



DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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ANSWERS, NON-ANSWERS AND TAKING QUESTIONS ON NOTICE

The last estimates hearings before the election expected in September were unusually quiet and free of incident.

There were, however, the usual instances of witnesses failing to understand the process mandated by the Senate's order of 13 May 2009 in relation to claims of public interest immunity. The order was referred to on numerous occasions by chairs in their attempts to assist witnesses comply with the Senate's requirements. The order, among others, is also covered in the [draft revised guidelines](#) for government witnesses appearing before committees. It is to be hoped that when the guidelines are finalised, there will be an appropriate level of awareness-raising as well.

On one occasion, a chair made a statement pointing out the only pathways available to witnesses who seek not to answer a question:

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. (EEWR, 5/6/13)

A familiar chorus of barely-formulated excuses why information could not be provided will be found in the Hansards for the hearings, including the much-discredited claim that "advice to government is never provided". Other novel claims included:

- speculation about an individual's circumstances (FPA, 28/5/13)
- another department is the lead agency (RRAT, 28/5/13)
- a need to take on notice whether a question would be taken on notice – not maintained (LCA, 29/5/13)
- the public component of funding to purchase an artwork could not be disclosed because there was also private funding and therefore (sic.) the information was commercial-in-confidence (RRAT, 30/5/13).

Some excuses were rejected, including the old chestnut that information provided to committees should be consistent with what might be provided under FOI (CA, 7/6/13; see Procedure Committee, 3rd Report of 1992). Many witnesses were not pressed further by senators although there is now a stronger level of awareness amongst senators of their rights in this regard. There were also many serious reasons advanced for seeking not to answer

questions, although it is evident that a very broad view is taken of some areas of sensitivity. Committees employed a range of strategies to deal with such matters, including:

- senators accepting the offer of private briefings outside the estimates context (RRAT, 27/5/13; FADT, 4/6/13, 5/6/13)
- senators indicating that they would pursue information by other means (Ec, 4/6/13).

The fact that information may be in the public arena does not necessarily mean that officials feel able to answer questions about it, particularly if the information has been the subject of media reports. Officials were very circumspect in their responses to an ABC *Four Corners* program alleging access by a foreign power to the floor plans of the new ASIO building (FPA, 28/5/13; LCA, 30/5/13). In relation to a person appealing the cancellation of their bridging visa, some details of which had been reported in the media, the relevant secretary stated that discussion of such details by officials in an estimates hearing was a different matter (LCA, 28/5/13). In contrast, in another committee, self-identification in the media of an employee associated with derogatory tweets and discussion of the case in another committee (FPA, 28/5/13) satisfied the Economics Legislation Committee that there were no sensitivities in discussing the matter further (5/6/13).

On the other hand, if the information has been published on a government website, the case for distinguishing the circumstances disappears. A committee seeking information about timelines for the Rural Classification Technical Working Group was told that while the minister had indicated the matter was a priority, there was no timeline. The group's (instantly accessible) website, however, contained information about targets to be met by 31 December 2013. When asked whether this represented a timeline, witnesses were unable to demur (CA, 5/6/13).

A committee rarely encounters an instance of too much information but such was the case in relation to the plight of two Australians subject to legal proceedings and detention in Dubai. The minister offered to disclose the contents of documents, including legal advice from the department, but indicated that this could harm the men's appeal. The chair indicated that this might be an appropriate subject for a private briefing (FADT, 5/6/13).

A serial offender reappeared to inform the Education, Employment and Workplace Relations Legislation Committee that whether the department had sought legal advice on the issue of compulsory arbitration was covered by legal professional privilege. This was roundly rejected by the committee which eventually allowed the witness to take the question on notice. The following day, the committee chair made a statement indicating the basis on which a claim of legal professional privilege **may** be able to be sustained but cautioning the department to think very carefully in answering the question on notice about where the public interest actually lies. The statement indicated that the public interest in Commonwealth agencies being accountable to committees of this Parliament for their administration of taxpayers' money must, in most cases, prevail (EEWR, 4-5/6/13). The same witness had been criticised for similar unsoundly-based claims in two previous estimates reports of the committee in [June 2006](#) and [March 2007](#).

The Commonwealth's legal costs for litigation with certain members of the former Federal Magistrate's Court were also described as "privileged" and, if disclosed, having the potential to influence or compromise the Commonwealth's position in the matter. The claim was not maintained, however, and the question was taken on notice. A figure has been quoted in the media.

With the usual number of questions being taken on notice and committees setting deadlines in July for answers, several senators expressed concern that, on past form, answers would not be available before the caretaker convention came into effect when the writs are issued, an event expected in August.

ESTIMATES: THE EVENT

Estimates hearings have largely escaped attempts to transform them into circuses. There are two reasons for this. One is that committees are more willing to take control of media access to their hearings, largely to prevent disruption. Photographers and camera operators are admitted to designated areas and given time limits. More importantly, the standing orders limit the range of activities that legislation committees considering estimates may undertake. 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. Not only does this rule out lengthy statements (apart from a reasonable opening statement which witnesses are invited to give), it also provides a limit on other activities such as showing films or bringing in display items (manikins in combat armour, promotional material, unarmed torpedoes ...). There are other opportunities for promotional displays that do not take up the limited time that senators have to hold ministers and agencies to account for their stewardship of public resources.

LATE ANSWERS

Another perennial issue is the provision of late answers to questions on notice. There were instances of answers being provided over the weekend or on the day preceding the hearings and many questions about the timing of their provision to ministers' offices for clearance. One secretary indicated that new departmental procedures had been implemented in an attempt to better manage the provision of answers. (LCA, 27/5/13; RRAT, 30/5/13).

APPEARANCE OF AGENCY HEADS

There were some absences amongst the ranks of agency heads but none was the subject of controversy. When the President of Fair Work Australia, who attends in accordance with a Senate order to that effect, commented that he was not present by choice, he was reminded of a decision by the Senate which had accepted advice that the appearance of an agency head was appropriate (EEWR, 3/6/13).

ESTIMATES AND ACCOUNTABILITY

It may be observed that these bulletins focus on information that is not provided, but the fact is that the estimates hearings remain one of the sharpest instruments of

accountability in our system of government, providing a forum for detailed scrutiny of agency performance.

The following is a selection of issues examined during the Budget estimates hearings:

- discovery and handling of asbestos in Telstra pits being used for the NBN rollout (EC, 30/5/13)
- broadcasting of live odds during sporting events (EC, 30/5/13)
- allegations of bullying and retribution at CASA (RRAT, 29/5/13) and AusAID (FADT, 6/6/13)
- the challenge that social media presents to public service employers (FPA, 28/5/13)
- requests for the Commonwealth to allow grazing in national parks in Queensland because of drought conditions (EC, 29/5/13)
- the suitability of the ABC's fact checker (EC, 29/5/13)
- the case of an immigration detainee who was the subject of an Interpol "red notice" in relation to serious crimes in Egypt (LCA, 27/5/13)
- concerns about the name DisabilityCare and the forthcoming advertising campaign (CA, 3/6/2013)
- "legacy debts" of the home insulation and green energy loan programs (Ec, 3/6/13)
- identification in the Budget papers of costs absorbed by agencies (FADT, 3/6/13)
- appointment of senior staff in the tourism area from previous positions in the abolished Department of Climate Change (Ec, 4/6/13)
- operations of the new Tertiary Education Quality and Standards Agency, including responses to critics of the agency's approach (EEWR, 4/6/13)
- recruitment of women in the ADF and numerous equipment purchases and capability issues (FADT, 4/6/13)
- the case of two Australian businessmen on trial in Dubai (FADT, 5/6/13)
- ASIC's handling of complaints regarding CBA's financial planning division (Ec, 4/6/13)
- economic forecasting, the carbon price and macroeconomic analysis (Ec, 5-6/6/13)
- waiting times for phone calls to Centrelink (CA, 4/6/13)
- delay in construction of GP super clinics (CA, 6/6/13)
- progress in Indigenous housing, education and health programs (CA, 7/6/13).

RELATED RESOURCES

The [Dynamic Red](#) records proceedings in the Senate as they happen each day.

The [Senate Daily Summary](#) provides more detailed information on Senate proceedings, including progress of legislation, committee reports and other documents tabled and major actions by the Senate.

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