

The Senate

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Education and Employment  
Legislation Committee

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Additional estimates 2016-17

April 2017

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# MEMBERSHIP OF THE COMMITTEE

## Members

Senator Bridget McKenzie, Chair, NATS, VIC

Senator Gavin Marshall, Deputy Chair, ALP, VIC

Senator Sarah Hanson-Young, AG, SA

Senator Chris Ketter, ALP, QLD

Senator James Paterson, LP, VIC

Senator John Williams, NATS, NSW

## Secretariat

Mr Stephen Palethorpe, Secretary

Ms Natasha Rusjakovski, Principal Research Officer

Ms Kate Campbell, Senior Research Officer

Ms Amy Walters, Research Officer

Mr Abe Williamson, Administration Officer

Committee web page:

[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment)

PO Box 6100  
Parliament House  
Canberra ACT 2600

Ph: 02 6277 3521  
Fax: 02 6277 5706  
E-mail: [eec.sen@aph.gov.au](mailto:eec.sen@aph.gov.au)



# TABLE OF CONTENTS

<b>MEMBERSHIP OF THE COMMITTEE</b> .....	<b>iii</b>
<b>Chapter 1</b> .....	<b>1</b>
<b>Overview</b> .....	<b>1</b>
Portfolio coverage .....	1
Portfolio Additional Estimates Statements (PAES) 2016-17 .....	1
Hearings.....	2
Public interest immunity claims .....	3
Questions on notice .....	7
Hansard transcripts .....	7
<b>Chapter 2</b> .....	<b>9</b>
<b>Education and Training portfolio</b> .....	<b>9</b>
Australian Skills Quality Authority.....	9
Australian Institute for Teaching and School Leadership.....	11
Australian Curriculum Assessment and Reporting Authority.....	11
Australian Research Council .....	13
Tertiary Education Quality and Standards Agency .....	13
Department of Education.....	14
<b>Chapter 3</b> .....	<b>19</b>
<b>Employment portfolio</b> .....	<b>19</b>
Fair Work Commission .....	19
Fair Work Ombudsman .....	21
Australian Building and Construction Commission.....	23
Safe Work Australia .....	24
Workplace Gender Equality Agency.....	24
Asbestos Safety and Eradication Agency.....	25
Department of Employment .....	26
<b>Appendix 1</b> .....	<b>29</b>
<b>Committee oversight of departments and agencies</b> .....	<b>29</b>

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Education and Training portfolio .....	29
Employment portfolio .....	29
<b>Appendix 2 .....</b>	<b>31</b>
<b>Index to Proof Committee Hansard Transcripts .....</b>	<b>31</b>
<b>Appendix 3 .....</b>	<b>33</b>
<b>Advice from the Clerk of the Senate .....</b>	<b>33</b>
<b>Appendix 4 .....</b>	<b>39</b>
<b>Statement by the Chair .....</b>	<b>39</b>

# Chapter 1

## Overview

1.1 On 9 February 2017 the Senate referred the following documents to the Education and Employment Legislation Committee (the committee) for examination and report:

- particulars of proposed additional expenditure in respect of the year ending on 30 June 2017 [Appropriation Bill (No. 3) 2016-2017];
- particulars of certain proposed additional expenditure in respect of the year ending on 30 June 2017 [Appropriation Bill (No. 4) 2016-2017]; and
- Final Budget Outcome 2015-16.<sup>1</sup>

### **Portfolio coverage**

1.2 In accordance with a resolution of the Senate on 31 August 2016 the committee is responsible for the examination of the expenditure and outcomes of the following portfolios:

- Education and Training; and
- Employment.<sup>2</sup>

1.3 A full list of agencies is available at Appendix 1.

### **Portfolio Additional Estimates Statements (PAES) 2016-17**

1.4 The Portfolio Additional Estimates Statements (PAES) 2016-17 for the Education and Training portfolio and the Employment portfolio were tabled in the Senate on 9 February 2017.<sup>3</sup>

#### ***Education and Training portfolio***

1.5 The 2016-17 PAES for the Education and Training portfolio provides information on the revised estimates for the portfolio and highlights the Australian Government's education and training priorities including:

- ensuring that families can access quality child care;
- progressing the implementation of the Jobs for Families Child Care Package;
- creating an efficient and effective skills and training system;
- supporting the National Strategy for International Education;

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1 *Journals of the Senate*, No. 26, 9 February 2017, pp. 888–889.

2 *Journals of the Senate*, No. 2, 31 August 2016, p. 76.

3 *Journals of the Senate*, No. 26, 9 February 2017, p. 889.

- progressing initiatives under the Government's National Innovation and Science Agenda; and
- striving to improve education outcomes for disadvantaged groups.<sup>4</sup>

1.6 The Department of Education and Training has two outcomes as follows:

- Outcome One: improved early learning, schooling, student educational outcomes and transitions from school through access to quality child care, support, parent engagement, quality teaching and learning environments; and
- Outcome Two: promote growth in economic productivity and social wellbeing through access to quality higher education, international education, and international quality research, skills and training.<sup>5</sup>

### ***Employment portfolio***

1.7 The 2016-17 PAES for the Employment portfolio provides information on the revised estimates for the portfolio and highlights the Australian Government's employment priorities including:

- providing young people with work experience through the Government's Youth Employment package;
- continuing to implement jobactive;
- encouraging more businesses to employ job seekers;
- encouraging entrepreneurship and self-employment among young people; and
- continuing to deliver the Transition to Work service, Empowering YOUTH initiatives and ParentsNext.<sup>6</sup>

1.8 The Department of Employment has two outcomes as follows:

- Outcome One: foster a productive and competitive labour market through employment policies and programs that assist job seekers into work, meet employer needs and increase Australia's workforce participation; and
- Outcome Two: facilitate jobs growth through policies that promote fair, productive and safe workplaces.<sup>7</sup>

### **Hearings**

1.9 On 8 November 2016 the Senate resolved that Additional Estimates hearings for the committee would occur on 1 and 2 March 2017.<sup>8</sup> Accordingly the committee considered particulars of additional expenditure of portfolios as follows:

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4 *Portfolio Additional Budget Statements 2016-17: Education and Training Portfolio*, pp. 13–15.

5 *Portfolio Additional Budget Statements 2016-17: Education and Training Portfolio*, p. 4.

6 *Portfolio Additional Budget Statements 2016-17: Employment Portfolio*, pp. 13–17.

7 *Portfolio Additional Budget Statements 2016-17: Employment Portfolio*, p. 4.

8 *Journals of the Senate*, No. 13, 8 November 2016, pp. 411–412.



- Education and Training portfolio—1 March 2017; and
- Employment portfolio—2 March 2017.

1.10 In addition, the committee resolved to hold a spill over hearing on 30 March 2017 to continue the examination of the Employment portfolio.

1.11 The committee heard evidence from the following Ministers:

- Senator the Hon. Simon Birmingham, Minister for Education and Training; and
- Senator the Hon. Michaelia Cash, Minister for Employment.

1.12 Evidence was also provided by the following departmental secretaries who were accompanied by officers of the portfolio departments and agencies:

- Dr Michele Bruniges AM, Secretary, Department of Education and Training; and
- Ms Renee Leon PSM, Secretary, Department of Employment.

1.13 The committee extends its appreciation to the Ministers and officers of the departments and agencies who assisted the committee in its conduct of the 2016-17 Additional Estimates hearings.

1.14 An index of proceedings is available at Appendix 2.

### **Public interest immunity claims**

1.15 In the course of examining the Fair Work Commission's recent decision to reduce weekend penalty rates, the Employment Department's legal counsel, Mr O'Sullivan, signalled his intention to make a public interest immunity claim.<sup>9</sup> The following Hansard extract illustrates the exchange:

**Senator CAMERON:** Mr O'Sullivan, have you been asked for advice on that matter of the four-yearly review—the take-home pay?

**Mr O'Sullivan:** Again, I am a solicitor. That is clearly the subject of client-solicitor privilege. I would need instructions.

**Senator MARSHALL:** No. We are not going to go there again, Mr O'Sullivan. We have dealt with that. The Senate has made determinations on this matter. You may not claim legal professional privilege here.

**Mr O'Sullivan:** Again—and this is probably going back a bit—I am not claiming legal professional privilege; I am just noting that the subject matter of request for advice from me is subject to a claim from legal professional privilege...

Again, I do not know any solicitor who would ever disclose the contents—

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9 *Committee Hansard*, 2 March 2017, p. 122.

**CHAIR:** Sorry, Mr O'Sullivan, but you are not here in your capacity as a solicitor; you are here giving evidence to a Senate committee.<sup>10</sup>

1.16 Ultimately, the committee indicated to the witnesses that client-solicitor privilege was not an accepted ground for a public interest immunity claim, and asked Mr O'Sullivan to provide an explanation on notice.<sup>11</sup>

1.17 The Senate's rules governing the Estimates process are clearly set out in the Chair's opening statement including that 'the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the parliament has expressly provided otherwise.'<sup>12</sup>

1.18 On 13 May 2009, the Senate passed an order relating to public interest immunity claims.<sup>13</sup> The order sets out the processes to be followed if a witness refuses to provide information to a Senate committee on the basis of a claim of public interest immunity. The full text of this order has previously been provided to departments and agencies and was incorporated in the Chair's opening statement on 2 March 2017.<sup>14</sup>

1.19 The committee notes that on several occasions in the past Mr O'Sullivan has attempted to claim public interest immunity on the same grounds, as detailed below.

1.20 In the Additional Estimates round of February 2007, Senator Wong asked Mr O'Sullivan about the timing of the Department's preparation of a confidentiality agreement that the members of the Minister's advisory group on the needs of people with disabilities were required to sign.<sup>15</sup> Mr O'Sullivan objected to answering the question on the grounds that he would be in breach of the confidentiality requirement for public servants laid out in subsection 13(6) of the Public Service Act,<sup>16</sup> which led to the following exchange:

Senator WONG—Which are you relying on? Let us be clear. Are you relying on legal professional privilege, are you relying on the Public Service Act or both?

Mr O'Sullivan—...I am relying on the Public Service Act, but I qualified the second limb to that by saying that it may be a breach of [legal professional privilege]. I would have to examine the documents in question more closely than that to give a more comprehensive and unequivocal

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10 *Committee Hansard*, 2 March 2017, p. 122.

11 *Committee Hansard*, 2 March 2017, p. 123.

12 Senator Bridget McKenzie, Chair, Senate Education and Employment Legislation Committee, *Committee Hansard*, 2 March 2017, p. 3.

13 *Journals of the Senate*, No. 68, 13 May 2009, p. 1941.

14 *Committee Hansard*, 2 March 2017, pp. 3–4.

15 *Committee Hansard*, 15 February 2007, p. 28.

16 *Committee Hansard*, 15 February 2007, p. 31.

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answer. But either of those I think is sufficient basis to justify the objection.<sup>17</sup>

1.21 After some debate and a private meeting of the committee, the Chair, former Senator Judith Troeth, made the following statement to the committee:

The committee notes the claim by Mr O'Sullivan that an attempt to answer the question would involve him in a breach of section 13(6) of the Public Service Act. It [the committee] noted advice to Senator Wong from the Clerk of the Senate on 6 June 2006 which was tabled at the hearing, which includes advice from the Solicitor-General. However, in view of the possibility that such a dispute may arise again, the committee has agreed that in future officers should not rely on such a claim. The committee notes that the opportunity already exists for officers to refer a matter to the minister at the table. In the meantime, the committee draws the Clerk's advice to the attention of the department.<sup>18</sup>

1.22 Furthermore, in the Budget Estimates round of 2013,<sup>19</sup> Senator Abetz asked the department whether it had sought legal advice during the drafting of the Fair Work Act in relation to compulsory arbitration of disputes.<sup>20</sup> Mr O'Sullivan declined to answer, stating: '[a]s Chief Counsel I would not disclose the content of requests for advice to this committee as to do so would waive the legal professional privilege in that advice.'<sup>21</sup> The committee regarded Mr O'Sullivan's refusal as unacceptable and Mr O'Sullivan subsequently agreed to take the question on notice.<sup>22</sup>

1.23 The former Chair Senator Marshall subsequently made a detailed statement regarding the refusal to answer questions, part of which reads:

No witness has an independent discretion to decline to answer a question. An officer has a right under Privilege Resolution 1(16) to refer a question to a senior officer or minister. Alternatively, an officer may state the public interest ground on which he or she believes it may not be in the public interest to disclose the information requested AND specify the harm to the public interest that could result from disclosure of the information. The order of the Senate of 13 May 2009, to which I have already referred, then sets out the process to be followed. There is no other basis on which an answer may be withheld from a committee.<sup>23</sup>

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17 *Committee Hansard*, 15 February 2007, p. 36.

18 *Committee Hansard*, 15 February 2007, pp. 70–71. The Clerk's advice is reproduced at Appendix 3.

19 See Education, Employment and Workplace Relations Committee, *Budget Estimates 2013-14*, June 2013, p.2.

20 *Official Committee Hansard*, 4 June 2013, p. 114.

21 *Official Committee Hansard*, 4 June 2013, p. 114.

22 *Official Committee Hansard*, 4 June 2013, p. 115.

23 *Official Committee Hansard*, 5 June 2013, p. 53. The former Chair's full statement is at Appendix 4.

1.24 On 12 April the committee received the department's answer to the question Mr O'Sullivan took on notice, which references the following material from the *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters* (Government Guidelines):

Legal advisers owe a duty to their clients not to disclose the existence or content of any advice. It would therefore be inappropriate for any official who has provided legal advice to government ... to disclose that advice. All decisions about disclosure of legal advice reside with the minister or agency who sought and received that advice.<sup>24</sup>

1.25 The answer did not however include the subsequent paragraph of the Government Guidelines which clearly states that:

Where an official has been asked a question about the content of legal advice, it may be appropriate to advise the committee that such information might properly be subject to a public interest immunity claim...<sup>25</sup>

1.26 The Government Guidelines also outline a process for claiming public interest which largely mirrors the Senate's order referenced in paragraph 1.17.<sup>26</sup>

1.27 Furthermore the Government Guidelines set out that government officers or the relevant minister, when making a claim of public interest immunity, should specify the harm to the public interest that could result from the disclosure of the information or document.<sup>27</sup> The committee notes that Mr O'Sullivan did not state the harm in the most recent instance despite being given the opportunity. He chose to take the question on notice.

1.28 The committee notes that its view on this matter is confirmed in *Odgers Australian Senate Practice*, which states: '[i]t has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for a refusal of information in a parliamentary forum.'<sup>28</sup>

1.29 The committee again reminds the department and Mr O'Sullivan in particular that legal professional privilege has not been established as an acceptable ground for a public interest immunity claim, and thus does not constitute a satisfactory reason for declining to answer questions.

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24 Department of Employment, answer to question on notice EMSQ17-001584, 2 March 2017, (received 12 April 2017).

25 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, February 2015, p. 12.

26 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, February 2015, pp. 10–12 and 29–35.

27 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, February 2015, p. 10.

28 Harry Evans and Rosemary Laing, eds, *Odgers Australian Senate Practice*, 14<sup>th</sup> Edition, Department of the Senate, 2016, pp. 668–669.

1.30 On a more fundamental level, the committee notes the Government Guidelines emphasise that officials have a duty to assist parliamentary inquiries:

A fundamental element of Australia's system of parliamentary government is the accountability of the executive government to the parliament... Officials' accountability regularly takes the form of a requirement for them to provide full and accurate information to the parliament about the factual and technical background to policies and their administration.<sup>29</sup>

1.31 In this regard, the committee also reminds the department and in particular Mr O'Sullivan of the Senate's resolution regarding the duties of public officials, including 'the statutory values which Australian Public Service agency heads and employees are required to uphold include a requirement to be open and accountable to the Australian community under the law and within the framework of ministerial responsibility'.<sup>30</sup>

1.32 Finally, in noting the department's response to the question on notice, the committee expresses serious concerns that this situation has arisen on numerous occasions and informs the department such refusals to answer questions are not and will not be accepted.

### **Questions on notice**

1.33 In accordance with Standing Order 26(9)(a), the committee agreed that the date for the return of answers in response to questions placed on notice from the Additional Estimates 2016-17 hearings on 1 and 2 March would be 13 April 2017, while those from the hearing on 30 March would be due on 11 May 2017.

1.34 Answers to questions on notice are published as they become available on the committee's website:

[www.aph.gov.au/Parliamentary\\_Business/Senate\\_Estimates/eetctte/estimates/add1617/index](http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/eetctte/estimates/add1617/index).

### **Hansard transcripts**

1.35 Committee Hansard transcripts are accessible on the committee's website: [www.aph.gov.au/Parliamentary\\_Business/Senate\\_Estimates/eetctte/estimates/add1617/index](http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/eetctte/estimates/add1617/index).

1.36 In this report, references to the most recent Committee Hansard are to the proof transcripts. Page numbers may vary between the transcripts of the Proof Hansard and the Official Hansard.

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29 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, February 2015, p. 2.

30 Procedural order of continuing effect 52A, Standing orders and other orders of the Senate, August 2015, pp. 150–151.



## Chapter 2

### Education and Training portfolio

2.1 This chapter summarises certain key areas of interest raised during the committee's consideration of additional estimates for the 2016-17 financial year for the Education and Training portfolio.

2.2 On 1 March 2017, the committee heard evidence from Senator the Hon. Simon Birmingham, Minister for Education and Training, along with officers from the Department of Education and Training (the Department) and agencies responsible for administering education and training policy, including:

- Australian Skills Quality Authority (ASQA);
- Australian Institute for Teaching and School Leadership (AITSL);
- Australian Curriculum Assessment and Reporting Authority (ACARA);
- Tertiary Education Quality and Standards Agency (TEQSA); and
- Australian Research Council (ARC).

#### **Australian Skills Quality Authority**

2.3 The committee opened proceedings by acknowledging the work of Mr Chris Robinson, who has recently departed as Chief Commissioner, and welcomed Mr Mark Paterson to the role.<sup>1</sup>

#### ***Quality and compliance of registered training organisations***

2.4 Committee members pursued questions relating to ASQA's investigations of training organisations who were receiving public funds and who were allegedly engaged in non-compliant behaviour. Attention was drawn to the report by the Australian National Audit Office (ANAO) on VET FEE-HELP, which detailed issues with the accountability and quality control mechanisms built into the VET FEE-HELP scheme.<sup>2</sup>

2.5 Senators Cameron and Williams questioned reports they had heard of training organisations allowing students to graduate and enter electrical, carpentry or other trades without appropriate skills, thus putting their lives in danger.<sup>3</sup> Mr Paterson replied:

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1 *Committee Hansard*, 1 March 2017, p. 4.

2 Australian National Audit Office, *Administration of the VET FEE-HELP Scheme*, Audit Report No. 31, 2016–2017, [www.anao.gov.au/work/performance-audit/administration-vet-fee-help-scheme](http://www.anao.gov.au/work/performance-audit/administration-vet-fee-help-scheme).

3 *Committee Hansard*, 1 March 2017, p. 12.

[t]he greatest systemic risk to the system is if an individual does not have the competency that their qualification would assert they have. That is why a lot of our attention is given to the quality of the trainers, the nature of the training that is provided and the nature of the assessment systems. Where we find failure in relation to those, then we take regulatory action... [T]he quality of the assessment, the quality of the training and the skills and competencies of the trainers within those RTOs are a key focus of our regulatory activity and will continue to be a key focus of our regulatory activity.<sup>4</sup>

2.6 Inquiries were made about the case of the training organisation registered as MHM, which allegedly enrolled students and allowed them to incur FEE-HELP debts shortly before it closed.<sup>5</sup> Dr Banerjee, Deputy Secretary, Skills and Training, informed the committee that MHM was no longer operating,<sup>6</sup> and Mr Paterson explained the steps ASQA took in relation to this organisation's behaviour:

[o]ur audit activity did identify noncompliances. The RTO was given an opportunity to rectify those noncompliances and it did rectify them. But we took further regulatory activity, on examining the RTO, and as I indicated prior to the break we issued a notice of intention to that RTO. We received a response on that notice of intention and we were planning to take a regulatory decision. It would appear on the information that is now available to us that that RTO is no longer operating and is now in liquidation.<sup>7</sup>

### ***Audit practices and risk model***

2.7 Mr Paterson and Professor Lavarch, Commissioner, provided information about ASQA's audit and compliance activities. Professor Lavarch confirmed that 1174 audits were completed in 2015-16.<sup>8</sup>

2.8 They also detailed the organisation's revised model in which a proactive approach is taken. Mr Paterson stated:

[o]ur approach in relation to regulating registered training organisations has progressively moved away from application-driven audits to an assessment of the risk to the system that an RTO places and then to focus more and more attention on the nature of that risk. We have moved to a much more comprehensive risk based audit approach that I think means that we can assess the performance of individual RTOs and the impact that they have on the student experience with those RTOs, which is critically important.<sup>9</sup>

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4 *Committee Hansard*, 1 March 2017, p. 12.

5 *Committee Hansard*, 1 March 2017, p. 15.

6 *Committee Hansard*, 1 March 2017, p.19.

7 *Committee Hansard*, 1 March 2017, p. 21.

8 *Committee Hansard*, 1 March 2017, p. 22.

9 *Committee Hansard*, 1 March 2017, p. 4.



2.9 Furthermore, Mr Lavarch detailed the scanning procedures, which are a key part of the proactive risk assessment model:

[f]irstly, we look at all of the datasets that we have available to us. We look at our own direct regulatory experience: what sorts of standards or obligations providers in the sector as a whole were having trouble consistently complying with. We would look at other publicly available data, such as some of the metadata for the sector as a whole collected through research agencies and the like. Importantly, we undertook effectively a dialogue with core stakeholders across the sector... So a combination of looking at datasets and talking to stakeholders is the core activity which we do in terms of environmental scanning. That document in turn helps inform ASQA, in terms of our regulatory strategy, which are our major projects, apart from day-to-day regulating individual providers, that ASQA should be allocating its resources to.<sup>10</sup>

### **Australian Institute for Teaching and School Leadership**

2.10 The Minister thanked the departed CEO Mr Chris Wardlaw and welcomed the new CEO, Ms Lisa Rodgers.<sup>11</sup>

2.11 The committee asked AITSL for an update on the accreditation of initial teacher education courses, and how the competencies of students are assessed prior to graduation. Mr Misson, Deputy CEO, informed the committee that 300 courses were scheduled to be accredited by December 2017, and this milestone was on track to be attained, though it was noted that the responsibility for accreditation lay with state and territory regulators.<sup>12</sup>

2.12 Similarly, information was sought regarding quality assurance mechanisms for entrance into teacher training courses. Mr Misson stated:

[u]nder the new standards, there are compulsory literacy and numeracy tests which all graduates must pass prior to graduation, and that is nationally implemented. We were also talking earlier about the teaching performance assessment, which is a much broader assessment. The requirement is that all graduates will have passed a rigorous, valid and reliable assessment of their classroom teaching performance before they graduate.<sup>13</sup>

2.13 AITSL undertook to provide the committee with information on notice regarding the best ways to track and map student progress.<sup>14</sup>

### **Australian Curriculum Assessment and Reporting Authority**

2.14 Inquiries were made about ACARA's staff satisfaction survey and the benchmarks used to define levels of satisfaction,<sup>15</sup> and the agency's approach to

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10 *Committee Hansard*, 1 March 2017, p. 5.

11 *Committee Hansard*, 1 March 2017, p. 23.

12 *Committee Hansard*, 1 March 2017, p. 24.

13 *Committee Hansard*, 1 March 2017, p. 28.

14 *Committee Hansard*, 1 March 2017, pp. 28–29.

combating bullying.<sup>16</sup> Mr Randall, CEO, informed the committee that the agency was committed to undertaking a more systematic approach to performance assessment, and dealing with bullying claims more quickly.<sup>17</sup>

2.15 The committee asked ACARA officials whether they agreed with some media reports alleging NAPLAN testing was biased in favour of girls. Mr Randall replied that he did not think that was the case, and furthermore that he did not believe in any inherent difference in boys' and girls' abilities.<sup>18</sup>

2.16 Committee members also asked for clarification of the use of an emoji in a NAPLAN sample test. Mr Randall and Mr Rabinowitz, General Manager, explained that the graphic was a tool of engagement, and the questions related to a passage of text that the graphic accompanied.<sup>19</sup>

2.17 There was discussion around development of best practice in formative assessment. Mr Randall used the Best Start assessment in New South Wales as a key example, and elaborated on the value of a common testing framework:

[t]he Best Start assessment in New South Wales is an example of a system-wide assessment that is done in a consistent way. The value of that is that it is a common reference for teachers. Instead of having to, if you like, develop the process themselves, they have that. The tool has been made available, the training has been made available to teachers and it is linked into the curriculum... We should not necessarily assume that everything should be left to every teacher in every way to discover the best way to assess. If we can help teachers improve their assessment, I think we should.<sup>20</sup>

2.18 ACARA was questioned about media reports that some schools were discouraging certain students from taking the Victorian Certificate of Education because of concerns about the school's ranking.<sup>21</sup> Mr Randall replied that, while it was a state matter, he did not believe it was widespread. Rather, he perceived that 'a great majority of parents, teachers and others actually do see this information as valuable and see the value in doing it to an extent.'<sup>22</sup>

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15 *Committee Hansard*, 1 March 2017, p. 31.

16 *Committee Hansard*, 1 March 2017, p. 34.

17 *Committee Hansard*, 1 March 2017, p. 33.

18 *Committee Hansard*, 1 March 2017, pp. 29–30.

19 *Committee Hansard*, 1 March 2017, pp. 34–35.

20 *Committee Hansard*, 1 March 2017, p. 37.

21 *Committee Hansard*, 1 March 2017, p. 39.

22 *Committee Hansard*, 1 March 2017, p. 39.

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## Australian Research Council

2.19 The committee inquired about the CEO recruitment process, and also about the public reporting of that position's remuneration.<sup>23</sup> The Minister advised that the selected candidate was to be announced imminently, and the Acting CEO Ms Harvey undertook to clarify the remuneration data.<sup>24</sup>

2.20 Committee members also inquired about the ARC's engagement and impact assessment process. Ms Harvey elaborated on the consultation process with industry and universities regarding the indicators used for this process, and explained that a pilot was about to be launched.<sup>25</sup>

2.21 There was discussion of issues associated with the measurement of research impact in the United Kingdom, including the gaming of the system and the negative effect on interdisciplinary research.<sup>26</sup> Ms Harvey assured the committee that the ARC was committed to both upholding the integrity of Australia's research framework and maintaining interdisciplinary research capacity.<sup>27</sup>

## Tertiary Education Quality and Standards Agency

2.22 TEQSA's Director, Professor Nicholas Saunders, gave an overview of the agency's regulatory framework in the context of the VET FEE-HELP reports of recent years.<sup>28</sup>

2.23 Committee members questioned Professor Saunders about the effect of budget cuts on the organisation. Professor Saunders replied that the mix of staff has changed with more contractors working in the organisation, though this does not lead to efficiency or savings in the longer term.<sup>29</sup>

2.24 Committee members asked about TEQSA's ability to cope with its increased workload in light of budget cuts. The committee was assured by Minister Birmingham that TEQSA 'is more than adequately fulfilling its responsibilities' and by Professor Saunders that the agency is 'seeking to further refine [its] risk based approach.'<sup>30</sup>

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23 *Committee Hansard*, 1 March 2017, pp. 41–42.

24 *Committee Hansard*, 1 March 2017, p. 44.

25 *Committee Hansard*, 1 March 2017, p. 45.

26 *Committee Hansard*, 1 March 2017, p. 50.

27 *Committee Hansard*, 1 March 2017, pp. 50–51.

28 *Committee Hansard*, 1 March 2017, p. 53.

29 *Committee Hansard*, 1 March 2017, pp. 54–55.

30 *Committee Hansard*, 1 March 2017, p. 54.

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## Department of Education

### *Cross-portfolio*

2.25 The committee inquired about the administrative arrangements relating to the Education Investment Fund (EIF).<sup>31</sup> Mr Learmonth, Deputy Secretary, Higher Education, Research and International, informed the committee that the Department of Finance had overall responsibility for the administration of the fund, but would clarify on notice whether the Department had a role in allocating any money from the fund.<sup>32</sup>

2.26 Information was also sought about the Department's expenditure on advertising. Ms Ulrick, Branch Manager, People, Communication and Legal, and Dr Bruniges, Secretary, outlined the costs for various campaigns including Jobs for Families, VET student loans and overseas HELP debts.<sup>33</sup> Ms Ulrick also outlined the concept testing process for the Jobs For Families campaign.<sup>34</sup>

2.27 There was discussion about the saving of almost \$2.7 billion across the Department listed in the MYEFO statement. Mr Ford, Branch Manager, Finance, Technology and Business Services, advised that the two significant areas of budgetary variation were in the areas of child care and Trade Support Loans. Minister Birmingham stated that the government continued to look for savings where possible.<sup>35</sup>

### *Outcome 1*

2.28 Senator Bernardi questioned the operation of the priority access guidelines in the child care sector. Specifically, there was concern that parents 'are being told that their child could lose their place because another child comes along who happens to have Aboriginal parents or happens to have a disabled parent or parents who are dysfunctional or comes from a low socioeconomic group.'<sup>36</sup> Ms Wilson advised that:

...in practice what happens is the centre negotiates a successful outcome where they can take on board that child who has a priority of access without displacing others. I have heard service providers talk to me in workshops about adjusting hours and consulting other families and trying to negotiate to find a solution around that.<sup>37</sup>

2.29 There was discussion about the calculations undertaken to determine the figures for the child care subsidy. Ms Mitchell, Group Manager, Early Childhood Strategy, confirmed that the original sample of 2000 families had continued to be used in calculations, and the Minister stated he was confident that 230 000 families would

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31 *Committee Hansard*, 1 March 2017, p. 57.

32 *Committee Hansard*, 1 March 2017, p. 59.

33 *Committee Hansard*, 1 March 2017, pp. 63–70.

34 *Committee Hansard*, 1 March 2017, pp. 65–66.

35 *Committee Hansard*, 1 March 2017, p. 71.

36 *Committee Hansard*, 1 March 2017, p. 173.

37 *Committee Hansard*, 1 March 2017, p. 173.

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be able to increase their workforce participation as a result of the fifty per cent subsidy.<sup>38</sup>

2.30 The committee also inquired about modelling for the child care subsidy, specifically in relation to the activity test.<sup>39</sup> After much discussion, Mr Palmer, Group Manager, Early Childhood Manager, provided an in-depth explanation of the methodology used, namely the seasonal autoregressive integrated moving average (SARIMA).<sup>40</sup> Minister Birmingham and Dr Bruniges also confirmed that the model did not disaggregate data to allow comparative break downs of current estimates and previous estimates, but gave a point-in-time picture of the actual compared to the estimate.<sup>41</sup>

2.31 Committee members inquired about funding for school students with disabilities. Mr Cook, Associate Secretary, Schools and Youth, and Minister Birmingham outlined the use of the Nationally Consistent Collection of Data to allocate \$118 million in funding as a top-up measure to support students with disability.<sup>42</sup>

2.32 There was examination of the Department's efforts with regard to parental engagement. Mr Cook outlined a range of activities:

[t]he Smith Family Learning for Life Program does intersect across parental engagement because it works with parents and students, and there is \$48 million to expand that program that the Smith Family runs so that parents actually become partners in school education. There is also work happening around ARACY [Australian Research Alliance for Children and Youth]. There is \$4 million that ARACY is utilising to undertake some research in relation to parental engagement. There is funding that the Catholic School Parent Associations of Australia have received from the Commonwealth to look at re-energising parental engagement in Australian primary and secondary schools. We are waiting for a report from them. So there is a range of additional research and activities that are happening across the parental bodies, as well as bodies like ARACY, to inform government around future activity in this area.<sup>43</sup>

## ***Outcome 2***

2.33 The committee inquired into the \$640 000 federal grant to Dr Bjorn Lomborg's Copenhagen Consensus Centre, which resulted in the publication of a book.<sup>44</sup> Ms Hart, Acting Group Manager, Research and Economic, advised that all

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38 *Committee Hansard*, 1 March 2017, p. 76.

39 *Committee Hansard*, 1 March 2017, pp. 79–83.

40 *Committee Hansard*, 1 March 2017, p. 82.

41 *Committee Hansard*, 1 March 2017, pp. 82–83.

42 *Committee Hansard*, 1 March 2017, pp. 120–121.

43 *Committee Hansard*, 1 March 2017, p. 119.

44 *Committee Hansard*, 1 March 2017, p. 122.

relevant contractual documents have been released as part of a freedom of information release.<sup>45</sup>

2.34 The committee also pursued questioning about reduced funding to the Commonwealth Grants Scheme (CGS). Minister Birmingham advised that the 20 per cent reduction to the CGS was still factored into the Budget, however it was unlikely that the measure would be brought forward in legislation. The Minister advised he was continuing a process of consultation to develop alternative budgetary solutions.<sup>46</sup>

2.35 The committee examined the operation of the expert panel charged with consulting on developing these alternative solutions. Minister Birmingham and Mr Learmonth advised there was extensive engagement between the Department, the panel and the university sector, and that the panel was engaging with the public through the submissions process.<sup>47</sup>

2.36 There was discussion about the Higher Education Participation and Partnerships Program (HEPPP). Mr Learmonth advised that there was a \$152 million funding reduction to the program over four years. The Minister stated that he was committed to supporting equity and participation in tertiary education, and that an evaluation of HEPPP was forthcoming.<sup>48</sup>

2.37 There was discussion about departmental modelling in relation to fee deregulation. Mr Learmonth advised that 'there was work done to try and understand what the likely changes and effects would be under that policy.'<sup>49</sup> Minister Birmingham informed the committee that further information about higher education funding would be made available in the context of the upcoming Budget.<sup>50</sup>

2.38 The committee queried whether the Minister saw TAFE as a pathway to high school completion. Minister Birmingham reiterated the importance of this function of the TAFE system, and undertook to provide more information about funding on notice.<sup>51</sup> The committee also questioned whether the number of arts courses on offer at TAFEs had decreased due to their exclusion from the VET student loan scheme. Mr Hart advised there 'are fewer arts courses that are available for subsidy through VET student loans than VET FEE-HELP, but there are still 13 that are on the courses and loan caps determination and a further nine were added in late December.'<sup>52</sup>

2.39 There was also discussion of matters relating to apprenticeship training, including Trade Support Loans and the Industry Skills Fund. Ms Hewlett, Group

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45 *Committee Hansard*, 1 March 2017, p. 123.

46 *Committee Hansard*, 1 March 2017, p.123.

47 *Committee Hansard*, 1 March 2017, p. 125.

48 *Committee Hansard*, 1 March 2017, p. 127.

49 *Committee Hansard*, 1 March 2017, p. 129.

50 *Committee Hansard*, 1 March 2017, p. 129.

51 *Committee Hansard*, 1 March 2017, p. 130.

52 *Committee Hansard*, 1 March 2017, p.131.

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Manager, Industry Skills and Quality, advised that the average debt held by people who have taken out Trade Support Loans but not completed their apprenticeships was \$5166.<sup>53</sup> In relation to the Industry Skills Fund, Ms White, Branch Manager, Skills Programs, outlined the following allocations: '\$230,000 to the Master Builders Association, \$1 million to NECA, \$230,000 to the North East Vocational College, \$759,000 to The Australian Industry Group and \$1 million to PricewaterhouseCoopers.'<sup>54</sup>

2.40 Concerns were raised about the security of personal information relating to students who have VET student loans. Dr Bruniges confirmed that if any breach of personal information occurred the Department would be very concerned.<sup>55</sup>

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53 *Committee Hansard*, 1 March 2017, p. 137.

54 *Committee Hansard*, 1 March 2017, p. 138.

55 *Committee Hansard*, 1 March 2017, p. 140.





# Chapter 3

## Employment portfolio

3.1 This chapter summarises certain key areas of interest raised during the committee's consideration of additional estimates for the 2016-17 financial year for the Employment portfolio.

3.2 On 2 March 2017, the committee heard evidence from Senator the Hon Michaelia Cash, Minister for Employment, along with officers from the Department of Employment (the Department) and agencies responsible for administering employment and workplace policy, including:

- Fair Work Commission (FWC);
- Fair Work Ombudsman (FWO);
- Australian Building and Construction Commission (ABCC);
- Safe Work Australia;
- Workplace Gender Equality Agency (WGEA); and
- Asbestos Safety and Eradication Agency (ASEA).

3.3 On 30 March 2017, the committee held a spill over hearing. On this occasion the committee heard further evidence from Senator the Hon Michaelia Cash, Minister for Employment, along with officers from the Department of Employment and the Fair Work Commission, including its President, Justice Iain Ross.

### **Fair Work Commission**

3.4 The committee asked for an update on the approval of workplace agreements in the construction industry and how the Commission would cope with an influx of proposed agreements. Ms O'Neill, General Manager, advised that:

[w]e will continue to monitor the resources needed and make adjustments to the extent that we can. For example, rather than not being able to deal with the applications, it may lead to some increase in the timeliness within which agreements are approved, but that happens over time in the normal course of events.<sup>1</sup>

3.5 The committee inquired about the process for terminating workplace agreements. Ms O'Neill outlined various aspects of the process, including in what circumstances protected action would not be permitted and the mechanisms both parties may use to persuade the other to adopt proposed variations.<sup>2</sup>

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1 *Committee Hansard*, 2 March 2017, p. 9.

2 *Committee Hansard*, 2 March 2017, pp. 10–12.

3.6 Committee members inquired about investigations into the Australian Workers' Union's membership reporting.<sup>3</sup> Mr Enright informed the committee that the General Manager was conducting inquiries, and that if any irregularities were found, the FWC may commence action against a member or an official of a registered organisation in the Federal Court.<sup>4</sup>

3.7 There was examination of the application process for right-of-entry permits. In particular, information relating to the application of an individual who had a history of domestic violence was sought.<sup>5</sup> Mr Enright elaborated on the procedure for managing a non-routine application, such as the one in question, and on the safeguards that have been put in place to ensure applicants and those who sign off on applications are fit and proper people.<sup>6</sup>

3.8 There was discussion of the tests used by the FWC in assessing agreements for employees who have gone through a bargaining process, particularly the better-off-overall test. Ms O'Neill stated:

[i]t is very common in the fast food sector, in the retail sector and in many sectors affected, that agreements are negotiated where penalty rates are reduced either for a loaded rate or some other benefit.<sup>7</sup>

3.9 The committee sought clarification whether the better-off-overall-test was applicable to the workers who would be affected by the FWC's recent decision to reduce penalty rates. Ms O'Neill clarified that the test was not applicable because the decision related to the award, not to an individual agreement.<sup>8</sup>

3.10 There was examination of Justice Ross' involvement in the Victorian Country Fire Association's enterprise bargaining dispute with the United Firefighters' Union.<sup>9</sup> Justice Ross outlined the extensive correspondence, meetings and phone calls he had been party to in the lead-up to hearings conducted by the FWC.<sup>10</sup>

3.11 There was also discussion about the statutory retirement age and pensions of FWC members.<sup>11</sup> Justice Ross tabled a prepared statement, which detailed the retirement ages and entitlements of recently retired members, and paraphrased it for the committee.<sup>12</sup>

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3 *Committee Hansard*, 2 March 2017, pp. 13–17.

4 *Committee Hansard*, 2 March 2017, p. 17.

5 *Committee Hansard*, 2 March 2017, pp. 19–21.

6 *Committee Hansard*, 2 March 2017, pp. 20–21.

7 *Committee Hansard*, 2 March 2017, p. 30.

8 *Committee Hansard*, 2 March 2017, p. 31.

9 *Committee Hansard*, 30 March 2017, pp. 2–4.

10 *Committee Hansard*, 30 March 2017, pp. 3–8.

11 *Committee Hansard*, 30 March 2017, p.8

12 *Committee Hansard*, 30 March 2017, pp. 8–9.

3.12 Committee members sought further information about FWC members' remuneration and pension entitlements, especially in relation to taxation concerns influencing a member's decision to retire before they are eligible for the maximum pension. Ms Leon, Secretary, undertook to provide relevant correspondence on notice.<sup>13</sup>

3.13 There was discussion about the appointment process for replacing senior members, particularly in relation to replacing Deputy President Acton with Commissioner Jones.<sup>14</sup> Justice Ross advised the Senator:

I did consider making an appointment purely based on seniority. That would have been perhaps the conservative and safe course to adopt. But I deliberately chose not to do so. I chose to make the appointment on merit. Commissioner Jones had had 10 years experience in litigation at the bar, and this was a role that called for expertise in case management of litigation. I was also conscious of the fact that, if I had gone on seniority, a male would have been appointed, which would have given rise to a predominantly male based leadership group within the organisation. The subsequent performance of the commissioner in her role vindicated my decision to appoint her. I have continued a pattern of appointment based on merit, not seniority.<sup>15</sup>

3.14 Further to this, the committee examined the responsibilities of senior members. Justice Ross elaborated on the more onerous aspects of being a senior member, including presiding over a full bench, hearing appeals, and presiding over particular panels, such as the termination of employment panel.<sup>16</sup>

### **Fair Work Ombudsman**

3.15 Senator McKenzie expressed her appreciation for the FWO's engagement with farmers,<sup>17</sup> which was discussed during the Supplementary round.<sup>18</sup>

3.16 Committee members sought information regarding activities arising from the FWO's 2015 national construction campaign report on apprentices.<sup>19</sup> Ms McAlary-Smith, Executive Director, Proactive Compliance and Regulation, detailed the FWO's actions, including the development of educational resources and social media campaigns, and undertook to provide more information about enforcement actions on notice.<sup>20</sup>

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13 *Committee Hansard*, 30 March 2017, pp. 15–16.

14 *Committee Hansard*, 30 March 2017, p. 9.

15 *Committee Hansard*, 30 March 2017, p. 9.

16 *Committee Hansard*, 30 March 2017, p. 23.

17 *Committee Hansard*, 2 March 2017, p. 33.

18 *Committee Hansard*, 19 October 2016, p. 155.

19 *Committee Hansard*, 2 March 2017, p. 33.

20 *Committee Hansard*, 2 March 2017, pp. 33–34.

3.17 There was examination of the transfer of functions from the FWO to the Australian Building and Construction Commission. The Ombudsman, Ms James, tabled correspondence in relation to her discussions with the ABCC Commissioner.<sup>21</sup>

3.18 Committee members pursued questions relating to the referral of complaints to the ABCC by the FWO.<sup>22</sup> Ms James and Mr Campbell, Deputy Fair Work Ombudsman, explained the delineation of each agency's functions,<sup>23</sup> and reiterated their commitment to ensuring the parliament's intentions in re-establishing the ABCC were fulfilled.<sup>24</sup>

3.19 Ms James was asked about the recent decision of the Fair Work Commission on penalty rates. Ms James advised that the FWO's priority in the period after this decision was to update their online pay tools.<sup>25</sup>

3.20 The funding of working women's centres was examined, in particular the rationale underpinning decisions in the new funding program and why the Queensland Working Women's Centre had not received funding. Ms James replied that the criteria for awarding funding had changed and that, in the view of the FWO, an organisation that provided services for employees in the horticultural sector had a stronger application.<sup>26</sup> Mr O'Shea, Executive Director, Migrant Worker Strategy and Engagement, also detailed the organisations that made successful funding applications, and the FWO and the Minister agreed to investigate whether the Queensland Working Women's Service was facing closure as a result of not receiving funding.<sup>27</sup>

3.21 There was also mention of allegations of underpayment of employees by Domino's. The FWO undertook to provide information about their ongoing investigations on notice.<sup>28</sup>

3.22 There was discussion about the FWO's contract with the Transport Workers Union and the Australian Road Transport Industrial Organisation to develop an app. Ms James stated that ultimately the app was never provided and that this was a 'suboptimal outcome' for taxpayers.<sup>29</sup> Ms James agreed to provide further information on notice about the performance of the parties' contractual obligations.<sup>30</sup>

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21 *Committee Hansard*, 2 March 2017, p. 36.

22 *Committee Hansard*, 2 March 2017, p. 49.

23 *Committee Hansard*, 2 March 2017, p. 50.

24 *Committee Hansard*, 2 March 2017, p. 51.

25 *Committee Hansard*, 2 March 2017, p. 38.

26 *Committee Hansard*, 2 March 2017, p. 39.

27 *Committee Hansard*, 2 March 2017, p. 44.

28 *Committee Hansard*, 2 March 2017, p. 41.

29 *Committee Hansard*, 2 March 2017, p. 45.

30 *Committee Hansard*, 2 March 2017, p. 46.

3.23 Committee members probed the FWO about their role in the Migrant Workers' Taskforce.<sup>31</sup> Mr O'Shea and Ms James provided an overview of the taskforce's funding and work. The FWO committed \$50 000 to the taskforce, and are creating an online tool which will be translated into 15 languages and which will allow migrant workers to anonymously report exploitation.<sup>32</sup>

### **Australian Building and Construction Commission**

3.24 The Commissioner, Mr Hadgkiss, made an opening statement in which he thanked Ms James and the rest of the Fair Work Ombudsman for their assistance in transitioning functions under the ABCC Act.<sup>33</sup>

3.25 There was examination of the ABCC's timeframes for assessment of enterprise agreements in the commercial construction sector.<sup>34</sup> Ms Cato, National Manager Building Code, informed the committee that the ABCC was building the capacity of the assessment team and may require additional staff. Furthermore, Ms Cato stated that the ABCC was investigating an appropriate model for computerised assessment,<sup>35</sup> and that they were also in the process of engaging lawyers from the firm Alternative Legal Services to assist with the enterprise agreement approval process.<sup>36</sup>

3.26 Committee members inquired about the strength of the Building Code's (the Code) provisions for the protection of sub-contractors in the event of a building company becoming bankrupt.<sup>37</sup> Mr Hadgkiss advised that the new Code had more protections than the previous Code, and Ms Cato elaborated on the new Code's protections for security of payments.<sup>38</sup>

3.27 There was discussion about the percentage of prosecutions relating to the Construction, Forestry, Mining and Energy Union (CFMEU). Mr Hadgkiss informed the committee that the CFMEU was involved in 57 out of 62 cases, and that 110 CFMEU officials were facing 1078 contraventions in the court system.<sup>39</sup>

3.28 Committee members pursued questioning relating to Mr Hadgkiss's salary and allowances.<sup>40</sup> Mr Hadgkiss and Minister Cash emphasised that Mr Hadgkiss's salary was set by an independent arbiter.<sup>41</sup> There was much discussion about Mr Hadgkiss's

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31 *Committee Hansard*, 2 March 2017, p. 51.

32 *Committee Hansard*, 2 March 2017, p. 52.

33 *Committee Hansard*, 2 March 2017, p. 55.

34 *Committee Hansard*, 2 March 2017, pp. 57–62.

35 *Committee Hansard*, 2 March 2017, p. 60–61.

36 *Committee Hansard*, 2 March 2017, p. 62.

37 *Committee Hansard*, 2 March 2017, p. 64.

38 *Committee Hansard*, 2 March 2017, p. 65.

39 *Committee Hansard*, 2 March 2017, p. 69.

40 *Committee Hansard*, 2 March 2017, pp. 68, 72–81.

41 *Committee Hansard*, 2 March 2017, pp. 68–69.

fuel allowance. Mr Hadgkiss advised that he sometimes drives to interstate meetings rather than flying, and in these cases he cannot make a claim for petrol expenses that is more expensive than the cost of an airfare.<sup>42</sup>

3.29 Inquiries were raised about Mr Hadgkiss's diary keeping arrangements. Mr Hadgkiss advised that he did not keep a formal diary, but that his appointments were listed in an Outlook calendar. After much discussion, he agreed to attempt to make the calendar available on notice.<sup>43</sup>

### **Safe Work Australia**

3.30 Committee members questioned the agency's role in investigating the death of a worker at the Royal Adelaide Hospital site in 2014. Ms Baxter informed the committee that the matter came under the responsibility of state regulators and she was unable to provide comment.<sup>44</sup>

3.31 The committee also questioned Safe Work Australia's oversight role in relation to the work health and safety regulations of other states. Mr Edwards, the Federal Safety Commissioner, advised the committee that his office approves the work health and safety practices of any builder or construction worker that wishes to undertake Commonwealth funded work. In addition, Mr Edwards detailed his investigative role, which 'is to engage with the company at the highest levels' and to 'look at the work that was being undertaken at the time, looking into the company's safety systems around that work that was being undertaken and their practices to see if there are any opportunities to work together to improve them.'<sup>45</sup>

### **Workplace Gender Equality Agency**

3.32 Senator Marshall asked: '[w]ould you characterise the work done in female dominated industries, such as child care or health work, as undervalued?'

3.33 Ms Paterson, Advice and Reporting Executive Manager, agreed that such work was undervalued, and Minister Cash added:

[t]here has to be a massively concerted effort on getting more males into female dominated roles, because of what the evidence shows, which is that, if you get males into female roles, there is the resultant effect of a lift in salary. That is why, when we look at a number of the government's priorities, for example investment in STEM—which is, obviously, science, technology, engineering and mathematics—a lot of that is driven by knowing that the higher-paying occupations need women, but at the same time you do need to focus on getting more men into those other roles.<sup>46</sup>

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42 *Committee Hansard*, 2 March 2017, pp. 72, 74–76.

43 *Committee Hansard*, 2 March 2017, pp. 82–88.

44 *Committee Hansard*, 2 March 2017, p. 110.

45 *Committee Hansard*, 2 March 2017, p. 110.

46 *Committee Hansard*, 2 March 2017, p. 113.

3.34 The effectiveness of the WGEA's campaigns to improve gender pay equity was examined. Ms Paterson and Ms Clifford, Operations Executive Manager, provided an overview of their campaign work, noting that Equilibrium Man was a particular success.<sup>47</sup>

3.35 Ms Paterson also noted that targets are often a driver of change towards pay equity within organisations, particularly in relation to women attaining leadership positions:

...for an employer to be an employer of choice for gender equality they have to have in place a target for women in leadership as well as women on their boards. As part of that process we interview CEOs to make sure that, from the top, gender equality is driven through the culture. Certainly those CEOs say that targets, on numerous occasions, have been the sole driver around not only women in leadership positions but also the pay gaps within their organisations. They have reached their target ahead of the endpoint of the target. It has been a key factor in driving that change.<sup>48</sup>

### **Asbestos Safety and Eradication Agency**

3.36 The committee asked ASEA for an update regarding efforts to combat the importation of products containing asbestos.<sup>49</sup> The CEO, Mr Tighe, detailed the measures in place across the whole of government, which include:

- ASEA and the Australian Border Force cooperating with each other and with stakeholders in the industry to apply a zero tolerance policy in relation to asbestos-containing materials;
- an interdepartmental committee looking at the issue; and
- the broadening of the terms of reference of a Senate Economics Committee inquiry to include the issue.<sup>50</sup>

3.37 There was also discussion of specific cases, such as the discovery of products containing asbestos at the Fiona Stanley Hospital site in Perth. Mr Tighe suggested that case involved a supply chain issue, and that a holistic approach was needed to prevent future incidents.<sup>51</sup>

3.38 Committee members asked ASEA about its survey work in relation to stakeholders and the agency's operational plan. Mr Tighe detailed work done in these areas and undertook to provide further information on notice.<sup>52</sup>

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47 *Committee Hansard*, 2 March 2017, p. 115.

48 *Committee Hansard*, 2 March 2017, pp. 115–116.

49 *Committee Hansard*, 2 March 2017, pp. 116.

50 *Committee Hansard*, 2 March 2017, pp. 116–117.

51 *Committee Hansard*, 2 March 2017, p. 117.

52 *Committee Hansard*, 2 March 2017, p. 119.

## Department of Employment

### *Outcome One*

3.39 Committee members inquired about the safeguards and assurance monitoring for the PaTH program.<sup>53</sup> Ms Leon elaborated about the safeguards in relation to the 'recycling' of program participants:

[w]e monitor the use of the program by employers. We also put in place up-front requirements on them that are meant to draw to their attention the significance of what they are agreeing to and the requirements they have to fulfil in order to participate in the program, including signing an agreement that they are not displacing existing workers in order to take on the intern and that they are taking on the intern with a reasonable prospect of there being a job at the end of it... if there appears to be a pattern of an employer taking on interns and then not offering them a job at the end then that employer would no longer be permitted to use the program.<sup>54</sup>

3.40 Mr Hehir, Deputy Secretary, also advised that young people who are participating in internships will be covered under insurance taken out by the Department,<sup>55</sup> however Ms Leon was unable to confirm whether the Department's insurance would result in an intern being better or worse off under the Department's scheme than if they were covered under a state or territory scheme because the outcomes depend on the unique circumstances of each case.<sup>56</sup>

3.41 The committee investigated matters relating to the safety of Work for the Dole sites. The Senator raised the issue of a Work for the Dole participant who was potentially exposed to asbestos at a site in Adelaide.<sup>57</sup> Ms Leon informed him that an investigation had taken place which confirmed that the material was asbestos, and that the Work for the Dole activity at the site had ceased.<sup>58</sup> Committee members asked further questions about a safety audit of all the sites conducted by Ernst and Young.<sup>59</sup> Ms Leon assured the Senator that most of the sites deemed non-compliant had minor issues that could be rectified with little difficulty, but acknowledged that work had to be stopped at two sites because of safety concerns arising from the audit.<sup>60</sup>

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53 *Committee Hansard*, 2 March 2017, p. 136.

54 *Committee Hansard*, 2 March 2017, p. 136.

55 *Committee Hansard*, 2 March 2017, p. 137.

56 *Committee Hansard*, 2 March 2017, pp. 138–139.

57 *Committee Hansard*, 30 March 2017, p. 24.

58 *Committee Hansard*, 30 March 2017, p. 25.

59 *Committee Hansard*, 30 March 2017, p. 28.

60 *Committee Hansard*, 30 March 2017, p. 28.



3.42 Committee members inquired into the release of the report into the death of a Work for the Dole participant. Minister Cash and Ms Leon advised that the report had not been release to avoid prejudging the outcome of ongoing inquires.<sup>61</sup>

3.43 There was examination of the effectiveness of the Work for the Dole program in moving participants off welfare and into employment. Minister Cash informed the Senator that 'the point of Work for the Dole is not to get an employment outcome as such...[i]t is an activation activity.'<sup>62</sup> Ms Leon reinforced this point, advising the committee: '[a]s the minister says, the principal purpose of Work for the Dole is around activation of jobseekers, and the valuations that we have done indicate that it is very effective in that respect and in increasing their confidence and motivation to get a job.'<sup>63</sup>

3.44 Committee members also sought information relating to the incorrect disposal of confidential records by Sarina Russo, an agency that is contracted under the Jobactive program. Mr Hehir advised that an investigation had taken place, and the Department was satisfied it was not a systemic error so a financial penalty was not applied. The agency was however required to improve their practices in this area.<sup>64</sup>

### ***Outcome Two***

3.45 Committee members pursued questions about the progress of establishing the Registered Organisations Commission and appointment of a Commissioner. Legal Counsel, Mr O'Sullivan, advised that the position had been advertised and that a merit selection process was underway.<sup>65</sup> In addition, Ms Leon informed the committee that, even though the Registered Organisations Commission will be within the Fair Work Ombudsman, '[t]here will not be any reduction in services. It is simply a transfer to the Fair Work Ombudsman of the functions and resources that go with those functions.'<sup>66</sup>

3.46 Senator Cameron also inquired about staffing arrangements to support the Registered Organisations Commission. Ms Anderson, Branch Manager, Workplace Relations Policy Group, advised the committee that:

...the process of a machinery of government is basically that any staff that are working on that function transfer with that role. Through negotiations between the Fair Work Commission and Fair Work Ombudsman they have identified 18 ASL, but 16 people have been identified out of that branch to follow the work of Registered Organisations Commission.<sup>67</sup>

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61 *Committee Hansard*, 30 March 2017, p. 27.

62 *Committee Hansard*, 30 March 2017, p. 29.

63 *Committee Hansard*, 30 March 2017, p. 29

64 *Committee Hansard*, 30 March 2017, p.34.

65 *Committee Hansard*, 2 March 2017, p. 120.

66 *Committee Hansard*, 2 March 2017, p. 120.

67 *Committee Hansard*, 2 March 2017, p. 121.

3.47 There was also considerable discussion about the Department's response to the Fair Work Commission's decision that weekend penalty rates be reduced. Dr Morehead spoke about measures to protect workers' take home pay,<sup>68</sup> and advised that the FWC's reasoning for the decision was because 'of the concept of disutility of working on a Sunday.'<sup>69</sup>

3.48 The committee also examined the potential impact of a reduction in penalty rates on women.<sup>70</sup> Dr Morehead advised there was no evidence before the FWC that a reduction in penalty rates would disproportionately affect women.<sup>71</sup>

**Senator Bridget McKenzie**

**Chair**

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68 *Committee Hansard*, 2 March 2017, pp. 122–123.

69 *Committee Hansard*, 2 March 2017, p. 125.

70 *Committee Hansard*, 2 March 2017, p. 128.

71 *Committee Hansard*, 2 March 2017, p. 130.

# Appendix 1

## Committee oversight of departments and agencies

### Education and Training portfolio

#### *Departments and Agencies examined*

- Department of Education and Training
- Australian Curriculum Assessment and Reporting Authority
- Australian Institute for Teaching and School Leadership
- Australian Skills Quality Authority
- Australian Research Council
- Tertiary Education Quality and Standards Agency

#### *Agencies not examined*

- Australian Institute of Indigenous and Torres Strait Islander Studies
- Australian National University

### Employment portfolio

#### *Departments and Agencies examined*

- Department of Employment
- Asbestos Safety and Eradication Agency
- Australian Building and Construction Commission
- Fair Work Commission
- Fair Work Ombudsman
- Safe Work Australia
- Workplace Gender Equality Agency

#### *Agencies not examined*

- Coal Mining Industry (Long Service Leave) Funding Corporation
- Comcare, the Safety, Rehabilitation and Compensation Commission, and the Seafarers Safety, Rehabilitation and Compensation Commission



## Appendix 2

### Index to Proof Committee Hansard Transcripts

<i>Wednesday 1 March 2017</i>	<i>Hansard page</i>
Australian Skills Quality Authority	4
Australian Institute for Teaching and School Leadership	23
Australian Curriculum Assessment and Reporting Authority	29
Australian Research Council	41
Tertiary Education Quality and Standards Agency	53
Department of Education	
Cross-Portfolio	55
Outcome 1	72
Outcome 2	122
<i>Thursday 2 March 2017</i>	
Fair Work Commission	4
Office of the Fair Work Ombudsman	33
Australian Building and Construction Commission	55
Safe Work Australia	109
Workplace Gender Equality Agency	111
Asbestos Safety and Eradication Agency	116
Department of Employment — Outcome 2	119
<i>Thursday 30 March 2017</i>	
Fair Work Commission	2
Department of Employment — Outcome 1	24



# Appendix 3

## Advice from the Clerk of the Senate



AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE  
CANBERRA A.C.T. 2600  
TEL: (02) 6277 3350  
FAX: (02) 6277 3199  
E-mail: [clerk.sen@aph.gov.au](mailto:clerk.sen@aph.gov.au)

hl.let.15054

6 June 2006

Senator Penny Wong  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Senator Wong

### ESTIMATES HEARINGS

#### EVIDENCE BY DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS

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

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

The department, in the person of Mr O'Sullivan, whose answers were not qualified by the secretary of that department, Dr Boxall, invoked subsection 13(6) of the Public Service Act 1999 as an impediment to answering certain questions in the

hearing. That subsection is one of a number of parts of the Public Service Code of Conduct, and provides:

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

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

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

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

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

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

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

A public interest immunity claim, that is, a claim that it would not be in the public interest to disclose certain information to a parliamentary committee, is simply the vehicle by which issues about the sensitivity of particular information are raised.



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

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

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

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

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

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

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

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

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

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

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

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

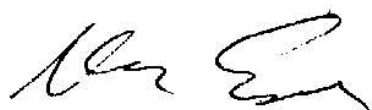
Mr O'Sullivan used the language of objecting to the questions. Perhaps he thinks that his taking objection to questions automatically triggers the Senate's Privilege Resolution 1(10). This provides that, if a witness objects to answering any question, the committee is to consider the stated ground of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

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

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

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'Harry Evans', with a stylized flourish at the end.

(Harry Evans)



## **Appendix 4**

### **Statement by the Chair<sup>1</sup>**

Yesterday, during questions to the department, Senator Abetz asked whether it had sought legal advice about compulsory arbitration. Mr O'Sullivan declined to answer on the basis of legal professional privilege but eventually took the question on notice.

It should be well known to officers attending this committee that there is a clear process for seeking not to answer a question, a process which is referred to at the beginning of every set of hearings. Copies are available from the secretariat.

No witness has an independent discretion to decline to answer a question. An officer has a right under Privilege Resolution 1(16) to refer a question to a senior officer or minister. Alternatively, an officer may state the public interest ground on which he or she believes it may not be in the public interest to disclose the information requested AND specify the harm to the public interest that could result from disclosure of the information. The order of the Senate of 13 May 2009, to which I have already referred, then sets out the process to be followed. There is no other basis on which an answer may be withheld from a committee.

It is very difficult to see how the answer to a question whether legal advice has been sought on a matter could attract legal professional privilege, let alone how it could harm the public interest. The public interest in Commonwealth agencies being accountable to committees of this Parliament for their administration of taxpayers' money must, in most cases, prevail.

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides a ground for a refusal of information in a parliamentary forum. The first question in response to any such claim is: to whom does the legal advice belong, to the Commonwealth or some other party? Usually it belongs to the Commonwealth. Legal advice to the federal government, however, is often disclosed by the government itself. Therefore, the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought.

I suggest that the department should think very carefully in answering the question on notice about where the public interest actually lies.

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1 Senator Gavin Marshall, Chair, Education, Employment and Workplace Relations Committee, *Committee Hansard*, 5 June 2013, p. 53.

