



DEPARTMENT OF THE SENATE

PROCEDURAL INFORMATION BULLETIN

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For the sitting period 10 - 20 August 2015

CASUAL VACANCY

The fourth casual vacancy for 2015 occurred with the foreshadowed resignation of Senator Milne on 10 August. The President advised the Senate of the vacancy when it met on 10 August and that he had notified the Governor of Tasmania in accordance with section 21 of the Constitution. Senator Nick McKim was chosen by the Parliament of Tasmania on 19 August and sworn in on 20 August.

A further vacancy, that of Senator Wright, has been foreshadowed and business was rearranged on 19 August to enable valedictory statements to be made from 5 pm.

OBJECTION TO DECISION OF THE DEPUTY PRESIDENT

On 25 June (see [Bulletin No. 294](#)), Senator Macdonald moved dissent from a decision of the Deputy President not to entertain a point of order that a motion to refer a matter to the Legal and Constitutional Affairs References Committee should be ruled out of order. The dissent motion was called on, on 10 August but withdrawn by the mover. The Deputy President incorporated in [Hansard](#) a background note by the Clerk on the matter.

STATEMENTS BY THE PRESIDENT

An outbreak of highly coloured sporting apparel in the chamber led the President to remind senators on 12 August about the need to maintain the Senate as a professional working environment, preferably without overt displays of sporting or other partisanship. The offending apparel was placed out of sight without necessitating a formal ruling from the chair.

The President also made statements about the conduct of question time, the unacceptable level of interjections from senators and an increasing tendency for senators to argue with the chair. A lengthy [statement](#) on 19 August was made in response to two particular incidents in question time on the previous day. The President urged all senators to consider the positions they occupied and the expectations on the part of the electors of their representatives.

LEGISLATION

Pursuant to an order agreed to on 14 May (see [Bulletin No. 292](#)), the question on the motion for the second reading of a private senators' bill (sponsored by several cross-bench senators) was put during government business time on 12 August after several senators made statements to explain their positions on the bill. The motion was negatived even though the legislation committee report on the bill had recommended its passage.

One of the Government amendments to be moved to the Medical Research Future Fund Bill 2015 and a related bill was circulated in the form of a request on the basis that a change in the wording of a definition was said to broaden the range of matters that would be eligible for funding. The Chair of Committees made a [statement](#) on 12 August, noting the Clerk's statement that the framing of the amendment as a request was not in accordance with the precedents of the Senate because the amendment had no clear, necessary and direct effect on the appropriation which was for the purpose of crediting a capped amount of funding to a special account. While the revised definition might change the allocation of proposed expenditure or the purposes for which money was appropriated, there was no increase in the amount available in the fund and therefore no increase in any charge or burden on the people within the meaning of section 53 of the Constitution. The Chair of Committees ruled that the amendment would be dealt with as such, a position which the Finance Minister accepted.

On this occasion, unlike other recent occasions, the House disagreed with the amendment, apparently on the basis of its interpretation of section 56 of the Constitution but declaring (without giving reasons) that the restrictions in section 53 prevented the Senate from making such an amendment. The House made an identical amendment in its place. On the return of the message from the House, the Chair of Committees made a [further statement](#) reiterating the Senate's position but suggesting that, as the House had made an identical amendment, the Senate could now agree to the amendment which it originally made. In a variation from usual practice, the minister moved that the committee agree to the amendment made by the House of Representatives which was identical to the Senate's amendment. It would not have been rational for the Senate not to insist on its original amendment and then agree to an identical amendment in its place.

On 17 August, the Building and Construction Industry (Improving Productivity) Bill 2013 and an associated bill and, separately, the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2] were all negatived at second reading. The Fair Work bill now satisfies the conditions set out in section 57 of the Constitution for a simultaneous dissolution, joining the Clean Energy Finance Corporation (Abolition) Bill 2013 as so-called "triggers". Upon its second introduction in June, the Fair Work bill had failed to attract the usual expedited method of proceeding provided for by [standing order 113](#). Somewhat optimistically, the Government moved a motion by leave on 17 August to remove the limitations that would otherwise apply to consideration of the different stages of the bill, hours before it was negatived.

The message from the House of Representatives disagreeing to amendments made by the Senate to the Omnibus Repeal Day (Spring 2014) Bill 2014 last December (see [Bulletin No. 288](#)) was considered on 19 August in committee of the whole. The question on the motion that the committee not insist on the amendments disagreed by the House was divided at the request of Senator Conroy. In relation to the first group of amendments originally moved by the Australian Greens, the motion was negatived and the amendments therefore insisted on. In relation to the original amendment moved by Senator Conroy, placing certain requirements on the naval submarine tender process, the

committee did not insist on the amendment but agreed to a substitute amendment on the same subject. The bill was therefore returned to the House of Representatives with the disagreement unresolved.

DISALLOWANCE

Over the winter break, the Government re-made Schedule 2 of the Federal Courts Legislation Amendment (Fees) Regulation (disallowed by the Senate on 25 June – see [Bulletin No. 294](#)) as the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation with the fees increased by a further \$5 on the very substantial increases that had been included in the disallowed regulations. An action to challenge the new regulations on the basis that they were the same in substance as the disallowed regulations and had been re-made within 6 months of the earlier disallowance, contrary to section 48 of the *Legislative Instruments Act 2003*, was launched in the Federal Court by an Opposition senator and a member of the House of Representatives, and subsequently joined by three people who had been affected by the new regulations.

In a decision given on 13 August, Dowsett J dismissed the application, finding that section 48 “should be construed as requiring that, in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure”. He noted that the question of whether the \$5 difference in fees between the two sets of regulations represented a substantial difference or not was a political judgement, involvement in the making of which the courts should seek to avoid.

In the meantime, the Senate disallowed the new regulations on 11 August. The Federal Court decision opens the way for the Government to make new regulations immediately, with a fee level that may differ from the disallowed level by only a minor amount, an outcome that would appear to be contrary to the purpose of section 48 which was to prevent the executive, in its exercise of delegated legislative power, disregarding the will of either House. Unless the decision is reversed by a higher court, a legislative solution may be required.

Special arrangements were made on 11 August to ensure that a disallowance motion in respect of the Amendment to List of CITES Species, Declaration of a stricter domestic measure (made under the *Environment Protection and Biodiversity Conservation Act 1999*) was dealt with by 6.30 pm on 12 August, the last day available for resolving the matter. The motion was debated and negatived on the voices well before the deadline.

The Acts and Instruments (Framework Reform)(Consequential Provisions) Bill 2015, agreed to on 19 August, among other things, changes the name of the *Legislative Instruments Act 2003* to the *Legislation Act 2003*.

The Regulations and Ordinances Committee gave multiple protective disallowance notices during the period, demonstrating that it continues to operate as an important check on the executive government.

ORDERS FOR PRODUCTION OF DOCUMENTS

An order for production of documents not previously presented to the Senate in relation to the modelling and costing of the Government's higher education changes, agreed to on 12 August, was refused on public interest grounds because access to "some of this material" had been sought and refused under the Freedom of Information Act, a ground which has been rejected by the Senate as a basis for declining to produce information. In a response tabled on 19 August, the Minister went on to state that an AAT review of the decision had "accepted the department's evidence that disclosure of the documents would be contrary to the public interest as it could influence the pricing of course fees in a deregulated higher education market and jeopardise genuine price competition". If commercial confidentiality is claimed as a ground for withholding information from the Senate, an order of the Senate dating from 2003 requires any such claim to be accompanied by a statement of the commercial harm that may result from disclosure. The response included no such statement.

Other orders for production of documents during the period focused on the Perth Freight Link infrastructure project. An order agreed to in the previous sitting period was responded to on 11 August. The substantive response from Infrastructure Australia (an independent statutory body) detailed the consultations that had occurred with Western Australian state government officials, the confidential basis on which information had been provided by those officials to Infrastructure Australia, and that body's view that premature publication of the information sought may prejudice future working relations with state and territory governments.

A subsequent order, directed to the Minister representing the Minister for the Environment, for various environmental and other information about the Roe 8 extension and Perth Freight Link, met with a partial response by the very short deadline and an indication that more time was required to consider the order. The Minister indicated the "Government seeks to comply with the requirements of the Senate in a timely manner and is mindful of the requirements of the order." When the further response was tabled on 18 August, the Minister informed the Senate that there were no documents to return for most of the nominated categories. In respect of the one remaining category, the Minister made a public interest claim on the basis of potential damage to Commonwealth-State relations and the potential for undermining Commonwealth and State environmental assessment processes. The documents sought had been classified as Cabinet-in-confidence by the State government.

The most recent [report](#) by the Procedure Committee which included its report on third party arbitration of public interest immunity claims (see [Bulletin No. 294](#)) provided some "better practice" guidance for Senate ministers responding to orders for production of documents and signalled that it would monitor all responses over the next twelve months or so.

Senator Ludlam, who initiated the orders for documents, joined forces with another Western Australian senator, the Chair of the Rural and Regional Affairs and Transport References Committee (Senator Sterle) to refer the infrastructure project and its decision-making processes to that committee for inquiry and report, thereby maintaining the spotlight on federal funding of state infrastructure projects.

FORMAL MOTIONS

The practice of denying formality to complex foreign policy motions continued with three such motions objected to as formal motions during the sitting period. In each case, senators made short statements by leave to express their views briefly, rather than suspending standing orders.

CONTROVERSY AND ACCOUNTABILITY

Several matters of controversy addressed during the period demonstrated the range of procedures available to senators to hold governments to account and to pursue their policy interests.

Orders for production of documents and a related committee inquiry were agreed to in relation to the planning and funding of the major Western Australian infrastructure project, the Perth freight link (see above).

The Government's climate change targets were the subject of a Matters of Public Importance discussion on 12 August, also the vehicle used to discuss the unemployment rate on 10 August. A private senator's bill to exempt small businesses from paying certain penalty rates to employees, seen as a measure to increase employment, was introduced on 13 August. These two vehicles were also used to promote further debate on the future of marriage equality with an MPI on 17 August and a bill to provide for a plebiscite on the subject introduced on 19 August. It is now also quite common for private senators' bills to be referred to committees for inquiry, as this bill was on 20 August as part of a wider inquiry.

Parliamentary entitlements and the broader question of anti-corruption and ethics measures were also dealt with in private senators' bills, with debate occurring on the National Integrity Commission Bill 2013 on 13 August and the Parliamentary Expenses Amendment (Transparency and Accountability) Bill 2015 introduced later that day. That bill was referred to the relevant legislation committee via the Selection of Bills Committee process on 20 August.

Questions without notice and an MPI were used to probe allegations that the Royal Commissioner conducting the Royal Commission into Trade Union Governance and Corruption, by initially accepting an invitation to make a speech at a party function, had not demonstrated expected standards of impartiality. An order for production of documents associated with the controversy was negatived on an equally divided vote on

19 August. The Leader of the Opposition in the Senate (Senator Wong) gave notice of a motion on 18 August to invoke a very unusual procedure, namely, an Address to the Governor-General under [standing order 171](#), asking the Governor-General to revoke the Commissioner's Letters Patent. Such addresses are a formal method of communicating with the Monarch or the head of the executive arm of government, just as messages are the method for communicating with the House of Representatives. Although usually reserved for polite expressions of thanks, congratulations or sympathy, they have also been used by the Senate for other purposes, although not since 1931 (when an Address was used to ask the Governor-General not to approve regulations that were much the same as regulations which had just been disallowed by the Senate; the Acts Interpretation Act was subsequently amended to prohibit remaking after disallowance within 6 months, to preserve the Senate's rights).

The notice was postponed till the next period of sittings, presumably to allow the Commissioner to receive submissions on the matter in the context of the Commission's proceedings, as foreshadowed during the week.

When it became apparent that the Government had not followed the usual practice in presenting a ministerial statement on science and innovation to both Houses, having presented it only to the House of Representatives, Senator Carr gave notice of a motion on 19 August to order the statement's production to the Senate, drawing attention to the departure from normal practice, exacerbated by the fact that it was National Science Week, an event long-celebrated by the Parliament. The statement was tabled in the Senate later the same day just before the adjournment was proposed, meaning that there was no opportunity to debate it. Although Senator Carr withdrew the notice, the nomination by the Opposition of another notice of motion on Science Week and science policy for the general business debate on 20 August allowed this departure from usual practice to be addressed.

The doctrine of ministerial responsibility that underpins our system of bicameral parliamentary government has produced the system of ministerial representation that provides for all ministers to be represented in the other House. Both Houses thus have access to representatives of all portfolios for accountability purposes. It is on this principle that the practice of making ministerial statements to both Houses is founded.

RE-APPOINTMENT OF SELECT COMMITTEE

When the Select Committee on Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru presented what was meant to be its final report on 31 July, it indicated that unforeseen circumstances had prevented it from finalising its substantive report. The report indicated that its chair would seek to re-establish the select committee on 10 August for a brief period to enable that to occur. Subsequently, Senator Gallacher moved a motion by leave on that day to re-establish the committee on the same terms as previously, with access to the original committee's evidence and papers, and with a new reporting date of 31 August. Members were

re-appointed and Senator Gallacher re-elected as chair. Select committees have been re-appointed on previous occasions when their work was interrupted by the termination of a Parliament (see [Bulletin No. 186](#)).

PRIVILEGES COMMITTEE REPORT

On 12 August, the Privileges Committee presented its [161st report](#), *Possible imposition of a penalty on a witness before the Rural and Regional Affairs and Transport References Committee*. The inquiry involved the question of whether an employee of the Civil Aviation Safety Authority (CASA) who gave in camera evidence to the Rural and Regional Affairs and Transport References Committee inquiry into aviation safety was then subject to code of conduct proceedings by CASA as a consequence of his evidence.

The code of conduct proceedings, which related to the employee's use of IT systems, led to a recommendation that the person's employment be terminated. Improper interference with a witness ranks among the most serious of all possible contempts. In this case, it was not disputed that action was taken against the employee. What was at issue was whether that action was taken as a result of his giving evidence.

The Privileges Committee concluded that, on the evidence before it, the requisite causal connection could not be demonstrated. Without that connection, the committee could not recommend that a contempt be found. As is usual in such cases, the committee made some significant observations and suggestions about committees' dealings with witnesses. The committee's recommended finding was adopted by the Senate on 13 August.

OTHER COMMITTEE REPORTS

The Select Committee on Wind Turbines presented its [final report](#) during the recess and substantial reports on [digital currency](#), the [future of naval shipbuilding \(part 3\)](#) (both by the Economics References Committee) and [disbursement of marketing and research and development levies in the agricultural sector](#) (Rural and Regional Affairs and Transport References Committee) were also presented out of sitting. Reports on numerous bills and regular reports from the legislative scrutiny committees, along with major reports by the Community Affairs References Committee on [out of home care](#) and by the Finance and Public Administration References Committee on [violence against women](#) were presented during the sitting period. The Economics References Committee presented three substantial interim reports, including on [Australia's innovation system](#) and the future of [Australia's automotive industry](#).

The third interim report of the Economics References Committee for the period, on [corporate tax avoidance](#), tabled on 18 August, attracted controversy because of the extent to which its content had been leaked to the media in advance, some coverage including actual shots of the document. In these circumstances, Senate procedures provide for affected committees to undertake their own inquiries before raising unauthorised disclosures of this type as matters of privilege.

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 can be found on the [Senate website](#).

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