

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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GOVERNMENT ADVERTISING: ORDER FOR DOCUMENTS

Another significant attempt to inject some accountability into problematical government expenditures was made by the Senate on 29 October. On the motion of Senators Faulkner and Murray, the Senate passed an order for documents requiring the tabling of statements providing details of any government advertising or public information campaigns costing more than \$100,000.

This is an attempt to at least expose the extent of, if not control, the misuse of taxpayer-funded advertising campaigns to assist the government's re-election. The order incorporates guidelines recommended by the Auditor-General and the Joint Committee of Public Accounts and Audit for government advertising campaigns.

CLAIMS OF COMMERCIAL CONFIDENTIALITY

The Senate passed a resolution on 30 October declaring that claims of commercial confidentiality are not to be entertained by the Senate or its committees unless made by a minister and accompanied by a ministerial statement of the basis of the claim, including a statement of the commercial harm that may result from the disclosure of the information.

The resolution is another stage in senators' impatience with the use of commercial confidentiality as a dragnet excuse for withholding any and all information. The moving of the motion by Senator Carr indicates its origins in the report by the Employment, Workplace Relations and Education References Committee on the government's refusal to provide information about university finances (see Bulletin No. 175, p. 1).

OTHER ORDERS FOR DOCUMENTS

Two new orders for documents were made in relation to reproductive technology and higher education, both on 28 October. In statements made on the following day, the government

indicated that, because the documents covered by the first order were Council of Australian Governments (COAG) documents, the permission of other governments would have to be sought for their release, and the higher education document would be refused on the ground that it is the subject of cabinet deliberations. These responses reinforced Senator Harradine's concern about COAG as a means of keeping parliaments in the dark, and led to another debate about the government's bad record in responding to orders.

Responses by the government were made on 30 October to four orders passed in previous periods of sitting:

- the Sepon mine in Laos: not enough time had been provided, and a fuller response would be forthcoming later
- free trade negotiations: some documents were tabled, and some were withheld on the grounds that they were the subject of ongoing negotiations with foreign governments and were part of government deliberations
- heritage listing of the Opera House: the document was tabled
- Kyoto treaty: documents were produced.

It appears that "government deliberations" may be assuming the place of the most favourite claim in recent times.

LEGISLATION

The saga of the superannuation legislation, relating to taxation treatment of superannuation entitlements of same-sex partners, came to an end on 27 October with the Senate not insisting on its amendments to the separate bills. In one case the amendment was not insisted on by an equally divided vote (see *Odgers*, 10th ed, p. 278). This raised a concern on the part of some senators about the possibility of a bill which did not have the support of a majority ultimately passing because the Senate did not insist on an amendment by an equally divided vote. The answer to this problem, however, is that there are two questions which have to be passed before the Senate's non-insistence on its amendment is effective: the questions for reporting out of committee of the whole and for the adoption of the committee's report. If these questions were negatived by an equally divided vote, the bill would be locked in the Senate and would not pass. The government, therefore, could not exploit this aspect of Senate procedures to have a bill passed without the support of a majority of the Senate.

The bill for the sale of the remainder of Telstra was negatived at the second reading on 30 October after lengthy debate, thereby providing the first stage of a double dissolution trigger.

Leave was required to proceed with the bill on 27 October because, although the Environment, Communications, Information Technology and the Arts Legislation Committee had reported on the bill, the committee had reported before the due date and the bill could not otherwise be proceeded with until that date (see *Odgers*, 10th ed, Supplement to p. 262).

RECALL OF THE SENATE AT REQUEST OF MAJORITY

The Senate was recalled by the President on 7 November, at the conclusion of the estimates hearings during that week, to deal with legislation for proscribing two terrorist organisations which was said by the government to be urgent. The President called the Senate to meet at the request of a majority of senators under the provisions of standing order 55. The majority requiring the recall was constituted by government and opposition senators.

At the special sitting Senator Brown unsuccessfully attempted to table the controversial migration regulations which seek to excise islands from the migration zone and which are similar to regulations previously disallowed by the Senate (see also below, under Delegated legislation).

DELEGATED LEGISLATION

Before regulations may be disallowed, they must be tabled, and the Senate has consistently adhered to this principle by not dealing with notices of disallowance motions which are purported to be given before the delegated legislation in question is tabled. It is not necessary, however, for the delegated legislation to be tabled by the government; any senator may table it, if a majority of the Senate agrees, and once the legislation is tabled, disallowance may be moved immediately (see *Odgers*, 10th ed, pp 348, 352-4).

In relation to the migration regulations excising islands from the migration zone, which were made on 4 November, and which are similar to regulations previously disallowed by the Senate, Senator Brown attempted to table the regulations on 7 November, but was not permitted to do so by a majority of the Senate, on the basis that the sitting was to deal only with one bill (see also above, under Recall of the Senate at request of majority). Senator Brown could not then move for the disallowance of the regulations.

Senator Bartlett, however, gave a contingent notice of motion to allow him to move for the disallowance of the regulations on their tabling.

FORMAL MOTIONS PROCEDURE

Another debate took place on 30 October on what some senators see as the overuse and the misuse of the formal motions procedure under standing order 66. It was pointed out that this matter is under consideration by the Procedure Committee, and Senator Faulkner referred to

the paper provided by the Clerk to the committee. Following that reference to the paper, an updated version was circulated to all senators and is available from the Clerk's Office.

CONSTITUTIONAL MOTIONS

As a by-product of the debate about the Prime Minister's proposals for "reform" of section 57 of the Constitution, the Democrats and the Greens moved formal motions on 30 October to express opinions about various constitutional issues. A Democrat motion about changes to section 44 of the Constitution (the provisions relating to disqualification of senators) was passed. A Democrat motion expressing the view that the Senate should not be able to block appropriation bills for the ordinary annual services of the government was rejected; somewhat bizarrely, all government senators voted against this motion although the Prime Minister's favoured proposal would prevent the Senate blocking *any* legislation. A motion by the Greens calling for, amongst other things, proportional representation in the House of Representatives was also rejected, presumably on the basis of that part of the motion.

ESTIMATES HEARINGS

Four days of estimates hearings were held from 3 to 6 November. These were the supplementary hearings arising from the budget hearings, although the two occasions were widely separated in time. The hearings were therefore required to be confined to specific matters of which senators give notice and answers to questions on notice from the previous hearings. The notices of matters to be raised, however, were extremely broad, allowing a virtual rehearing of departments chosen for examination. Topical matters could be explored, such as the sudden arrival of another boat carrying asylum seekers, and ongoing matters could be further explored, such as the reliability of the intelligence which justified the Iraq war (Legal and Constitutional Committee and Finance and Public Administration Committee, respectively). The Secretary of the Department of Agriculture, Fisheries and Forestry was recalled by the Rural and Regional Affairs and Transport Committee after evidence he gave appeared to conflict with statements by his minister. It was notable that government senators participated in some rigorous questioning of some agencies.

One question which arose for advice related to whether statutory authorities could rely on claims by ministers in determining whether and how to answer questions. The answer to this question depends on the extent to which a statutory authority is independent of ministerial control. Authorities which are statutorily independent cannot seek to rely on claims made by ministers, but must argue their own case.

(See also below, under Addresses by foreign presidents, for the estimates hearing of the Department for the Senate)

ADDRESSES BY FOREIGN PRESIDENTS

The addresses by the United States and Chinese Presidents took place on 23 and 24 October (see Bulletin No. 175, p. 4). Following the address by President Bush, the Speaker stated that Senators Brown and Nettle had been guilty of an offence by interjecting during the speech and not leaving the chamber when told to do so by the Speaker. He then called the Minister for Health and Ageing, Mr Abbott, who moved that the two senators “be suspended from the service of the House” [sic]. The Speaker put this question and declared it carried, ignoring calls for a division apparently made by the requisite numbers of senators and members. It was subsequently claimed that this action excluded the two senators from the meeting for the address by President Hu on the following day. This claim was enforced by an instruction by the Presiding Officers to the security staff not to admit the two senators to the meeting. This greatly suited the government, which was anxious that the Chinese government not be “affronted” by any interjections during the speech.

Subsequently, there was disputation about whether the Speaker’s actions were authorised by the resolutions which applied the procedures of the House of Representatives to the joint meeting “so far as they are applicable”, and in particular whether senators could be excluded from a meeting of the Senate except by decision of the Senate itself. On the next Senate sitting day, a claim was raised (not in debate) that Senator Brown was excluded from the Senate for seven days because he had been suspended from the Senate earlier in the year and the action of the Speaker amounted to a second suspension by the Senate. No attempt was made, however, to persuade the Senate of this claim, and Senator Brown attended the sitting.

The Senate made three references to committees as a result of these events, one to the Procedure Committee on 28 October relating to the rules which should apply to future joint meetings, “if any”, and two separate references to the Privileges Committee, on 29 October, relating to the Bush and Hu addresses, concerning the activities of foreign personnel in and around the addresses, and particularly whether any pressure was brought to bear by the Chinese government in relation to Senators Brown and Nettle, or their guests who were apparently not acceptable to the Chinese government and who were directed to the glassed-in galleries. Questions arising from these events were also explored with the Clerk at the estimates hearing for the Senate Department on 3 November, where it was pointed out that these joint meetings to receive addresses were apt to give rise to many difficulties, and that this had been pointed out when the first of them was held in 1991.

SENATE DAILY SUMMARY

This bulletin provides Senate staff and others with a summary of procedurally significant occurrences in the Senate. 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, *Senate Daily Summary* may be reached through the Senate home page at www.aph.gov.au/senate

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