

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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FILLING OF CASUAL VACANCIES

The first day of the brief sittings before the budget round of estimates hearings was devoted to a condolence motion following the death of Senator Ferris on 2 April.

At the beginning of the sitting, however, Senator Simon Birmingham, appointed to the vacancy created by the death of Senator Ferris, and Senator Suzanne Boyce, appointed to the vacancy created by the resignation of Senator Santoro, by their respective state parliaments, attended and were sworn in.

The Senate has always followed the principle that senators duly appointed to casual vacancies should be sworn in and allowed to take their seats at the next meeting of the Senate at which they are available, a principle based on these considerations:

- The Senate has a duty to ensure that it is duly constituted before it proceeds to other matters, and it is not duly constituted if there are vacancies to which senators have been duly appointed who are available to be sworn in and seated.
- It would be wrong in principle for the Senate to sit with vacancies to which senators have been duly appointed when those senators are available to be sworn in and take their seats.
- It would be discourteous, at the least, to the state parliaments who have duly made appointments to casual vacancies for the Senate not to swear in and seat the senators when they are available at the next meeting.
- Any failure to swear in and seat duly appointed senators who are available to be sworn in could set a precedent for delay, perhaps for partisan reasons, in the seating of senators appointed to casual vacancies.

The Senate passed on 3 June 1992, and reaffirmed on 7 May 1997, a resolution which read, in part:

The Senate –
believes that casual vacancies in the Senate should be filled as expeditiously as possible, so that no state is without its full representation in the Senate for any time longer than is necessary

This injunction on the states reinforces the requirement to swear in and seat as early as possible senators duly appointed to casual vacancies.

REFERENCE OF BILLS TO COMMITTEES

Of the ten committee reports on bills released during the non-sitting period and tabled on 9 May, two recommended amendments to bills and one contained a complaint by non-government senators about the inadequate time given to committees to consider bills.

The Selection of Bills Committee report on 10 May was the occasion of another debate featuring allegations by the non-government parties that the government is abusing the process by setting unreasonable deadlines for committees to report on bills, thereby not allowing sufficient time for witnesses to prepare their submissions and give their evidence.

The Selection of Bills Committee, at the instigation of the government, recommended a reference of the forthcoming government bill to provide further “safety net” provisions in the Work Choices legislation in advance of the introduction of the bill, which is not expected to be introduced until 23 May or later. The government moved an amendment to the motion for the adoption of the committee’s report to set a reporting date of 14 June, giving the committee at the most two weeks to receive submissions and hear evidence. As the bill will have retrospective application in any event, because the provisions will be backdated, the reason for the urgency attached to its passage is not clear.

The procedure of referring a bill to a committee prospectively in advance of the bill’s appearance, or referring a matter to a committee and allowing the committee to consider future legislation in relation to that matter, is a valuable means of giving committees maximum time to undertake their inquiries. It is now being used, however, to shorten the time available to committees to consider bills.

In that regard, the deadlines for the passage of bills are also questionable. There have been several instances of committees reporting on bills to tight deadlines and the bills not being dealt with for weeks afterwards. An example during this period was the Food Standards Australian New Zealand Amendment Bill 2007.

ESTIMATES QUESTIONS ON NOTICE

Members of committees are encountering widespread refusals to answer questions and delays in answering questions on notice. One favoured reason for refusing to answer questions is the alleged cost of doing so. Some departments, particularly the Department of Employment and Workplace Relations, have taken to costing the preparation of answers, and ministers have adopted the tactic of referring to the cost of preparing answers in response to complaints of delays and refusals to answer.

A senator asked the Department of Employment and Workplace Relations how many persons were receiving a particular entitlement. This might be thought to be a piece of information readily available to the department administering the relevant entitlement. The department, however, eventually answered that 2857 people were receiving the entitlement and the preparation of the answer took 26.7 hours at a cost of \$438.51. The senator could well respond that this answer indicates inefficiency on the part of the department.

On 10 May Senator Marshall employed the procedure under standing order 74(5) to ask for an explanation of the failure to answer many questions not answered by the Department of Employment and Workplace Relations. He stated that answers to questions have been prepared by the department and forwarded to the minister's office, where they have remained. At the February hearings the department refused to provide answers to questions where the answers had been forwarded to the minister's office. Senator Marshall alleged that the government is deliberately suppressing the answers until it introduces its bill to modify the workplace relations legislation. The minister, in response, referred to the cost of preparing the answers.

The "clearing" of answers from departments by ministers' offices provides the opportunity for the departmental answers to be altered and "spun". At the February hearings one department accidentally left on an answer to a question the names of ministerial staff who approved the answer, providing a rare public disclosure of the actual process.

(Some senators were unaware of the procedure whereby unanswered estimates questions on notice, as well as questions placed on the Notice Paper, can be pursued in the chamber after question time. The procedure was recommended by the Procedure Committee in its report in October 2005 and was adopted by amending standing order 74 on 9 November 2005, the only improvement of the Senate's accountability mechanisms since 1 July 2005.)

DELEGATED LEGISLATION

In its report on 9 May the Scrutiny of Bills Committee referred to bills which contain provisions to the effect that an instrument authorised to be made under the legislation is not a legislative instrument under the Legislative Instruments Act. This means that the instrument is not subject to disallowance by the Senate. The committee pointed out that such a provision may merely confirm that an instrument is not to be legislative in character, or it may express a policy intention to exempt an instrument from scrutiny and disallowance by the Senate, and that explanatory memoranda accompanying bills do not make this clear. The committee observed that this situation could lead to the Senate inadvertently agreeing to legislation exempting legislative instruments from disallowance on the misapprehension that the instruments proposed by the legislation would not be legislative in character. This is a matter to which the committee has drawn attention ever since the enactment of the Legislative Instruments Act. The committee suggested that this be included in the many improvements which are to be made to explanatory memoranda in the future.

MINORITY REPORTS

On 10 May Senator Marshall tabled by leave a document setting out observations by Opposition senators on the Employment, Workplace Relations and Education Committee on a bill reported by the committee. The senators had not had time to include their observations as a minority report.

The principle has been followed in the past that, where members of a committee indicate an intention to present a minority report, they may present, without leave, such a report subsequent to the presentation of the main committee report. In the absence of a notification of intention to the committee, however, such a minority report is simply another document for which a senator requires leave to table.

ACCOUNTABILITY REPORT

The deadlines for committees to report on bills and the refusal to answer questions in estimates hearings, sought to be justified by the cost of preparing answers, are adverse signals for the future of accountability.

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.

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

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