

# ODGERS' AUSTRALIAN SENATE PRACTICE

SUPPLEMENT TO THE THIRTEENTH EDITION

Updates to 31 December 2013

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## **Introduction**

This supplement updates to 31 December 2013 material in the 13th edition of *Odgers' Australian Senate Practice* which reflected developments to 31 May 2012.

The supplement is issued in printed and electronic form, and updated every six months until the next edition is published. Amendments to the text are incorporated into the ebook version, 13.2, which can be downloaded free of charge from the Senate website.

Users of the book should refer to the material in the supplement by the page and paragraph number of the text in the book (or pdf version online).

Rosemary Laing  
Clerk of the Senate  
February 2014



## Chapter 1 – The Senate and its constitutional role

*Table 1: Votes and seats in elections, 1949-2013*

page 14, table, add

Election	Party	Senate			House of Representatives		
		% of vote	Seats	% of seats	% of vote	Seats	% of seats
2013*	ALP	30.11	12	30	33.38	55	36.66
	LP	29.63	14	35	32.02	58	38.67
	NP				4.29	9	6
	LNP	8.08	3	7.5	8.92	22	14.66
	CLP	-	-	-	0.32	1	0.67
	Greens	8.65	4	10	8.65	1	0.67
	PUP	4.91	2	5	5.49	1	0.67
	NX Gp	1.93	1	2.5	-	-	-
	FF	1.11	1	2.5	-	-	-
	LDP	3.91	1	2.5	-	-	-
	AME	0.50	1	2.5	-	-	-
	AS	0.02	1	2.5	-	-	-
	Others	11.15	-	-	6.93	3	2

\* The results for the Senate are based on the final declaration by the Australian Electoral Commission in November 2013 which includes the recount in Western Australia. The result in Western Australia is under challenge in the Court of Disputed Returns in 2014.

Abbreviations, add

AME	Australian Motoring Enthusiast Party
AS	Australian Sports Party
CLP	Country Liberals (Northern Territory) Party
DLP	Democratic Labour Party
LDP	Liberal Democratic Party
NX Gp	Nick Xenophon Group
PUP	Palmer United Party

**Table 2: Party affiliations in the Senate 1901-2013\***

Page 19, table, add

Year of election	Total number of seats	Government	Non-government	Government majority	Govt minority	Party	Number of seats
2013	76	33	43	-	-10	Liberal ◇	28
						Labor	25
						Greens	10
						The Nationals ◇	5
						Palmer United Party	2
						Nick Xenophon Group	1
						Democratic Labor	1
						Liberal Democratic	1
						Family First	1
						Australian Motoring Enthusiast	1
						Australian Sports	1

◇ Government party/parties

\* The results for the Senate are based on the final declaration by the Australian Electoral Commission in November 2013 which includes the recount in Western Australia. The result in Western Australia is under challenge in the Court of Disputed Returns in 2014.

## Chapter 2 – Parliamentary Privilege: immunities and powers of the Senate

### *Subpoenas, search warrants and members*

Page 60, paragraph 2

add, In two cases in 2012 in which a Senate estimates brief prepared by a department had been tendered in evidence, the Full Federal Court ordered that no regard be had to the brief and that a later affidavit containing the same data be accepted as evidence in its place. [add footnote: *Nojin v Commonwealth* (VID1110/11), *Prior v Commonwealth* (VID1111/11),

unreported, Federal Court of Australia, 5 December 2012.]

## **Chapter 3 – Publications of Senate proceedings**

### ***Broadcasting of proceedings***

Page 101, paragraph 6, end     add, and on the internet.

Page 101, penultimate paragraph

replace last sentence, All of the foregoing provisions were consolidated into a set of broadcasting orders first passed on 13 February 1997, and again on 11 December 2013 to incorporate the broadcasting of proceedings on the internet and use of archived audio visual material accessible through the Parliament of Australia website.

Page 102, paragraph 1     first sentence, after “system”, insert “and on the internet”.

Delete third sentence.

Page 104, paragraph 3, end     add, The republication of extracts of Hansard, including by electronic link, is covered by qualified privilege. In 2013, the Procedure Committee considered a proposal to provide additional protection to the republication of Hansard extracts. The committee concluded that this would involve a significant change to the law which should not be undertaken without further analysis. [add footnote, Procedure Committee, Second report of 2013, PP 474/2013]

## **Chapter 4 – Elections for the Senate**

### ***Counting the vote***

- Page 124, paragraph 4 delete, “and also the National Tally Room in Canberra”
- delete, “Proposals to discontinue the National Tally Room have not yet eventuated.”
- Page 124, after paragraph 5 insert, After the 2013 election, during the course of a recount of the Western Australian Senate vote, it was discovered that 1370 ballot papers had been lost. An official inquiry failed to locate the papers or identify the circumstances of the loss. Given the closeness of the results and the different outcome from the recount, the AEC itself lodged a petition with the High Court sitting as the Court of Disputed Returns asking for the election result to be declared void. Two other parties lodged similar petitions.

### ***Recounts***

- Page 127, paragraph 4, end add, A recount last occurred in 2013 after the result of the count in Western Australia was so close as to raise questions about the safety of the original result.

### ***Casual vacancies***

- Page 131, paragraph (f) after “facsimile”, insert “or other electronic means”.
- Page 131, last paragraph, sentence beginning “Had he resigned” to end of paragraph (p132).
- replace, The interesting questions that would have arisen had he resigned before the end of his term were deferred till 2013 when Senator Bob Carr resigned, having just been elected to a new



term starting on 1 July 2014. He submitted what was in effect a “double resignation”, resigning both from his place in respect of his term ending on 30 June and also in respect of his new term commencing on 1 July.

### *Method of filling casual vacancies*

Page 134, after paragraph 1 insert, The “double resignation” of Senator Bob Carr in 2013 created interesting questions for the Parliament of New South Wales in choosing a replacement. Senator Carr’s party nominated one person to fill both the remainder of his current term and the new term to which he had been elected, but the Parliament, after considering advice from the Crown Solicitor, determined that it could fill the current vacancy only and could not act prospectively to fill a future vacancy. The advice was tabled in the New South Wales Legislative Council on 12 November 2013.

### *Delay in filling casual vacancies*

Page 136, footnote 56 add, For a vacancy filled by a state governor, see the case of Senator Tierney (NSW) 1991. For earlier precedents, see ASP, 6th edition, pp. 149-50.

Page 136, penultimate paragraph, end

add a footnote after “principle”: For particularly expeditious filling of casual vacancies, see the cases of Senators Smith (WA), Thorp and Whish-Wilson (Tas) in 2012.

## **Chapter 5 – Officers of the Senate: parliamentary administration**

### ***The President of the Senate***

Page 140, paragraph 1 end      add, Since 1986, Presidents have introduced other bills of an administrative character (see Appendix 5).

Page 140, paragraph 5, end      add, and the Parliamentary Budget Office established in 2012.

### ***Senate's appropriations and staffing***

Page 154, penultimate paragraph, end

add, The committee persisted and the remaining new policy proposals were agreed to for the 2013-14 budget, together with additional funding for a new joint select committee to be supported by the Senate Department. At the same time, the President and the Minister for Finance agreed on a process for consultation on the budget and for the minister to have carriage of the department's budget through the Cabinet approval process on behalf of the President. [add footnote, 55th report, Estimates for the Department of the Senate 2013-14, Transfer of information and communication technology services, Budgetary milestones, PP 116/2013].

Page 155, after paragraph 4      insert, In 2012, after an external review of information and communication technology services to the Parliament, these services were consolidated in the joint department under a governance structure that included the Appropriations and Staffing committee and the equivalent committee of the House of Representatives meeting jointly in an oversight role. On the recommendation of the committee in its 54th report, standing order 19 was amended to authorise the committee to

consider the administration and funding of ICT services for the Parliament and to meet jointly with a similar committee of the House for that purpose. [add footnote, 54th report, A governance structure for Parliamentary ICT services, PP 446/2012; adopted 27/11/2012, J.3418-9.]

### ***Other Departments***

Page 156, second dot point under DPS

omit “information systems support,” substitute “information and communication technology services”.

### **Chapter 7 – Meetings of the Senate**

Page 187, footnote 24, end      add, A temporary order, adopted in 2013 modified this rule by providing for 5, 10 and 20 minute speaking times on Tuesday; 12/3/2013, J.3714-5, readopted 12/11/2013, J.21.

### **Chapter 8 – Conduct of proceedings**

#### ***Routine of business***

Page 200, after paragraph (vii) insert, (viii) At 12.45pm, non-controversial government business only. [renumber paragraphs]

#### ***Government and general business***

Page 202, paragraph 1, end      add, It was re-adopted after the 2013 election notwithstanding a change of government. [Add footnote, 14/11/2013, J.128.]

Page 202, paragraph 2      omit “three”.

add, On Thursdays at 12.45pm the government business that

may be transacted is specified as non-controversial government business only. This, according to the Procedure Committee, “is business that senators agree may be dealt with without divisions. It does not preclude debate and amendment of bills but it involves an understanding that divisions will not be called during the period 12.45 to 2pm.” The committee also indicated that the requirement to proceed to non-controversial business at 12.45pm did not preclude other business being conducted after such bills have been dealt with, subject to the usual consultations amongst senators and necessary motions to rearrange business. [add footnote, Procedure Committee, First report of 2012, PP 144/2012, p.2.]

Page 202, paragraph 6

add, Business of the Senate takes precedence until determined or until the time during which general business would otherwise take precedence over government business has expired.

## **Chapter 10 – Debate**

### ***Time limits on debates and speeches***

Page 243, footnote 16

replace, No total time limit applies on Tuesdays and senators may speak for 5, 10 or 20 minutes (by temporary order adopted 12/3/2013, J.3714-5, re-adopted 12/11/13, J.21).

### ***Rules of debate***

Page 260, footnote 81

add, For confirmation of this principle, see the report of the Legal and Constitutional Affairs Legislation Committee on the Courts Legislation Amendment (Judicial Complaints) Bill 2012 and Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill, tabled 14 August 2012, PP 470/2012, p. 29.

## *Dividing the question*

Page 275, footnote 181 add, ; SD, 19/6/2013, pp. 3349-51 (request declined on stated principle and after agreement to the closure).

## **Chapter 11 – Voting and divisions**

### *Free votes*

Page 286, paragraph 1, list add, Marriage Amendment Bill (No. 2) 2012 (government senators only); Marriage Act Amendment (Recognition of Foreign Marriages for Same-Sex Couples) Bill 2013 (government senators only; one Opposition senator crossed the floor).

## **Chapter 12 – Legislation**

### *Initiation*

Page 294, footnote 13 add, ; eleven bills to repeal the carbon pollution reduction scheme 2/12/2013, J.172, each bill then dealt with separately, J.172-4.

Page 299, table add:

<b>Sittings</b>	<b>Bills passed</b>	<b>Length of sittings in weeks</b>	<b>Bills passed during last 4 sitting weeks (% of bills passed)</b>	<b>Bills passed during last 2 sitting weeks (% of bills passed)</b>
Jan—June 2012	112	7	95 (84.8)	60 (53.6)
July—Dec 2012	95	8	63 (66.3)	48 (50.5)
Jan—June 2013	135	7	114 (84.4)	80 (59.3)
July—Dec 2013	14	3	14 (100)	13 (92.9)

### ***Reference to standing or select committee***

- Page 303, after heading            insert, Most bills are now referred to committees on the recommendation of the Selection of Bills Committee (see next section) but the standing orders also retain traditional methods for the reference of bills to committees during the legislative process.
- Page 303, after paragraph 3       insert, For some years the Senate has agreed to an order for the automatic referral to legislation committees of bills with substantive provisions required to commence on or before 1 July, and introduced in the House of Representatives during the two weeks when the Senate does not meet because of budget estimates hearings. The order authorises committees to report, by unanimous decision, that there are no substantive matters requiring examination. This is a practical response to maximise the time available for committees to consider time-critical bills that will require urgent consideration. [add footnote: 13/5/2010, J.3485, 12/5/2011, J.911, 9/5/2012, J.2407; 15/5/2013, J.3929.]
- Page 304, paragraph 8            omit first sentence.
- Page 306, paragraph 3 (mid-paragraph)
- insert footnote after “received.” For examples of the Senate explicitly providing otherwise, see reference of the Building and Construction Industry (Improving Productivity) Bill 2013 and related bills, 4/12/2013, J.233 and the Fair Work (Registered Organisations) Amendment Bill 2013, 9/12/2013, J.288-9, all referred to the references committee.

### ***Disagreement of House with Senate amendments***

Page 328, footnote 186      add, For an example of the Senate not insisting on its original amendment and proposing new amendments as an alternative, one of which, for constitutional reasons had to take the form of a request, see proceedings on the Commonwealth Inscribed Stock Amendment Bill 2013, 9/12/2013, J.271-5.

### ***Control of bills***

Page 335, after paragraph 3      insert, Similarly, after the motion to take together a package of eleven bills to repeal the carbon pollution reduction scheme had been negatived on 2 December 2013, the non-government parties then gave precedence to two of the bills ahead of the remaining bills in the group [add footnote, 2/12/2013, J.172.]

### ***Limitation of debate – urgent bills***

Page 338, footnote 237      add, For an example of amendments being withdrawn by leave, see proceedings on the Low Aromatic Fuel Bill 2012, 27/11/2012, J.3432.

Page 339, footnote 240      add, ; 27/11/2012, J.3409-10.

Page 339, paragraph 3      replace first sentence, In recent times such orders have been used in preference to the procedures under standing order 142, possibly because fewer steps are required to put them in place (but this has an impact on the rights of senators to resist the procedure). Such orders are drafted to apply as if they were limitations of debate under standing order 142. When the allotted time expires, the questions necessary to determine the matter, including on any circulated amendments, are put in accordance with the standing order.

## **Chapter 13 – Financial legislation**

### ***Bills appropriating money***

Page 367, paragraph 3, end      add, There have also been occasions on which this bill has included other matters as well. Amendments to the *Commonwealth Inscribed Stock Act 1911* to raise the government's borrowing limits were included in Appropriation Bill (No. 2) for both the 2011-2012 and 2012-2013 financial years and were therefore subject to amendment by the Senate. An Opposition amendment to the 2012-2013 bill to remove the provisions raising the borrowing limit was unsuccessful. [add footnote: 25/6/2012, J.2631].

Page 368, after paragraph 3      insert, In 2012, in the case of *Williams v Commonwealth* [2012] HCA 23, the High Court held that the power of the Commonwealth government to enter into contracts (in this case for the supply of school chaplaincy services to a school in Queensland) was limited to the ordinary and well-recognised functions of government. By itself, the authority conferred by an appropriation by the Parliament under section 83 of the Constitution was insufficient, and specific parliamentary approval was required where governments wished to venture into new fields such as this. The purpose for which appropriations could be made was therefore limited by the Constitution, having particular regard to the federal character of the Constitution and the role of the Senate in preserving it.

### ***Meaning of ordinary annual services of the government***

Page 373, paragraph 2, end      add, but no progress was achieved before the subsequent election and change of government in 2013.



Page 373, end of section add, The matter has been considerably complicated by the legislative response to the High Court’s decision in *Williams v Commonwealth* [2012] HCA 23. The *Financial Framework Legislation Amendment Act (No. 3) 2012*, introduced and passed within a week of the High Court’s decision, validated the funding for the school chaplaincy program along with funding for other programs possibly affected by the decision. It also created a mechanism to authorise expenditure of a similar nature in future by regulation, thus delegating to the executive the fundamental parliamentary function of approval of appropriations. Whether this mechanism is to be regarded as satisfying paragraph (2)(a) of the consolidated resolution and thus including in the scope of ordinary annual services of the government a great variety of expenditure that would otherwise not meet that test (and so indicating it should be included in the amendable bill) has not been considered by the Senate.

**loan bills**

Page 377, paragraph 4, end add, Borrowing limits were subsequently removed by the *Commonwealth Inscribed Stock Amendment Act 2013*.

**Chapter 15 – Delegated legislation and disallowance**

Page 416, table add

<b>Year</b>	<b>Disallowable Instruments</b>	<b>Year</b>	<b>Disallowable Instruments</b>
2011 – 2012	1850	2012 – 2013	1986

Page 436, footnote 89 add, This tactic was also employed in 2013 but without condemnatory motions.

## **Chapter 16 – Committees**

### ***Committee of Privileges***

Page 448, paragraph 3      replace with, The Committee of Privileges is established by standing order 18, which provides:

(1) A Committee of Privileges, consisting of 8 senators, shall be appointed at the commencement of each Parliament to inquire into and report upon matters of privilege referred to it by the Senate.

(2) The Committee shall have power to send for persons and documents, to move from place to place and to sit during recess.

(3) The Committee shall consists of 8 senators, 4 nominated by the Leader of the government in the Senate, 3 nominated by the Leader of the Opposition in the Senate and 1 nominated by minority party and independent senators.

(4) The Committee shall elect as its chair a member nominated by the Leader of the Opposition in the Senate.

Page 449, before paragraph 1      insert, Before 2013, the membership of the committee was seven. It had been increased occasionally, either for the purpose of a specific inquiry [footnote: See 49th report] or for a period of time. A temporary order agreed to in 2011, increasing membership to eight by the addition of a member nominated by minority party or independent senators was adopted as a permanent change on 2 December 2013 [footnote: 11/10/2011, J.1581; 2/12/2013, J.161-2]

### ***Senators' Interests Committee***

Page 454, paragraph 2            add footnote at end of first sentence, The committee was authorised by the Senate to confer with the Committee of Privileges on a reference concerning a draft code of conduct for senators; 12/9/2011, J.1413.

### ***Selection of Bills Committee***

Page 456, footnote 51            add; 17/6/2013, J.3999, 4001, 4002.

### ***Legislative and general purpose standing committees***

Page 461, paragraph 2, end    add, The allocation of departments and agencies to committees is achieved by a resolution of the Senate which is renewed at the commencement of each Parliament and varied as required.

### ***Estimates committees***

Page 469, paragraph 5, end    add, although changes in administrative arrangements in 2013 led to the cross-portfolio hearings being conducted by the Finance and Public Administration Legislation Committee.

### ***Supplementary estimates hearings***

Page 473, footnote 104        insert at the beginning, This rule was varied for the 2013 supplementary budget estimates hearings for one group of committees because of the timing of the opening of Parliament that year, 13/11/2013, J.90.

### ***Joint committees***

Page 476, list of joint standing committees

delete National Broadband Network

add, National Disability Insurance Scheme

### ***Chairs and deputy chairs of committees***

Page 477, footnote 112      add, ; 2/11/2011, J.1708-10.

### ***Substitute and participating membership***

Page 480, footnote 125      add, This arrangement continued in the following Parliament for the Joint Select Committee on Northern Australia, 2/12/2013, J.195, 4/12/2013, J.224, and, for a particular inquiry only, the Joint Standing Committee on Electoral Matters, 4/12/2013, J.232.

### ***Access to other committees' documents***

Page 488, footnote 152      add, In 2012, the reference of a private senator's bill relating to wind farm noise was accompanied by a proposal for the committee concerned to have access to the evidence of another legislative and general purpose standing committee which had previously conducted an inquiry into the health effects of wind farms (including in camera evidence, subject to certain safeguards). The proposal was defeated on 19/11/2012, J.3286-7.

Page 489, paragraph 4, end      add, In 2012, in connection with a reference to inquire into the unauthorised disclosure of the draft final report of the Select Committee on Electricity Prices, the Committee of Privileges

was given power to access relevant minutes and records of that committee which had ceased to exist. [footnote: 21/11/2012, J.3343-4.]

### ***Legislation***

Page 493, paragraph 3                      omit “2011”, substitute “subsequent years”.

### ***Broadcasting of committee proceedings***

Page 502, broadcasting order and footnote 200

replace with:

The following conditions apply to the broadcasting of committee proceedings:

- (1) Recording and broadcasting of proceedings of a committee may occur only in accordance with the authorisation of the committee by a deliberate decision of the committee.
- (2) A committee may authorise the broadcasting of only its public proceedings.
- (3) Recording and broadcasting of a committee is not permitted during suspensions of proceedings, or following an adjournment of proceedings.
- (4) A committee may determine conditions, not inconsistent with this order, for the recording and broadcasting of its proceedings, may order that any part of its proceedings not be recorded or broadcast, and may give instructions for the observance of conditions so determined and orders so made. A

committee shall report to the Senate any wilful breach of such conditions, orders or instructions.

(5) Recording and broadcasting of proceedings of a committee shall not interfere with the conduct of those proceedings, shall not encroach into the committee's work area, or capture documents (either in hard copy or electronic form) in the possession of committee members, witnesses or committee staff.

(6) Broadcasts of proceedings of a committee, including excerpts of committee proceedings, shall be for the purpose only of making fair and accurate reports of those proceedings, and shall not be used for:

(a) political party advertising or election campaigns; or

(b) commercial sponsorship or commercial advertising.

(7) Where a committee intends to permit the broadcasting of its proceedings, a witness who is to appear in those proceedings shall be given reasonable opportunity, before appearing in the proceedings, to object to the broadcasting of the proceedings and to state the ground of the objection. The committee shall consider any such objection, having regard to the proper protection of the witness and the public interest in the proceedings, and if the committee decides to permit broadcasting of the proceedings notwithstanding the witness' objection, the witness shall be so informed before appearing in the proceedings.

[add footnote, 11/12/2013, J.337-8. This resolution replaced an earlier one, 23/8/1990, J.237; incorporated into a consolidated order 13/2/1997, J.1447.]

Page 503, paragraph 3 (quote) and footnote 203

Replace with:

The public proceedings of legislative and general purpose standing committees when considering estimates may be broadcast through the House Monitoring System and through the Parliament of Australia website in accordance with this order, and in accordance with any further conditions, not inconsistent with this order, determined by a committee in relation to the proceedings of that committee.

[add footnote, 11/12/2013, J.338.]

### ***Uncompleted inquiries and a new Parliament***

Page 506, footnote 216

add, For reports presented and adopted at the commencement of the 44th Parliament, see 14/11/2013, J.140-1, 2/12/2013, J.164.

### ***Meeting with House committees***

Page 527, after paragraph 2,

insert, In 2012, the Senate agreed to expand the terms of reference of the Appropriations and Staffing Committee to include the administration and funding of information and communication technology services to the Parliament when meeting jointly with a similar committee of the House of Representatives. Authority for such meetings to occur was also added. [add footnote, 27/11/2012, J.3418-9.]

## **Chapter 17 – Witnesses**

### ***Inquiries and witnesses***

Page 530, paragraph 4, last sentence

replace, After several unsuccessful attempts to relax the order, the Senate agreed to a resolution in 2013 expressing an expectation that the President would appear when requested by the committee.

Page 530, footnote 7

replace, 13/11/2013, J.100. For unsuccessful attempts, see 23/6/2010, J.3684-5; 4/7/2011, J.1135; 23/8/2011, J.1358; 25/8/2011, J.1399-1400.

### ***Witness expenses***

Page 541

add, Under Privilege Resolution 2(11), the President may agree to the reimbursement of a witness's legal costs, on the recommendation of the Privileges Committee, in cases where liability to pay those costs would cause substantial hardship. [add footnote, See correspondence and advice on this issue, published by the committee in connection with its 150th Report, PP69/2012.]

### ***Members or officers of other Houses***

Page 544, paragraph 1, end

add, The Minister for Immigration and Border Protection appeared before the Legal and Constitutional Affairs References Committee in 2014 for its inquiry into a claim of public interest immunity relating to information about border protection activities.



***Public servants as witnesses***

Page 550, paragraph 2                    A revised draft of the guidelines was provided to and published by the committee, which made extensive comments on the revised guidelines in its report. [add footnote 153rd Report, Guidance for officers giving evidence and providing information, PP 204/2013.] The revised guidelines have yet to be promulgated.

**Chapter 18 – Documents tabled in the Senate**

***Orders for production of documents***

Page 561, table                            add

<b>Parliament</b>	<b>Orders</b>	<b>No. of orders complied with</b>
2010-2013	53	19

Page 565, paragraph 2, end            add, In 2013, the Commissioner of Taxation was ordered to produce to the Economics References Committee data on revenue collected from the minerals resource rent tax. The order followed an explanation from the responsible minister that the information could not be provided to the minister for tabling in the Senate because of confidentiality provisions in the *Taxation Administration Act 1953* which explicitly modified parliamentary privilege for this purpose. [footnote, See Chapter 2, under Parliamentary privilege and statutory secrecy provisions.] There was no restriction on the provision of information to a committee and the Commissioner of Taxation was duly ordered to provide the information to the committee which then published it. [footnote, 6/2/2013, J.3575.]

### ***Resistance by government to orders***

Page 567, third paragraph, last sentence

omit “The motion was passed and”, substitute “Although the motion was negatived,”.

Page 567, footnote 62

replace, 16/5/1991, J.1049-51; 28/5/1991, J.1053.

## **Chapter 19 – Relations with the executive government**

### ***The Governor-General and the Senate***

Page 580, footnote 2

add, The Governor-General did not attend the Senate on 14/8/2007 to announce the resignation of Senator Calvert as President. The announcement was made by the Clerk and the Senate then elected a new President. Senator Calvert remained in the Senate till 29/8/2007.

Page 581, paragraph 5, end

add, In 2012, in correspondence to the Chair of the Finance and Public Administration Legislation Committee responding to matters raised at supplementary budget estimates hearings that year, the Leader of the Government in the Senate suggested that it would be more appropriate for information concerning the administration of the Australian honours system to be sought by means of an address to the Governor-General, since the honours system was established by royal prerogative. [footnote: Also see below under Statutory authorities and public interest immunity.]

### ***Ministerial accountability and censure motions***

Page 595, footnote 95

add, 25/2/2013, J.3625-6.

### *Claims by the executive of public interest immunity*

Page 597, paragraph 2, end      add, It was also canvassed during an inquiry by the Legal and Constitutional Affairs References Committee in 2014 into a claim of public interest immunity raised over documents relating to the Government's border protection activities. [footnote, see advice and evidence to the committee by the Clerk of the Senate, and evidence by the Clerk of the NSW Legislative Council.]

### *Later cases in the Senate*

Page 622, footnote 181 (advice voluntarily disclosed when it suits a government's position)

replace, For example, 28/2/1984, J.651; 31/8/1988, J.908; 6/12/1988, J.1249; 15/12/1988, J.1326; 16/12/1988, J.1331; 23/5/1989, J.1682; 15/8/89, J.1930; 28/5/1991, J.1053; 20/8/1991, J.1395; 18/5/1993, J.178; 31/8/1993, J.412; 6/9/1993, J.459; 23/3/1994, J.1472; 8/2/1995, J.2909; 29/6/1995, J.3585; 23/8/1995, J.3668; 6/2/1997, J.1374; 1/9/1997, J.2381; 25/9/1997, J.2517; 2/9/1999, J.1654; 17/2/2000, J.2334; 18/3/2003, J.1577; 4/9/2006, J.2553.

Page 623, footnote 188      replace, 15/6/2010, J.3535.

Page 623, after paragraph 3      insert, A major focus of the 2010-13 Parliament was on the proposed mining tax, both in its original form as a resources super profits tax and its modified, narrower form as a minerals resource rent tax. Details of revenue estimates and their underlying assumptions were not provided, initially on the basis of commercial confidentiality and potential prejudice to negotiations between private companies. [footnote, 30/9/2010, J.116, 117, 118, 156.] A select committee was established on

the scrutiny of new taxes and further similar orders were agreed to in relation to the proposed tax, also refused on commercial confidentiality grounds. [footnote, 30/9/2010, J.119-20, 156; 26/10/2010, J.206, 207,208; 28/10/2010, J.253.]

An order for documents on the fiscal impact of the tax was met with a response indicating that the government, as a matter of course, did not assess or publish medium term forecasts for individual revenue measures given the considerable uncertainty attached to such estimates. [footnote, 21/6/2011, J.1058; 23/6/2011, J.1113.] An attempt to delay consideration of the legislation (after another order on 1 November 2011, relating to the mining tax and measures linked to it, met with no response) was unsuccessful on 9 February 2012 but a partial response to the order was produced later that day. [footnote, 1/11/2011, J.1698. The select committee report was tabled on the same day, J.1699. 9/2/2012, J.2076-7, 2092.] Once the mining tax legislation took effect, orders were passed for details of revenue collected on a monthly basis (of continuing effect) and the cost to the budget of state royalty increases (creditable against the mining tax liability) and other tax deductions. [footnote, 11/9/2012, J.2937; 17/9/2012, J.2995-6.] The latter information was claimed to be commercial in confidence but updated information was foreshadowed in the Mid Year Economic and Fiscal Outlook. [footnote, 19/9/2012, J.3032.] In relation to the former order, the government reiterated its intention to release monthly updates on the revenue when the data became available. [footnote, 9/10/2012, J.3077.] However, before the Senate resumed in 2013, the Finance Minister announced that it would not be possible to provide monthly revenue figures because of the confidentiality provisions in

the *Taxation Administration Act 1953* which prevented tax officers providing information about individual taxpayers to the minister, even if it were for the purposes of proceedings in parliament. A subsequent order required the Commissioner of Taxation to produce the information to a committee which he duly did. [footnote, See Chapter 18, under Orders for production of documents and Chapter 2, under Parliamentary privilege and statutory secrecy provisions.]

A matter of similar controversy in the following Parliament concerned refusals to provide information about the government's border protection activities on grounds of prejudice to national security, defence, international relations and law enforcement operations. The Senate referred the claims of public interest immunity to the Legal and Constitutional Affairs References Committee late in 2013.

### ***Statutory authorities and public interest immunity***

Page 623, paragraph 4, end add, The resolution of the Senate of 13 May 2009 envisages that claims of public interest immunity will be made by ministers. The exception to this practice concerns statutory authorities and office-holders who are not subject to direction and control by the executive government in their day to day operations, but who are nonetheless accountable to the Senate for their expenditure of public funds. Since the passage of the 2009 resolution, there has been a degree of acceptance that it is appropriate for such officers to make public interest immunity claims directly, where it would not be appropriate for a minister to do so because of the relationship (or lack thereof) between the authority and the minister.

Page 623, after paragraph 6 insert, In 2012, the question arose whether it was appropriate for the Official Secretary to the Governor-General (a statutory office-holder under the Governor-General Act 1974) to make a claim of public interest immunity, rather than a minister. Advice was given that it would be more consistent with Senate practice and constitutional principle for the Official Secretary to offer any claim directly to the committee, rather than a minister of state making the claim on his behalf. The advice was consistent with a position tacitly adopted by the Procedure Committee in its Fourth Report of 2009. In the event, no such claim was made. [footnote: Finance and Public Administration Legislation Committee, supplementary budget estimates hearing, 15/10/2012, p. FPA61; answers to questions taken on notice, including correspondence from the Leader of the Government in the Senate to the chair of the committee, dated 27 November 2012. Procedure Committee, Fourth report of 2009, PP 320/2009, p. 2.]

### ***Other jurisdictions***

Page 626, paragraph 1, end add, After a preliminary hearing the matter did not proceed.

Page 626, footnote 199 add, and to the Legal and Constitutional Affairs References Committee in its inquiry into a claim of public interest immunity relating to border protection activities.

### ***Effect of prorogation and of the dissolution of the House of Representatives on the Senate***

Page 646, paragraph 2 add, (as was the case until 1991 in the Icelandic parliament and in the Norwegian parliament until 2009)

## Chapter 20 – Relations with the judiciary

### *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

Page 683, paragraph 3

replace:

- *The Parliamentary Commission of Inquiry Act 1986*, as this chapter has suggested, had serious defects. Apart from the question of its constitutionality, the Commission had features that should not be followed in the future, particularly the provision for hearing evidence in private and for withholding evidence from the Houses. Over the years, several private members' and senators' bills were introduced proposing the establishment of a standing body to assess the conduct of judges and report to both Houses. In 2012, a bill to provide for the appointment of parliamentary commissions to inquire into allegations of judicial misbehaviour or incapacity and provide information to the Houses was introduced by the government and passed following an inquiry by the Legal and Constitutional Affairs Legislation Committee which led to several amendments.
- The Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 has the following features:
- it provides a standard mechanism for the investigation of allegations of misbehaviour or incapacity concerning federal judicial officers by providing for the establishment of parliamentary commissions to investigate specified allegations and gather information and evidence to inform the Houses in the performance of their constitutional role under section 72;
- it provides for commissions to be established by resolution of each House to investigate specified allegations when they arise;
- commissions do not determine whether facts are proved and

- do not make recommendations about the removal of judges;
- threshold questions such as the meaning of “misbehaviour” and the standard of proof to be applied are left to the Houses to determine;
- serving Commonwealth, State or Territory judicial officers are not eligible to be appointed as members of a commission but at least one member of a commission must be a former such officer;
- members of commissions, including the presiding member, are appointed by resolution of each House, but only after being nominated by the Prime Minister who is to consult the Leader of the Opposition in the House of Representatives;
- commissions are required to conduct investigations in an inquisitorial rather than adversarial manner and in accordance with the rules of natural justice;
- hearings are to be held in public but may be held in private at the commission’s discretion;
- other inquiry powers of commissions include the power to require witnesses to appear at hearings, take evidence an oath, require production of documents or things, and issue search warrants;
- current and former Commonwealth judicial officers are exempt from the application of a commission’s coercive powers;
- reasonable costs of the Commonwealth judicial officer who is the subject of the investigation are to be covered by the Commonwealth;
- commissions are to report to each House and may provide the Presiding Officers with sensitive reports which are not to be tabled, but which are to be available for inspection by members



and senators and the Commonwealth judicial officer who is the subject of the investigation.

While the 2012 law made some attempt to address the flaws of the 1986 law, it nonetheless introduced some further difficulties, all of which were alluded to in evidence given to the Legal and Constitutional Legislation Committee's inquiry into the bill and most of which had been encountered during previous consideration of these matters. The non-compellability of Commonwealth judicial officers was seen as limiting the effectiveness of commissions, on the one hand, but essential to the independence of judges appointed under Chapter III, on the other. The potential abridgement of the rights of a judge under investigation by the use of a joint investigatory mechanism, and the avoidance of such vexed questions as the meaning of "misbehaviour" or the appropriate standard of proof, led some to conclude that the mechanism would be feasible only in the most uncontentious circumstances. From the point of view of the rights of the Senate, the domination by the executive, and alternative executive, in the House of Representatives of the process for nominating members of a commission detracts from the characterisation of commissions as parliamentary bodies.

The Houses are not bound to follow the mechanism established by the Act. Its utility will become apparent only when it is tested.

## Appendices

### Appendix 3 - Committee of Privileges Reports 1966-2013

Report, date tabled	Reference	Findings, recommendations, action by Senate
151st Report: <i>Possible imposition of a penalty on, or interference with, a witness before the Rural Affairs and Transport References Committee</i> , PP 95/2012	<b>Referred by Senate:</b> President determined precedence 16/8/2011; motion moved by Senator Kroger on behalf of Senator Heffernan and agreed to 17/8/2011, J.1257	<b>Findings</b> • no contempt should be found <b>Action by Senate</b> • adopted by 23/8/2012, J.2887
22/3/2012, J.2370		
152nd Report: <i>Possible unauthorised disclosure of the draft report of the Select Committee on Electricity Prices</i> , PP 111/2013	<b>Referred by Senate:</b> President determined precedence 20/11/2012, J.3312 Motion moved by Senator Thistlethwaite and agreed to 21/11/2012, J.3343-4	<b>Recommendations:</b> that no contempt be found in respect of the matter referred <b>Action by Senate</b> • motion to adopt report lapsed at the end of the 43rd Parliament
Tabled 14/05/2013, J.3894-5		
153rd Report: <i>Guidance for Officers giving evidence and providing information</i> , PP 204/2013	<b>Referred by Senate:</b> Advisory report; motion moved by Senator Parry at the request of the Chair of the Privileges Committee and agreed to 21/3/2011, J.700	<b>Action by Senate</b> • motion to note report lapsed at the end of the 43rd Parliament
Tabled 24/6/2013, J.4150		
154th Report: <i>Persons referred to in the Senate Ms Deborah Hegarty and Mr Peter Ross Hegarty</i> , PP 205/2013	<b>Referred by President:</b> 20/6/2013	<b>Recommendation</b> • that response be incorporated in Hansard <b>Action by Senate</b> • report adopted 24/6/2013, J.4150
Tabled 24/6/2013, J.4150		

Report, date tabled	Reference	Findings, recommendations, action by Senate
155th Report: <i>Person referred to in the Senate Father</i> <i>Frank Brennan SJ</i> AO, PP 473/2013	<b>Referred by President:</b> 10/12/2013	<b>Recommendation</b> • that response be incorporated in Hansard <b>Action by Senate</b> • report adopted 12/12/2013, J.390
Tabled 12/12/2013, J.390		

## Appendix 4 – Matters of Privilege raised and rulings of the President

Date, Journal reference	Senator	Subject	Ruling regarding determination of precedence
21/11/2012, J.3343	Thistlethwaite, Former Chair of the Select Committee on Electricity Prices	Whether there was any unauthorised disclosure of the draft report of the Select Committee on Electricity Prices	Given

## Appendix 5

### *Private senators' bills passed since 1901*

#### **Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws)**

**Bill 2011** [previously Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010]

*Purpose:* To amend the Australian Capital Territory (Self-Government) Act 1988 and Northern Territory (Self-Government) Act 1978 to remove the Governor-General's power to disallow or recommend amendments of any laws made by the legislative assemblies of those territories.

*Senate:* Introduced by Senator Bob Brown 29/9/10; passed with amendments and read a third time 18/8/11.

*HoR:* Introduced 22/8/11; read a third time 1/11/11.

*Assent:* 4/12/11; Act no. 166 of 2011.

**Low Aromatic Fuel Bill 2012**

*Purpose:* To mitigate the negative impacts of petrol sniffing in areas designated as low aromatic fuel areas and fuel control areas.

*Senate:* Introduced by Senator Siewert 1/3/12; passed with amendments and read a third time 27/11/12.

*HoR:* Introduced 28/11/12; read a third time 6/2/13.

*Assent:* 14/2/13; Act no. 1 of 2013 (Act cited as Low Aromatic Fuel Act 2013).

**Parliamentary Service Amendment Bill 2013** [previously Parliamentary Service Amendment Bill 2012]

*Purpose:* To amend the Principal Act to make certain changes to the framework of the Parliamentary Service.

*Senate:* Introduced by Senator Hogg 28/11/12; read a third time 7/2/13.

*HoR:* Introduced 11/2/13; read a third time 13/2/13.

*Assent:* 1/3/13; Act no. 4 of 2013.

***Private senators' bills which have passed the Senate since 1901***

**Low Aromatic Fuel Bill 2012**

*Introduced by:* Senator Siewert

*Date passed by Senate:* 27 November 2012

Remove last entry relating to Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill 2011

## Marine Engineers Qualifications Bill 2013 (No. 2)

*Introduced by:* Senator Williams

*Date passed by Senate:* 27 June 2013

## Appendix 6 – List of bills in which the Senate has made requests for amendments and results of such requests, 1901-2013

HRD page(s) on which Senate requests appear	Date	Title of Bill and Nature of Request	How Disposed Of
1960	9/12/13	Commonwealth Inscribed Stock Amendment Bill 2013 — House of Representatives disagreed to an earlier amendment/ One requested amendment to remove the limit on stock and securities on issue under the Treasurer's standing borrowing authority made in place of the earlier amendment (both a request and further amendments were made to this bill)	Requested amendment made

## Appendix 7 – Casual vacancies in the Senate

Senator	VACANCY		APPOINTMENT		
	Reason for Vacancy	Date	Senator	How Appointed	Date
Sherry, N	Resignation	01/06/12	Thorp, L E	Tas Parliament	20/6/12
Brown, R J	“	15/06/12	Whish-Wilson, P S	Tas Parliament	20/6/12
Fisher, MJ	“	14/8/12	Ruston, A S	SA Parliament	5/9/12
Evans, CV	“	12/4/13	Lines, S	WA Parliament	15/5/13
Joyce, BT	“	8/8/13			
Thistlethwaite, MJ	“	9/8/13	Dastyari, S	NSW Parliament	21/8/13
Feeney, DI	“	12/8/13	Tillem, M	Vic Parliament	21/8/13
Carr, RJ	“	24/10/13	O'Neill, D	NSW Parliament	13/11/13

[add footnote, RJ Carr resigned from current term and also in respect of term commencing on 1 July 2014 to which he had been elected.]

## **Appendix 8 – Committees on which senators served 1970-2013**

<b>Year</b>	<b>Domestic</b>	<b>Estimates</b>	<b>Legislative Scrutiny</b>	<b>Legislative and General Purpose</b>	<b>Select</b>	<b>Joint</b>	<b>Total</b>
2013	8	0	2	16	4	23	53

## **Appendix 9 – Select Committees**

### **Senate Select Committees:**

Australia's Food Processing Sector (Report — PP 208/2012)

Electricity Prices (Report — PP 407/2012)

Cyber Safety

Abbott Government's Commission of Audit

National Broadband Network

School Funding

### **Joint Select Committees:**

Australia's Immigration Detention Network (Reports — PP 265/2011 and 122/2012)

Gambling Reform (Reports — PP 85/2011, 214/2011, 215/2011, 4/2012, 261/2012, 445/2012, 198/2013 and 206/2013)

Constitutional Recognition of Local Government (Reports — PP 18/2013 and 65/2013)

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Reports — PP 26/2013 and 218/2013)

Broadcasting Legislation (Reports — PP 193/2013)

Cyber Safety (Reports — PP244/2013)

DisabilityCare Australia\*

Northern Australia

\* A Joint Standing Committee on the National Disability Insurance Scheme was appointed in the 44th Parliament with the power to consider and make use of the evidence and records of the former Joint Select Committee on DisabilityCare Australia.

## **Appendix 10 – A chronology of the Senate**

<b>Date</b>	<b>Event</b>
25 November 2009	Modified rules for questions without notice adopted on a temporary basis. Answers required to be 'directly relevant' to the question.
27 November 2012	Terms of reference of Appropriations and Staffing Committee amended to allow joint meetings with a similar committee of the House of Representatives for oversight of administration and funding of parliamentary ICT.