidentiality obligations and who may attend an examination;
- the rights of examinees to claim legal professional privilege and privilege against self-incrimination;
- the examinee's rights to legal representation, and to fairness;
- preparation of a transcript of the examination and provision of it to the examinee; and
- use of the transcript in litigation.

There are a number of judicial decisions (where exercise of the power has been challenged) which provide guidance on the scope of this power, and these are all incorporated in the practice guidance provided to ASIC staff in the Enforcement Manual.

Powers to request documents

The powers to require production of documents may be exercised to obtain documents from an entity or an individual. They are used to enable ASIC to assess and analyse documents relevant to a regulatory function or power being exercised.

For example, if there are concerns about possible insider trading, notices would need to be issued on the person whose trades are being considered and their broker and probably employer, people who may have provided or received the inside information and their brokers and employers, the other party to the securities transactions and their broker, ASX (for trading data, official announcements and CHESSE material), and the person's bank to trace the funds received. This may amount to more than 10 notices in relation to the one discrete surveillance/investigation. More complex investigations would require a greater range of notices. Powers to require production of documents are used for analysing complaints from a member of the public, for surveillances/to test compliance, and for formal investigations of a suspected contravention. In the life of one matter notices may be issued:

- when a complaint is received by ASIC and an initial assessment of it requires further information about the particular entity/ transaction/investment being considered (ASIC issued 237 notices in the 2009-10 financial year to assist in assessing the 13,372 complaints received that year. Of those complaints, some 21% (2808) were referred for compliance, investigation or compliance);
- there appear to be concerns and for example, ASIC wants to conduct a surveillance of the entity to see whether it is offering financial products outside the regulatory regime;
- where the surveillance or complaint gives rise to suspicions that the Corporations Act and the ASIC Act are being contravened – to gather evidence of a wide range, eg from the entity's auditors and advisors, its directors, its bankers, financial advisors/agents through whom the entity provided the products, investors, and the entity itself.

Information collected at each stage of this example would be used in later stages of the matter. If a matter was to be resourced and a formal investigation commenced, material may also be gathered at this stage in order to prove each element of the offence at trial.

Processes in relation to and guidelines on the use of these powers are contained in Chapter 6 of the Enforcement Manual. Safeguards on the use of these powers include that their exercise requires a written notice that specifies the reason for production, what is required to be produced and the place and time of production. For s31, 32A and 33 ASIC Act notices the ASIC Regulations provide a form. Other notices are issued by standard ASIC template that notifies recipients of their obligations and protections.

Chapter 6 of the Enforcement Manual covers the use of powers to request documents and it covers such topics including:

- the scope of the powers and when they should be used;
- consultation with the recipient around the scope of material sought and time for compliance;
- approval processes for the issue of a notice (approval by a lawyer and team manager);
- how to deal with the books and information obtained;
- claims of legal professional privilege and confidentiality;
- what is a reasonable basis for non-compliance.

As outlined above, notices to produce documents are issued in a variety of circumstances where ASIC seeks access to material to enable it to discharge its functions. In many instances notices are issued after some discussion with the proposed recipient about the scope of material requested, and the time for compliance.

ASIC's procedures require that notices to produce documents are approved by the team leader of the matter and reviewed by a lawyer. The notices are sent with a covering letter that sets out the recipient's rights and obligations, and provides a contact name and phone number if the recipient has any questions.

In cases where it is considered likely that there will be voluntary production, this is requested.

The notice will require production of the material to a named ASIC office at a particular time and date. In many instances ASIC is willing to extend the time for production. When the documents are produced, the producer is issued with a receipt. The notice and the documents provided are registered on an ASIC evidence management system, which allows the notice and the documents to be recorded and access to them tracked.

Once the documents are no longer required by ASIC, they are returned to the producing party. While the documents are held by ASIC, any person who would have an entitlement to access them if they were not in ASIC's possession may do so.

Checks and balances to ensure the public interest in calling for that evidence outweighs the confidentiality obligations that exist.

Apart from the protections outlined above, additional general checks and balances in place to ensure that any decision to use coercive powers is made carefully are set out below.

Enforcement Manual and Technical and Procedures Library

Guidance on the use of ASIC's coercive powers is provided in both the internal Enforcement Manual and ASIC's Technical and Procedures Library. These are regularly updated by senior staff with expertise in the relevant area, to take account of changes in the law (either legislative or through judicial decisions, or internal decisions on changes in practice or procedure).

Oversight of matters

Investigations and surveillances are carefully planned and overseen by an officer at team leader level or higher. Major matters are overseen by a Senior Manager, or a Senior Executive Leader.

Professional Standards Unit

The Manager of the Professional Standards Unit reviews serious complaints from members of the public about misuse of ASIC powers (Information Sheet 107) and makes recommendations where ASIC's policies or procedures need to be updated or additional training is needed. There are approximately 1-2 complaints per year in relation to the use of coercive powers that are reviewed by the Professional Standards team.

Regular review of powers

ASIC may from time to time review the use of its powers. For example, in mid 2008 ASIC conducted internal reviews of the policies and procedures surrounding its powers to obtain documents and to commence formal investigations. For those reviews the Administrative Review Council's 2008 report on *Coercive Information Gathering Powers of Government Agencies* was used as a benchmark. ASIC's view was that, by and large, its written guidelines and practice accorded with the 20 principles set out. ASIC also benchmarked its practices with other regulators, including overseas regulators.

Other layers of review include:

- application for a court order to set the notice aside;
- if enforcement action is taken, an application to the court for an order that the evidence is inadmissible as it was obtained by misuse of power;
- complaint to the Commonwealth Ombudsman;
- Parliament, parliamentary committees and other inquiries/reviews.

Challenges to the use of ASIC's compulsory powers

Since 1 July 2007, ASIC's use of compulsory powers has been challenged in court 7 times. Two instances concerned examinations, the balance were in relation to the use of notices to produce documents. In 3 instances the proceedings were settled, in 2 ASIC's actions were upheld and in 2 ASIC's use of powers was found to have been invalid.

While court oversight of the use of compulsory powers is fundamental to the protection of private rights, in ASIC's experience many issues raised following the use of compulsory notices are tactical actions by people or entities who are the subject of investigation as opposed to people who are contacted in a witness capacity. For example, the 7 court challenges to notices included actions by Firepower (2 instances) and AWB (2 instances).

QUESTION CONTINUED

Senator BUSHBY—In general, are the coercive powers available to you sufficient and appropriate to ASIC's role in ensuring compliance with the law?

Mr D'Aloisio—Subject to one comment. We do not have within the commission a view that we need more coercive powers. The one qualification relates to—again, we have discussed it in the past—the issue of access to information from telephone interception that is carried out by the Australian Federal Police. There is a bill currently before the parliament, which I think has been reintroduced following the election and is in committee. We have said to government that we felt that it was important for ASIC to be able to share information through telephone intercept that was carried out by an intercept agency.

Senator BUSHBY—That is the Corporations Amendment (No. 1) Bill 2010?

Mr D'Aloisio—Yes. My team is indicating that it relates to market offences above five years. Where we were particularly interested in it was in relation to insider trading and market manipulation.

Senator BUSHBY—I imagine on 3 November we will have the opportunity to ask you a few more questions about that at the Senate inquiry into the bill.

Mr D'Aloisio—Yes.

Senator BUSHBY—In applying the coercive powers that you have, what regard does ASIC or your investigators have to the potential impact of their use on business efficiency?

Mr D'Aloisio—Business efficiency is a factor. We can do some investigation. When these investigations are on foot, in a lot of cases the investigations are in relation to companies that have got into difficulties and we are looking at wrongdoing.

Senator BUSHBY—But not all of your financial services or surveys that you send out. I suspect there is a lot of paperwork there.

Mr D'Aloisio—I agree. I think we try to use judgment in that way, but there have been instances where we have been criticised for having an impact on business efficiency by issuing notices when business would probably say, 'They weren't needed. We would have provided you with the information.' So there are judgments that are made. We are conscious of the issue and we accept that from time to time there will be criticism that we might have used a power when we could have got the information anyway. But the judgment has to be made, whatever we are doing, whether it is surveillance or an industry review or an investigation. The officers need to make a judgment on what they need and how quickly. So, yes, they will look at business efficiency, but we will not always get that judgment right and business will say, 'We could have provided that in any event.'

CONTINUED E27

Senator BUSHBY—Are you aware that the US government has regulated intelligence-gathering processes, through the federal codes, to prevent unnecessary intrusion into the affairs of individuals and businesses in its investigatory activities?

Mr D'Aloisio—I am not personally aware of that. What is the extent of the protection there? Is it the sort of protection we have already?

Senator BUSHBY—No. I think it extends further.

Mr D'Aloisio—It has gone beyond what we have?

Senator BUSHBY—It goes beyond what we currently have in Australia. So you might have a look at that—

Mr D'Aloisio—Okay.

Senator BUSHBY—as part of looking at your internal processes. As you do not have an internal policy on the use of your coercive investigative powers as such—other than to the extent which you outlined previously—how do you ensure that unnecessary intrusion into the affairs of individuals and businesses does not occur?

Mr D'Aloisio—This is what I was saying about the strict procedures we have in our enforcement manual.

As I said in answer to the previous question, I am prepared to look at that and at whether we need to improve. Probably the next step is for us to discuss those internal enforcement manuals and procedures that we follow with groups out there—lawyers and so on—to try and home in on where the problem areas may be and to review them. But certainly we do have those procedures and policies in our manual. The issue is: are they adequate; should there be some change? As I say, we do not see it, from the way we are working, but we are happy to look at it.

Senator BUSHBY—I understand. My questions are not intended to imply that there are any inappropriate uses of your coercive powers either, for the record.

Mr D'Aloisio—Thank you.

Senator BUSHBY—I think it is important that you have coercive powers, but it is also important that the Australian public has confidence that those powers are used appropriately. My question is more to do with ensuring that there are appropriate transparencies, procedures and rules that are followed in the use of these

powers, to ensure that the Australian public can have confidence that they are used appropriately and not in situations where they are not needed, particularly when they cause burdens on those who have to comply with them. In that respect, given that you rely to a significant extent on your investigators to exercise their own judgment and the extremely high level of utilisation of the coercive powers as outlined in answer BET-25, what evidence do you have that investigators are only using those powers in appropriate circumstances?

Mr D'Aloisio—I think because of the process of responsibility in the delegation of the powers, their use and the teams that are put in place, the leaders that are in place, in running investigations and supervision—we work on a pyramid structure—there is accountability. There is review. There are performance assessments. There are a range of things that we would expect our leaders to be examining. Certainly, had they picked up and should they pick up potential abuse of that power, that would be referred to us or to our internal unit that would look at these issues. We have within ASIC a complaints unit that would look at issues where there are complaints from the public about the way we are exercising our powers. That unit would examine that and provide a report to me or to the commission or to a senior leader. If they come from the outside, they would be examined.

Senator BUSHBY—There are checks and balances.

Mr D'Aloisio—There is that check and balance. There is the check and balance that comes through the leadership structure.

Senator BUSHBY—There are varying levels of potential abuses, though. The most glaring one, which would I think get caught out by those checks and balances, is where the coercive powers are used for nefarious purposes. But there are much lower level but still important abuses, where they might be used to pepper particular industries or businesses with requirements to comply with notices or other things which might seem on the face of it reasonable but, standing back objectively, might not be reasonable in all circumstances.

Mr D'Aloisio—As I said at the beginning, I think we need to home in on what those are. Through this round of discussion that I mentioned earlier, I think we can get a better feel on that and then make that assessment. At the moment, with the information from what we have seen and the way we operate, I am not seeing that within ASIC. I am not dismissing it. We are conscious of the need to be perceived by the community to be responsible in this area and not just to be responsible.

Senator BUSHBY—Absolutely. It is important that the community has confidence in ASIC, and the business community in particular. Part of ensuring that confidence is ensuring that your use of your coercive powers is seen to be transparent and appropriate.

Mr D'Aloisio—I think the next step, importantly, in taking on a lot of the comments you have made this morning and brought to the market, is for us now to actually try to home in more specifically on the issues that have concerned business and concerned people and then for us to make a judgment. Clearly if it is an issue of efficiency and the use of a notice that should not be used, if it is a simple 'disgruntled because we're getting information you didn't want to give us', that is different. We have got to analyse the pressures and then make a judgment as to whether we need to introduce additional protections. We want to be perceived as a responsible regulator that is respected in the way it uses its powers.

Senator BUSHBY—I have one final question on coercive powers. Of the matters in which your powers have been used—and you have outlined those in the answers to questions on notice, particularly those ones in respect of investigations of potential breaches—what percentage have actually resulted in action being taken against those investigated? You might want to take that on notice.

Mr D'Aloisio—I would have to take that on notice.

ANSWER – SBT 194:

ASIC does not keep statistics on which uses of compulsory powers result in action being taken. ASIC coercive powers are used in surveillances and preliminary assessments, as well as matters the subject of investigation. In some instances material obtained by notice at the assessment or surveillance stage may ultimately be used in an investigation. Some information can, however, be extracted from information about our investigations. It almost every investigation, ASIC's compulsory information-gathering powers are used. In the 3 financial years ending with the 2009/10 year, a total of 471 investigations were commenced.

As at 29 October 2010, 345 of these investigations had been completed, of which 51% (175 of 345) concluded with an enforcement outcome, ranging from a negotiated outcome such as an enforceable undertaking, to administrative, civil or criminal action.

Where an investigation does not result in action being taken against an entity or individual, it may be that the investigative team concludes that there was no contravention, or there may be insufficient evidence for action to be taken. This does not mean that it was inappropriate to use coercive powers, nor that the investigation should not have occurred.

There are many instances where positive outcomes have been a result of the use of coercive powers in the conduct of surveillances and compliance action. For example, ASIC's National Insolvent Trading Program, reported on in October 2010, focused on companies that ASIC intelligence had revealed may have been experiencing signs of financial distress. As a result of that program, ASIC visited 1,533 companies identified to be at risk, using a notice to produce documents to access records in each case.

As a result of this program, 242 (15%) of those companies were placed into external administration—mostly by the directors, although in some cases by ASIC. The appointment of external administrators is likely to have occurred at an earlier stage as a result of this program. Notices to produce financial records (not otherwise publicly available) were used to ensure that all relevant information was obtained in a timely fashion, that the information could be used in any compliance action to be taken, and to ensure there were clear parameters around the way in which ASIC could use the information, and the protections for the companies and company officers involved.

Additional information

Each time a notice is served is counted as one use of power. The greater use of coercive powers by ASIC is due to:

- lack of voluntary cooperation;
- the large number of inquiries/surveillances and investigations taken;
- the complex nature of the areas regulated – financial transactions are inherently document based and often large scale;
- the broad range of ASIC's regulatory mandate.
- In addition, it is important to note that in many instances (e.g. with banks) the recipient of the notice to produce requires a formal notice from ASIC. The entity can then point out to its clients or customers that it has been compelled by law to produce.

QUESTIONING CONTINUES

Senator COONAN—I have a very brief point that I want to raise with you about the corporations law amendment enhancing asset search warrant capacity without first issuing a notice to produce and also enabling an interception agencies such as the AFP to apply for interception warrants in the course of a joint investigation relating to insider trading. The point I am about to make will no doubt come up in the scrutiny of bills examination of the legislation and possibly in debate, but I just wanted to flag it here. It might require some thought in the meantime, unless I have not understood something about the bill.

ASIC's powers in division 3 to apply for a search warrant provide in effect that it should be exercisable for 'proper purposes' in connection with ASIC's statutory functions. Yet it does not seem that in the current bill that we will shortly be considering that the exercise of the powers will be subject to specified safeguards with reference to the purpose for which the power is being exercised. In other words, there is no reference to particular seriousness. I heard Ms Gibson's point earlier about indictable offences, which might be the answer, but it certainly is not very clear. Do you have any comment about that?

Ms Gibson—I think the term 'proper purpose' appears in many pieces of legislation. It intones in common law motions of the right intent and so on. I cannot comment specifically on the legislation but I think 'proper purpose' brings with it a lot of common law as to what that is, which is perhaps the protection that would otherwise be built in.

Senator COONAN—I just wonder about that because, for example, I had a look at the New South Wales

Law Enforcement (Powers and Responsibilities) Act where it actually defines ‘searchable offences’ in relation to a warrant to mean an indictable offence and various other things. But there is certainly a definition that it must be serious. This appears to just be at-large. I think there is a real issue as to whether that is potentially an infringement on personal liberties et cetera that will be raised as part of the scrutiny of the legislation. I think it would be certainly worth limiting ASIC’s powers or specifying that the powers be confined to seeking a search warrant for investigations of particular seriousness. Perhaps there should be some collaboration about that, because it is potentially very coercive.

Ms Gibson—I think I will leave that for government.

ANSWER – SBT 195:

The new search warrant power to be included in the ASIC Act (proposed new s35(1)) is only available in situations where ASIC would otherwise be able to serve a notice to produce documents. Those situations are set out in s28 of the ASIC Act. Search warrants require approval by a magistrate after information is provided on oath – this is a significant protection attaching to the circumstances in which ASIC may use this power. In relation to the ability to apply for telecommunications interception warrants, an interception agency may only apply where a serious offence has been committed. The definition of serious offence will be amended to include provisions of the Corporations Act that cover insider trading and other market manipulation offences.

ASIC– MODEL LITIGANT PROVISIONS - SENATE ECONOMICS COMMITTEE – THURSDAY 21 OCTOBER 2010 – E26 TO E27

Senator BUSHBY—Are you aware of the Australian Government Investigation Standards?

Mr D’Aloisio—In terms of the model litigant and the way we do things? Yes.

Senator BUSHBY—The Australian Government Investigation Standards are a set of best practice standards for all investigations of offences under Commonwealth legislation.

Mr D’Aloisio—Yes, we are aware of those and they are incorporated into our manuals. I am personally not able to answer questions specifically on those standards, but they are covered in our enforcement manuals.

Senator BUSHBY—So the standards that they contain would be complied with and followed by ASIC?

Mr D’Aloisio—I think they would, but I am happy to take that on notice and check it more specifically for you.

Senator BUSHBY—I do not know that it is necessary a requirement, but it is a set of best practice standards. So could you take on notice the extent to which you enforce the use of and train investigators in the use of the AGIS.

Mr D’Aloisio—I am happy to do that.

ANSWER – SBT 192

The Australian Government Investigation Standards Package (AGIS) applies directly to investigation of allegations of fraud on the Commonwealth, and may also be used for investigations of any offence under Commonwealth legislation. The AGIS therefore does not apply directly to ASIC investigations, although it does propose a set of best practice principles.

In 2008, ASIC conducted a preliminary review of whether we complied with the AGIS in our regulatory investigations. The preliminary review found that our processes and procedures were well above the standards set in the AGIS.

ASIC - LATE ANSWERS - SENATE ECONOMICS COMMITTEE – THURSDAY 21 OCTOBER 2010 – E42

Mr D’Aloisio—Thank you, and I note that there are a number of questions that have been foreshadowed to be given to us on notice. We will answer those as quickly as we can.

Senator BUSHBY—Hopefully quicker than last time.

Mr D’Aloisio—There was an election in that process, Senator.

Senator ABETZ—With the questions that were placed on notice, if any information can be brought back today, or indeed as soon as possible, that would be very much appreciated.

Senator Sherry—That is assuming, of course, it is not at the ministerial level.

Senator ABETZ—Of course.

Senator Sherry—In terms of the later questions, I will get my office to check with the other responsible office or officers to see whether they are at a ministerial point.

Senator BUSHBY—I may have unfairly accused APRA last night, but I am fairly confident that ASIC's answers were not within the timeline.

ATO – MEETING OF SERVICE STANDARD - SENATE ECONOMICS COMMITTEE – THURSDAY 21 OCTOBER 2010 – E84-85

Senator XENOPHON—Just before Mr Butler does that, it might be useful to establish—and you may want to take this on notice—that I take it you have had to take on extra staff with respect to catching up with respect to the change program. If you could confirm that—the number of staff and the number of hours that have been put into this? Again, on notice would be fine.

Mr D'Ascenzo—I am not sure—we will provide that on notice, but I just want to put the context to you, if I can. Every tax time we put on new staff. We have a range of casual and ongoing staff that we put on because tax time is our busiest time of the year. So it is hard to differentiate what is there because of normal tax time duties or what is there to catch up.

Senator XENOPHON—But in terms of seasonal variations, for tax season you could establish how many staff you had in the previous couple of years?

Mr D'Ascenzo—Yes, we can do that. We can give you the comparisons over time.

Senator XENOPHON—That would be useful. And also whether it was anticipated that the new system would lessen the need to have that many staff—whether that was something that was anticipated in the initial contracts and the scoping for the change program.

Mr D'Ascenzo—We will provide whatever information we can in that regard.

Mr Butler—If I can just give you the context around that, in this tax time we have certainly overengineered. I think I mentioned last time we were here that we were planning to do that, and we have done that. We brought on some additional staff, or brought forward in some sense the spending we would do this year. We are in a position now that we have—since late July the system has performed extremely well, we believe, and we have met or come very close to meeting our service standard during August and September and it looks reasonably good for October as well.

Senator XENOPHON—When do you expect to reach those service standards, given that you are in a catch-up phase now?

Mr Butler—The catch-up phase that Mr D'Ascenzo referred to was really early in this calendar year, when we had the system switched off for six weeks. You will recall that last time we were here I answered questions from you about where we were up to with processing those returns. By the end of June this year we actually had fewer unprocessed returns on hand than at the end of June the two previous years. So we had caught up by then. We then moved into tax time. During July we had a range of different things happen. We did not meet our service standards then—and I can explain those if you wish. But during August and September we have done very well.

Senator XENOPHON—Is it the case that in July, when the 2009-10 returns were lodged, there was a problem associated with the matching data between the agencies? Is that the case? Mr D'Ascenzo is nodding, so—

Mr D'Ascenzo—We had to tie in the requirements of CSA and Centrelink, and their processing did add time to our processing.

Senator XENOPHON—And that has been sorted now in terms of the matching?

Mr Butler—For example, for Centrelink clients we send 50,000 to 100,000 transactions per day to and from Centrelink. So as you build these quite significant new systems and get them working together, there will be

some things that need to be clarified and fixed. Even last weekend, for example, we put some fixes in the system for some particular Child Support Agency issues. We were processing things manually and the new system fix removed the need to do them manually.

Senator XENOPHON—And finally on this—hopefully at the next estimates I will have even fewer questions to ask you about the change program—has it met the benchmark or expectations in terms of the contract that was entered into with Accenture back in 2004? Is there a way of robustly and transparently measuring that, given that so much taxpayers' money was spent?

Mr Butler—We have undertaken a benefit realisation work. We have had an independent person do that—Richard Tait, who is the principal of Aquitaine Consulting. He has undertaken benchmark work which shows that the costs incurred by the ATO in the whole of the change program will be returned in the way of benefits over a four-year period.

Senator XENOPHON—Is that a public document?

Mr Butler—It will be. We do plan to put it on our website, so we can certainly arrange for you to have a copy when that is there.

Senator XENOPHON—That would be terrific, thank you.

Mr Butler—It does show a good return, we believe.

ATO –LATE ANSWERS TO QUESTIONS ON NOTICE - SENATE ECONOMICS COMMITTEE – WRITTEN QUESTION – SBT 74

Senator Bushby asked:

1. Why did your organisation fail to submit your answers to questions on notice before the due date, even though the due date was pushed back from 30 July till 20 August 2010?
2. Who do you provide the answers to (direct to the committee, to Treasury or the Minister's office)?
3. What date did you provide the answers to Treasury?
4. When do you anticipate providing the rest of the answers (if some overdue still)?
5. Did any Senators invoke Standing Order 74(5) to request the answers? [if Senate has sat in that timeframe (30 days from due date)] – how often has this happened to your agency over the last decade?
6. What consequences could apply to taxpayers who fail to meet ATO timelines in terms of meeting information demands and payment schedules? Should such timeliness not also apply to the ATO itself?

ANSWER – SBT 74:

1. The ATO postponed the provision of responses to the Minister for approval during the caretaker period. The Assistant Treasurer the Hon Bill Shorten MP was appointed on 24 September 2010.
2. The answers were provided to the Parliamentary team in Treasury who submitted them to the Committee on the ATO's behalf.
3. The Minister's approved responses were provided to Treasury on 29 September 2010.
4. There are no outstanding ATO responses to questions on notice from the June 2010 hearing.
5. No standing order 74(5) was issued to the ATO in relation to Budget Estimates 2010 questions on notice. Records on www.aph.gov.au do not distinguish between standing orders issued to the ATO and the broader Treasury portfolio. Therefore the ATO is unable to advise whether these standing orders were issued to the ATO over the last decade.
6. Where a taxpayer fails to meet the conditions of a payment arrangement, the ATO generally gives taxpayers the opportunity to demonstrate their capacity to satisfy the conditions for a new payment arrangement before considering firmer recovery action. The ATO will take action based on the taxpayer's individual circumstances. The ATO understands the importance of timeliness and every effort is made to ensure deadlines are met.

ATO – ATO OVERSIGHT – ECONOMICS COMMITTEE – WRITTEN QUESTION – SBT 76

Senator Bushby asked:

1. Earlier this year the ATO agreed with the Commonwealth Ombudsman to institute a new system for greater checks and balances for ATO use of their 'wallet access power' – power to enter premises without a bench

warrant. How many decisions have been made under this system? Will data on this new policy be posted annually on the ATO web site?

2. What agreement has been reached with the Federal Privacy Commissioner to ensure that the recommending person is outside the business line of the decision maker when sensitive tax payer information is passed to other agencies such as police forces or government agencies?

3. What data does ATO currently have on the transfer of this sensitive data to agencies outside ATO? Could you provide data as follows for the last three years:

- Number of data transfers in total for each year; and
- Number of transfers and to which agency (please identify each agency by name)?

ANSWER – SBT 76:

1. During 2009–10, we used our access-without-notice powers on 10 occasions. From 1 July to 31 October 2010, we used our access-without-notice powers on 4 occasions.

In February 2010, we agreed with the Commonwealth Ombudsman to report annually on use of our access-without-notice powers in our Annual Report. In line with that agreement, we reported our use of these powers in the recently released Annual Report 2009-10 at page 83, also available online at www.ato.gov.au.

2. The Privacy Commissioner has not sought an agreement of this nature with the ATO. There are, however, strict controls in place for the disclosure of sensitive taxpayer information to police forces and other law enforcement agencies. The ATO has dedicated gatekeepers who have sole responsibility for responding to disclosure requests of this nature. These gatekeepers carefully supervise and monitor requests for information and assiduously record subsequent disclosures to ensure compliance with secrecy and privacy laws.

ATO – ATO DELAYS – ECONOMICS COMMITTEE – WRITTEN QUESTION – SBT 77

Senator Bushby asked:

1. What does the ATO regard as a reasonable time in which to reimburse taxpayers who have overpaid their tax? What is regarded as too slow?

2. How much is paid in compensation to taxpayers when the ATO is late making a refund? Is it the GIC charge?

ANSWER – SBT 76:

1. If the assessment, amended assessment or activity statement shows an overpayment of tax, the amount overpaid and applicable interest is forwarded to the taxpayer with the notice of assessment or directly to their bank account where they chose to provide these details.

ATO service standard benchmarks for processing original income tax returns are as follows:

- For individuals:
 - 94 per cent within 14 days for electronically lodged returns
 - 80 per cent within 42 days for paper returns
- For non-individuals:
 - 92 per cent within 14 days for electronically lodged returns
 - 80 per cent within 56 days for paper returns

ATO service standard benchmarks for processing original activity statement forms are as follows:

- For individuals:
 - 92 per cent within 14 days for electronically lodged forms
 - 85 per cent within 14 days for paper forms

If a return or activity statement is incomplete, incorrect, or needs manual checking, it may take longer to process.

ATO – COERCIVE POWERS – ECONOMICS COMMITTEE – WRITTEN QUESTION – SBT 75

Senator Bushby asked:

1. What are the ATO's coercive powers? How often has each power been used in the past five years?

2. How many departure prohibition notice orders does the ATO currently have in force?

- a. Is it the case that if a court declares a departure prohibition order invalid the ATO can immediately issue a further DPO effectively over-riding the Court?
 - b. Has this ever occurred?
 - c. What are the procedures?
3. Third, when exercising these powers what is the ATO position re suggesting that those under coercion seek the advice of an appropriate adviser so that their rights are respected?
4. Does the ATO ever try to discourage a taxpayer in its dealings with the ATO from using lawyers?
 - a. If you had heard of such an instance would that concern you and what would you do?
5. In the UK the HM Revenue and Customs HMRC has a policy on its web site as follows:
Does the ATO have an equivalent statement on its web site or does it send written advice with these messages to taxpayers under scrutiny?

ANSWER – SBT 75:

1. The Commissioner may compel a taxpayer to undertake specified actions. These powers are under provisions of taxation legislation such as:
 - Division 353 in Schedule 1 of the Taxation Administration Act 1953 (upon notice being given in writing, require information or evidence to be provided, in some cases in person and on oath or affirmation; also require authorised ATO officers to be given access to buildings, places and documentation)
 - Section 263 of the Income Tax Assessment Act 1936 states that the Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of the Income Tax Assessment Act 1936, and for that purpose may make extracts from or copies of any such books, documents or papers. Taxpayers frequently provide information to the ATO on an informal basis, without formal notice or upon an informal request from the ATO. The use of the Section 263 power without notice is only authorised in exceptional circumstances, on a small number of occasions in any one year. This is recognised in the Commonwealth Ombudsman's February 2010 Report on the ATO's use of "access without notice" powers.
 - ATO officers must be properly authorised to exercise access powers. Authorised officers should carry their authorisation document titled "Authorisation for Access". The authority (sometimes referred to as a wallet) may be used where informal access is being sought. If proceeding on an informal basis an officer should only show the bottom half of their authority (that is, photograph identity only) to the enquirer.
 - If an officer does not have a current, valid authority they may not enter premises without the informed consent of the occupier. Generally, the ATO's access provisions stipulate that an officer is not entitled to enter or remain on land or premises if, on being requested by the occupier of the land or premises for proof of authority, they do not produce an authority in writing signed by the Commissioner or his delegate stating that they are authorised to exercise the access powers. If an officer does not have a valid authority and do not leave the premises when requested, the officer would be open to an action for trespass.
 - Section 264 of the Income Tax Assessment Act 1936 (upon notice being given in writing, require information to be provided, in some cases in person and on oath or affirmation).
 - The ATO used its access without notice powers under section 263 on ten occasions, four in 2008-09, eleven in 2007-08, twenty one in 2006-07, and sixty eight times in 2005-06.
 - Subsection 264 (1) is the Commissioner's power to, by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority to furnish him with such information as he may require. This power is more routine or frequently used than other section 264 powers. Subsection 264 (2), where the Commissioner may require the information or evidence to be given on oath or affirmation and either verbally or in writing is used but used infrequently but is still necessary in some complex tax matters.
 - We cannot provide statistics on how often our section 264 powers have been used over the past five years. This is because our use of the subsection 264 (1) power, requiring the furnishing of

information, is mostly used routinely. Furthermore, our case management and reporting systems are not structured to extract and report this information.

- The ATO continues to document the use of these powers within the taxpayer case records in our centralised case management system.

2. At 31 October 2010 the ATO had 53 departure prohibition orders (DPOs) in place.

a. The ATO has the power to issue a DPO immediately following the setting aside of a previous DPO by a court.

b. On one occasion where the court set aside a DPO on technical grounds, the ATO issued a new DPO shortly afterwards based upon newly acquired information.

c. The procedure for issuing a new DPO after a court has declared the previous DPO invalid is the same as that followed for all DPOs. The decision to issue a DPO is made in accordance with chapter 13 of the ATO Receivables Policy (available on the ATO website) and can only be made by a senior officer within the ATO.

3. Our position on this matter is embedded in publicly available ATO guidelines which require officers to take steps to ensure that taxpayer rights are respected in the course of exercising these powers. In particular, the ATO advises taxpayers that they will be given reasonable opportunity at any time to consult with their advisers.

Paragraph 6.6.4 of the ATO's Access and information gathering manual is relevant and requires officers to do the following:

When you are exercising the power to access premises you are required to give the custodian of documents an adequate opportunity to claim privilege, unless there is no possibility of privilege being applicable – see Chapter 1. Either at the time of giving a person a notice, or at the very latest at the time of entering the premises, you should hand out and explain booklet 9 which supports the taxpayers' charter and is called Fair use of our access and information-gathering powers. The Taxpayers' charter booklet referred to above is at Attachment A. At page 5, the ATO makes it clear to taxpayers that they have legal rights which will be respected as follows:

RESPECTING YOUR LEGAL RIGHTS

If you are required to attend a formal interview, you may choose to have your representative or advisers present. However, your representative or adviser will not be able to answer questions put to you. They may advise you about what a question means but they cannot tell you the answer you should give.

In some limited circumstances, you may not be able to have your choice of representative or adviser at the meeting. This may be because they were involved in the transaction under review. In this case, we will give you reasonable time to find an alternative representative or adviser.

You will be given reasonable opportunity at any time to consult with your advisers.

We will respect your right to claim legal professional privilege for certain communications between you and your barrister or solicitor. In some circumstances, we will allow some advice given to you by a professional accounting adviser to remain in confidence between you and that adviser. You will need to provide sufficient information about each communication where you are claiming legal professional privilege or for each advice that you want to remain in confidence between you and a professional accounting adviser.

4. The ATO fully respects taxpayers' rights to legal and other professional representation (e.g. to be represented by registered tax agents). That said, there will be many instances where both the ATO and taxpayer agree that discussions on a particular issue are best conducted informally and without either party being professionally represented. As noted above, publicly available ATO information clearly recommends that taxpayers seek professional advice where necessary in relation to their tax affairs.

a. The ATO acknowledges that taxpayers may choose legal representation at their own discretion. Taxpayers who consider they may have been wrongfully discouraged from seeking legal counsel would be within their rights to raise this concern with the ATO for investigation. Taxpayers concerned with the behaviours of ATO officers can make a complaint. Information on how taxpayers can make a complaint in person, by phone, fax or by lodging a form with the ATO is available through ato.gov.au. The link for taxpayers to the relevant page is as follows:

<http://ato.gov.au/corporate/content.asp?doc=/content/67192.htm>

5. The ATO has a Taxpayers' charter, which is publicly available on the ATO website and in printed format. The Taxpayers' charter includes clear statements that the ATO will treat taxpayers 'with courtesy and respect' and

use its powers 'fairly and professionally'. The ATO's use of its access and information gathering powers is explained in the Taxpayers' charter booklet 'Fair use of our access and information gathering powers'. This booklet includes a specific paragraph entitled 'Respecting Your Legal Rights' which advises that 'you may choose to have your representative or advisers present'.

In addition, the ATO has published our Access and Information Gathering Manual on ato.gov.au. This manual sets out guidelines which tax officers should follow when they are using the powers of investigation contained in the various Acts administered by the Commissioner of Taxation. The manual sets out the law on which those guidelines are based.

It also provides taxpayers and our staff with practical examples of how the guidelines work.

These examples are intended to illustrate particular key points of practice. This manual can be found on the ATO website using the following link: <http://www.ato.gov.au/corporate/content.asp?doc=/content/9101.htm>

FWA – SCRUTINY OF PROCEDURES – EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS LEGISLATION COMMITTEE – THURSDAY 21 OCTOBER 2010 – EEWR 62

Senator HUMPHRIES—Do you break those figures up at all by states and territories or by whether the agreements have a union as party or whether they do not have a union as a party?

Mr Nassios—No. Senator HUMPHRIES—So you cannot tell me

whether agreements to which a union is a party are more or less likely to be approved quickly than an agreement without a union as a party?

Mr Nassios—I do not believe we can.

Senator HUMPHRIES—Is it possible to back cast the lodgements to obtain that information? Would that be difficult to do?

Mr Nassios—I am certain it would be difficult to do. Whether it is possible, I would have to see how we collect the data and what we have in terms of the way the application is made. The application is made under the same section. Whether there is a union that is somehow a signatory to the agreement or not, to the extent that there may be a union that has sought to be covered by the agreement, which is a different process, there may be a capacity to somehow match that and then try to work out a differential of time if such a differential exists. But I have to say that at this stage I am thinking of a possibility, but whether that is practical—I would have to take that on notice.

ANSWER- 577_11:

Fair Work Australia has provided the following response:

For the financial year 2009/10, the median time taken from lodgement to approval of a section 185 Fair Work Act 2009 enterprise agreement application was 32 days. For the financial year 2009/10, the median time taken from lodgement to approval of a section 185 Fair Work Act 2009 enterprise agreement application in which one or more notices under section 183 for an employee organisation to be covered by an enterprise agreement was given to Fair Work Australia was 23 days.

FWA – SCRUTINY OF PROCEDURES – EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS LEGISLATION COMMITTEE – THURSDAY 21 OCTOBER 2010 – EEWR 91

Senator ABETZ—Can I take you to question on notice—0286. In that question I asked, 'Is it accepted by Fair Work Australia that due to an error in registration the supported employment services award had the transition schedule deleted?' We are told that it did not contain a transitional schedule and that the award was varied on 15 March to include the transitional provisions as the result of an application to vary the award. It was accepted that the transitional schedule was not contained in it. I am wondering whether it is accepted

that the fact the transitional schedule was not contained was due to an error in registration. That was the import of the question, and that has not been answered.

Mr Hower—The award, when it was issued in December 2009, did not include a transitional schedule.

Senator ABETZ—We know that. Was it an error that occurred within Fair Work Australia—as in an administrative error?

Mr Hower—I am not sure of the proceedings before the tribunal that led to the making of the award.

Senator ABETZ—I accept that you are not, and I accepted last time around that people at the table might not be aware of that. That is why the question was put on notice. The question related to whether it was due to an error in registration. With respect, I was hoping that a body like Fair Work Australia would be able to give us a straight answer as to whether it was an error in registration or not, and not just tell us that it did not contain a transitional schedule.

We all knew that it did not contain that, so the answer provided was unhelpful, and avoided the substance of the question as to whether it was due to an error in registration. I also add, we all make mistakes so there is nothing shameful in saying, 'Yes, out of all the awards we did, there was one where we accidentally missed out a transitional schedule.' I do not think there is any great shame associated with that. The great shame might be trying to avoid acknowledging that it was in fact an error in registration—if it was. It may well have been that somebody had not applied, but I would of thought, with respect, it would have been a Fair Work Australia obligation to have that transitional schedule in the supported employment services award 2010.

Mr Nassios—We would have to have a look at the number that is contained in the answer there.

Senator ABETZ—It is AN2009-172

Mr Nassios—Correct. Unfortunately I do not have the answer for you.

Senator ABETZ—Can you please take it on notice again and give us a direct answer as to whether an error did occur within Fair Work Australia?

Mr Nassios—Yes.

ANSWER – 579_11:

Fair Work Australia has provided the following response:

In establishing the model transitional provisions on 2 September 2009 the Award Modernisation Full Bench stated:

'...Although we have decided not to introduce a statement of principles, the model provisions will serve a similar purpose. This should minimise the potential for confusion and promote consistency of outcomes. It is our intention that the model provisions be applied generally although some modern awards will require special provisions. While the model provisions can be departed from to meet the circumstances of a particular case, departures should be limited. ...' [para 18; Decision AIRCFB 800]

While most modern awards contain the model transitional schedule there are several modern awards where the schedule was not included. This occurred in cases where parties submitted that a transitional schedule was not necessary.

The reason for the model transitional schedule not being included in the Supported Employment Services Award 2010 when it was issued on 4 December 2009 is unclear from the public record. It appears from the transcript from the initial award modernisation consultation proceedings for this award on 14 August 2009 that the parties went off the record when transitional provisions were discussed.

The exposure draft of the modern award published for comment on 25 September 2009 included the model schedule.

The rates in the modern award reflected the rates derived from the federal award - the Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005. There was also a notional agreement preserving a State award (NAPSA) in Western Australia - the Supported Employees Industry Award, however this NAPSA did not contain rates of pay.

On 14 December 2009 Australian Business Industrial lodged an application to vary the modern award to amend the classification structure/definitions and to insert the model transitional schedule. In support of their application in relation to the transitional provisions ABI stated:

'There is no reason to depart from the standard approach to the transition of differences in wage rates, penalties or loadings. The primary federal award based transitional instrument the *Australian Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005* was responsiveness based and did not cover a significant proportion of employers to be covered by the SES award. There was only one NAPSA which directly covered employers to be covered by the SES award and across the majority of employers to be covered by the SES award there will be a great diversity of arrangements currently applying. In these circumstances the case for phasing arrangements is strong.'

On 15 March 2010 the Full Bench issued an order inserting the model transitional schedule in line with ABI's application.

ACC – ANAO REPORT CRITICISM OF ACC – LEGAL & CONSTITUTIONAL AFFAIRS COMMITTEE – MONDAY 18 OCTOBER 2010 – L&C 81

Senator BRANDIS—Thank you, Madam Chair. Mr Lawler, I wanted to ask you some questions arising out of the ANAO's audit report on direct procurement, No. 11 of 2010-11, which was published on 30 September. Am I right in understanding that the Australian Crime Commission was one of the four Commonwealth agencies that was the subject of that audit report?

Mr Lawler—Yes, that is correct.

Senator BRANDIS—Thank you. By any chance, do you have a copy of the audit report handy?

Mr Lawler—There is a copy of the audit report here, but I have studied the report and its findings. I can brief the committee on the ACC's response.

Senator BRANDIS—Please do not do that. I do not want a speech or a briefing. I want to put questions to you and I would like you to respond to the questions I and other senators put to you, and to limit yourself to an answer to those questions, not commentary. Mr Lawler, you could not dispute, could you, that of the four agencies that were the subject of the audit— FaCSIA, the Department of Innovation, Industry, Science and Research, the Department of Veterans' Affairs and the Australian Crime Commission—the report in relation to the Australian Crime Commission was far and away the worst in terms of your agency's compliance with the Commonwealth procurement guidelines so far as they concerned direct source procurement?

Mr Lawler—I do not intend to comment about the other agencies. Certainly the ACC agrees with the findings in the report.

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Senator BRANDIS—And that in 93 per cent of cases there was no documentation supporting an assessment of value for money—considerably poorer than the other three agencies, although it should be said in fairness that the highest level of performance was the Department of Veterans' Affairs at 31 per cent. Mr Lawler, given that the documentation of consideration for value for money is one of the benchmarks required of all agencies of the government, how can you explain to the parliament how your agency failed in 93 per cent of instances audited to meet that benchmark?

Mr Lawler—I think the principle issue relates to knowledge by staff of the Crime Commission of their requirements surrounding the documentation and that specifically goes to, in my view, issues of training. Quite clearly the report highlighted serious deficiencies within the ACC. That is acknowledged. What the ACC has been endeavouring to do, before even the report was tabled, is to remedy that.

Senator BRANDIS—I understand that. In the section of the report that deals with agency responses, at paragraphs 65 and 66 of the summary, the ACC's undertaking to do better is appropriately recorded. But, Mr Lawler, these guidelines are not newly published guidelines. The Australian Crime Commission is not a brand-new agency. It is a reasonably recent agency in its current emanation but not a very new agency. How can it be that in 93 per cent of instances from a large audit sample this basic compliance requirement was not met?

Mr Lawler—All I can do is repeat my earlier comment to you—that is, there are issues of circulation of staff. We have a large number of staff who join the agency and leave the agency. But I do not want to proffer excuses here. Quite clearly, the audit's findings are unsatisfactory and, as the chief executive officer, I am endeavouring to remedy that situation, and we are doing so.

