DEPARTMENT OF THE SENATE
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SENATORS AS WITNESSES

Three senators appeared by video-link during the week at a hearing of the UK Joint Committee on the Draft House of Lords Reform Bill to give evidence about how the Senate works, its electoral basis and powers and other aspects of its functions. The members of the committee had expressed an interest in speaking directly to senators about what an elected chamber looked like in practice, given the Senate's prominence (and pre-eminence) as an elected upper house in Commonwealth circles.

CONSIDERATION OF LEGISLATION UNDER TIME LIMITS

Any observer watching the Senate this week, however, may not have gained the most favourable impression of the Senate's operation as an exemplar of thorough legislative scrutiny. The Senate operated under a limitation of debate for the week (see Bulletin No. 257) and all legislation apart from one bill (the Deterring People Smuggling Bill 2011, considered at the end of other proceedings) was considered under time limits. This led to many critical comments about the process and the lack of time to debate many of the bills designated for consideration.

Government senators drew comparisons with a similar episode in 1999 when the then Government, with the support of the Australian Democrats, guillotined 36 bills over a similar period (see Journals of the Senate, 23 June 1999, pp. 1069-73). The similarities were somewhat superficial. Under the 1999 arrangements, which grouped the bills into four packages, all of the guillotined bills were called on and available for debate. One package consisted of the Environment Protection and Biodiversity Conservation Bill and an associated bill, while the remaining packages comprised three groups of bills implementing A New Tax System and related measures (the GST legislation). Each package comprised bills that had been taken together under the expedited proceedings in standing order 113 and thus all of the bills were given designated time, however minimal, for consideration.

Of the 33 bills passed under the limitation of time in the current period, 24 were passed without debate. This was because the allotment of time applied on a daily basis to a list of unrelated bills. Once time had expired for the day, the questions were put on all the bills even though debate had not progressed past the first or second item of business (of between four and eight items) for that particular day.

Lest it be concluded too readily that this represents a new low in the consideration of legislation by the Senate, other comparisons should be considered. Longer memories might recall the 57 bills guillotined on 16 June 1992 (over an eight day sitting fortnight), the 52 bills guillotined

on 13 December 1990 (over six sitting days), or the 36 bills guillotined on 1 June 1988 (over two sitting days, the second of which was the last sitting day in Old Parliament House).

On the first two occasions, specific amounts of time were allocated to each bill or package of bills (and extensions of time initiated by the Government were moved on a couple of occasions). The third occasion combined specific amounts of time allocated to individual bills or packages of bills, with a fixed point in time for the expiration of debate on other bills. Where a group of unrelated bills was considered from 3.05 pm to 7 pm on one day, the bills were debated cognately; that is, the first bill was called on and a motion moved by leave allowed all the other listed bills to be debated at the same time. Although this resulted in a somewhat random debate, it nonetheless allowed senators to speak on the bills they wished to, including about any amendments they would not get the opportunity to move in a committee stage that was unlikely to occur.

The allocation of specific amounts of time to individual bills or related packages is the obvious solution to preserve the rights of senators where time is limited. Comparisons with earlier times remain problematic, however, because in those times sitting days lasted as long as they needed to in order to accommodate the required business and the Senate often sat till the early hours of the morning. Indeed, it was these kinds of experiences that led to the reform of sitting hours and the routine of business in 1994 to avoid "legislation by exhaustion".

On the last sitting day, Senator Xenophon foreshadowed a reference to the Procedure Committee of the operation of this particular style of limitation of debate which had the effect of depriving senators of the right to speak at all on some bills. Past experience will no doubt inform the committee's deliberations.

One bill which was debated was the Parliamentary Service Amendment (Parliamentary Budget Officer) Bill 2011 which was ultimately passed without amendment, the Opposition having moved amendments to strengthen the information-gathering powers of the officer. Another bill, the Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Bill 2011, was the subject of unanimous acclamation. Initiated in the House of Representatives as a private member's bill, it was supported by the Government and dealt with in the Senate as Government Business, as were the final stages of the Auditor-General Amendment Bill 2011, also initiated as a private member's bill (see Bulletin Nos. 257 and 256).

As foreshadowed elsewhere, the enhanced opportunities to consider private members' and senators' bills under the so-called new paradigm are finally beginning to lift the number of such bills passed into law.

New paradigm

In other respects, the new paradigm was altered this week by the resignation of the Speaker and the election of the former Deputy Speaker to the post. On assuming the Chair, the new Speaker announced that he would resign from his party, thereby altering the numbers in the lower house and giving the Government a slightly safer margin than it has enjoyed to date.

One aspiration of the various agreements on parliamentary reform was for committees of the House of Representatives to have more bills referred to them. While it is the absolute right of each House to deploy whatever steps it chooses in the scrutiny of legislation, the proposal gave rise to concerns about the potential for duplication between committees of the two Houses and the resulting strain on witnesses. That this concern has generally been avoided by common sense measures was again demonstrated this week when the Joint Standing Committee on Foreign Affairs, Defence and Trade (the House members of which comprise a committee of the House for the purpose of bill referrals from the House) reported that it had received two related bills for inquiry but, in the interests of avoiding duplication, had resolved not to conduct the inquiry given that the principal bill had been referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee. Senate committees thus continue to be pre-eminent in the field of legislative scrutiny.

A commitment in the same agreements to an annual debate on the deployment of Australian troops to Afghanistan was honoured on 21 November when time was set aside for debate on a ministerial statement on Afghanistan.

Privilege matters

Two matters of privilege were raised during the week, both concerning the possible improper influence of a senator by a third party or the possible seeking of benefits by a senator (see Privilege Resolution 6(2) and (3)). In one case, the President determined that precedence should be given and a motion to refer the matter to the Privileges Committee was agreed to on the voices the following day, notwithstanding that it raised highly contentious matters of a partisan political nature.

The second matter, also of a partisan character, was not given precedence on the basis that it did not meet the threshold criteria in Privilege Resolution 4 that the President is required to take into account. The President made a statement to the Senate on 25 November determining not to give the matter precedence. Senator Bob Brown then moved dissent from the President's decision, a matter which will come up for determination on the first sitting day next year. He also exercised his right under the standing orders to give notice of a motion at any time to refer a matter to a standing committee (see standing order 25(11)), to give notice that he intends to refer the matter to the Privileges Committee by the usual means. The matter will therefore have precedence as business of the Senate (ranked second in the hierarchy of business) rather than precedence as a matter of privilege (ranked first).

Most possible contempts referred to the Privileges Committee concern the protection of witnesses and the investigative processes of committees. The Privileges Committee has stated on numerous occasions that it considers the protection of witnesses before Senate committees as the highest duty it performs on behalf of the Senate. Nonetheless, some matters concerning the treatment or conduct of senators have been referred. The procedures followed by the committee in inquiring into matters relating to contempts require it to observe procedural fairness and to make determinations on the basis of specified criteria (see Privilege Resolutions 2 and 3). A considerable body of precedent also guides the committee's deliberations, allowing it to deal with sometimes acutely partisan

matters in a way that focuses on the institutional purpose of the law of parliamentary privilege (see 125th Report).

Matters of public importance or urgency

Provision for raising matters of public importance or urgency under standing order 75 was available on only two days this week, the normal routine of business having been truncated to accommodate the limitation of debate on an extensive list of bills. On both days, a ballot was held to determine which proposal would be reported. The ballot was held between two proposals on 21 November but on the following day five proposals were submitted, one by the Australian Greens whip and four identical proposals by Opposition senators. The submission of multiple identical proposals has not occurred since 1989 when independent Senator Irena Dunn's proposal was in competition with 25 identical proposals from Opposition senators. On both occasions, an Opposition senator's proposal was selected.

Unanswered questions on notice

The procedure in standing order 74(5) to follow up answers to questions on notice that remain unanswered for 30 calendar days was again used during the week, indicating that this procedure has returned to common usage in the past few months after some time in abeyance.

Access to committee documents

Standing order 37(3) provides for the President to grant access to unpublished committee documents, including in camera evidence, after a period of time has elapsed. A resolution of both Houses agreed to by the Senate on 6 September 1984 applies the same procedures to documents of joint committees with the access decision being made jointly by the President and the Speaker. Under this resolution, access was granted to documents of the former Joint Committee of Public Accounts dating from 1945-55. A report of the decision was tabled on 21 November.

Order of the call in debate

Standing order 186(2) provides that, subject to the practices of the Senate, when two or more senators rise to seek the call during a debate, the President shall call the senator who, in the President's opinion, first rose in their place. The practices of the Senate were endorsed by the Procedure Committee in its Second report of 1991 and are enumerated in *Odgers*. On 22 November, a proposal by the Leader of the Australian Greens to provide for the leader of a minority party, as defined by section 3 of the *Parliamentary Entitlements Act 1990*, to be given the call before leaders of other non-government parties was defeated. The proposition, which was based on the statutory definition of a minority party as one with at least five members, would have had the unusual effect of requiring the chair to apply a statutory criterion to their interpretation of the standing orders.

Continuation of temporary orders

The temporary orders relating to the consideration of private senators' bills and the modified rules for questions without notice were both extended on 24 November till June 2012.

Days of meeting for 2011

A motion to dispense with the final sitting days for 2011 (28-30 November) was denied formality on 24 November but was moved and debated the following day, providing an opportunity for senators to vent their frustration with arrangements for the consideration of legislation. The motion was agreed to.

Another sign of frustration was the unusual debate on motions moved by leave on 25 November to grant leave of absence to various senators for the day. Such motions are categorised as business of the Senate but they are invariably moved by leave rather than on notice. Such a motion is required under standing order 47(1) to state the period of absence and the cause, but detailed reasons are almost never required. The debate resulted in an interesting discussion of the conventions before the motions were agreed to.

Censure motions and suspensions of standing orders

Censure motions are often moved pursuant to a suspension of standing orders, which is traditionally agreed to so that the substantive motion may be debated. There were numerous attempts to suspend standing orders during the week, including when senators were refused leave to make statements about various matters, but two proposed censure motions were initiated by other means. On one occasion, Senator Bob Brown gave notice of a motion to censure the Minister for Agriculture, Fisheries and Forestry, Senator Ludwig, in relation to an intergovernmental agreement on forestry. The notice was withdrawn on 24 November. On the same day, the Leader of the Opposition in the Senate, Senator Abetz, sought leave after the third question in question time to move a censure motion against the Government for its performance over the four years since its election. Debate proceeded when leave was granted for the motion to be moved, but the matter was not resolved because debate was interrupted by the operation of the guillotine (see above). Senator Ludlam who apparently had the fourth question that day moved the closure on the censure motion so that questions without notice could resume but that motion was lost by a large margin.

Australia Network

Reference was made in the previous Bulletin to the refusal of an order for production of documents about the troubled tender process for the Australia Network. Senator Birmingham gave notice of a motion on 22 November to establish a select committee into the affair. The responsible minister, Senator Conroy, provided a further ministerial statement on the matter on 23 November. The statement was presented to the President out of sitting as the operation of the guillotine overtook the minister's opportunity to make the statement to the Senate. The opportunity to table the statement was similarly

overtaken on the following two days, although the procedures for presentation out of sitting provide for the documents or reports to be authorised for publication. The statement reiterated that aspects of the tender process had been referred to the Australian Federal Police but announced that the minister had also requested the Auditor-General to review the process. On this basis, the Australian Greens declined to support the motion to establish a select committee and the motion was defeated on 24 November.

Orders for production of documents

No response was made to the order of 1 November for further detailed information on the impacts of the Minerals Resource Rent Tax on various revenue measures, including methodologies used to assess the impacts. A response is now well overdue. Another order for detailed information on Treasury's modelling of the carbon tax and the subsequent emissions trading scheme was defeated on 23 November.

A joint Opposition/Australian Greens-initiated order for production of further information about the Medicare Chronic Disease Dental Scheme, as a follow up to the information returned on 19 October (see Bulletin No. 257), was agreed to on 24 November. The order falls due on the first day of sitting in 2012.

Committee inquiries and reports

With the Senate operating under end-of-year pressures, the opportunity for committees to present reports is invariably adversely affected. In its Second report of 2011, the Procedure Committee recommended a number of strategies to encourage committees to make greater use of the existing opportunities under standing order 62(4) for debating reports on presentation. Some of these have been successfully adopted. Those committees that followed the suggestion to have their reports ready for tabling before the last day of sitting were nonetheless frustrated in their efforts by the fact that the guillotine superseded the usual opportunity to present and debate reports. Reports were carried over on successive days until an opportunity arose before the Senate adjourned on 25 November to present, but not debate, reports of inquiries to which committees and their support staff had devoted considerable efforts. Some chairs were able to incorporate tabling speeches in Hansard, at least putting some matters on the record.

With many inquiries completed, the week also saw the initiation of several new inquiries. A further attempt by Senator Xenophon to refer matters arising from and related to alleged events at the John Oxley Youth Detention Centre in Queensland in the late 1980s, and the subsequent aborted inquiry, was again defeated, despite the terms of reference having been considerably broadened. The Senate has now indicated on two recent occasions that it is not currently disposed to re-examine these matters (see Bulletin No. 252).

As well as significant reports on policy matters, committees also presented reports on procedural matters. A report by the Legal and Constitutional Affairs References Committee examined a possible unauthorised disclosure of answers to questions on notice by the former Commonwealth Ombudsman (see Bulletin No. 256 and 257). In an interview on ABC radio, the former Ombudsman insinuated that the secretariat was

one of two possible sources of the unauthorised disclosure. The committee's report gave an account of its investigation of the unauthorised disclosure, concluded that it was not a case that warranted raising as a matter of privilege, and expressed absolute confidence in the secretariat staff.

Another report, this time by the Legal and Constitutional Affairs Legislation Committee, examined a case of possible misleading evidence given by officers of the Northern Land Council to the committee's inquiry on the National Radioactive Waste Management Bill 2010. The matter had also been pursued in estimates hearings. In drawing its conclusions, the committee reiterated the Senate's position on the *sub judice* convention and its purpose to prevent prejudice to proceedings before a court. It does not necessarily prevent matters before a court being simultaneously considered by a committee or the Senate where the committee or the Senate considers that it is in the public interest to do so. The committee was unable to conclude that the evidence was misleading or that a matter of privilege should be raised. Senator Ludlam presented a dissenting report.

For details of reports presented and new inquiries, see the Senate Daily Summary.

This is the last issue of the Procedural Information Bulletin for 2011. The Bulletin will resume in February 2012.

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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