

## PREFACE

At the end of the preface to the eleventh edition of this work, it was noted that the then government had gained a party majority of one in the Senate in the 2007 general elections, and the possible effect of this on the performance by the Senate of its essential task of holding the executive government accountable was mentioned. A detailed study of Senate activity during the period between that majority taking effect and the following general election concluded, unsurprisingly, that the accountability function was diminished. It is almost a law of nature that executives will seek to avoid accountability, and that independent legislatures are needed to impose it. The structures and measures built up by the Senate over many years to achieve accountability, however, remained in place during that time. The party majority was lost in the general elections of 2007, and the Senate returned to what is now regarded as the normal situation of no party holding a majority. It is to be hoped that this situation will support the Senate's accountability role. This work, as with previous editions, seeks to perform the task of recording the Senate's accountability and other activities in the past as a guide to the future.

The period since the last edition saw several significant changes and precedents in the operations of the Senate.

The structure of the committee system, which is the mainstay of the Senate's accountability operations, was changed to revert to the pre-1994 structure of eight standing committees. This was not necessarily a negative development; as the history before 1994 indicates, the old structure was perfectly capable of serving the functions of the institution and of supporting the parliamentary activities of senators. Only six months after the change of government, however, more select committees had been appointed; the proliferation of select committees under the old system was one of the reasons for the 1994 change: it was intended to encourage more use of the standing committees for particular inquiries. History may be repeating itself.

The standing committees were employed, often to their full capacity, and set several precedents in their scrutiny of estimates and bills and inquiries into matters referred to them by the Senate. Innovative methods of referring bills were adopted to allow committees to begin their examinations as early as possible in the legislative process. As a result the amendment of bills in consequence of Senate committee scrutiny has sometimes occurred before the bills were actually received by the Senate.

There were some significant precedents and lower court judgments vindicating that immunity of the Senate and its committees known as parliamentary privilege, which supports the freedom of parliamentary debate and inquiry. The Committee of Privileges presented several significant reports, including one on mistaken court judgments in other jurisdictions about references to parliamentary proceedings outside the protected parliamentary sphere.

The problem of the execution of search warrants in the premises of senators was settled by agreement between the President and the government on a set of procedures to govern that

process. A judgment of a United States court upheld the view of the law taken by the Senate on which that agreement was based.

Parliamentary scrutiny and control of public finance was in issue in several contexts. Senate committees grappled with a new system of appropriations which undermined the long-standing agreement between the Senate and government about the content of appropriation bills and the ordinary annual services of the government. This matter had not been resolved at the time of writing, but those committees and the Senate itself have clearly indicated that it should be resolved in favour of the past arrangements which best suited parliamentary scrutiny. A significant High Court judgment on the legality of government expenditures clearly signalled to the Parliament that it must exercise the responsibility to ensure that public funds are appropriated in such a manner as to avoid improper or unexpected expenditure. The Finance and Public Administration Committee presented a significant report on transparency and accountability of Commonwealth public funding and expenditure, and the implementation of its recommendations would greatly improve parliamentary control of expenditure. The need for reform in this area was supported by several reports by the Australian National Audit Office detecting serious problems in the management of public expenditure.

One of the most venerable statutes of the Australian Parliament, the *Acts Interpretation Act 1901*, in so far as it related to parliamentary scrutiny and control of delegated legislation, was replaced by the *Legislative Instruments Act 2003* which came into operation in 2005 and which codified the law on the subject and greatly extended the scope of parliamentary control, while creating some further yet-to-be-resolved uncertainties.

There were procedural innovations. The procedure whereby a senator may raise a debate in the chamber on any delay in answering questions on notice was extended to estimates questions on notice and orders for the production of documents. This change expanded a very significant accountability mechanism which may be wielded by any senator.

There continued to be problems with claims by government to be immune from producing documents to the Senate and its committees, or rather non-claims, as in some instances the obligation on government to raise a public interest ground for not producing information appeared to be forgotten. The old misconception that general statutory secrecy provisions impinge on parliamentary inquiries briefly reappeared. Senate precedents and resolutions should by now have provided utmost clarity to these matters. The question of whether the government may be required to produce advice provided to government should now have been settled by proceedings in estimates hearings in 2008.

This edition appears when the country is entering upon an era of life-and-death policy issues and extremely difficult decisions. As always, there are demands for power to be concentrated in the hands of the central executive government, supposedly to allow it to solve the problems that must be confronted. As always, such demands are misconceived. In this era, scrutiny and accountability of government will be more vital than ever. The greater the policy issues and the more difficult the decisions, the more likely it is that mistakes will be made, and parliamentary scrutiny and control is essential to disclose and remedy those mistakes. Government itself is weakened by lack of accountability. The Senate and its processes

provide a large part of the scrutiny that will be required. The means by which it may do so are here recorded.

### **ACKNOWLEDGMENTS**

As always, senators are the first to merit acknowledgement for their efforts in enhancing the Senate's role. The procedure for requiring explanation of unanswered estimates questions on notice and orders for documents, for example, was adopted because it was pursued by an individual senator seeking to find a solution to an accountability problem. Virtually all Senate staff make some contribution to this book, but those especially worthy of mention are Rosemary Laing, Andrea Griffiths, Cleaver Elliott, Richard Pye and Maureen Weeks. Thanks to Kay Walsh and Lynnette Eager for production.

Harry Evans  
July 2008