ODGERS' AUSTRALIAN SENATE PRACTICE

SUPPLEMENT TO THE THIRTEENTH EDITION

Updates to 31 December 2012

Canberra© Commonwealth of Australia 2013

ISBN 9781742297439

This book is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission. Requests and inquiries concerning reproduction rights should be directed to the Clerk of the Senate, Parliament House, Canberra ACT 2600.

National Library of Australia Cataloguing-in-Publication data:

Author: Odgers, J. R. (James Rowland), 1914-1985.

Title: Odgers' Australian Senate practice / edited by Harry Evans and Rosemary Laing.

Edition: 13th ed.

ISBN: 9781742296203 (hbk.)

Notes: Includes index.

Subjects: Australia. Parliament. Senate--Rules and practice.

Other: Authors/Contributors: Evans, Harry, 1946-; Laing, Rosemary, 1956-

Australia. Parliament. Dept. of the Senate.

Dewey Number: 328.94

Printed by CanPrint Communications Pty Limited, Canberra

Available at www.aph.gov.au

Introduction

This supplement updates to 31 December 2012 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.

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
January 2013

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 4 – Elections for the Senate

Casual vacancies

Page 131, paragraph (f)

after "facsimile", insert "or other electronic means".

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 10 – Debate

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, p. 29.

Chapter 11 – Voting and divisions

Free votes

Page 286, paragraph 1, list

add, Marriage Amendment Bill (No. 2) 2012 (government senators only).

Chapter 12 – Legislation

Reference to standing or select committee

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.]

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.

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.

Chapter 16 – Committees

Committee of Privileges

Page 449, before paragraph 1 insert, Occasionally the membership of the committee has been increased, either for the purpose of a specific inquiry [footnote: See 49th report.] or for a period of time [footnote: See 11/10/2011, J.1581 for a temporary order increasing the membership by one for the remainder of the 43rd Parliament; the additional member to be nominated by independent or minority party senators.

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.

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.

Chairs and deputy chairs of committees

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

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.]

Chapter 17 – Witnesses

Public servants as witnesses

Page 550, paragraph 2 A revised draft of the gidelines was provided to and published by the committee, which has yet to report on the reference.

Chapter 19 – Relations with the executive government

The Governor-General and the Senate

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.]

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.]

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:

Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012

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 4 – Matters of Privilege raised and rulings of the President

Add:

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 which have passed the Senate since 1901

Add:

Low Aromatic Fuel Bill 2012
Introduced by: Senator Siewert
Date passed by Senate: 27 November 2012

Appendix 7 – Casual vacancies in the Senate

Add:

VACANCY			APPOINTMENT		
Senator	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

Appendix 9 – Select Committees

Add:

Senate Select Committees:

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

Electricity Prices (Report — PP 407/2012)

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 and 445/2012)

Constitutional Recognition of Local Government

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

Appendix 10 – A chronology of the Senate

Insert:

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.