

12. Orders for production of documents

The power to require the production of information is set out in [section 49 of the Constitution](#) and is one of the most significant powers available to a legislative body to enable it to carry out its functions of scrutinising legislation and the performance of the executive arm of government.

Source of the power

The Senate possesses this power through section 49 of the Constitution which provides that the powers of the Houses of the Commonwealth Parliament are, until declared by the Parliament, the powers of the UK House of Commons at the time of the establishment of the Commonwealth in 1901. Those powers undoubtedly included the power to call for documents. In 1987, the Commonwealth Parliament declared its powers through the *Parliamentary Privileges Act 1987*, section 5 of which provided for the continuation of those powers in force under section 49 of the Constitution (except to the extent varied by that Act).

Basic procedure

Documents may be ordered to be “laid on the table” of the Senate. [Standing order 164](#) contains provisions about communicating such orders, tabling “returns” to orders and dealing with non-compliance. Most orders for production of documents start with a notice of motion, which is moved and determined during “formal motions” on any sitting day (see [Guide No. 8](#)—Notices of motion). Sometimes an order for production of documents is contained in an amendment moved to a motion for a particular stage in the consideration of a bill (see [Guide No. 16](#)—Consideration of legislation).

An order for production of documents has the following elements:

- The “activating” words, “that there be **laid on the table**”, are the core of any such order.
- The person to whom the order is directed is identified (usually a minister or the Senate minister representing the portfolio). If the recipient of the order is not specified, responsibility for acting on the order lies with the Leader of the Government in the Senate.
- Effective orders specify a deadline for production of documents. The deadline should account for the volume and nature of the documents requested. For a permanent order (known as a continuing order) there may be an annual or biannual deadline.
- Finally, the documents are identified by title or by a description of individual (or classes of) documents. The order may specify **information**, rather than documents, which may require the respondent to create a document (or return) containing the information.

What information can the Senate ask for?

There are no limits on the documents which may be ordered to be tabled. There are no automatic exemptions or exceptions for cabinet submissions or national security documents or other classes of documents for which governments have traditionally claimed public interest immunity. There is also no requirement that a document be one that is already in existence.

Ministers (and others to whom orders are directed) sometimes seek to withhold information sought by the Senate. The grounds for refusing to produce information are encapsulated in the generic term “public interest immunity”. For detailed information on public interest immunity claims, see [chapter 18](#) of *Odgers’ Australian Senate Practice*.

What can the Senate do if a minister refuses to produce information?

It is clear that the Senate has the power to enforce its orders (see Privileges Committee [49th report](#)). The refusal of a minister to comply with an order of the Senate may ultimately be dealt with as a contempt of the Senate, with penalties applied in accordance with the [Parliamentary Privileges Act 1987](#). On most occasions, however, ministerial refusals to produce information are resolved through political means.

There are many remedies available to senators to pursue information which governments are reluctant to disclose. These remedies fall broadly into two categories: punitive remedies and coercive remedies.

Punitive remedies

Punitive remedies are those which make it more difficult for ministers to operate in the Senate and for a government’s legislative program to be achieved. Examples include:

- impeding the progress of legislation through motions to postpone consideration of particular bills, including until after the requested information has been produced, or by taking up time that would otherwise be spent on government legislation;
- censure motions;
- motions restricting the ability of ministers to handle government business;
- motions depriving ministers of procedural advantages they enjoy under the standing orders, such as the ability to rearrange business on any day or determine the order of government business on the *Notice Paper*; and
- motions to extend question time or other elements in the routine of business.

Coercive remedies

Coercive remedies are those which use alternative means of obtaining all or part of the information to which access has been refused. Examples include:

- orders for the information or documents to be produced to a specified committee, including instructions to the committee about how the information is to be handled (*received in camera*, not published for a specified period etc);
- orders requiring particular committees to hold hearings and particular witnesses to attend for the purpose of answering questions about the information or documents;
- further orders for production of the documents, perhaps refining the scope of the demand or excluding certain kinds of information to encourage compliance;
- motions requiring ministers to make regular explanations to the Senate about the reasons for non-compliance with the previous order (or orders) and providing for motions to be moved, without notice, to take note of such explanations; and
- motions requesting the Auditor-General, or requiring another third party, to examine the contentious material and report to the Senate on the validity of the grounds claimed by the minister for non-production.

All such remedies require the support of a majority of the Senate to implement.

The 30-day rule

Under [standing order 164](#), a senator may ask a minister for an explanation of that minister's failure to comply with an order for production of documents within 30 days after the date specified for compliance.

The senator may then move – without notice – a motion to take note of the explanation or, if no explanation is provided, a motion in relation to the minister's failure to provide either the documents or an explanation.

This process is not available if a minister has apparently complied with an order, including in circumstances where the response is that no documents within the terms of the order exist.

Need assistance?

Advice on any of the matters covered by this guide is available from the Clerk of the Senate extension 3350 or clerk.sen@aph.gov.au, the Clerk Assistant (Table) extension 3020 or ca.table.sen@aph.gov.au (for government senators) or the Clerk Assistant (Procedure) extension 3380 or ca.procedure.sen@aph.gov.au (for non-government senators).

The Clerk Assistant (Procedure) is also available to assist with drafting notices of motion for orders for documents.

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