DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

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New Senate

The new Senate was sworn in on 7 July by the Governor-General, apart from Senator Bilyk who was unable to be in attendance (and was sworn in by the President on 9 July). Senator Parry was elected as President of the Senate and Senator Marshall as Deputy President and Chair of Committees.

It will be recalled that, in October 2013, former Senator Bob Carr submitted to the President a double resignation from the Senate, both from his current term and from the term to which he had been elected, to commence on 1 July 2014. The President notified the vacancies to the Governor of NSW, but the NSW Parliament, having considered advice from the Crown Solicitor, filled the current vacancy only. The question then arose of how - and when - the NSW Parliament would fill the vacancy arising on 1 July, given that both Houses were not scheduled to sit between 17 June and 12 August. Further advice was sought from the Crown Solicitor, first, about whether - given the Houses were not sitting - an appointment could be made by the NSW Governor and ratified subsequently by the Parliament and, secondly, whether a resolution from the Senate encouraging the NSW Parliament to fill the vacancy could somehow act as a "trigger" for the NSW Parliament to meet and fill the vacancy.

While the Senate has regularly resolved in the past to encourage state parliaments to fill casual vacancies expeditiously, there can be no suggestion that such a resolution could have any status within the constitutional framework of section 15. Nor did the Senate make such a suggestion or - in this case - pass a resolution on the matter. Somewhat gratuitously, the Crown Solicitor's advice suggested that the NSW Parliament should not entertain such a resolution but gave no plausible basis for the suggestion. In relation to an interim appointment by the Governor, NSW has always been one of those states that takes a strict view of the process by interpreting it as available only when the Parliament is technically not in session through prorogation or expiry. Therefore it was not surprising that this option was also rejected. However, both Houses adjourned to 2 July (rather than dates in August) and, on that day, met jointly to choose Senator O'Neill, who therefore ceased to be a senator for one day only. For the avoidance of doubt, the President, on 1 July, reminded the NSW Governor of his earlier notification pursuant to section 21 of the Constitution and of the vacancy existing from that date.

Legislation

The focus of the new Senate was on legislation to repeal the carbon and mining taxes but the repeal bills for the first measure met with some hurdles. When the package of nine bills was reported on 7 July, the routine application of the expedited procedures to the bills under standing order 113 was negatived, meaning that the bills had to proceed by the traditional method which spreads the legislative process over several days, and individually rather than together. Each of the bills was read a first time and adjourned automatically in accordance

with standing order 115(3) which provides that further consideration of bills referred to committees (and, in practice, the provisions of bills so referred, as in this case) is an order of the day for the day on which the committee has been ordered to report. Following protracted and complex proceedings on the 8th report of the Selection of Bills Committee in the last sitting period (see Bulletin No. 283), the date for the Environment and Communications Committee to report on these bills had been set at 14 July.

Even if the committee had reported earlier, it would still have been necessary for the Senate to modify the effect of standing order 115(3) in setting 14 July as the date for debate to resume.

Refused leave to move a further motion to bring the bills on for immediate debate notwithstanding standing order 115(3), the Government moved to suspend standing orders, but the motion lapsed unresolved at 2 pm when the standing orders require questions without notice to be called on. Later in the day, leave was again sought and refused for such a motion and standing orders were successfully suspended to enable the motion to be moved. The motion gave precedence to the package and, subsequently, to the Climate Change Authority (Abolition) Bill 2013 [No. 2] and undid the effects of the earlier decisions preventing the bills being taken together and by the expeditious route. With the necessary programming motion in place, the Government then moved the second reading of the bills and debate continued. Incidentally, the provision in the motion for precedence for the bills overcame the effect of standing order 115(3) in deferring debate till 14 July. The legislation committee finally succeeded in reporting early on the package.

On the morning of 9 July, the Government attempted to guillotine the bills, using the traditional procedures in standing order 142 to declare the bills urgent. In recent years this method has been abandoned in favour of time-management motions that have the effect of applying the rules of the guillotine, but which are put in place without the safeguards of senators' rights required by the traditional method. The motion, that the bills be considered as urgent bills, was negatived on an equally divided vote, three cross bench senators voting with the Opposition and Australian Greens to defeat the proposal.

The second reading vote was taken later that morning, after votes on three second reading amendments which saw a government senator cross the floor to support Senator Xenophon's call for an urgent review of the national electricity price setting rules. At Senator Leyonhjelm's request, the question for the second reading of the bills was divided and the question put separately on the Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 [No. 2] (which would have repealed the tax cuts associated with the carbon tax introduction). That bill was defeated and the remaining bills considered in committee because amendments had been circulated.

When the Senate met on 10 July there was a new, and this time successful, attempt to guillotine the bills, using the time normally allocated for private senators' bills on Thursday morning to deal with all remaining stages of the bills. Standing order 142 allows for the question to be put on all amendments that have been circulated at least two hours ahead of the deadline. During the morning, the Palmer United Party circulated two replacement sets of amendments, neither of which would have met the deadline

and the second of which raised difficult constitutional issues that would have been the subject of a statement by the Chair of Committees for the guidance of the committee, had the amendments been moved otherwise, or the question put on them by leave. When time expired, all the remaining questions were put except for the question on the PUP amendments which were withdrawn by leave. At the initiative of the Australian Greens and the Australian Motoring Enthusiast Party, Schedule 5 of the main bill was negatived, thus preserving the appropriated funding for the Australian Renewable Energy Agency, but the package of bills, as amended, was negatived in committee, with PUP and AMEP senators joining the Opposition and Australian Greens senators to vote against the bills.

Rejection of the bills a second time qualified them as a trigger under section 57 of the Constitution.

The story continued the following week when a new package of bills, minus the income tax rates amendment bill, was introduced into the House of Representatives and passed with amendments moved by the Government incorporating the Palmer United Party amendments that had not been moved in the Senate. The amendments were moved in the constitutionally safe form recommended by Senate drafters, a form that not only avoided the limitations on the Senate of section 53 (no longer a relevant consideration given that the amendments were moved by the Government in the House of Representatives), but also limited the prospects of any challenge to the law once enacted, under section 55 (which provides that laws imposing taxation shall deal only with the imposition of taxation and any provisions dealing with any other matter shall be of no effect).

There was no possibility that the third package of bills could be considered as an occasion under section 57 because the interval between the Senate's rejection of the second package and the House's passage of the third was considerably less than the required three months. Difficult questions that would have arisen from the prospect of 3-legged triggers were thereby avoided.

These bills, and several others, were considered under an order varying the routine of business and extending the Senate's hours for the purpose. The bills were finally passed on 17 July 2014, bringing to an end a long series of attempts to impose, and then repeal, a carbon taxation and trading scheme, all attended by complex and protracted proceedings, described in the pages of these Bulletins since 2009.

In other legislative activity, it was clear that bicameralism had returned, after an absence of legislative disagreements during the last Parliament.

- The Asset Recycling Fund Bill 2014 and its consequential amendments bill were passed with numerous amendments moved by Government, Opposition and Australian Greens senators. Only the Government amendments were agreed to by the House of Representatives and the bill returned to the Senate during its extended sitting on Friday 18 July where the Senate insisted on its amendments to which the House had disagreed.
- The Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 [No. 2] was passed on 17 July, minus several of the Other Measures, namely, cuts to the low income superannuation contribution, the income support bonus and the schoolkids

bonus. The Government's adjustments to the Superannuation Guarantee Charge percentages were also lost. The House of Representatives disagreed with the Senate's amendments but the sittings ended with the Senate insisting on them.

- The Qantas Sale Amendment Bill 2014 was passed with amendments after foreign ownership limits proposed by the Opposition were agreed to by the Government. The House of Representatives agreed to the amendments.
- The House of Representatives also agreed to amendments made by the Senate to the Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2013 and the Trade Support Loans Bill 2014.

Having been given precedence earlier in the sitting period, the Climate Change Authority (Abolition) Bill 2013 was not further considered.

Disallowance

The repeal of the carbon and other taxes was not the only subject of controversy during the period. New regulations to put into effect the Government's policy changes on the Future of Financial Advice rules were registered on 30 June to come into effect on 1 July. It was reported in the press that the Government intended to use all of the available 6 sitting days under the *Legislative Instruments Act 2003* to table the regulations, thereby delaying the ability of senators to give notice for their disallowance.

Opposition senators sought, and were denied, leave to table the regulations and the process was also the subject of questions without notice and debate on motions to take note of answers. On 10 July, the Senate agreed to an order for the regulations to be tabled that day. When the deadline passed, a further question without notice was asked and the answer debated during motions to take note of answers.

Relying on a very traditional parliamentary procedure last used in the Senate in 1994, Senator Dastyari quoted extensively from the regulations and, at the conclusion of his speech, Senator McEwen, pursuant to standing order 168, moved that the document quoted from by Senator Dastyari be tabled. The motion was agreed to on a division and Senator Dastyari, thereby ordered to table the regulations, complied. A response to the order for production of the regulations, tabled shortly afterwards, indicated that the regulations would be tabled by 15 July, consistent with the requirements of the Legislative Instruments Act. The regulations and explanatory statement were tabled on that date.

In the meantime, Senators Dastyari and Whish-Wilson gave notice on 14 July of a motion to disallow the regulations in their entirety. The motion was lost on 15 July, the Finance minister, Senator Cormann, tabling a letter during the debate to the Palmer United Party, outlining further concessions to be made in exchange for that party's support for the regulations.

Senator Dastyari gave a further notice of motion on 16 July for the disallowance of parts of the regulations. The motion was not dealt with during the sitting period.

The Higher Education (Maximum Amounts for Other Grants) Determination, affecting funding for universities, and the Migration Amendment (Offshore Resources Activity)

Regulation, affecting labour standards of certain vessels and drilling rigs within Australia's economic zone, were disallowed on 14 and 16 July respectively, the former on the last available day. Also dealt with on its last available day, the Migration Amendment (Bridging Visas – Code of Behaviour) Regulation, prescribing standards of behaviour for people on bridging visas, survived a disallowance motion on 14 July.

The extension of sittings into Friday 18 July raised the prospect that the Migration Amendment (2014 Measures No. 1) Regulation 2014 would be deemed to have been disallowed if not dealt with on that day. As of 17 July, the notice stood postponed to the next day of sitting (26 August) with two sitting days (including 17 July) left on the clock. Although 18 July was not technically a new sitting day, there is no reason for assuming that a court would adopt such an artificial definition of sitting day. As a consequence, agencies are advised to adopt a cautious approach and treat extended sittings as separate sitting days for the purposes of the Legislative Instruments Act. In the event, the disallowance motion in respect of the regulations was moved by Senator Hanson-Young on 18 July, following a re-arrangement of business to provide for the question to be put after an hour's debate on the issue. Debate concluded ahead of the deadline but the disallowance motion was lost.

Orders for production of documents

Responses to two orders agreed to in the last sitting period (see Bulletin No. 283) were due on 7 July. An order for documents held by Infrastructure Australia in relation to the business case for the East West Link road project in Victoria was again met with a refusal due to the commercially sensitive stage of negotiations but the manner of refusal was unusual. It took the form of a letter from the National Infrastructure Coordinator to the Clerk, with the only ministerial responsibility evident for the decision not to comply being a covering letter from the minister to the Clerk indicating that the attached letter "can be tabled in Senate".

An order for production of documents relating to the Perth Freight Link resulted in copies of requested correspondence between State and Commonwealth ministers and an extract of a cost benefit analysis, with a claim that releasing detailed modelling on the project at this point would prejudice Commonwealth-State relations.

A new order, agreed to on 9 July, for production of documents relating to the independent review of the Air Warfare Destroyer Program was responded to with the tabling of a press release and report summary but no public interest immunity claim for failure to produce the full report. A further order challenged the refusal to provide the report and again ordered the minister to produce it or make a claim of public interest immunity in accordance with those recognised by the Senate. The order also provided for a senator to move a motion without notice in relation to the minister's failure to comply with either element of the order.

A further response was tabled on 18 July, signed jointly by the Defence and Finance ministers, and responding to claims made in the second order. The ministers confirmed, on legal advice no less, that the proffered grounds for non-compliance (disclosure of Cabinet deliberations and commercial damage) were made in accordance with those

previously accepted by the Senate, first circulated in a paper by the former Clerk in 2005. No motion was moved in response as the initiating senator was unavoidably absent.

An order for production of information by the Australian Electoral Commission about an alleged vexatious FOI applicant and the source code for the software used to count the Senate vote was agreed to on 10 July. In relation to the first matter, the minister advised that, as the matter was under review by the Administrative Appeals Tribunal, it would be inappropriate to comment. In relation to the source code, the minister cited vulnerability to hacking and commercial confidentiality as reasons for non-compliance, but without articulating the harm to the public interest of compliance.

Formal motions

The re-established practice by the Opposition of refusing formality to complex foreign affairs motions continued during the sitting period. In one case a proposed suspension of standing orders was negatived. In another, statements were made by leave.

Dividing the question

On several occasions during the period senators asked for the question before the chair to be divided. Standing order 113 gives senators an absolute right to ask for the question to be divided on the application of the expedited proceedings to bills. This occurred on the introduction of the second round of clean energy bills on 7 July when both elements of the expedited procedures were negatived.

Otherwise, standing order 84(3) gives the chair a discretion to order that a complicated question be divided. Presidential rulings have established that the chair will exercise this discretion where senators indicate that they wish to vote differently on different elements of the question. Thus, the motion for the second reading of the second package of clean energy bills was divided on 9 July at the request of Senator Leyonhjelm to enable senators to vote for elements of the package but against the Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 [No.2] which was negatived.

The procedure emerged again during discovery of formal business on 14 July when Senator Hanson-Young sought leave for her motion on asylum seekers to be put in two parts. The chair explained that it was not a matter for which leave could be granted by the Senate but was a discretion of the chair which would be exercised in accordance with the stated principle. When Senator Hanson-Young was unable to indicate that she intended to vote different ways on her own motion, Senator Xenophon so advised the chair and the question was divided accordingly.

Matters of privilege

The President made a statement on 10 July granting precedence to a motion to refer a matter of privilege raised by Senator Xenophon concerning a possible penalty imposed on a witness before the Rural and Regional Affairs and Transport References Committee, or on a person providing information to the committee. The chairs of the Rural and Regional Affairs and Transport Legislation and References Committees raised the same matter a

few days later and the President granted precedence on the same basis. By week's end both matters had been referred to the Privileges Committee for inquiry and report.

The Privileges Committee also presented a right of reply report on 14 July in relation to a person referred to in the Senate. As has been the case with all of the committee's reports recommending the incorporation of a reply in Hansard, the Senate adopted the recommendation.

Procedure Committee

Amendments to the standing orders in relation to the Scrutiny of Bills Committee's operations, presented in the Procedure Committee's First report of 2014 (see Bulletin No. 283), were agreed to by the Senate on 15 July having been proposed by the Chair of the Scrutiny of Bills Committee, Senator Polley.

The Procedure Committee presented its Second report of 2014 on 15 July. The report proposed for discussion by senators a number of initiatives to streamline some routine procedures, including the authorisation of committees to meet while the Senate is sitting, and routine extensions for committee inquiries. It also proposed changes to the adjournment debate and Matters of Public Interest on Wednesday (including a new name) to enhance speaking opportunities for senators. Finally, the report proposed a consolidation of multiple opportunities to present documents and reports, with enhanced opportunities to debate them as of right.

Committees

Several important reports were presented during the period including that of the Select Committee on School Funding, the Rural and Regional Affairs and Transport References Committee's report on beekeeping and pollination service industries, the Finance and Public Administration References Committee's report on Commonwealth procurement procedures, and two reports by the Education and Employment References Committee on child care. Reports were also presented by legislation committees on bills, by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, and the legislative scrutiny committees.

A proposal to terminate the NBN Select Committee, and to establish a new joint select committee on the same subject and a select committee on aspects of Queensland State Government administration have been postponed to the next sitting period.

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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