

**‘This is a Procedure on Which We
Should Not Lightly Embark’: Orders
for the Production of Documents in
the Australian Senate, 1901 to 1988**

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When confronted, on 12 May 1960, with the first motion for an order for the production of documents in the Senate for nine years (and seventeen years since the last successful order¹), Leader of the Government in the Senate William Spooner was adamant that such orders were obsolete. While acknowledging that the procedure had been used ‘in the early days of the Senate’, Spooner maintained that the preparation of facts and figures ‘entailed a good deal of work for the departments concerned’ and that:

there would be considerable difficulty and embarrassment in returning to the old procedure and, as a result, disclosing not only for the information of the Senate but publicly, for the newspapers and for all who may care to read, advice that from time to time is tendered to a Minister and either rejected or accepted by him, in the ebb and flow of the conduct of government.²

‘This’, Spooner concluded, ‘is a procedure on which we should not lightly embark’.

The motion attempting to revive orders for production of documents was put by a Tasmanian government senator, Reg Wright. That he was a government senator is not as surprising as it might first appear. Elected in 1950, maverick Senator Wright had by 1960 crossed the floor on thirty occasions (thirty-one, including the vote on his motion for the production of documents on 12 May)³ and went on to make a career of defending the powers of the parliament against the executive. Although his motion was on a relatively trivial matter—calling for the papers relating to the construction of the post office at Sorell in Tasmania—Wright considered the procedure ‘an essential and inherent right of the Parliament ... a right that we hold as representatives of the people ... to scrutinize administrative action by the perusal of public documents’.⁴

¹ The last successful order, made on 30 June 1943, related to the payment of travelling allowances to officers of the Commonwealth Public Service. An unsuccessful order had been moved on 17 October 1951 relating to the double dissolution of that year.

² Senate debates, 12 May 1960, p. 962.

³ Rob Lundie and Deirdre McKeown, ‘Crossing the floor’, unpublished table compiled by the Research Branch, Commonwealth Parliamentary Library.

⁴ Senate debates, 12 May 1960, p. 961.

Although Wright's motion was not successful in 1960, use of the procedure would be re-established in 1965. This paper charts the fluctuating use of the power to order the production of documents in the Senate from its confident beginnings in 1901, through its dwindling use from 1915 and the twenty-two year period of complete disuse between 1943 and 1964, until 1988, the start of its resurgence as a common mechanism for holding governments to account.

The constitutional basis for orders for production of documents

In Australia's colonial parliaments the practice of ordering the production of documents was well-established.⁵ When the Australian Constitution was enacted, the Parliament was given the power to order documents required for its information. Section 49 of the Constitution provided that until otherwise declared, the powers, privileges and immunities of both houses of the parliament 'shall be those of the Commons House of Parliament of the United Kingdom' in 1901. Contemporaneous authorities on the powers and practice of the House of Commons reveal a rich history of the House calling for and obtaining documents from both public and non-government bodies.⁶

From its formation the Australian Parliament made immediate use of this power. From 1901 the Senate temporarily followed the standing orders of the South Australian House of Assembly before the adoption of the Senate standing orders in August 1903.⁷ Standing order 344 of the new standing orders (renumbered SO 353 in 1909, SO 358 in 1922 and 164 in 1989), which stated that 'Accounts and Papers may be ordered to be laid upon the Table', was based on the standing orders of the Victorian and South Australian legislative assemblies.⁸

Orders for return in the new Commonwealth, 1901–14

The first two orders for the production of documents, or orders for return as they were then known, were moved on 31 May 1901. It was an inauspicious start, with none of the documents being produced in response to the orders. The first order, which required statistics on aged and destitute persons in the states, was raised in debates in the Senate by the minister responsible some two years later with the lament:

⁵ Lynn Lovelock, 'The power of the New South Wales Legislative Council to order the production of state papers: revisiting the *Egan* decisions ten years on', *Australasian Parliamentary Review*, vol. 24, no. 2, p. 199.

⁶ Rosemary Laing, 'Orders for the production of documents: origins and development of the power', *Procedural Information Bulletin*, Department of the Senate, no. 247, 14 February 2011, pp. 7–12.

⁷ Rosemary Laing (ed.), *Annotated Standing Orders of the Australian Senate*, Department of the Senate, Canberra, 2009, pp. 4–7.

⁸ *ibid.*, p. 471.

I regret that I have not been able, up to the present time, to make a return to that order. It is a very intricate one. A great deal of information is required to be obtained and, if the Government are not in a position to go on with a system of old-age pensions, it can hardly be said that it is a matter of urgency.⁹

The second order, requesting copies of all agreements in force between the state and Commonwealth governments and the Eastern Extension Telegraph Company relating to the management of the telegraph cable between Tasmania and the mainland, fared a little better. With no response after two years, a second order along the same lines was moved¹⁰, and over the following months a number of documents were tabled in the Senate¹¹ although not, it appears, in direct response to the order.

In the first year of the new Commonwealth, 29 orders for return were agreed in the Senate. It would take until 2002, another 101 years, for this number of orders to be exceeded in a single year. Between 1901 and 1914 the Senate agreed to an average of 14 orders a year. The subject matter of many of the orders reflected the major legislative concerns of the day: defence (including a request for a paper in 1904 confirming reports that the governments of Japan and China were 'casting longing eyes upon the northern portions of Australia'¹²); customs and excise (especially the value of goods, revenue collected and duty paid on products); the administration of the territory of Papua; banking; seemingly endless orders on postal and telegraphic services and the big public infrastructure project of the time, the Kalgoorlie to Port Augusta transcontinental railway. Orders for return in the earliest years also reflected the other great policy initiative, the White Australia Policy, including requests for details on 'Asiatics' imported into WA; kanaka and coloured labour in Queensland; numbers of 'coloured aliens' in each state; and labourers, by nationality, engaged by the Australian pearling fleet who were returned to their homes in 1904.

A significant number of orders in the early years of the Senate were of a statistical nature asking, for example, for the number of women employed in federal and state departments; details of appointments, transfers and pensions of civil servants; unemployment numbers; arrivals and departures and the like. The high number of orders in these early years may be explained in part by the work in progress of the Parliament in setting up public service procedures and reporting mechanisms. Some statistics requested, such as electoral returns, were later tabled in the Senate by the government as a matter of course. Others such as statistics relating to population and

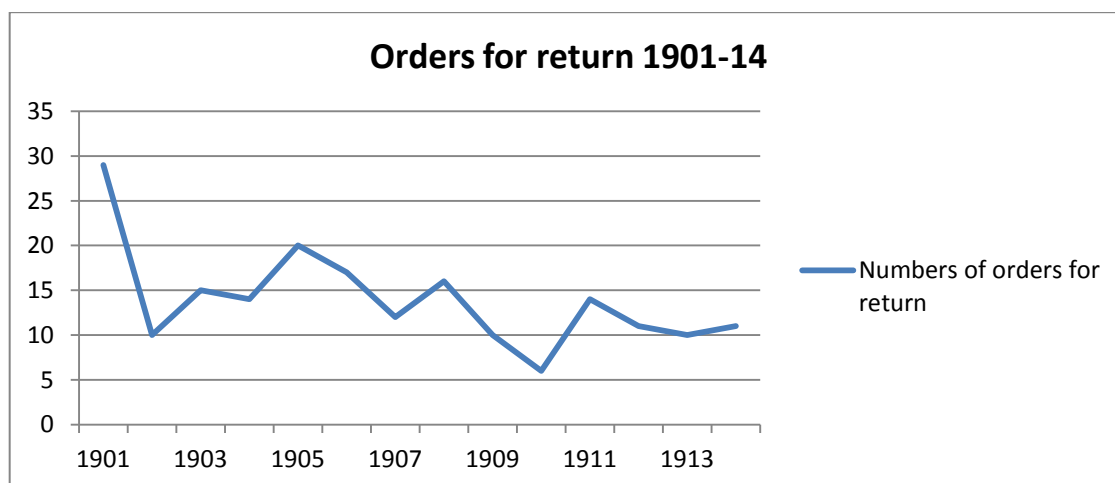
⁹ Senate debates, 2 September 1903, p. 4464.

¹⁰ Senate Journals, 28 May 1903, p. 9.

¹¹ For example, Senate Journals, 24 July 1903 p. 87; 19 August 1903, p. 133; 24 August 1903, p. 149.

¹² Senate debates, 7 September 1904, p. 4328.

employment would come to be reported regularly through yearbooks, government gazettes and annual reports.



Not all orders, by any means, were statistical. Some were for original documents such as the orders for correspondence relating to a proposal to deport Boer prisoners to Tasmania, the Trans-Australian Railway, the proposed federal capital site and the suppression of *Reynolds' Newspaper*. Copies of government contracts, agreements and reports were also supplied on occasion. However, the relatively factual and non-political nature of the orders at this time can be illustrated by the fact that the House of Representatives also ordered the production of documents. Between 1901 and 1917, after which the practice fell into disuse, the House agreed to over 120 orders for returns.¹³

Motivations for ordering documents in the Senate, where they can be discerned from the debates, were many and varied. Senator Neild's 1904 order for all papers connected with the selection and approval of the Commonwealth flag came with an explanation that valued parliamentary oversight and the importance of maintaining the public record:

I may say at once that there is absolutely nothing behind my motion. But I feel that we are under some little disadvantage, as it was understood that the papers in question were to be laid before Parliament. The selection of a Commonwealth flag is a very important matter, and it has apparently been left to judges whose qualifications have been seriously questioned. I have no other desire than to have an opportunity of seeing the papers, and to

¹³ *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p. 591; House of Representatives, *Votes and Proceedings*, 1901–17.

understand what has led to the selection being made without any reference to Parliament. I think that Parliament ought to have been consulted ...¹⁴

Another order, moved by Neild later that year, for correspondence relating to the conduct of the General Officer Commanding the Military Forces of the Commonwealth, was in response to material published in the press. On that occasion he explained 'it is desirable, in a matter of importance as affecting the public interests, that there should be no garbled representation of correspondence'. The remedy for this, he argued, was to table the source material in full.¹⁵

Senator Chataway's rationale for the order for return he had moved on natives employed in Papua in 1910 was to ameliorate public service reporting shortcomings:

If we are going to govern Papua or the Northern Territory efficiently, I would suggest that the annual reports upon those Territories must be presented to us within a reasonable time after the close of their financial years. The annual report upon Papua for the year ended 30th June last has not yet reached us, and, but for the return which I asked the Government to supply, nothing would be known in reference to its progress or administration.¹⁶

The potential, and also the limitations, of access to documents to illuminate allegations of government corruption and maladministration was also realised early. In December 1913 a railway contractor, Henry Teesdale Smith, was granted an earthmoving contract (the term of which conveniently ran for the exact length of the long summer parliamentary recess) for a section of the transcontinental railway west of Port Augusta. When Parliament sat in April 1914, the Labor opposition attacked the decision for the secrecy over the tendering process, the lack of competitive tendering and the exorbitant rates paid to Teesdale Smith.¹⁷ On 16 April the Senate, which was not controlled by the government, ordered that 'all papers relating to the letting of the contract' be laid on the table of the House. When these were tabled on 7 May the Senate further ordered 'all papers in connexion with the resignation of Mr. Deane [who had engaged Teesdale Smith] as Engineer-in-Chief of Commonwealth Railways and the appointment of his successor'. On 3 June 1914 the matter was referred to a Senate select committee which six days later advised the Senate¹⁸ that it could not proceed further with the inquiry due to its inability to obtain the necessary

¹⁴ Senate debates, 26 May 1904, pp. 1584–5.

¹⁵ Senate debates, 14 September 1904, p. 4682.

¹⁶ Senate debates, 25 November 1910, p. 6822.

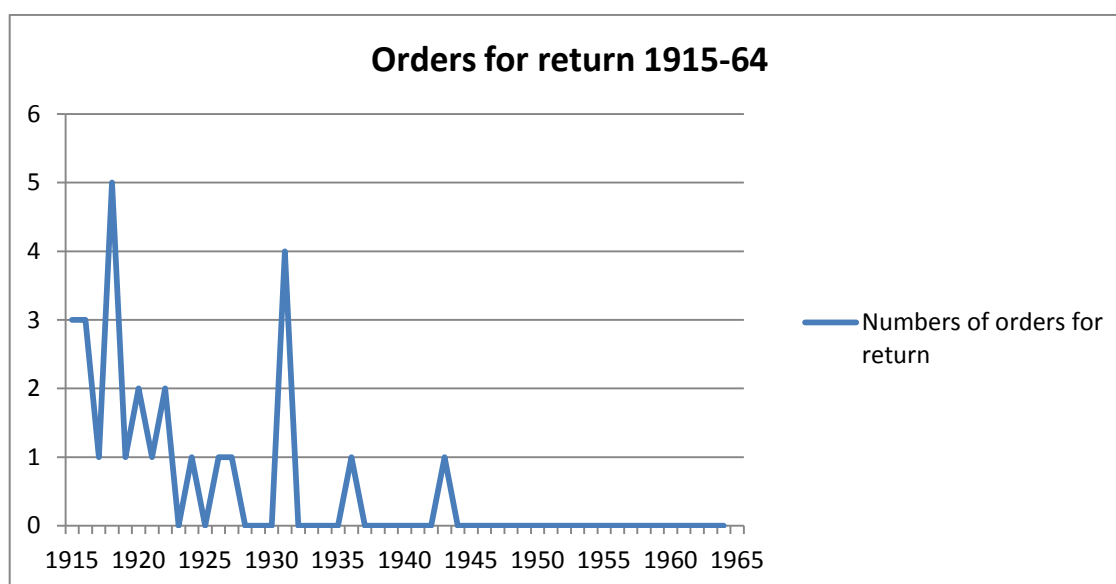
¹⁷ David Burke, *Road Through the Wilderness*, New South Wales University Press, Kensington, NSW, 1991, pp. 120, 132–42.

¹⁸ Parliamentary paper S2, 1914.

documents from the department. The inquiry was ultimately thwarted by litigation by Teesdale Smith against the Commonwealth and the 1914 election.¹⁹

Decline and fall, 1915–64

Throughout the years 1915 to 1964 the number of orders for return each year ranged between zero and five, with 36 years out of 50 having no orders at all. The growing requirement for documents to be tabled pursuant to statute may account for some of the decline in numbers of orders in both houses over time. The *Export Guarantee Act 1924*, for instance, required the tabling of quarterly reports from the minister on any assistance granted in relation to the export and marketing of primary produce, while the *Commonwealth Bank Act 1951* required that papers documenting any difference of opinion between the government and the bank board over policy be laid before each house of Parliament within a specified time.



Another factor in the reduced number of orders appears to be the use of alternative methods of obtaining information. In particular, the practice of informally requesting documents in questions was commonplace. In June 1923 Nationalist Senator Harold ‘Pompey’ Elliott, in a question on notice, sought information from the Minister for Defence in the Nationalist government on the discharge of Warrant Officer J. R. Allen from the permanent military forces. In his question he also added ‘Will the Minister place on the table of the Senate the file relating to this matter?’ The minister agreed. Some weeks later Elliott succeeded in establishing a select committee into the matter (while the Nationalists held a majority in the Senate, six Nationalist senators voted with the ALP). During the inquiry it came to light that the Defence Department had withheld what Elliott considered ‘a most vital file’. This prompted Elliott to take the

¹⁹ Senate debates, 26 June 1914, p. 2611.

novel approach of moving that the House of Representatives be requested to reduce the proposed vote for the Department of Defence by £1 in order to bring attention to the department's failure to 'recognise the authority of the Senate' and 'obey its directions'.²⁰

Returns for order did, however, serve opposition senators from time to time as additional leverage to obtain information not forthcoming in questions in the Senate. In October 1931, in response to a question by Lang Labor Senator James Dunn concerning the application by a former paid organiser for the Labor Party for a hotel licence at Jervis Bay, the leader of the Scullin Labor government in the Senate replied, 'It is not proposed to take steps to obtain the information desired by the honourable senator'. Realising that he 'must have dropped a brick', Dunn pursued the matter further in adjournment debates and in a second question on notice before moving an order for return that all papers and copies of testimonials relating to the application be laid on the table. The papers were made available to senators later that day.²¹

Orders for returns were used as an accountability mechanism during this period by government as well as opposition senators. This practice has precedents in 'unopposed returns' in the House of Commons which were initiated by ministers to make accounts and other documents of interest available to the public.²²

In July 1915 an order was agreed by the Senate on a motion by a government senator that all papers and reports be laid on the table in connection with the denial of a request by the community of Mount Balfour in Tasmania to have its (reportedly squalid) post office moved to a more central location. The papers tabled by the Fisher Labor government on 12 August led to the Senate appointing a select committee into the matter, which found that the Deputy Postmaster-General of Tasmania had misled the federal minister and noted that his 'most improper' behaviour deserved 'severe censure'. The expense and small-town nature of the 'great Balfour controversy' and its 'high-souled, self-sacrificing, justice-loving and fearless Senate committee' were duly sent up by the local newspaper in mock-epic style.²³

Similarly, in 1924 Nationalist senator Walter Kingsmill moved that all papers be laid upon the table relating to the closure of the Federal Forest Products Laboratory in

²⁰ Senate debates, 28 June 1923, p. 419; 2 August 1923, p. 2016; 22 August 1923, p. 3274, 3303.

²¹ Senate debates, 20 October 1931, pp. 831, 871, 875; 29 October 1931, pp. 1323–4; 10 November, p. 1525; 12 November 1931, pp. 1630–31; *Canberra Times*, 21 October 1931, p. 3.

²² *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th edn, LexisNexis, London, 2011, pp. 133–4, 352. The author also acknowledges the assistance of the Clerk of the Senate.

²³ *The North Western Advocate and the Emu Bay Times* (Tas.), 18 November 1915, p. 4.

Perth and the removal of its functions to Melbourne. As a government senator, Kingsmill's motion was motivated partly by his close personal interest in the issue and partly by what he considered to be the 'gross injustice' to the state of Western Australia and the evils of 'insidious and pernicious centralization'. Apparently a matter of complete indifference to the opposition, six other Nationalist senators contributed to the debate on the motion, which was carried with amendments. Kingsmill reflected that it was 'important that we should study this little incident of mal-administration in order to avoid mistakes in future'.²⁴

Nevertheless, some examples of the value to oppositions in obtaining documents were also apparent. An opposition motion for correspondence and reports relating to the import duty on Oregon timber was agreed to by the Senate on 19 March 1931. Nationalist senator Sir Hal Colebatch, in proposing the motion, explained that the present duties had been in operation for sixteen months, against the recommendation of the Tariff Board and without the Parliament having had the opportunity to scrutinise them. He suggested that the increase in tariff advantaged a small number of importers who had large timber stockpiles. Labor senator John Barnes, Leader of the Government in the Senate, replied that he was only too happy to table the documents to 'assure the Senate that in framing its tariff schedules the Government acted in the interests of the people'.²⁵

The opposition was also successful in obtaining documents in 1943 that showed that Prime Minister Curtin had authorised that determinations made by the Public Service Arbitrator concerning travel allowances should apply only to returned soldiers and trade unionists. This was, however, to be the last successful order for return initiated by either government or opposition until 1965.

Revival years, 1965–88

The resurgence of orders for return was of a gradual and sporadic nature between 1965 and 1988, with a total of only 14 agreed to by the Senate. The longstanding use of this procedure to inform debate and legislation and as a mechanism to obtain information not forthcoming in questions in the chamber certainly continued during this time. In 1987 an order for return was first used to obtain answers to questions asked during estimate hearings.²⁶ In September 1988 the Senate adopted an order of continuing effect to provide remedial action for questions on notice which remained unanswered after 30 days. From November 1988 orders for return began to be used to

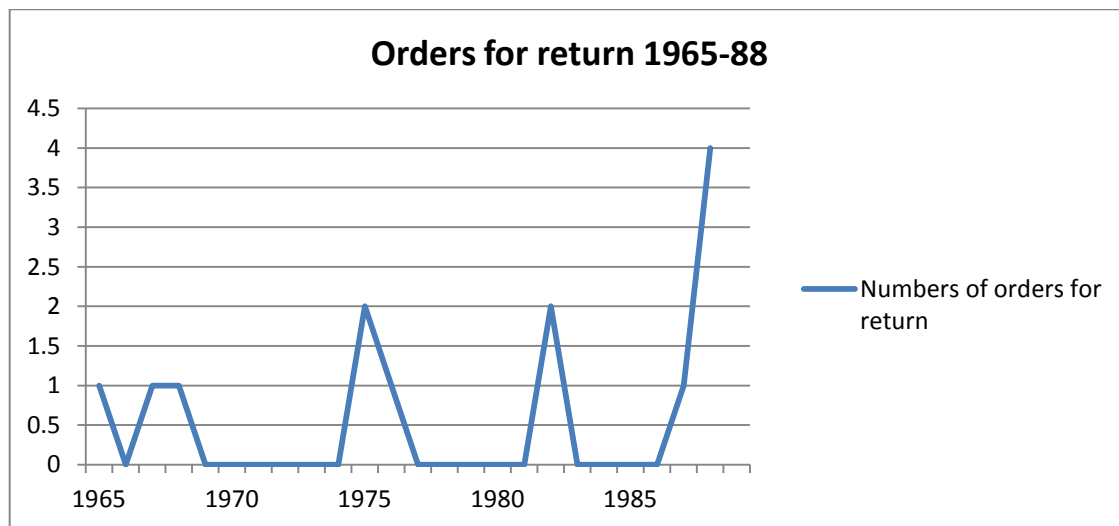
²⁴ Senate debates, 8 May 1924, pp. 481–6; 3 July 1924, pp. 1819–29.

²⁵ Senate debates, 19 March 1931, p. 403.

²⁶ Senate debates, 16 September 1987, p. 112.

obtain answers to questions on notice and explanations from ministers for the failure to provide answers.²⁷

The most distinguishing feature of orders for return at this time, however, was the marked increase in their use for government accountability and parliamentary oversight. Three orders sought to make the legislative activity—or inactivity—of the executive more open to the scrutiny of parliament. In 1965 a motion by Senator Reg Wright, that instruments in writing made pursuant to the *Housing Loans Insurance Act 1965* be laid on the table, was agreed to by the Senate. Unlike regulations, instruments in writing are not automatically tabled in Parliament and are thus not subject to disallowance. This, according to Wright, 'puts the Executive in an uncontrollable position'. Wright was thus able to use the power of orders for returns to bring the instruments in writing applying to this particular Act to the attention of the Parliament.²⁸



The VIP planes affair brought the Senate's power to demand official documents, and the consequences of the government's attempts to conceal them, to greater public attention than ever before. In 1966 and 1967 the Holt Government was repeatedly questioned about costs incurred and passengers taken on board RAAF VIP aircraft by ministers and other members of parliament. Replies to questions and statements by the Prime Minister were evasive and incorrectly maintained that passenger records had not been kept. In October 1967 the Senate passed a motion ordering that the government table all relevant documents. Cabinet initially resisted the Senate's demands but after continued pressure in the Parliament and in the media, Senator John Gorton tabled the passenger manifests and flight authorisation books on 25 October 1967. The tabling of the documents exposed Holt's mistruths, but defused a crisis for

²⁷ Senate Journals, 28 September 1988, p. 952; 23 November 1988, p. 1144.

²⁸ Senate debates, 25 November 1965, p. 1850; 12 May 1966, p. 1036.

the government. In the final analysis, the process of covering up the information did far greater damage to the government than the information exposed.²⁹

Following the VIP planes affair orders for returns were used increasingly to investigate suspicions of government maladministration or impropriety. In subsequent years documents were ordered relating to the purchase of F111 aircraft from the United States in 1968, the overseas loans negotiations and the purchase of Hobart Trades Hall in 1975, government administration of tax avoidance and evasion laws in 1982 and the administration of Aboriginal affairs in 1988.

During the 1980s there was a growing recognition of the fact that large numbers of Acts of Parliament had received royal assent but had never come into effect by proclamation.³⁰ The need to establish the magnitude of the problem was addressed in September 1988 by an order for return. The resulting document detailed 57 Acts and the reasons that each had not been proclaimed. In debate on the return to order, Senator Macklin noted that ‘what we have in fact done, by the mechanism under which Bills are drafted, is hand over effective legislative powers to the bureaucrats’ who were having ‘the final say in respect of the legislation passed by the representatives of the people in these chambers’.³¹ The Senate subsequently agreed to its first order of continuing effect for the production of documents on 29 November 1988 which required twice yearly reporting on the non-proclamation of Acts. Now, under standing order 139, this has become an annual requirement.

Failure to provide documents

In nearly 85 per cent of the orders for return throughout the study period ministers have complied with requests for documents. Sometimes ministers in fact have actively encouraged them in preference to questions on notice. For instance, when Senator McGregor was asked by Senator Chataway in 1912 for information on the numbers of aged pensioners found dead or destitute in the states, he asked for the information to be presented as a return so that it could be put to the relevant department in a formal way, noting that there would be ‘no opposition offered to the motion’.³² Putting an order for return to the Senate was used ‘to decide whether or not there was ... a

²⁹ Ian Hancock, *The V.I.P. Affair: The Causes, Course and Consequences of a Ministerial and Public Service Cover-up*, Australasian Study of Parliament Group, Belconnen, ACT, 2004.

³⁰ Anne Lynch, ‘Legislation by proclamation: Parliamentary nightmare, bureaucratic dream’, *Papers on Parliament*, no. 2, July 1988, pp. 4–16.

³¹ Senate debates, 24 November 1988, p. 2774.

³² Senate debates, 1 August 1912, p. 1520; 2 August 1912, p. 1614. Another example is the request for information on employees of the Commonwealth working 40 hours a week or less (Senate debates, 6 May 1936, p. 1248).

sufficient volume of opinion in support of the provision of the information that was requested'.³³

Of the 36 failures to comply with orders for return, three-quarters occurred in the years 1901 to 1908. In half of the total cases there was no evidence to be found in the Senate debates for the reasons for the failure to provide documents. Where reasons were provided they included that the information was available elsewhere (such as having been tabled in the House of Representatives³⁴) and that the information requested was unobtainable, either because the relevant statistics had not been kept³⁵ or because they were impractical to supply.³⁶ A 1906 return asking for the unimproved value of privately owned land in the states was an early example of the perils of requesting documents not controlled by the Commonwealth. After three months Victoria and Tasmania announced that they did not have the statistics from which they could compile a return, New South Wales claimed that they did not have staff available to compile the material until a later date, South Australia and Western Australia sought reimbursement from the Commonwealth for the high cost involved in compiling the information while Queensland 'merely acknowledged the Prime Minister's circular of the 26th July'.³⁷

The fact that documents requested related to matters subject to court cases or inquiries were factors in their non-supply in two early cases. In one instance in 1908, in a controversial matter where the failure of the postal service to deliver a registered letter resulted in a Labor candidate for the Queensland state seat of Bowen missing the nomination deadline, the government reneged on providing the documents even after the investigations were completed.³⁸ Documents were also not tabled in connection with the case of A. Hart, who took legal action against the Brisbane Post and Telegraph Department in 1905. In this case the volume and physical inaccessibility of the documents also came into play and the order ultimately failed because the Senate did not pass a further motion for return after the case had concluded in 1906.³⁹ It was not until 1982 that the conduct of legal proceedings became the central issue in a refusal to produce documents. Concerted efforts by the opposition to obtain documents on the government's consideration of possible legal action against those

³³ Senate debates, 12 May 1960, p. 962.

³⁴ Senate debates, 4 June 1903, pp. 521–2; *Votes and Proceedings*, 9 June 1903, p. 19.

³⁵ For example Senate debates, 31 July 1903, p. 2910; 23 November 1905, pp. 5641–3; 7 December 1905, pp. 6375–6.

³⁶ Senate debates, 23 November 1905, pp. 5644–5.

³⁷ Senate debates, 18 July 1906, p. 1425; 11 October 1906, p. 6435.

³⁸ Senate debates, 9 April 1908, pp. 10392–3.

³⁹ Senate debates, 23 November 1905, p. 5644; 16 August 1906, pp. 2894–903.

involved in ‘bottom of the harbour’ tax schemes were thwarted by the government’s view that the disclosure would be harmful to the administration of justice.⁴⁰

National security concerns were cited as a reason for documents to be withheld in 1968. Years of delays and cost blow-outs in the purchase of F111 aircraft from the United States finally came to a head in September when, after a five and a half hours debate, the Senate ordered documents relating to the purchase arrangements by the Australian Government be laid on the table of the Senate. While a number of papers were tabled, the government affirmed that it would not disclose documents ‘with a security content’ nor confidential documents between the governments of the US and Australia without the ‘full consent’ of the US Government.⁴¹

Claims that advice tendered to government was confidential led to two orders for returns being explicitly refused. In June 1914 the opposition sought and was refused advices from the Prime Minister to the Governor-General over the terms of the request and reasons given for the double dissolution election of 1914. Reasons given for the refusal were that the conversations and correspondence were ‘absolutely confidential’ and it has ‘never been the custom’ to release such information. Arguments that there had never been a federal double dissolution to establish precedent fell on deaf ears. The ALP opposition was able to use its massive majority in the Senate to take further action in the form of a direct appeal to the Governor-General for the information they required. The Governor-General declined to comply with the request. When the Fisher Labor government took office after the double dissolution election it tabled, on 8 October 1914, the communications that took place between the Governor-General and the government.⁴²

In 1984 the confidentiality of advice from public servants to ministers became the issue. In March of that year Democrats senator Don Chipp moved that documents containing advice from the Commissioner of Taxation to the Treasurer concerning provisions contained in the Income Tax Assessment Amendment Bill (No. 5) 1983 be laid on the table. Senator Chipp’s concern was that clause 5 of the bill would result in ‘one of the most evil things that a Parliament can introduce’—retrospective legislation. While debate was adjourned without the Senate agreeing to the order, four days later a letter was communicated to the Senate in which the Treasurer refused to table the documents, which also included cabinet material, and referred to the ‘long

⁴⁰ These events were written up at length in J. R. Odgers, *Australian Senate Practice*, 6th edn, Royal Australian Institute of Public Administration (ACT Division), Canberra, 1991, pp. 908–10.

⁴¹ Senate debates, 17 September 1968, pp. 695, 703; 26 September 1968, pp. 1028–9; J. R. Odgers, *Australian Senate Practice*, 4th edn, AGPS, Canberra, 1972, p. 519.

⁴² Senate debates, 10 June 1914, pp. 1921–2; 12 June 1914, pp. 2088–102; 17 June 1914, pp. 2145, 2169; 24 June 1914, pp. 2419–20; 8 October 1914, p. 12.

established convention' of not disclosing the advice of a public servant.⁴³ Ultimately, while the order for return failed, the issues were widely debated and clause 5 was negatived in the committee stage of the bill.

Punitive actions against ministers who have refused documents were rare. In 1905 the Senate ordered a proposed agreement between the Commonwealth and Burns, Philp and Co for a mail services contract for the Pacific Islands. When the return was refused, due to the Prime Minister's view that an unsigned agreement should not be tabled, an urgency debate took place on the 'want of due attention' of the minister in regards to 'requests for information by honourable senators'. Four days later the document was tabled.⁴⁴ After the failure to obtain documents relating to the bottom of the harbour tax scheme in 1982, the opposition gave notice of a motion censuring the government, among other things, for failing to comply with the Senate's directions. The notice of motion lapsed when Parliament dissolved in February 1983.⁴⁵ It was not until 2005 that standing order 164 was changed to provide a formal mechanism for dealing with non-compliance.

Majorities in the Senate

The link between government majorities in the Senate and executive accountability has been the subject of numerous studies.⁴⁶ During the period of government majority in the Senate from July 2005 to November 2007 there was only one order for the production of documents, a sharp decline from numbers in the twenties and thirties in the preceding years.⁴⁷ Looking back at the period 1901 to 1988 it is also instructive to examine the correlation between majorities in the Senate and the success of the Senate in ordering and obtaining documents.

The golden age for the production of documents in terms of sheer numbers of orders coincides with the 1901–10 period when party allegiances were loose and none of the three major parties held an outright majority in the Senate. However, the numbers of orders still remained at a substantial level through the ALP Fisher Government's majority in the Senate from July 1910, the loss of the Senate majority by the Liberal Cook Government from July 1913 and the September 1914 return of the Fisher Government's Senate majority. What is significant to note is that the two most

⁴³ Senate debates, 2 March 1984, p. 288; 6 March 1984, p. 482; Senate Journals, 27 March 1984, p. 737.

⁴⁴ Senate debates, 15 December 1905, pp. 7054–8; 19 December 1905, p. 7313.

⁴⁵ Odgers, 6th edn, op. cit., pp. 910–11.

⁴⁶ For example, Harry Evans, 'Having the numbers means not having to explain: The effect of the government majority in the Senate', *Papers on Parliament*, no. 52, December 2009, pp. 151–63; Patrick Weller, 'Parliamentary accountability for non-statutory executive power: Impossible dream or realistic aspiration?', *Public Law Review*, vol. 16, no. 4, pp. 314–24.

⁴⁷ Evans, op. cit., p. 156; *Business of the Senate*, 2005–07.

politically controversial cases, the Teesdale Smith contract and the double dissolution advices from 1914, both occurred during the period when the government did not have a majority in the Senate.

From September 1914 until June 1962 government majorities in the Senate were the norm and numbers of orders for the production of documents reduced to a trickle before ceasing completely. Until the introduction of proportional representation for Senate elections in 1949, these government majorities were very large, some reaching over 90 per cent, which may help explain why divisions on motions ordering the production of documents were so rare. Once again, the most politically sensitive accountability issues⁴⁸ occurred during times of non-government majorities. However, during three of the periods where governments had lost their majorities in the Senate⁴⁹ there is little evidence of oppositions taking advantage of the change of circumstances to obtain government documents.

Former Clerk of the Senate Harry Evans has characterised the Senate of the second decade and beyond as ‘a changing institution’. He argues that while the founding senators were supporters of a strong, assertive Senate, later senators abandoned the Senate’s federalist principles in favour of the ‘hegemony of Westminster over Australian institutions’, tighter party discipline, executive government domination and, in the case of the ALP, a policy to abolish the Senate.⁵⁰

During the periods of government control between 1914 and 1962 there were some notable accountability motions that failed to gain the support of the Senate. In June 1933, concerned that a public service appointment was ‘made for political purposes in payment for services rendered’, the opposition moved a return for papers relating to the appointment. The United Australia Party government maintained that appointment reports to the Public Service Board were ‘absolutely confidential’, dealt with the ‘most secret organization of the Foreign Office’ and that it was ‘not in the public interest that these papers should be laid on the table of the Library’.⁵¹

⁴⁸ The Jervis Bay hotel licence, October 1931; Oregon timber import duty, March 1931; and travel allowances for public servants, 1943.

⁴⁹ The periods were 14 November 1916 to 30 June 1917, 19 December 1949 to 28 April 1951 and 1 July 1956 to 30 June 1959.

⁵⁰ Harry Evans, ‘The senators, the Senate and Australia, 1901–1929’ in Ann Millar (ed.), *The Biographical Dictionary of the Australian Senate*, vol. 1, 1901–1919, Melbourne University Press, Carlton South, Vic., 2000, pp. 2–3, 5.

⁵¹ Senate debates, 15 June 1933, pp. 2383, 2386, 2389–90. Between 1907 and 1931, 14 orders for returns were laid ‘on the table of the Library’ rather than the Senate. Papers laid upon the table of the Library remained the property of the government department and could be returned after use. This practice was favoured in some circumstances due to the difficulty in reproducing voluminous documents. The practice died out with the general decline in orders of any sort. By the time of the resumption of orders in the second half of the twentieth century, advances in copying technology had made the practice obsolete.

Also unsuccessful was an October 1951 motion calling for the tabling of the advices tendered by the government to the Governor-General relating to the 1951 double dissolution. The motion was defeated 31 votes to 26, albeit with a government recognition that it would be 'proper that in due time that material should be made available'. With government control of the Senate and without a change of government, the documents were not tabled until May 1956.⁵²

From July 1962 to December 1975, the Democratic Labor Party (DLP), Liberal Movement and independents held the balance of power in varying combinations. When combined with a growing sense among government and non-government senators of the responsibility of the Parliament to monitor the executive and the increased Senate effectiveness brought about by the introduction of the Senate committee system in 1970, the independents and minor parties now possessed the ability to explore the accountability possibilities of standing order 358 to its full potential. The division ordering papers on the VIP planes affair in 1967, for instance, was won with support of two independents, two DLP senators and three Liberal floor crossers.⁵³ This occasion marked the first time in the federal parliament that a motion for an order for the production of documents had been put to a vote and won despite government opposition.

When government control was reimposed from December 1975 to June 1981 the government was able to use its majority to clamp down on the release of information on the tendering processes for government computing equipment⁵⁴ and the questionable dealings of Asia Dairy Industries. The latter controversy related to allegations that Asia Dairy Industries (HK) Ltd, a subsidiary of the Australian Dairy Corporation which marketed Australian dairy produce throughout south-east Asia, had evaded paying taxes to the Thai Government and violated Australia's international treaty obligations.⁵⁵ On 2 April 1980 and 28 August 1980 the opposition moved that a secret report of the Auditor-General on the activities of Asia Dairy be tabled. While the motions were unsuccessful, portions of the report were leaked to the shadow minister for primary industry who tabled them in the Senate on 19 August 1980 and the matter was the subject of a report by the Senate Committee on Finance and Government Operations in 1981.⁵⁶

⁵² Senate debates, 17 October 1951, pp. 737–41; 24 May 1956, p. 981.

⁵³ Senate debates, 5 October 1967, p. 1266.

⁵⁴ Senate debates, 7 March 1978, pp. 383–6.

⁵⁵ P. N. Grabosky, 'The Asia Dairy case', *Wayward Governance: Illegality and Its Control in the Public Sector*, Australian Institute of Criminology, Canberra, 1989, <http://aic.gov.au/publications/previous%20series/lcj/1-20/wayward/ch12t.aspx>.

⁵⁶ Senate Standing Committee on Finance and Government Operations, *The Australian Dairy Corporation and Its Asian subsidiaries*, AGPS, Canberra, 1981.

From July 1981 the Democrats held the balance of power. With the credo ‘keeping the bastards honest’, the Democrats were able to use their combined voting power to contribute to the continued rise in the use of standing order 358 for the purpose of government accountability.

Conclusion

While government majorities in the Senate had a marked effect on the slump in the numbers of orders for the production of documents after the First World War they cannot fully explain the discontinuation of the practice—even for non-political, informational purposes—after 1943 or the continued low numbers in the 1960s, 70s and 80s.

Certainly some change in the political culture prompted an end to statements from government senators such as that made by the Vice President of the Executive Council, Senator O’Connor, who remarked in 1901 that the ‘Government have no desire to withhold information in any document in their possession’⁵⁷ or Senator Dawson who maintained in 1904, ‘I have absolutely no objection to every document to which I, as Minister, put my signature ... being laid upon the table’.⁵⁸

Some clues may be found in Senator Spooner’s arguments against Senator Wright’s motion in 1960 for the order for return on the Sorell post office in Tasmania. Spooner stated on the one hand that ministerial advices and departmental files should be exempted as a class, thus thwarting the use of the measure for accountability purposes. But he also maintained that the right should only be used ‘in circumstances which justify its use’, such as ‘a matter of major public importance or a set of circumstances in which there was wrong-doing or something of that kind’, thus denying its use in a non-political context to maintain the public record or inform debate or legislation.⁵⁹

Even with the assistance of minor parties and non-government majorities in the Senate, as an accountability measure orders for the production of documents in themselves can be an imperfect tool. It is one thing issuing an order and quite another obtaining the documents. However, orders for the production of documents can be worth moving even when unsuccessful. In Senator Gareth Evans’ words:

It is only by access to these documents that it will be possible ... for an objective view to be reached as to where the merits and the truth lie. If the

⁵⁷ Senate debates, 28 June 1901, p. 1799.

⁵⁸ Senate debates, 15 Sept 1904, p. 4682.

⁵⁹ Senate debates, 12 May 1960, pp. 962–3.

Government has anything to hide, I can understand its continued reluctance to make these documents available. If the Government believes, however, that its Ministers and senior officials have acted throughout reasonably and with a proper sense of responsibility to the public at large, the Government should not hesitate for one second to put these documents in the public domain to enable the truth of that perception to be established once and for all.⁶⁰

The compelling logic of public perception is difficult for any government to ignore.

⁶⁰ Senate debates, 8 September 1982, p. 713.