



Rule of Law Association of Australia

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**Senate Estimates survey on the  
economic regulators**

May 2010

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## 1. RoLAA finds the estimates hearings valuable for the rule of law

*“On the evening of 11 June 1970 the Australian Senate passed an historic resolution to establish seven Legislative and General Purpose Standing Committees and five Estimates Committees. That decision has been described as having ‘revolutionised the Parliament as a whole’ and has had far reaching effects on the Australian system of parliamentary government, changing the nature of much parliamentary activity and affecting the way in which executive government carries out its business” – Senator Cooney, presenting the report on the Standing Committee on Legal and Constitutional Affairs at its 20<sup>th</sup> anniversary.<sup>1</sup>*

Forty years on, almost to the month, the Senate Estimates continue their scrutiny function, and their modus operandi is more or less the same, notwithstanding changes to the Senate’s party composition and notwithstanding other changes to the Senate procedures.

### RoLAA

The Rule of Law Association is an independent non-profit association formed to uphold the rule of law in Australia. RoLAA has a keen interest in the conduct and outcomes of Senate Estimates.

RoLAA’s objectives are:

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

RoLAA believes the Senate estimates hearings are arguably the most critical and systematic element of the accountability mechanism applicable to our Federal economic regulators. The hearing transcripts and written responses for Estimates are a key record of the interaction of the parliament and the executive. Our economic regulators are independent agencies and accountable only to the Parliament. It is rare for a Minister to direct one of these agencies to take a particular course of action.

The economic regulators RoLAA has surveyed are:

- Australian Securities and Investments Commission (ASIC)
- Australian Competition and Consumer Commission (ACCC)
- Australian Prudential Regulation Authority (APRA)
- Fair Work Australia (FWA)
- Australian Taxation Office (ATO)

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<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=0;query=11%20june%201970;querytype=:rec=1;resCount=Default>

In the 2009/2010 financial year these regulators had appropriation funds at their disposal totalling approx \$3,939,498,000, with an expected \$4,439,763,000 for the 2010/2011 year. This total budget is small compared to the balance sheets of the many companies that are regulated. However, for each dollar of regulation there is multiplier effect on cost structures for these companies, and ultimately this impacts the price for goods and services. Also, the economic regulators inter alia protect and uphold the interests of the 18 or so million Australians who work, save, invest and purchase goods and services. For example, over the past few years, ASIC and APRA have been required to deal with the Global Financial Crisis, the collapse of financial institutions and flagging investor and consumer confidence.

RoLAA intends to analyse each Estimates hearing and publish key indicators of accountability and scrutiny. We have begun with the hearings conducted in February 2009, and surveyed each hearing since. When the June 2010 estimates occur we will survey them.

## 2. What happens at the estimates hearings?

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

There are several permanent Senate committees, known as standing committees. The standing committee system was brought in to subdivide the Senate, as the whole cannot do it all.<sup>2</sup> The plan was that the Senate would become more efficient as it could deal with more work.<sup>3</sup> The Committees conduct estimates hearings into their areas of speciality. The key committee RoLAA examined was the Economics Committee, as it covers the major economic regulators. We also reviewed the Education, Employment and Workplace Relations Committee which deals with the more recently established industrial relations regulator, Fair Work Australia.

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

Odgers' Australian Senate Practice 12<sup>th</sup> edition provides a very comprehensive guide to estimates;<sup>4</sup> describing them as:

“Estimates scrutiny is an important part of the Senate’s calendar and a key element of the Senate’s role as a check on government. The estimates process provides the major opportunity for the Senate to assess the performance of the public service and its administration of government policy and programs. It has evolved from early efforts by senators to elicit basic information about government expenditure to inform their decisions about appropriation bills, to a wide-ranging examination of expenditure with an increasing focus on performance. Its effect is cumulative, in that an individual question may not have any significant impact, but the sum of questions and the process as a whole, as it has developed, help to keep executive government accountable and place a great deal of information on the public record on which judgments may be based.

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

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<sup>2</sup> Senator Murphy, Senate Debates, 4 June 1970, p 2050

<sup>3</sup> Ibid.

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

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

### **3. Methodology**

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

We have selected to consider:

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

#### ***\*Meaning of 'question'***

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

During the hearings, from time to time regulators decline to answer because a question is not in their area; because a court case is underway; or an investigation is underway; or because it is not their place to offer an answer. Those are still included in the 'questions unanswered section'. Questions taken on notice by Assistant Treasurer, Senator Sherry are also included in the 'questions unanswered section'. Sometimes the number of questions taken on notice exceeds the number of answers in the Committee's answers section. This is because RoLAA deemed there was more than one question taken on notice, but the Committee secretariat grouped them as one.

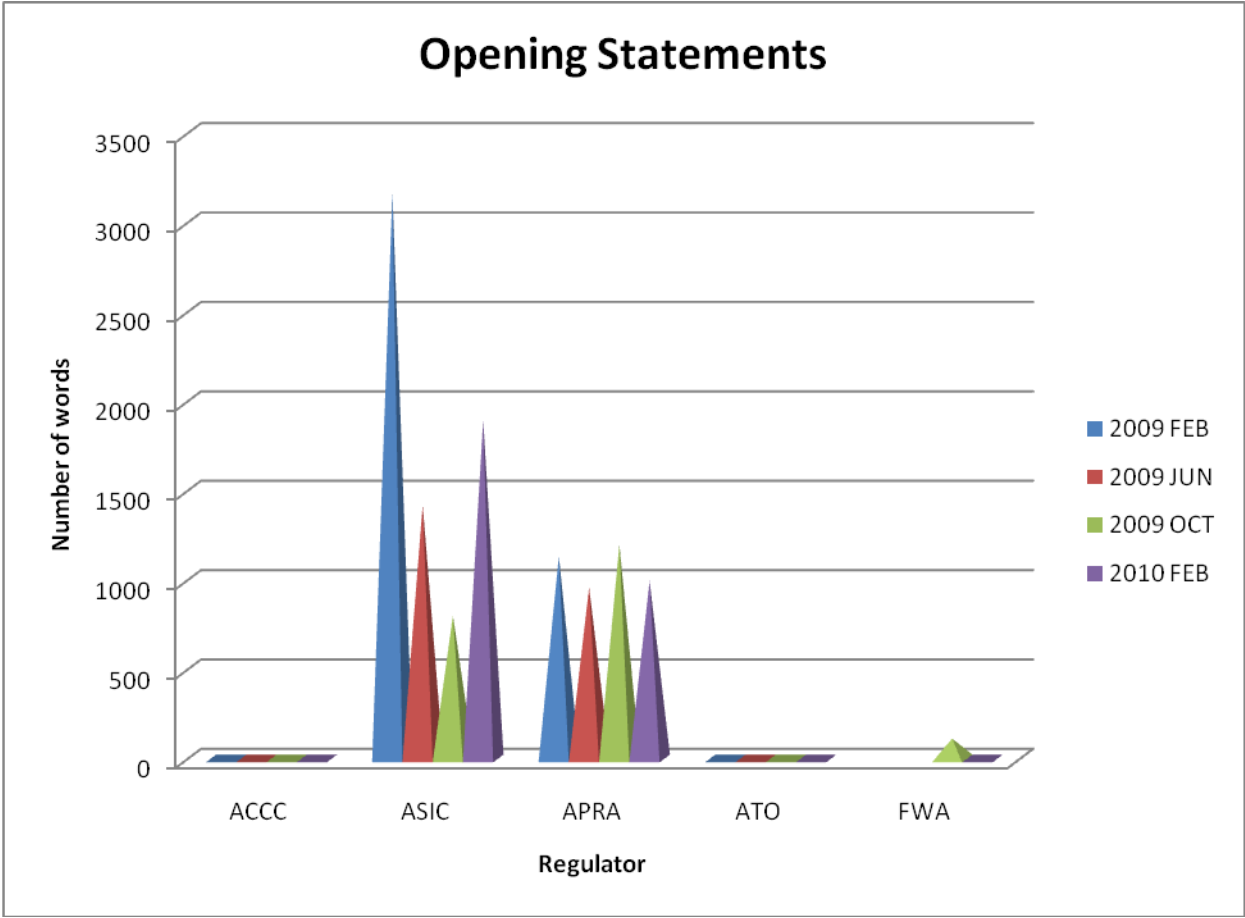
# 4. Observations

## 4.1 Opening statements

As the table below indicates, ASIC makes by far the longest opening statements. While regulators are invited to make these statements, they do take up time for allocated for questions. On the other hand, a quality opening statement can answer potential questions. Statements often are tendered as evidence after being read out.

The ACCC and ATO did not provide an opening statement in any of the surveyed estimates. Both regularly have longer hearings than the two agencies which provided statements.

*This graph shows the number of words in opening statements for each regulator:*

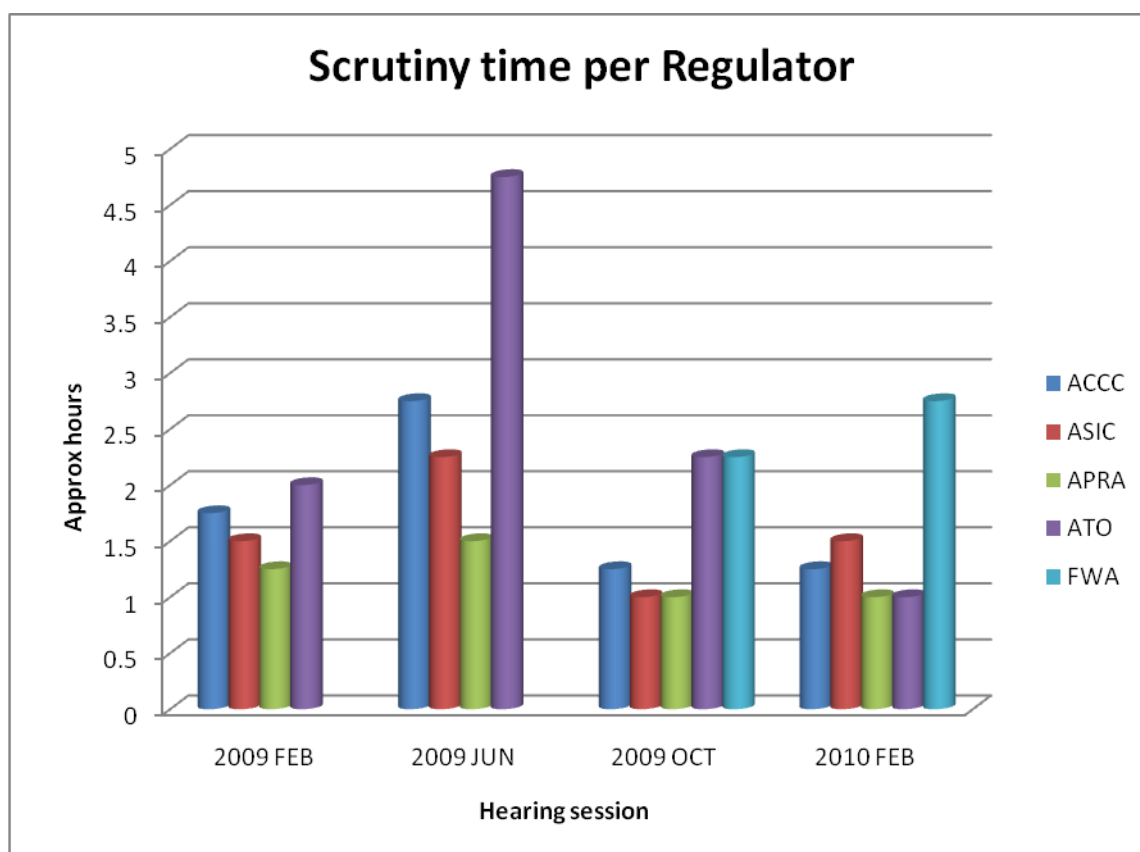


## 4.2 Allocations of scrutiny time per year per regulator

The allocation of time for each regulator and whether it is important is a complex issue. As questions of priorities and political outcomes will drive issues and questions it is not surprising that some agencies at some times will be the subject of scrutiny which is disproportionate to their relative budget allocation. Notwithstanding this, the community expectation is that Parliament will apply appropriate levels of scrutiny, just as the boards and management of our public listed companies are scrutinised at shareholder meetings (sometimes for four to five hours). If sufficient time is not allocated to Estimates scrutiny for a particular regulator it is possible that the Parliament will be exposed to criticism of it not doing its job, especially if there is a major failure under that regulator's watch.

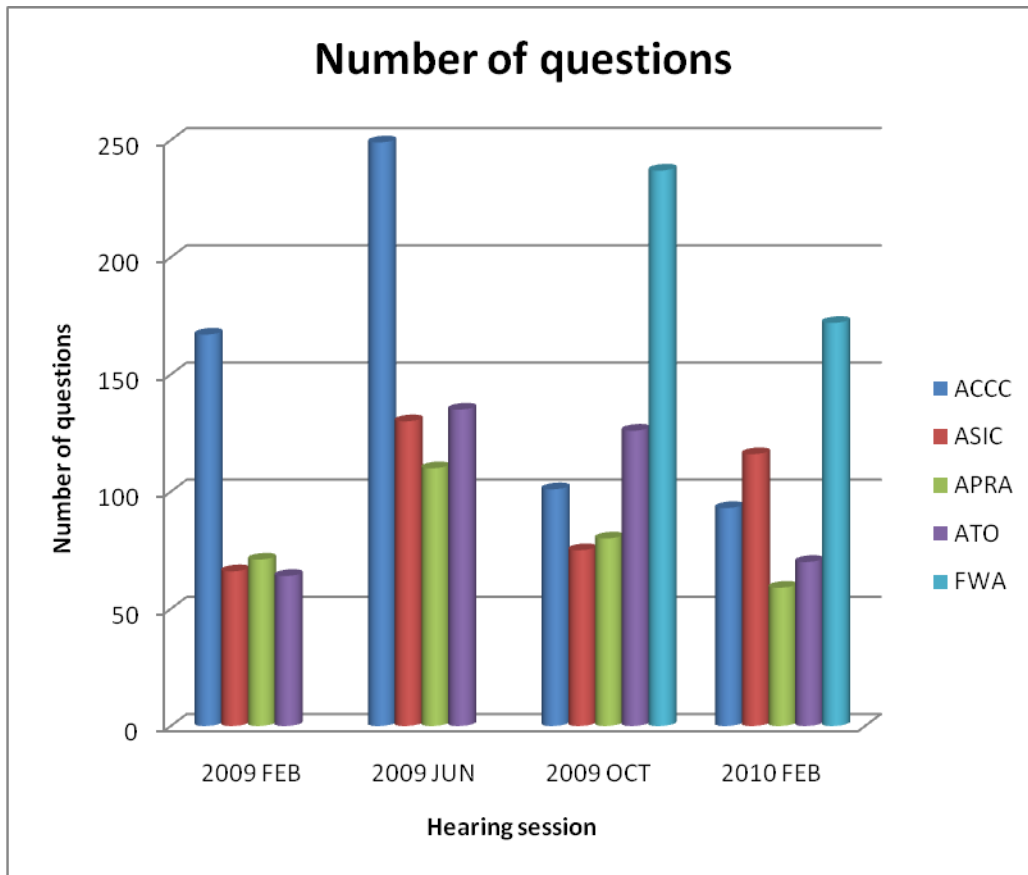
It is understandable that FWA, as a new regulator, was allocated above average scrutiny time at the February 2009 Estimates. In general, the ACCC seems to get more time, which seems at odds with its relatively modest budget. Political and media factors no doubt play a role in agency scrutiny. Using size of budget allocation as a device to allocate time, the ATO would need seven times the time allocation as the next largest, ASIC and presumably should have much longer dedicated to it alone. For example, in Feb 2010 ASIC had approximately 1.5 hours allocated. Following this, the ATO should have had 10.5 hours. It had 4.5, which was shared with Treasury, and was also asked approximately 46 questions fewer than ASIC.

ASIC has more than twice the budget of the ACCC, and twice chose to make an opening statement which was longer than 1800 words. ASIC received less time than the ACCC, and often barely more time than APRA, which has one third of ASIC's budget. The 'time squeeze' which ASIC experienced might explain why ASIC took a larger number of questions on notice.

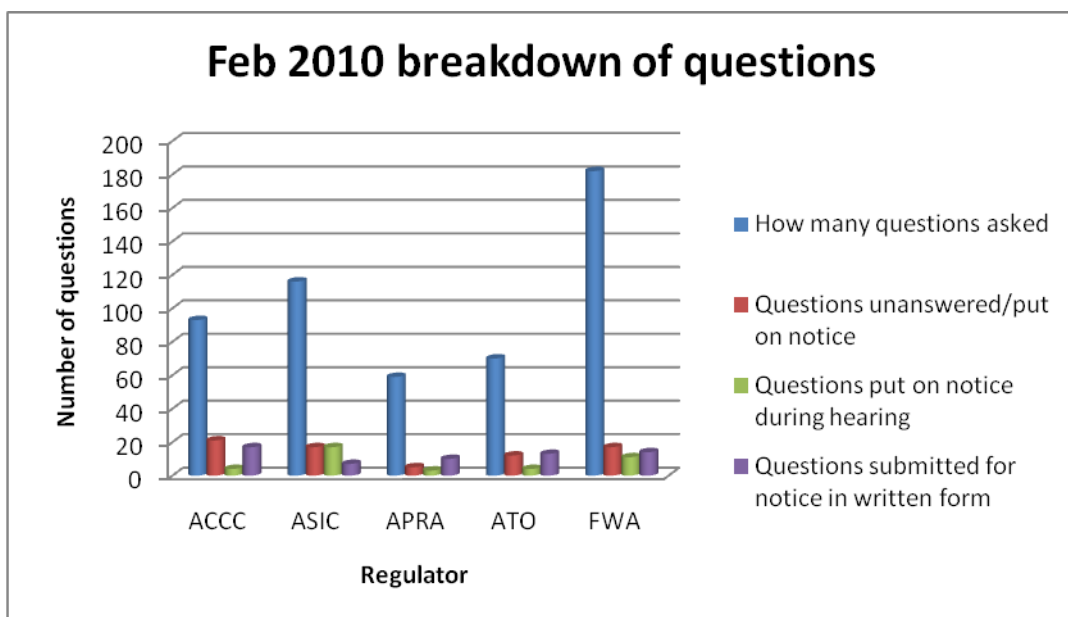


### 4.3 Differences in rate of answering/taking on notice

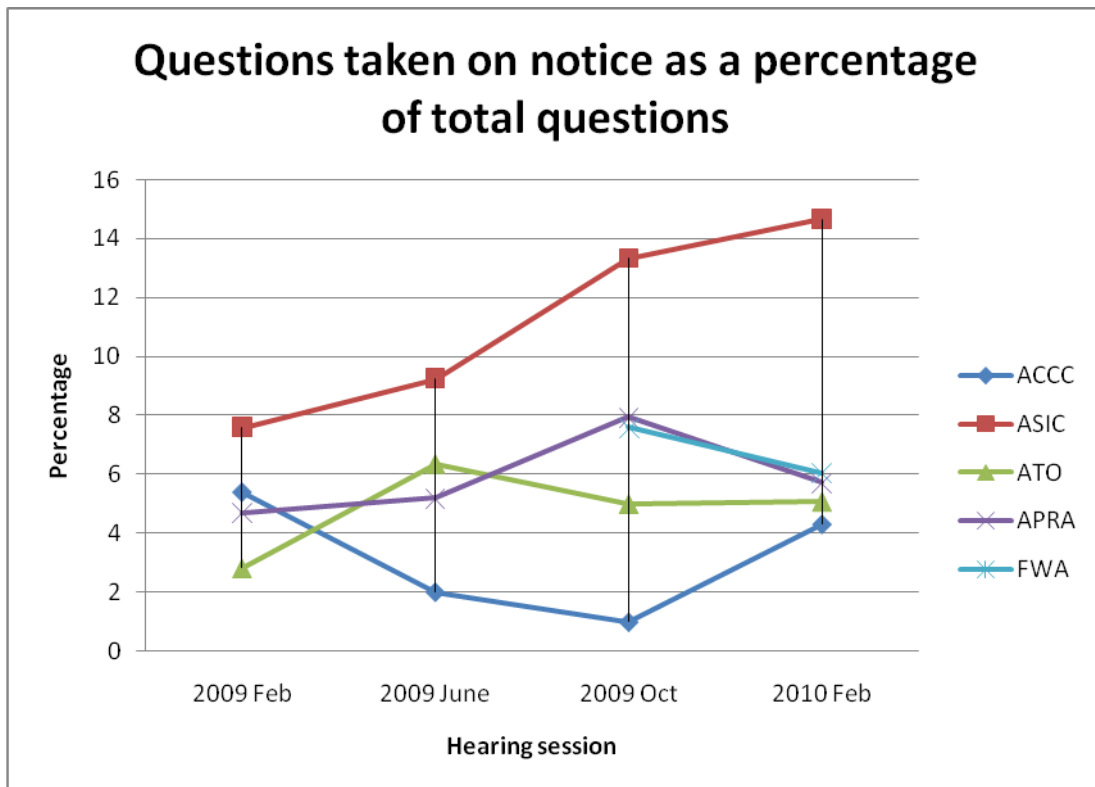
Each regulator is asked many questions during the hearings:



Generally, the regulators only take a small percentage of questions on notice or decline to answer them. When questions are not able to be asked they are submitted as written notice questions by the senators. The graph showing the breakdown of questions for February 2010 shows the experience of regulators under this categorisation.

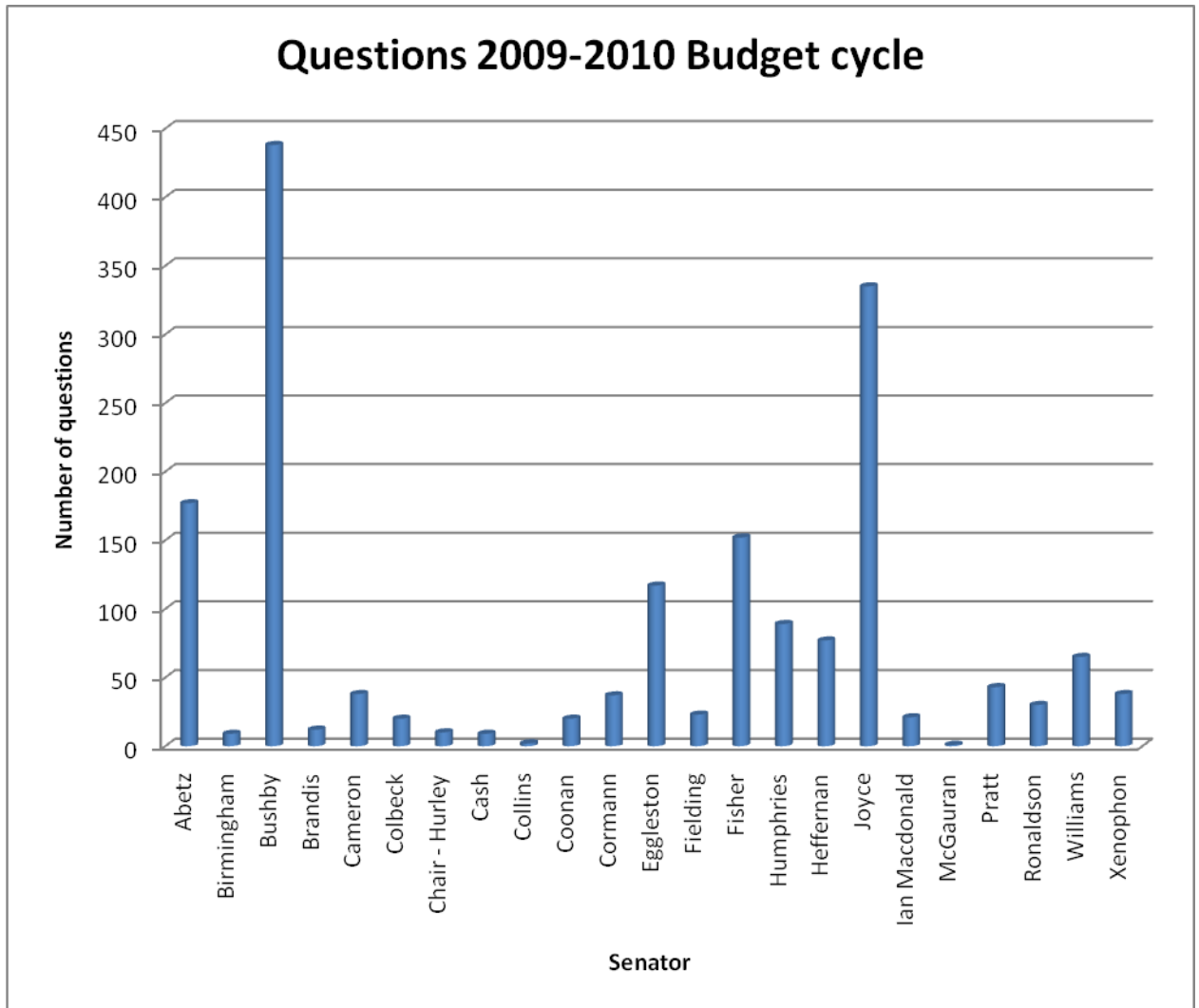


ASIC generally takes the most questions on notice compared with the total questions asked. The graph below shows the questions on notice as a percentage of the total questions asked.



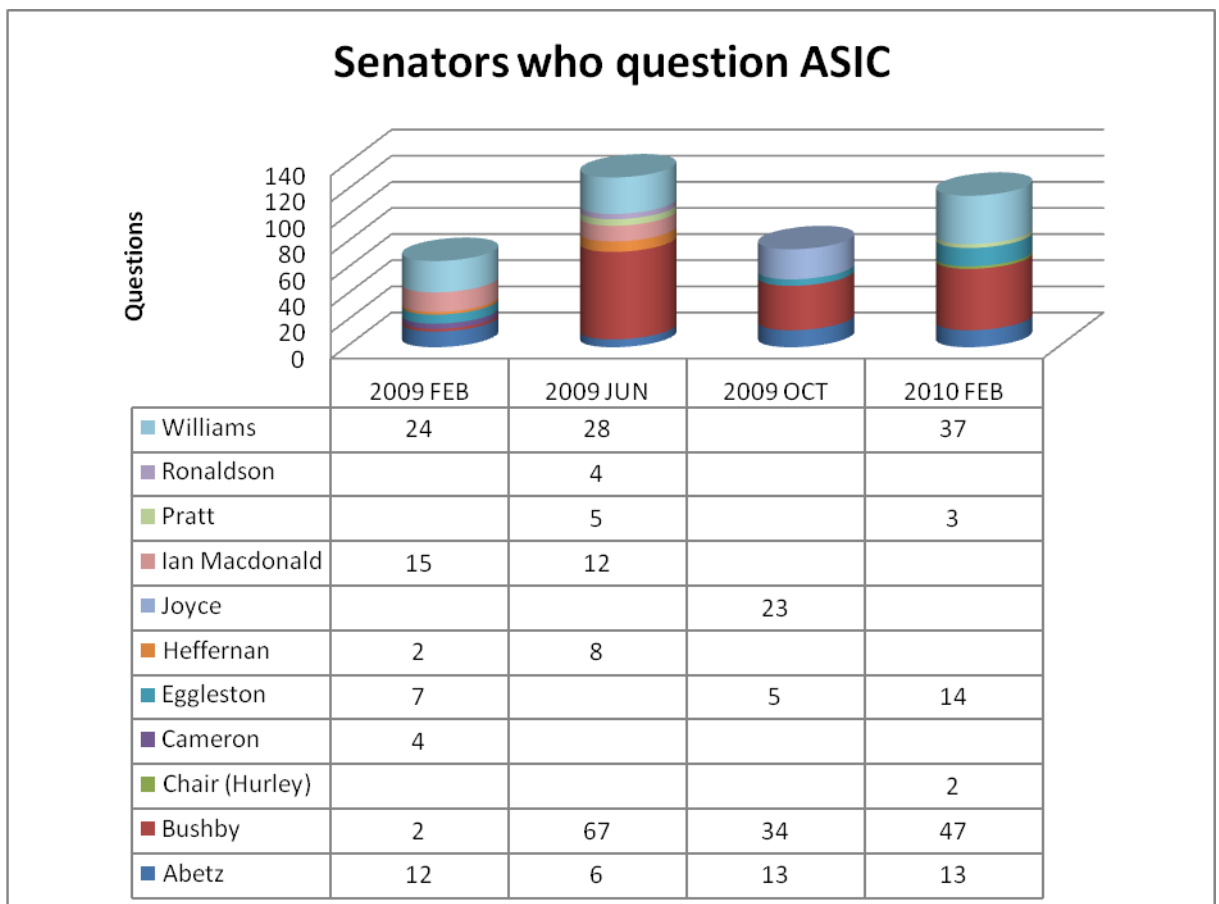
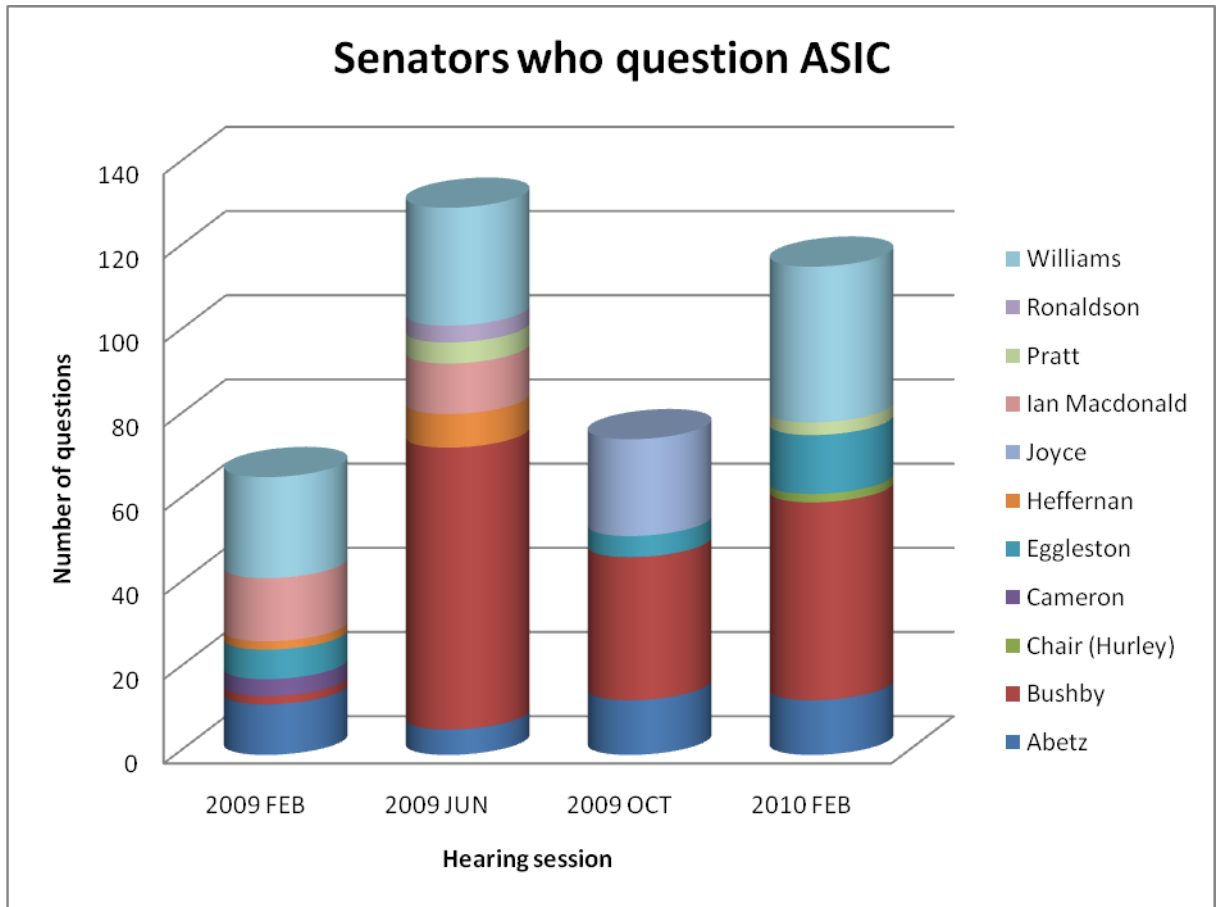
#### 4.4 Which Senators focus on which regulators

More than 20 Senators ask questions of the economic regulators. The 2009-2010 budget year break-down of which Senators asked questions and how many questions they asked appears in the following chart.

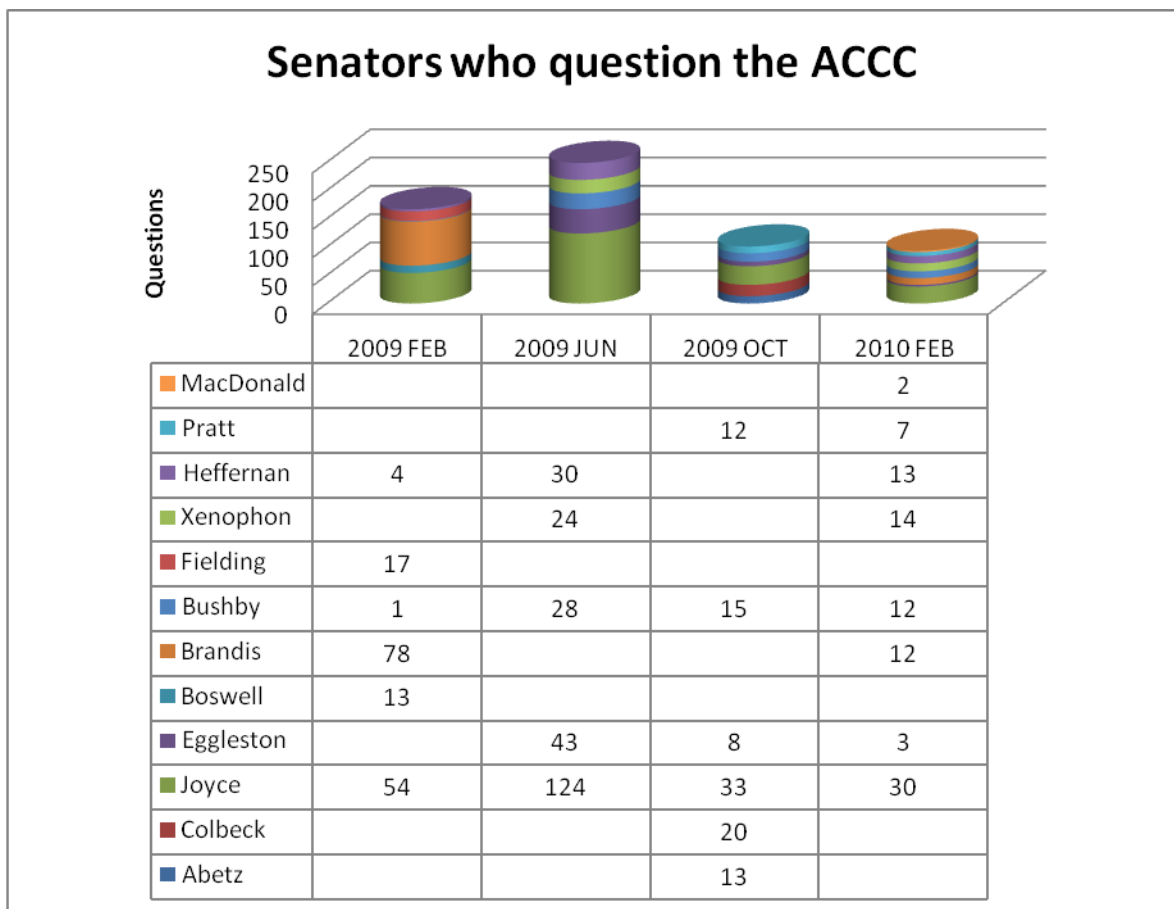
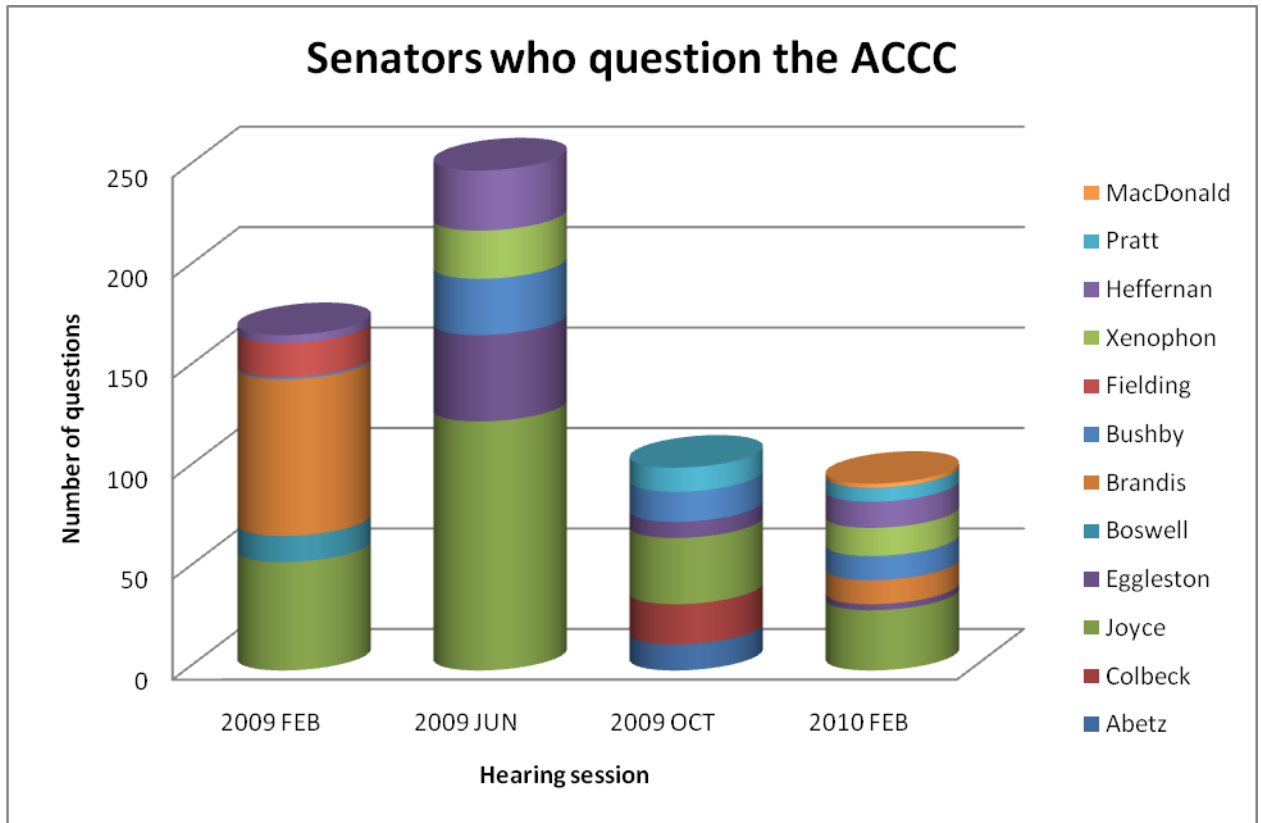


The graphs on the following pages set out which Senators ask questions, of which regulator, and the number of questions they ask:

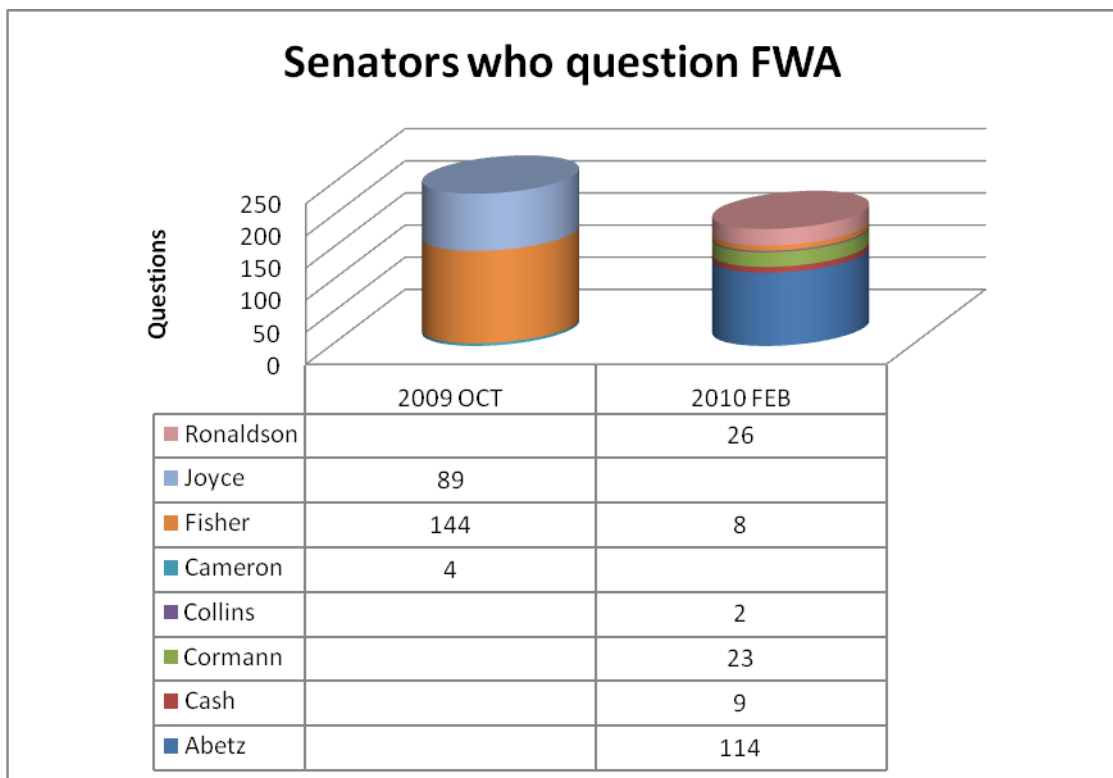
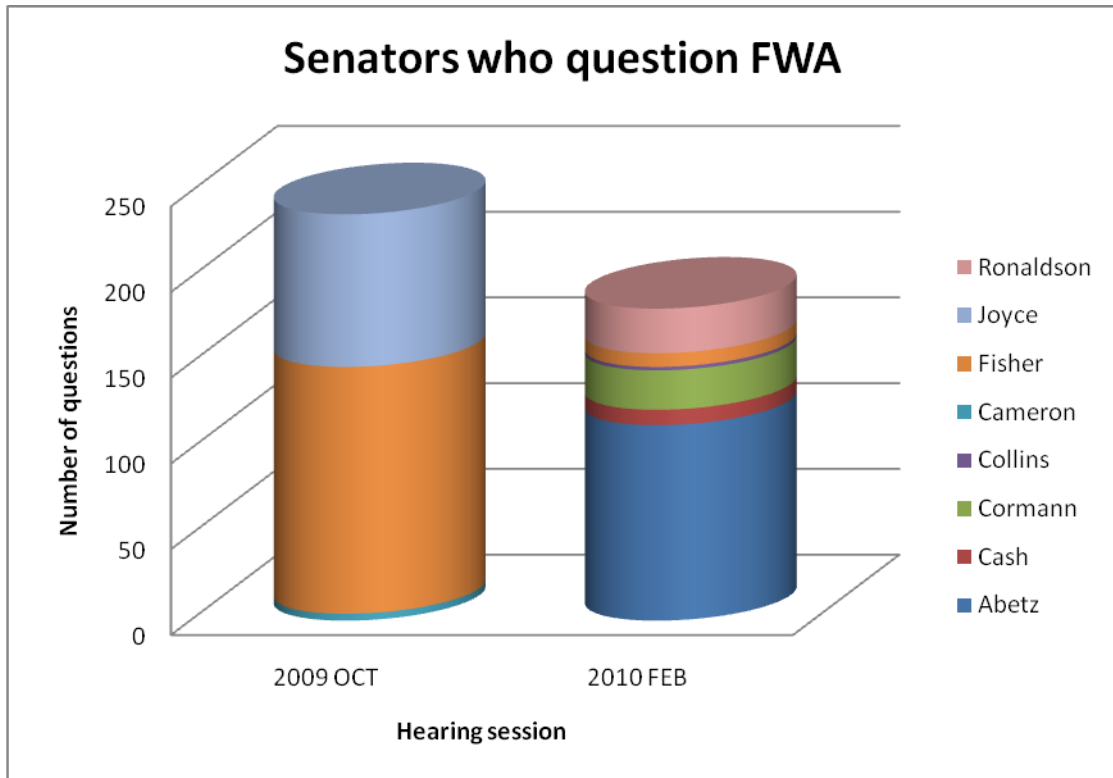
# ASIC



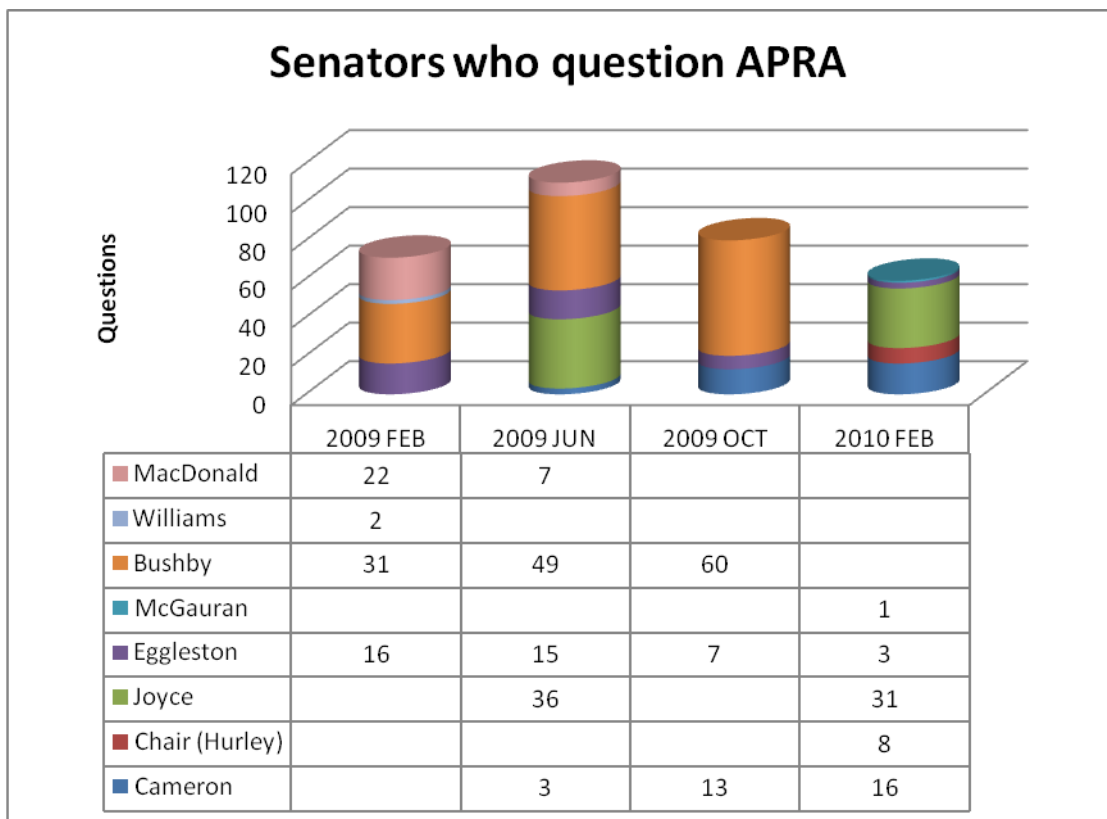
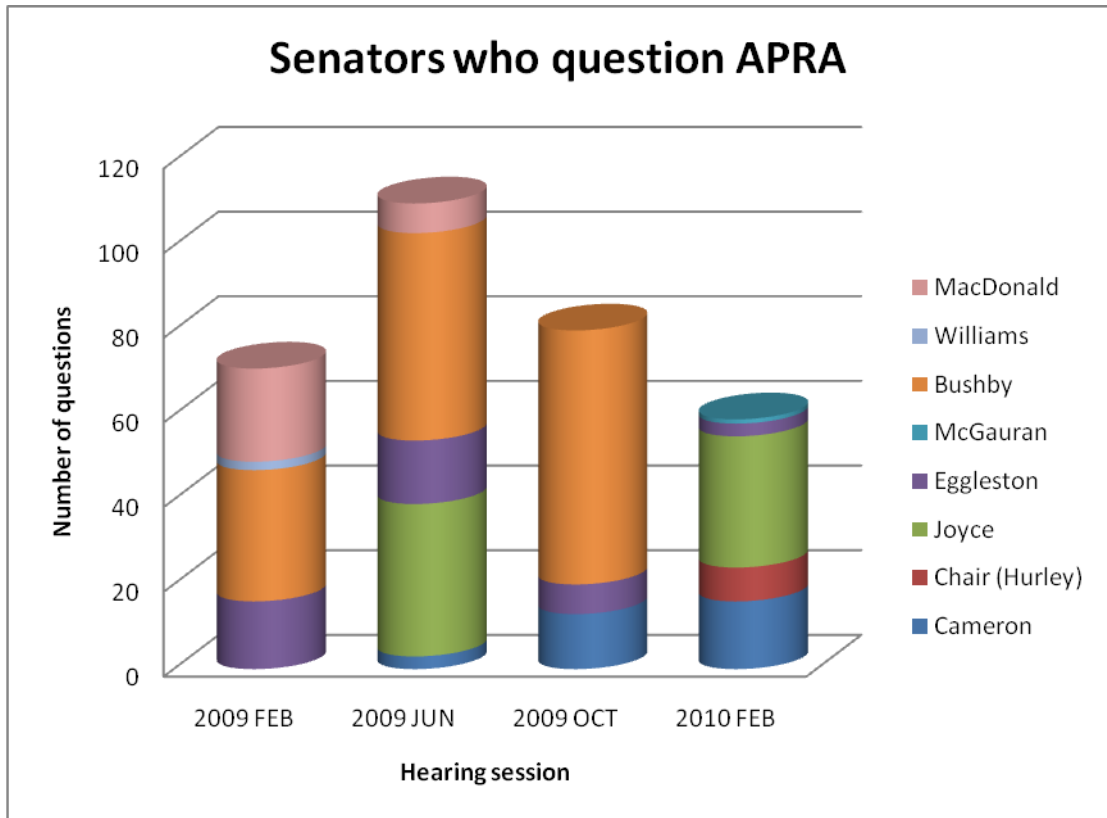
ACCC



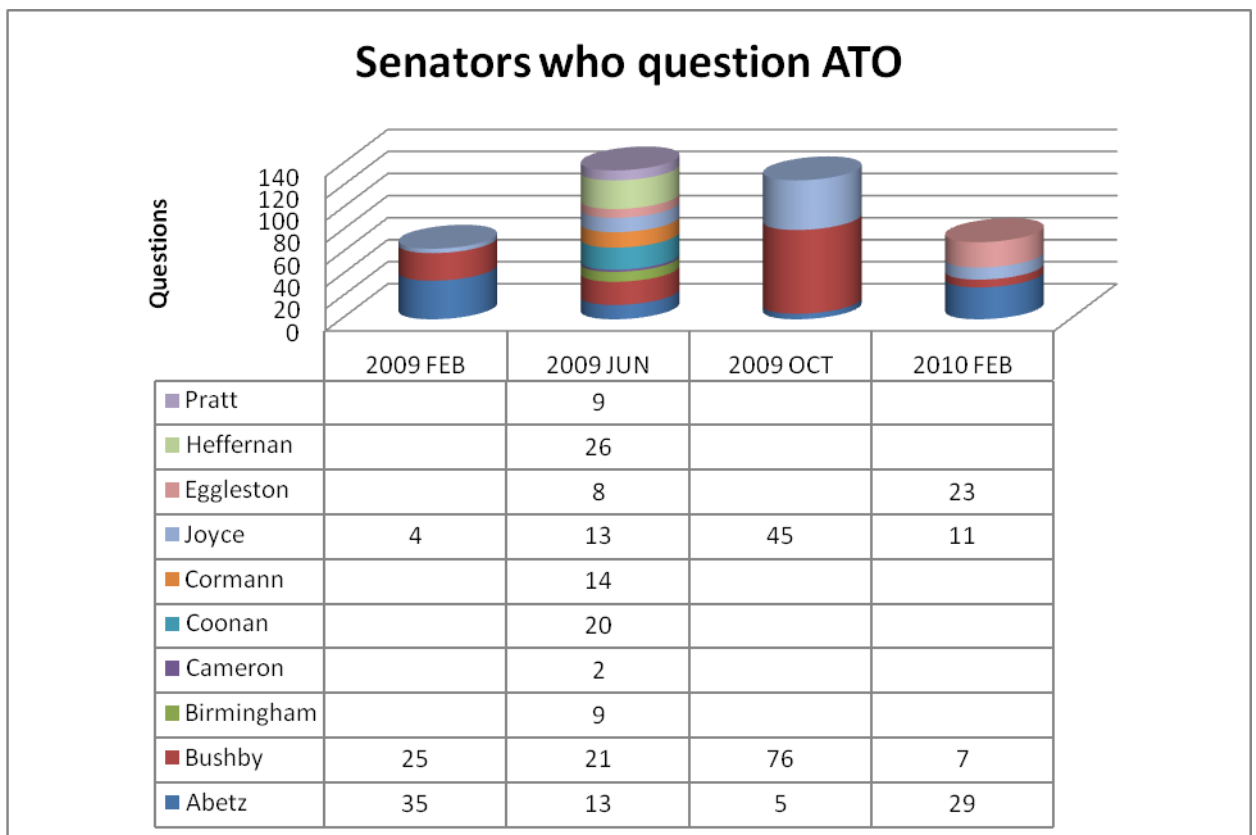
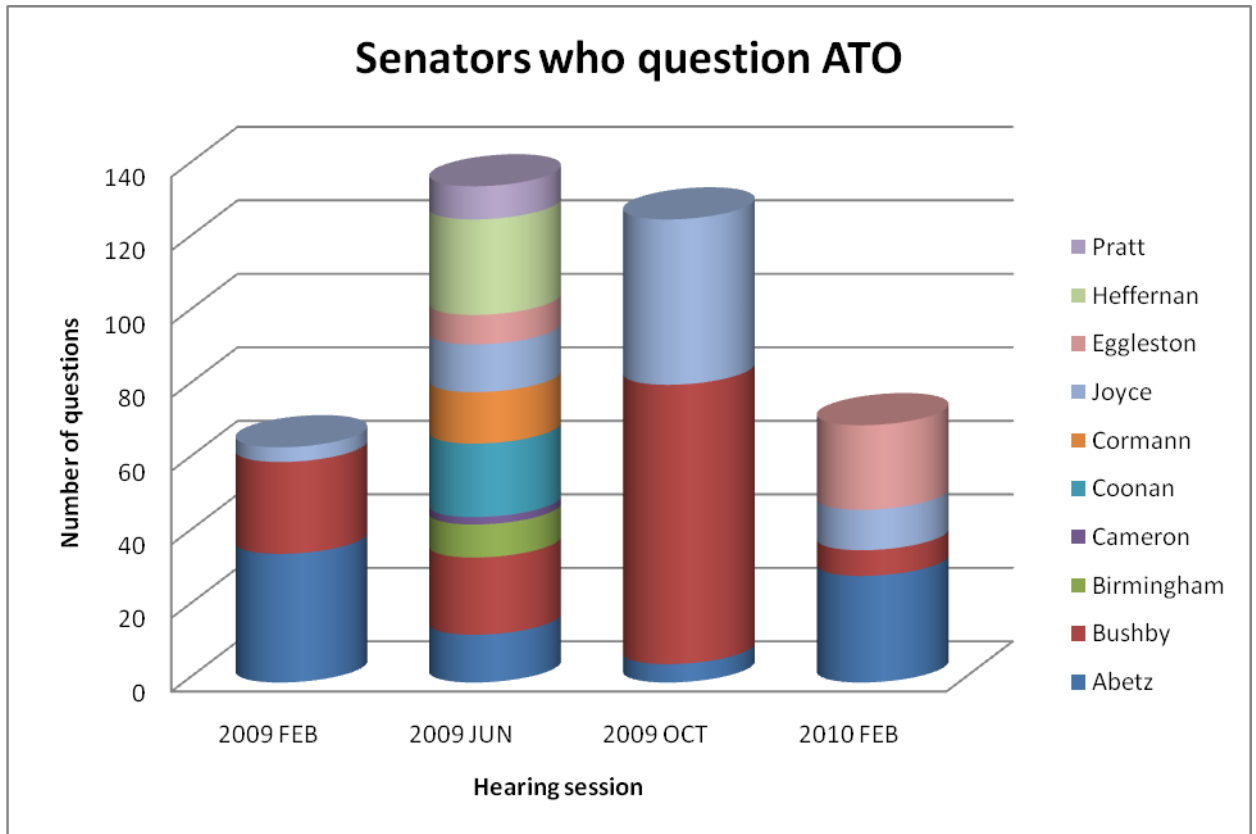
**FWA**



# APRA



# ATO



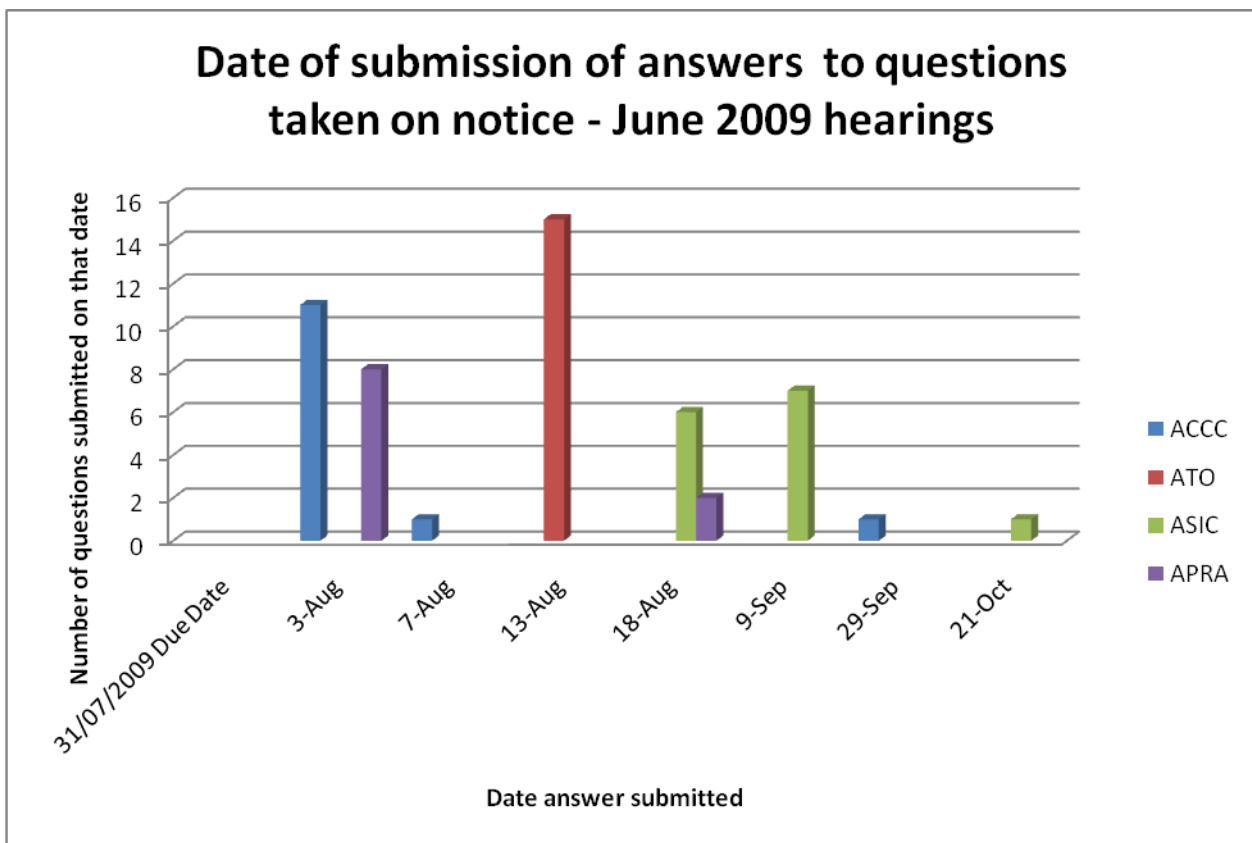
## 5. Questions on notice – how long before they are answered?

In relation to the time taken to provide answers, RoLAA was only able to survey the Feb 2009 and June 2009 hearings of the Senate Economics Committee as they were the only hearings to have dates of answers listed.

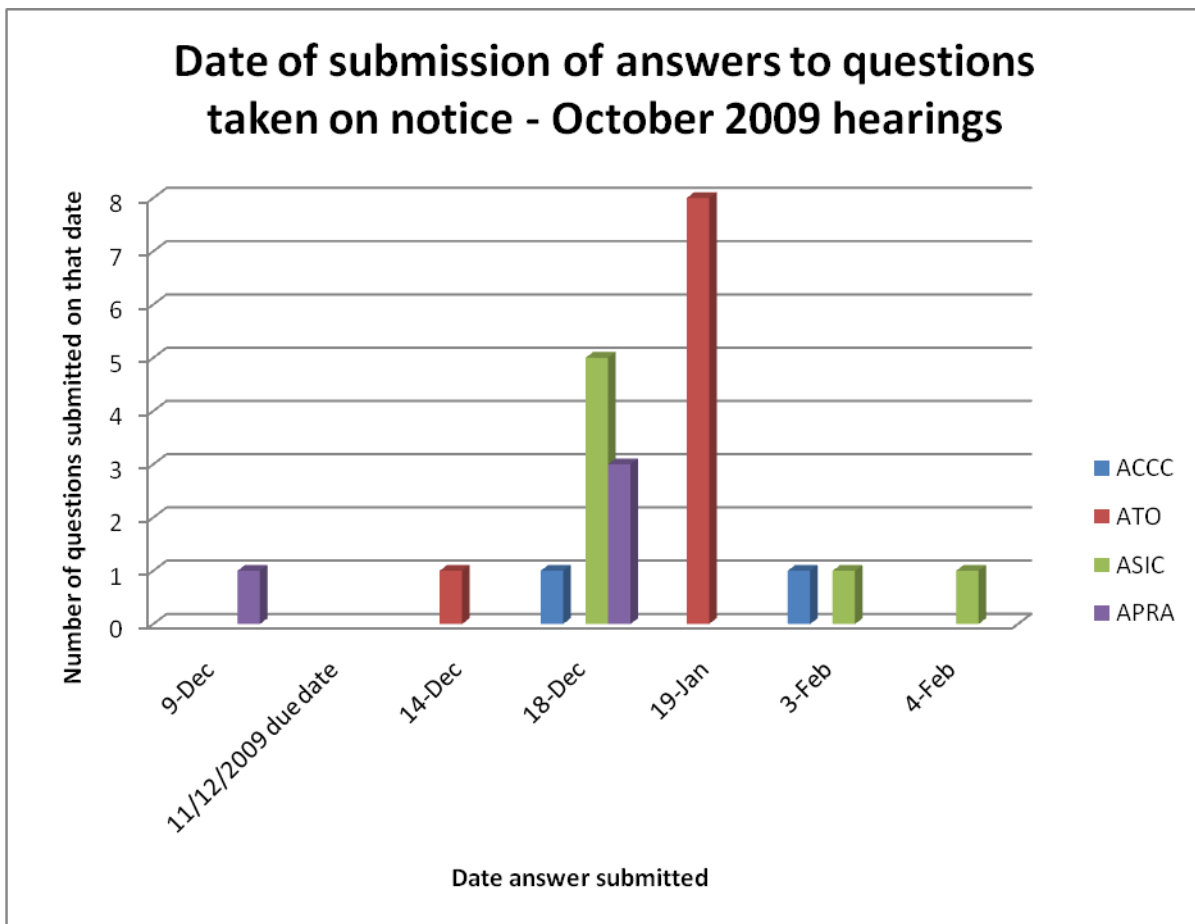
All the regulators submitted answers to questions after the due agreed by the Committee as per Senate Standing Orders. APRA was the only regulator to submit an answer before a due date, with one question in the October 2009 estimates.

The graphs below show how many answers each regulator submitted and on which date. The dates are spread across up to three months post the deadline date. The number of answers is less than RoLAA's calculation of questions taken on notice because some answers are grouped, and this survey treats 'offers to look for information' as questions taken on notice, even if they did not appear to be questions taken on notice.

### 5.1 June 2009



## 5.2 October 2009



## 6. Vignettes on rule of law

RoLAA has captured some of the more interesting rule of law exchanges from its survey of the Estimates material and presents them for the readers in the following paragraphs. The rule of law issues include:

- Use of information gathering and coercive powers by regulators;
- Attendance and punctuality in giving evidence before Parliament;
- The limits to a regulator's power to make laws; and
- Parliament's expectations re annual reports which are required under statute.

Economics – Thurs 22 Oct 2009 – E132-133

**Senator ABETZ**—I understand there is a differential in the price they are willing to pay the producers in New Zealand as opposed to Tasmania.

**Mr Cassidy**—That is something we could probably find out information about. We have not asked, but we could probably ask National Foods. In a sense this is a voluntary request. We are not using our compulsory information acquisition powers. As I said, at this stage we do not have a suspected breach of the act to investigate. I am hesitating a bit, because the response from National Foods is due almost any day, as I understand it. It may well come in today, but I am afraid I am not aware of that. That is what we have done. If there were more complaints, we would have been more active, although I have to say to you—and I hope I do not give offence to anyone in saying this—I understand from certain discussions held with the industry that, at the end of the day, it is not enforcement of the Trade Practices Act in particular that the industry in Tasmania is pursuing.

Economics – Wed 10 Feb 2010 – E10

Mr Samuel is late:

**Senator JOYCE**—With all the accumulated knowledge that you now have around 46(11A)—the Birdsville amendment—do you feel that you are now in a position to issue guidelines or information guides regarding—

**Mr Samuel**—I was half anticipating this question, given that it has been asked on several previous—

**Senator JOYCE**—I had to wait three minutes until you turned up.

**Mr Samuel**—You made us wait in eager anticipation of the question. I am also waiting for the question about the various statistics, which we have handy here for you, Senator.

Economics - Thursday 11 Feb 2010 – E165

**Senator EGGLESTON**—That is fine. I understand that ASIC has sought new laws improving your ability to telephone intercept and also to expand the search warrant powers available to ASIC. Given that ASIC has only prosecuted one case of insider trading and two of market manipulation over the 2009 financial year, why does ASIC feel that the new powers are warranted and why are ASIC's current powers insufficient?

**Mr D'Aloisio**—There are a number of points. Firstly, that we have only run one insider trading case is not correct. I can refer back to what I said earlier. Fundamentally, at the moment, we would have something in the order of over 50 active cases in market manipulation and insider trading. I mentioned earlier the successes we were having. Secondly, yes, we are using the existing powers we are pushing and we have made market integrity, insider trading and market manipulation a priority. I have spoken to this committee about this on previous occasions.

Finally, concerning the issue of needing the additional powers; when we looked at our

record of insider trading we felt that, in addition to the efforts we have put in and what I talked about earlier following the strategic review, we should be put in the same position as the ACCC is in cartels and as a number of international regulatory agencies are in relation to insider trading and market manipulation. Insider trading and market manipulation is akin to cartel in the ACCC space. It seems to us that the penalties, the deterrence impact of the penalties and our ability to have access to real-time speaking, subject to the proper safeguards that apply for other agencies, is important.

One of the key reasons that it has been difficult in getting convictions on insider trading has been the ability to run a circumstantial evidence case from which judges can draw inferences—exceptionally difficult cases to run—yet you need to run those because of the deterrence aspects you need. The ability to get access to telephone intercept in real time is an important additional power that ASIC needs, and the government has responded to that and built in appropriate safeguards. We do not do telephone or electronic interception ourselves; that is done by another agency subject to proper court safeguards.

Economics - Thursday 11 Feb 2010 – E168

To ASIC:

**Senator ABETZ**—I invite the chair of ASIC to consider providing an opening statement in written form about an hour or so before the hearing. Then it can, hopefully, simply be incorporated so that it becomes part of the record of this committee, just to save time. But I just make that as a gratuitous suggestion to you.

Economics - Thursday 11 Feb 2010 – E169

**Senator ABETZ**—I thought I heard you say ‘ASIC doesn’t want to change the law,’ but, if the appeals were not taken, is it not the case that those cases would be precedent and would be seen as the law? By seeking an appeal aren’t you in fact trying to change the precedent law?

**Mr D’Aloisio**—In our system appeals are very much part of what litigants are entitled to and have rights to do. If the general accepted approach is in relation to, say, continuous disclosure, the test to be applied is an objective test, and that is what market has been working with. If a judge in a case takes a different interpretation, we are entitled to test that in a court of appeal.

**Senator ABETZ**—Of course you are. You are entitled to test with an appeal.

**Mr D’Aloisio**—I am saying that these two cases fall into what I have just described. We are not seeking to create new law. We feel that we are looking at the law as it is as we have understood it and as it has been applied in these cases.

**Senator ABETZ**—I will not take that any further.

**Mr D’Aloisio**—It is important, Senator, in the sense that we are not doing anything different than what ordinary litigants would or would not do.

**Senator ABETZ**—Yet the assertion that you were not wanting to change the law is something else. I do not want to pursue that anymore.

Economics - Wed 25 Feb 2009 – E186

**[D’Aloisio finishes his statement]**

**CHAIR**—Are you prepared to table that and have it distributed now for the committee? It is a long statement.

**Mr D’Aloisio**—Yes, we can do that.

**Senator IAN MACDONALD**—Can I just raise a procedural motion? Thank you very much, Mr D’Aloisio, for the statement. It is very, very helpful. It did take 20 minutes, which is fine.

**Mr D’Aloisio**—I am sorry.

**Senator IAN MACDONALD**—No, do not be sorry, but it does mean, with the committee’s normal procedure, that we have seven minutes for questions.

**CHAIR**—No, Senator Macdonald, we are scheduled to go until 11.30 pm.

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**Senator FISHER**—Thank you, Chair. Thank you very much for your appearance, Mr Lee and others. I had a clear preference for the president of Fair Work Australia to attend alongside you to advise the committee as to what Fair Work Australia is doing in the discharge of its financial obligations—for which I understand you have some responsibility—and administrative and operational obligations. I seek to table some advice that I have received from Harry Evans, the Clerk of the Senate, to the effect that this committee is entitled, if it so wishes, to require that Mr Justice Giudice, the President of Fair Work Australia, attend estimates for that purpose in the discharge of the performance of his functions in that regard. I seek to table that advice, Mr Chair. Thank you.

**Pg 79-80**

**[Issues with the president of FWA not attending continued]**

**CHAIR**—To ensure that the information provided to you is accurate and fulsome and complete. Have you got any other questions, Senator Fisher?

**Senator FISHER**—Yes, Chair.

**CHAIR**—All right. ‘What did the president have for lunch?’

**Senator FISHER**—Actually, is the president attending to judicial events today? He told the committee that is what he would be doing yesterday and today.

**CHAIR**—No, he has not told the committee that at all, and I would ask you not to misrepresent the president at all. The president has not said that to the committee.

**Senator Arbib**—Actually, my understanding is that the committee accepted the president was not going to be here today.

**CHAIR**—Absolutely.

**Senator Arbib**—So I am astounded—

**Senator FISHER**—Yes, you did—

**Senator Arbib**—If Senator Fisher continues on this ‘trying to send the president a message’ campaign, I think we have all got the message.

**CHAIR**—While we are on that, Senator Fisher tabled earlier in the day some advice from the Clerk. I want to make it quite clear: in the second paragraph of that advice, the Clerk indicates that the president refused a request of the committee to attend. That is absolutely incorrect. Maybe the Clerk based that on bad-faith advice from Senator Fisher, who has given that advice to him, or may have been misled or maybe he has just misconstrued the information in front of him, but I want to make it very clear that the president did not refuse a request of the committee to attend. Indeed, the committee has made it clear that Mr Tim Lee is the appropriate person to answer questions in this estimates. It is true that Senator Fisher has expressed a different point of view from that and may take that up, but she ought not misrepresent the president or the facts in this Senate estimates hearings. Do you have any more questions?

**Senator FISHER**—Chair, if I may clarify the record? If you look at the dates of respective correspondence, you will be able to note that the advice that was sought from the Clerk and provided to me by the Clerk was done prior to the committee communicating, as you have just outlined, with the president. So my advice was sought from the Clerk and the Clerk provided it at a point in time based on correspondence and communication that appeared to be accurate as far as the record was concerned at the time I sought the advice and at the time the Clerk provided it and then there has been subsequent correspondence.

**CHAIR**—Let me say that I am staggered, then, that you would then table advice which is out of date and is not based on accurate information. I really think that is bad faith to the Senate and to this committee.

**Senator FISHER**—The advice stands, Chair, and it is not out of date in terms of its substance.

**CHAIR**—That is what you say.

**Senator FISHER**—You are informing the committee now, as these proceedings unfold, of particular views by particular people about particular things of which we have not necessarily been apprised up until now. So the advice stands on its own feet.

**Senator Arbib**—Can I just say that we have now been going with Senator Fisher’s questions for almost an hour and she has raised not one problem, not one complaint, not one

issue with the operation of Fair Work Australia.

**Senator FISHER**—I am happy to have a rest. I will be back.

**CHAIR**—But we have not got to the president's dietary requirements or what time he gets up, or what brand of toothpaste he uses.

Legal & Constitutional -Monday 8 Feb 2010 - 62

**Senator LUDLAM**—There were some criticisms raised in the press after your last annual report, due to repeated instances of simply reprinting material from your previous annual report. I do not know whether you would be aware of some of the commentary that surrounded that. The section on espionage, for example, was a straight cut-and-paste from the 2007-08 report. Do the people who draft these reports for you simply start with the last annual report and then update bits and pieces?

**Mr Irvine**—They may well have done so on that occasion, but what is produced in the annual report each year is relevant to that year. In that sense it represents a continuum.

**Senator LUDLAM**—It is certainly an admirable example of recycling, but are you a bit concerned that the reports are essentially being cut from the same template, using the same words, year on year?

**Mr Irvine**—Again I would say that the report itself I believe to be an accurate representation of what occurred during the year. We can change the words, if you wish, but if the situation that is being described is the same I am not too worried.

**Senator LUDLAM**—I do not want to dwell on it, but it is just a peculiar example. Annual reports are one of the few accountability mechanisms or public reporting avenues that we have, so it is somewhat peculiar year after year to see the same words trotted out. It looks somewhat glib, if I could put it that way.