



# DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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For the budget estimates period 23 May - 2 June 2011

Budget estimates proceeded with few procedural issues raised but, as usual, with much information about the operations of departments and agencies being placed on the public record.

## LATE ANSWERS TO QUESTIONS ON NOTICE

The usual chorus of complaints was made about the provision of late answers to questions on notice. Responses across the various portfolios indicated that delays may often be attributed to ministers' offices but that there appears to be a widely held belief that lodging answers on the last business day before the hearings or on the morning of the hearings is acceptable. This view was not shared by the Parliamentary Secretary for Defence who acknowledged that committees were justifiably annoyed about the practice and indicated that more timely responses would be provided in future (FADT, 30/5/11).

Agencies cannot have been unaware that dissatisfaction would be expressed about late answers, given that a record number of senators used the procedures available under standing order 74(5) on 12 May to pursue unanswered questions taken on notice at the additional estimates hearings in February.

## GROUNDINGS FOR NOT ANSWERING QUESTIONS

### — 'ADVICE TO GOVERNMENT'

There were few disputes about answers to questions but it is apparent that, despite the order of the Senate of 13 May 2009 which explicitly rejects reliance on deliberations of, or advice to, government as an acceptable ground for a claim of public interest immunity, such responses continue to be provided, without elaboration in most cases (eg, CA, 1/6/2011). It is unusual for an estimates round to pass without an officer or minister declining to provide information about the dates of Cabinet decisions or Cabinet meetings and the budget estimates hearings proved no exception (L&CA, 23/5/2011). Reference is usually made to the 'convention' that Cabinet matters, including advice to individual ministers, are not discussed. This is a misstatement of the scope of the generally recognised public interest in not disclosing the actual deliberations of Cabinet so as to protect the ability of Cabinet ministers to discuss

alternative policy options fully and frankly and to deliberate in private. It does not apply to such process information as dates which have been freely disclosed on many occasions during estimates hearings, one example occurring during questioning of officials of the Department of the Prime Minister and Cabinet about briefing to the Prime Minister on the Wikileaks documents when the dates of the 12 briefs were provided (F&PA, 24/5/2011).

#### – ‘SUB JUDICE’

On several occasions, officers declared that certain matters were ‘sub judice’ and therefore answers ‘could not be provided’. This is another ground which is commonly claimed by witnesses as justification for not providing any information about a matter. Like Cabinet-in-confidence claims it is also interpreted widely by those at the witness table without a proper basis for that interpretation. Unlike Cabinet-in-confidence, ‘sub judice’ is not a recognised ground of public interest immunity in itself. Rather, it is a restriction on debate (or discussion in such public forums as estimates hearings) that the Senate imposes on itself to avoid prejudice to legal proceedings. Formulated through rulings of Presidents, there are three important principles involved in the application of the ‘sub judice’ convention:

- first, there should be an assessment of whether there is a real danger of prejudice to legal proceedings (in the sense of either creating an atmosphere where a jury would be unable to deal fairly with the evidence put before it, or possibly affecting the evidence a future witness might give);
- secondly, the danger of prejudice must be weighed against the public interest in the matters under discussion; and
- thirdly, the danger of prejudice is considered greater when a matter is actually before a magistrate or a jury.

The issue was the subject of comments by the Chair of the Community Affairs Legislation Committee during the cross-portfolio hearings on Indigenous matters on 3/6/2011. The Chair drew attention to the rights of senators to ask questions even where matters were before a court (in this case, proceedings before the Federal Court in which the Northern Land Council had an interest). The issue also came up in relation to questions to agencies about the recent disturbances at the Christmas Island and Villawood detention centres with the Immigration Department Secretary expressing a well-founded concern that information he was asked for may go to the guilt or innocence of individuals (L&CA, 24/5/2011). (Also see L&CA, 26/5/2011, EEWR, 30/5/2011 and CA, 30/5/2011.) For further information, see Odgers’ *Australian Senate Practice*, 12th edition, pp 198-203.

#### – LEGAL PROFESSIONAL PRIVILEGE

At the additional estimates hearings of the Finance and Public Administration Legislation Committee, the minister took on notice whether a claim of legal professional privilege would be made in respect of a document sought from the Australian Electoral Commission. The question had not been answered by the time of the budget

estimates hearings but the AEC revealed that a draft answer had gone to the responsible minister's office. While legal professional privilege is not a ground that has been recognised by the Senate, it would have been open to the committee to consider the reasons for claiming that disclosure would not be in the public interest. Instead, the committee delivered a rebuke to the minister and agency indicating that all outstanding questions should be answered as soon as possible. It intends to consider the matter further (F&PA, 25/5/2011).

## ADMINISTRATIVE ARRANGEMENTS ORDERS AND PORTFOLIO COMPLEXITY

Several committees encountered difficulties from changes to AAOs which saw programs moving between departments and confusion about where particular questions should be asked (EC, 24 & 25/5/2011), perhaps a comment on the actual transparency and informativeness of the portfolio budget statements. The complexity of outcome and program arrangements also saw some departments offering to provide committees with 'mud maps' in future to assist in identifying where questions should be asked (EC, 24/5/2011, CA, 30 & 31/5/2011). The need for such aids was highlighted during questioning of the Department of Sustainability, Environment, Water, Population and Communities (EC, 25/5/2011) when it emerged that questions relating to eucalyptus dieback and cane toads both fell under the marine program.

## SCOPE OF ESTIMATES HEARINGS

### — WHO SHOULD APPEAR?

Standing order 26(5) governs the scope of estimates hearings and provides that 'committees may ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure'. The standing order is broadly framed to accommodate wide-ranging scrutiny of Commonwealth expenditure. Estimates committees have long been regarded as one of the most important accountability mechanisms available to the Senate. Questions frequently arise whether this or that agency is required to attend or whether this or that person is an 'officer' for estimates purposes. No specific tests have been formulated by the Senate as to which agencies should attend or who is an officer. These are matters for the judgement of committees, taking into account the purpose of estimates to scrutinise Commonwealth expenditure (whether or not it is provided for in the annual appropriation bills) and the two fundamental principles applying to the interpretation of standing orders: that each should be read in relation to the others and that the favoured interpretation is that which preserves or strengthens the powers of the Senate and the rights of senators (and certainly not the convenience of ministers or officers) (see Odgers' *Australian Senate Practice*, 12th edition, p. 20). Also see various resolutions of the Senate on the scope of questioning and the accountability of statutory bodies, for example.

While possible tests, such as whether there is an employment relationship or whether an agency has been established by legislation, may sometimes assist, they are not determinative. In the past, a wide range of people have appeared, including employees

and officers of the public service, statutory authorities and government corporations, members of government boards, and officers of oversight or coordinating agencies such as the Australian National Audit Office and the Department of Finance and Deregulation budget group (attendance of whose officers at the hearings of each agency was considered *de rigueur* in the past and recorded in committee minutes).

The question of whether secretaries of departments should attend has also arisen on numerous occasions. While most secretaries attend for the duration of estimates, some have had different practices over the years. In the end, it is a matter for individual committees to determine and to communicate their requirements (such requirements being backed up by the availability under standing order 25(14) of coercive powers if necessary). In the budget round of estimates, there was much discussion of the attendance of the new Treasury Secretary, Dr Parkinson, who appeared with outcome groups in addition to those originally scheduled, at the request of the committee (Ec, 1 & 2/6/2011).

#### – ‘BREAD AND CIRCUSES’

Standing order 26(5) also prescribes the format of estimates hearings which shall consist of questions and explanations (see also paragraph (4)). Proceedings in estimates hearings are more restricted than in general committee inquiries because the hearings are a substitute for the committee of the whole stage on the appropriation bills. Proceedings which used to occur in the chamber have been delegated to committees but their purpose remains the asking of questions by senators and the answering of them by ministers in the Senate and officers. Thus the following activities are not considered to be appropriate components of hearings:

- the showing of videos or other audio visual entertainments;
- demonstrations of public relations campaigns involving officers dressing up in character suits and parading around committee rooms (CA, 31/5/2011);
- demonstration of show bags or other ‘bread and circuses’;
- the making of statements or provision of commentary on either side of the table, including through animal mimicry.

Such things would be out of order in the Senate chamber and are likewise out of order in estimates hearings. While such restrictions may appear unduly puritanical, particularly given the long hearings which are taxing for all involved, they nonetheless have a very important rationale which is to protect the rights of senators to ask questions about the items of proposed expenditure. Time spent on such displays (and on lengthy opening statements) detracts from the time available for senators to question ministers and officers. On the same principle, it is not considered appropriate for bills that have been referred for separate committee inquiries to be the subject of questions at estimates, the rationale being that there is another opportunity for this to occur and the Senate’s decision to refer the bill is an indication that the bill is to be examined in that context (CA, 30/5/2011).

It is also worth mentioning that the standing orders do not distinguish between the rights of government and non-government senators. While non-government senators traditionally make more use of estimates hearings, there is no basis for limiting the participation of government senators in the questioning (F&PA, 23/5/2011), although this does not extend to ministers at the table who are there to provide explanations, not to ask questions of committee members (FADT, 1/6/2011). Finally, it is not the role of witnesses to tell committees how they should conduct their inquiries (L&CA, 25/5/2011). It is the chair's role to manage the proceedings and apply the standing and other orders, subject to review by the committee where a chair's ruling is challenged.

## FIRST AND LAST APPEARANCES

Committees noted the last appearances at estimates by the outgoing Chief of the Defence Force, Air Chief Marshall Angus Houston and the three Service Chiefs (FADT, 31/5/2011), as well as the Chairman of the ACCC, Mr Graeme Samuel (Ec, 31/5/2011). Having been farewelled at his ostensibly last appearance in February, the Director of the Classification Board, Mr Donald McDonald, nonetheless reappeared for the final time, pending filling of the position (L&CA, 25/5/2011). First appearances included the new Treasury Secretary, Dr Parkinson (Ec, 1/6/2011) and the new Chairman of the Australian Securities and Investments Commission, Mr Greg Medcraft (Ec, 31/5/2011). Agencies or bodies to appear for the first time included the COAG Reform Council (F&PA, 23/5/2011), the Threatened Species Scientific Committee (EC, 25/5/2011) and the new Independent National Security Legislation Monitor, Mr Bret Walker SC (F&PA, 24/5/2011).

## SENSITIVE INFORMATION

The question sometimes arises whether information may be provided to estimates committees in confidence. It may not. Standing order 26(2) provides that the 'committees shall hear evidence on the estimates in public session'. This is consistent with the role of estimates as being a substitute for the committee of the whole stage on the appropriation bills. When the Defence Secretary offered to provide further information to the Foreign Affairs, Defence and Trade Legislation Committee on a sensitive personnel matter, subsequent discussions covered the status of information provided to committees in their estimates mode and the availability of other means of communicating with committees that could provide for the non-publication of the information if that was the preference of the committee (FADT, 31/5/2011).

## TECHNOLOGY

The use of social networking media to disseminate information about the department's operations was discussed in evidence given by officers of the Department of Immigration and Citizenship (L&CA, 23/5/2011). In other committees (F&PA, CA), there were questions about the publication of documents in formats suitable for tablet computers and similar devices. Electronic publication, already the norm, is no doubt set

to undergo a further revolution, possibly even extending to making the next edition of the venerable Odgers available as an iPad app (F&PA, 23/5/2011).

## MATTERS OF INTEREST

Among the many hundreds of issues canvassed at the hearings, the following provide a sample of the variety:

- the extent of the NBN Co chief's previous involvement in the troubled Alcatel company (EC, 26/5/2011);
- the revelation that the Small Renewable Energy Scheme has been the subject of unintended trading and profiteering (EC, 23/5/2011);
- the date of the so-called heritage assessment of Parliament House billiard tables sold by DPS (F&PA, 23/5/2011);
- the allocation of other departmental functions to the Parliamentary Librarian (F&PA, 23/5/2011);
- the impact on Department of Immigration and Citizenship legal expenses of a recent High Court decision finding boat arrivals had the same rights as other asylum seekers (L&CA, 23/5/2011);
- plans to compensate households for the impact of a carbon tax on the price of petrol (EC, 23/5/2011);
- annual welfare and the live export trade (RAT, 24/5/2011)
- confirmation that the agreement with Malaysia involves 'up to' 800 asylum seekers in exchange for settling 4000 refugees over several years (L&CA, 23/5/2011);
- the continuing impact of the efficiency dividend on small cultural agencies despite a change in policy (EC, 24/5/2011);
- the personal involvement of a senior Immigration official in resolving a recent situation at Villawood detention centre (L&CA, 24/5/2011);
- reduced estimates of the amount of water needed to restore and maintain the Murray-Darling river system (EC, 25/5/2011);
- the cost of the inquiry to be conducted by the Human Rights Commission into aspects of recent incidents at the Australian Defence Force Academy (L&CA, 25/5/2011);
- the lack of research done to support a 2010 election commitment to fund the Parramatta-Epping rail link (RAT, 25/5/2011);

- the whereabouts of the State Coach Britannia to which a previous government contributed funds (F&PA, 23/5/2011);
- the prosecution of former Customs official Alan Kessing and inconsistencies between the AFP and the defence counsel about what information was disclosed to the defence team (L&CA, 26/5/2011);
- ASIO concerns about the reliability of immigration alert lists (L&CA, 25/5/2011);
- the program to provide set top boxes to pensioners (EC, 26/5/2011);
- whether the ABC's political coverage is biased (EC, 26/5/2011);
- cost over-runs on the Air Warfare Destroyer project (FADT, 30/5/2011);
- the proportion of proceeds from the proposed carbon tax to be allocated to industry assistance (Ec, 30/5/2011);
- the cost of dismissing an employee of the Defence Material Organisation who was later re-instated and provided with an out-of-court settlement (FADT, 30/5/2011);
- the impact of the caretaker period on Defence expenditure targets (FADT, 30/5/2011);
- the cost of pot plants in offices of the Department of Education, Employment and Workplace Relations (EEWR, 30/5/2011);
- the computers in schools program (EEWR, 2/6/2011);
- problems with the processing of security clearances (FADT, 30/5/2011);
- efforts by ASIC to improve its performance in relation to the liquidation industry (Ec, 31/5/2011);
- how hospital bed numbers are calculated under recent hospital reform programs (CA, 31/5/2011);
- criteria (or lack thereof) for Cabinet decisions to defer listing of particular drugs on the PBS (CA, 31/5/2011);
- the failed takeover bid by the Singapore Exchange for ASX (Ec, 1/6/2011);
- how APRA is monitoring insurers' reinsurance cover following the past summer's natural disasters (Ec, 1/6/2011);
- Treasury forecasts and forecasting failures relating to the extent of the resources boom and the point at which inflation started to decline in the early 1990s (Ec, 2/6/2011);

- the impact of changes to the Fringe Benefits Tax on cars (Ec, 1/6/2011);
- the review of the school chaplaincy program (EEWR, 2/6/2011);
- the impact of changes to the youth allowance scheme (EEWR, 2/6/2011);
- the amount of stimulus funding still to be spent on BER projects (EEWR, 2/6/2011).

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