

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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Estimates hearings, 23 May—3 June 2005

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The two weeks of estimates hearings gave rise to several significant procedural issues.

PROCEDURAL ISSUES

Public interest immunity matters

Before the hearings began senators asked for advice on the grounds for refusals by ministers to answer questions. A paper on the subject was prepared, and was eventually circulated to all senators. A copy of that paper is attached to this bulletin. It is an attempt at a brief but systematic analysis of the grounds for what are now called public interest immunity claims by ministers.

“Rulings” by chairs

Part of the purpose of the public interest immunity advice was to emphasise the point that chairs of committees have no role, as chairs, in raising or determining such claims. Some chairs still believe that they can raise such claims and rule on them. Unfortunately, some chairs also believe that they can rule on all sorts of matters for which there is no requirement set down by the Senate and therefore no basis for such “rulings”.

As was pointed out in a letter to all chairs by President Sibraa in 1988, chairs have two substantive roles in estimates hearings:

- to ensure that questions are put and answered in an orderly manner
- to ensure that questions are relevant.

The letter went on to point out that it is for ministers to determine whether questions will be answered by officers or ministers and whether they should be taken on notice.

In relation to the relevance of questions, the Senate determined this matter in 1999. As with all committee hearings, the questions must be relevant to the matters under inquiry, and the matters under inquiry in estimates hearings are the estimates of expenditure. In 1999 the

Senate resolved, in adopting a report of the Procedure Committee, that any questions relating to the operations or financial positions of departments are relevant questions for the purposes of estimates hearings. Any ruling of a chair in relation to the relevance of questions must therefore reflect this determination of the Senate. This was the subject of an advice to all chairs in 2003.

The only other rule of the Senate about the content of questions is in Privilege Resolution No. 1(16):

An officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.

The first part of this provision refers to the giving of *opinions* on matters of policy, and does not prohibit questions which seek explanations or expositions of policy positions or factual questions about when and how policies were adopted.

Any rulings by chairs must be based on some known rule of the Senate. It is not open to chairs to make new rules of their own. It is particularly not open to chairs to rule questions out of order because of their content when the questions meet the requirements determined by the Senate. The rights of all senators ultimately depend on observance of this principle. Restricting the rights of senators to ask questions is an extremely serious step, and can occur only by deliberate decision of the Senate. Also, different rulings made by different chairs would result in the rights of senators depending on which committee they are in and who is in the chair.

An example of an unauthorised ruling occurred in the Economics Committee on 2 June: the chair ruled that a senator was not permitted to continue to ask questions based on a document unless he presented the document. There is no rule of the Senate which requires a senator asking questions based on a document to present the document to anyone. There is therefore no basis on which a chair of a committee can make such a ruling. It is open to a committee to order, by resolution, the production to the committee of a document which is referred to or quoted by a senator. This is not, however, a matter for the chair to rule on, but a decision for a committee to make by resolution.

Questions on notice

For some weeks before the hearings, and immediately prior to the hearings, statistics for answers to questions on notice in previous hearings were circulated to all senators. These statistics showed that some questions remained unanswered from the main estimates hearings in 2004, one year ago, from the special procedure for questions on notice adopted by the Senate in November 2004 (see Bulletin No. 186, p. 4), and from the additional estimates

hearings in February this year. The reasons for the delay in answering these questions were explored. In one case, it was discovered that an answer to a question had been sent to the Prime Minister's office for "clearance" in April 2004 (F&PA, 23 May). The President was asked what he intended to do about it, and indicated that it was for senators to initiate appropriate action, while observing that the situation was unsatisfactory (F&PA, 23 May).

Senator Murray had lodged a series of questions about government advertising campaigns costing more than \$100,000. Although the government had refused to respond to an order of the Senate on that subject, on the basis that the information could be pursued through estimates hearings (see Bulletin No. 178, pp 1-2), and the Department of the Prime Minister and Cabinet was supposed to be coordinating responses, some of those questions also remained unanswered.

Budget figures

There was an initial refusal by the Department of Employment and Workplace Relations, subsequently superseded by taking the questions on notice, to provide figures not contained in the budget papers, on the apparent grounds that anything not contained in the budget papers must be confidential, although such questions have been routinely answered in the past. A similar attitude was taken to questions about factors used in calculating budget figures. This approach, if followed in the future, promises to be highly restrictive of estimates hearings. It was the subject of two advices to the EWR&E committee which were published and are attached to this bulletin.

Source of appropriations

Senator Sherry asked in a question on notice lodged in February for figures for total appropriations since 1998 categorised into the sources of appropriations, that is: annual appropriations; special (standing) appropriations; advances; section 31 (revenue) appropriations; section 30A (GST) appropriations; section 20 and section 21 special accounts. A table was provided, and served to demonstrate that annual appropriations endorsed by Parliament are now a minor factor in government funding. The figures for revenue appropriations and special accounts were not provided. For some years senators have been exploring the question of whether this funding structure is in accordance with section 81 of the Constitution, which requires all government revenues to form one Consolidated Revenue Fund out of which appropriations are then made.

Other procedural matters

Other matters of procedural and institutional interest explored at the hearings included:

- the independence and establishment of the Parliamentary Library (F&PA, 23 May)
- the sufficiency of the funding of the Audit Office, in the light of the outgoing Auditor General's letter to the Prime Minister (F&PA, 23 May)
- the taking on notice of questions which would have been answered in the past and the apparent lack of preparedness of some departments
- the refusal of the Leader of the Government in the Senate to identify particular staff responsible for matters in the Prime Minister's office, on the basis that the "inner workings" of ministerial offices should not be revealed (providing another paragraph in the history in the matter of accountability of ministerial staff) (F&PA, 26 May)
- the refusal to disclose where a government decision had been made, and whether it was a cabinet decision, again apparently on the "inner workings" ground (F&PA, 24 May)
- the difficulty of identifying particular programs and other costs in the output structure of the budget documents
- the confusing division of responsibilities in the human services area, with questions referred to other departments in a sort of circular effect, and a similar problem in indigenous affairs following the abolition of ATSIC
- the role of the Prime Minister's office in the selection of the new Electoral Commissioner, an independent statutory office-holder (F&PA, 25 May)
- the refusal, later reversed, to disclose the yearly fee of a former departmental officer acting as a consultant (F&PA, 25 May)
- the government's contingency funds, the amounts of which are not disclosed (F&PA, 25 May)
- the refusal to disclose late adjustments to the budget figures (F&PA, 25 May)
- an initial refusal, subsequently converted to a taking on notice, to provide documents because they are *government* documents; it was pointed out that this alleged principle would result in the withholding of a great deal of information (F&PA, 26 May)
- the refusal, later reversed, to provide the *number* of tenderers for an awarded contract (L&C, 23 May)

- the refusal to disclose the requests by a statutory body (HREOC) for funding (L&C, 23 May)
- a committee allowed a minister to withdraw a document which had been mistakenly handed up by the minister with a tabled document (L&C, 25 May)
- the danger of creating material protected by parliamentary privilege which would then cause difficulties in subsequent legal proceedings was invoked by the Building Industry Task Force (a prosecuting authority) in declining to talk about some cases (EWR&E, 3 June) (see *Odgers* 11th ed, p. 404)
- there was no minister for a long period at one of the hearings of the FAD&T committee, but subsequently a hearing was held up due to the absence of a minister
- there were at least two refusals by ministers to answer questions on the basis that they were allegedly taken from leaked documents
- a senator asked about the cost of a “government inquiry” which was in fact an inquiry by a House of Representatives committee on a reference by a minister, but desisted when this was pointed out (on the principle that the Senate does not inquire into the affairs of the House) (EWR&E, 31 May)
- there was a reluctance on the part of ministers and departments, frequent in recent years, to disclose forward estimates for particular programs.

OTHER MATTERS EXAMINED

As always, the hearings were used to explore matters of current public interest and controversy, including:

- the government’s and departments’ knowledge of the Medicare safety net “blowout” before the general election
- the costs of investigations of “leaks” from departments
- the government’s options for bringing in its budget income tax changes (this was the subject of two advices, which are attached to this bulletin)
- the quality of administration in the Department of Immigration and Multicultural and Indigenous Affairs, especially the mistaken detention and deportation of Australian

citizens (this was the subject of an unusual apology by the secretary of the department at the beginning of the hearing)

- allegedly anti-competitive behaviour by Telstra
- Telstra's re-engagement of an officer previously given a redundancy payment
- the Regional Partnerships Program, especially the "strange case" of the Beaudesert heritage railway (this program is the subject of a general inquiry by the F&PA committee)
- government advertising programs, especially those of a political bent, and their cost
- civilian casualties in Iraq and the failure of government authorities to attempt to calculate them
- alleged killing of civilians by the SAS in Afghanistan
- the Department of Defence's financial management and stocktaking failures, as identified by the Audit Office, particular the lost items of equipment
- the government's Future Fund
- the level of ministerial staffing
- the selection of High Court judges
- the alleged failings of the quarantine service, a matter of longstanding interest on the part of the R&RA&T committee
- alleged bias in the ABC (a matter pursued by a government senator over successive hearings)
- the government's new welfare to work policy.

ACCOUNTABILITY REPORT

As always, the hearings were intensive exercises in accountability, and resulted in the provision of a large amount of information not otherwise known, but some senators detected an increasing rate of refusal to answer questions, and an increasing tendency to take questions on notice which is sometimes a preliminary to a refusal to answer them.

SENATE DAILY SUMMARY

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. Like this bulletin, *Senate Daily Summary* may be reached through the Senate home page at www.aph.gov.au/senate

Inquiries: Clerk's Office
(02) 6277 3364