

# DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

hc/pro/prob/14257

**No. 181**

**for the sitting period 11—13 May 2004**

**14 May 2004**

## **DELEGATED LEGISLATION**

The Senate passed a resolution on 13 May “rescinding” its resolution of 24 March disallowing some provisions in some Corporations Regulations. The effect of this resolution under section 49 of the Acts Interpretation Act is to allow the government to make new regulations the same in substance as the disallowed regulations without waiting for the statutory six month period after disallowance. The disallowance resolution is not actually rescinded; the original regulations remain disallowed, but the term “rescission” is used in the resolution because it is used, technically incorrectly, in the Act (see *Odgers*, pp 358-9 and pp 206-7). For the purpose of the Senate’s procedures, the resolution is not a rescission resolution and therefore does not attract standing order 87, which requires special notice and a special majority for such a resolution.

## **ESTIMATES HEARINGS**

With the presentation of the annual appropriation bills, the estimates process was set in train, the estimates being referred to the legislation committees on 11 May. There will be two weeks of estimates hearings before the Senate meets again.

One suggestion made during all the speculation about the possibility of an early general election was that the government would call the election sufficiently early to avoid the estimates hearings, which invariably result in the disclosure of information which the government would rather not have disclosed. Unless there were a double dissolution under section 57 of the Constitution, however, the calling of an election would not necessarily avoid the estimates hearings; it would be possible for the Senate to proceed with the hearings regardless of the election.

Attached to this Bulletin is a document, prepared for senators, which analyses the constitutional and statutory limitations on the timing of the general election.

## **LEGISLATION**

Among the bills passed during the period were two bills to put into effect the government's budget announcement of additional financial assistance for families. The bills were rushed through the House of Representatives by gag and guillotine, but were passed by the Senate by agreement after debate.

Two bills of great interest to senators, the Trade Practices Amendment (Personal Injuries and Death) Bill (No. 2) 2004, and the Postal Services Legislation Amendment Bill 2003, were the subject of extensive amendment on 11 and 12 May, respectively. As the government disagreed with some of the amendments, the return of the bills is thought likely.

The Australian Federal Police and Other Legislation Amendment Bill 2003, however, was the subject of voluminous amendments moved by the government on 12 May to address matters raised in the inquiry by the Legal and Constitutional Legislation Committee (this was a bill initiated in the Senate).

## **ORDERS FOR PRODUCTION OF DOCUMENTS**

An order for the production of the draft National Drug Research Strategy passed on 8 October 2003 was responded to on 12 May. This is another case in which the document in question belongs to state and territory governments as well as the Commonwealth, the Commonwealth government will not release it without the approval of all state and territory governments, and not all state and territory governments have agreed to release it. On this basis the Commonwealth government refuses to provide it to the Senate (see the matter of the COAG documents, Bulletin No. 178, p. 1 and Bulletin No. 177, p. 3).

The order of 1 April for the production of files relating to ministerial discretions under the Migration Act, which was the subject of a select committee inquiry (see Bulletin No. 180, p. 3), was met with a further refusal to produce the files on 12 May on the grounds of privacy and resource implications of extracting the documents. Further pursuit of the matter was promised in debate.

There was a similar reaction to the tabling on 13 May of further documents, but only documents released under the Freedom of Information Act, in relation to the long-running saga of the ethanol subsidy.

## **PRIVILEGES COMMITTEE REFERENCE**

The Privileges Committee received a reference, on a case of unauthorised disclosure of a draft committee report, in unusual circumstances on 12 May, after the President had

determined on the previous day that a motion to refer the matter should have precedence. The committee concerned had investigated the unauthorised disclosure under the resolution of the Senate of 20 June 1996, determined that the disclosure had not substantially harmed its proceedings, and therefore decided not to raise the matter in the Senate. Two government members of the committee, however, dissented from this conclusion and raised the matter separately, as they are entitled to do under standing order 81. The President determined that in these circumstances he was not precluded from giving the matter precedence under the criteria he is required to consider, which basically go to the seriousness of the matter, but he indicated that it was for the Senate to determine whether the reference to the Privileges Committee should be made. The reference was subsequently passed without debate.

### **PROCEDURAL CHANGES**

The Senate adopted on 11 May the following procedural changes recommended in two reports of the Procedure Committee:

- the Senate endorsed the committee's view that the Senate should not participate by way of a formal meeting of the Senate in any future parliamentary addresses by foreign heads of state, and that if the government persists with this practice such occasions should be held by the House of Representatives with senators invited to attend if they choose to do so
- the annual Tax Expenditures Statement was referred to the estimates committees for consideration during future estimates hearings
- government documents tabled on any day of the week are to be carried over for consideration each day until they appear on the list for consideration under General Business on Thursday (standing order 61)
- the time after which divisions may not occur on Thursdays was brought back from 6pm to 4.30pm (a temporary order for the June sittings)
- if formality is refused to a notice of motion under standing order 66, a motion to suspend standing orders to bring on the substantive motion will not be entertained unless the mover has the support of four other senators (also a temporary order for the June sittings).

### **COMMITTEES**

Among a number of references on significant matters made to committees during the period was one on 11 May relating to the long-disputed matter of the Chief Scientist, who appears to hold a public office but is regarded by the government as a consultant and is also a consultant

to private companies in the mining industry. The reference, in effect, asks the Employment, Workplace Relations and Education References Committee to disentangle this matter.

The Employment, Workplace Relations and Education References Committee received on 13 May a comprehensive reference on the matter of schools funding.

The Rural and Regional Affairs and Transport Legislation Committee reported on 13 May recommending the rejection of the proposal by Biosecurity Australia to allow the importation of pig meat.

## **IRAQ**

The Iraq war returned to trouble the proceedings in the shape of the allegations about mistreatment of prisoners. This was the subject of an urgency motion on 11 May, which was passed. A motion was moved by Senator Brown on 13 May for a reference to the Foreign Affairs, Defence and Trade References Committee, but debate was adjourned on the motion. Senator Faulkner indicated that the Opposition recommended the adjournment of the debate because there would soon be an opportunity in the estimates hearings, which he called the best accountability mechanism available anywhere, to question ministers and officers about the matter, and the terms of the proposed reference could be reconsidered following that process.

## **EUREKA FLAG**

A motion moved by Senator Marshall was passed on 12 May inviting and authorising the President to fly the Eureka flag at the Senate entrance on 3 December to commemorate the 150<sup>th</sup> anniversary of the Eureka Stockade.

## ***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](http://www.aph.gov.au/senate)

Inquiries: Clerk's Office  
(02) 6277 3364

## TIMING OF ELECTIONS

The following sets out the considerations applying to various questions arising in relation to the timing of general elections.

### **(1) House of Representatives election**

A House of Representatives election may be held at any time by a dissolution of the House under sections 5 and 28 of the Constitution.

If, however, separate Senate and House elections are to be avoided, the time for a House of Representatives election is constrained by the time for a Senate election (see below). (An early House election in 1963 resulted in separate Senate and House elections until 1974.)

There is a timetable for general elections set by a combination of section 28 of the Constitution, whereby the House of Representatives expires three years after the first meeting of the House, and the provisions of the Constitution, section 32, and the Commonwealth Electoral Act, sections 156 and 157, relating to the issue of writs, the close of nominations, and the fixing of polling day.

Under this statutory timetable, the minimum gap between the issue of writs and polling day is 34 days, and the maximum is 68 days, but polling day must be a Saturday.

The current House first met on 11 February 2002. The last possible day for the polling day for the next House of Representatives election is 16 April 2005.

It would be possible for the polling day for the next Senate election to be delayed until 16 April 2005 (see below).

### **(2) Double dissolution election**

Once the conditions of section 57 of the Constitution have been satisfied in relation to a piece of legislation (in common parlance, once a “trigger” is in place), a double dissolution under that section can occur at any time, and a general election for the whole of both Houses can be held in accordance with the constitutional and statutory timetable already mentioned. There are currently eight “triggers” in place.

A double dissolution, however, cannot take place within six months before the expiry of the House of Representatives. This means that, as the House of Representatives expires on 11 February 2005, a double dissolution would have to occur on or before 11 August 2004.

### **(3) Periodical Senate election**

Section 13 of the Constitution provides that a periodical election for the Senate must “be made” within one year before the relevant places in the Senate are to become vacant. The

relevant places of senators in the current Senate become vacant on 30 June 2005. This means that the election must occur on or after 1 July 2004.

The question which arises is whether the whole process of election, commencing with the issue of the writs, must occur within one year of the places becoming vacant, or whether only the polling day or subsequent stages must occur within that period, so that the writs for the election could be issued before 1 July 2004.

This question has not been definitely decided. In *Vardon v O’Loghlin* 1907 5 CLR 201, the question before the High Court was whether, the election of a senator having been found to be void, this created a vacancy which could be filled by the parliament of the relevant state under section 15 of the Constitution. The Court found that this situation did not create a vacancy which could be filled by that means, but that the senator originally returned as elected was never elected. A contrary argument was raised to the effect that, under section 13 of the Constitution, the term of service of a senator began on 1 January [now 1 July] following the day of his election, and it would lead to confusion if it were held that the subsequent voiding of the election, perhaps a year or more after the commencement of the term, could not be filled as a vacancy under section 15. In dismissing this argument, the Court, in the judgment delivered by Chief Justice Sir Samuel Griffith, made the following observation:

It is plain, however, that sec. 13 was framed *alio intuitu*, *i.e.*, for the purpose of fixing the term of service of senators elected in ordinary and regular rotation. The term “election” in that section does not mean the day of nomination or the polling day alone, but comprises the whole proceedings from the issue of the writ to the valid return. And the election spoken of is the periodical election prescribed to be held in the year at the expiration of which the places of elected senators become vacant. The words “the first day of January following the day of his election” in this view mean the day on which he was elected during that election. For the purpose of determining his term of service any accidental delay before that election is validly completed is quite immaterial.

This part of the judgment has been taken to indicate that, in interpreting the provision in section 13 whereby the periodical Senate election must be made within one year of the relevant places becoming vacant, the Court would hold that the whole process of election, not simply the polling day or subsequent stages, must occur within that period. This question, however, has not been distinctly decided. It would still be open to the Court to hold that only the polling day or subsequent stages must occur within the prescribed period, and there are various arguments which could be advanced to support this interpretation. The view that the requirement that the election “be made” within the relevant period means only that the election must be *completed* in that period is quite persuasive.

If a government decided, however, to hold a periodical Senate election with only the polling day or subsequent stages occurring within the prescribed period, there would be a risk of the validity of the election being successfully challenged and the election held to be void. This would lead to the major consequence that the whole election process would have to start again. It may be doubted whether the Court would favour an interpretation which would bring about this consequence. (Technically, it is not the Commonwealth government which begins the election process by issuing the writs but the governors of the states, under section 12 of the Constitution, but they always do so at the request of the Commonwealth government.)

#### **(4) Commencement of senators' terms**

Section 13 of the Constitution provides:

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of July following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of July preceding the day of his election.

In this provision, the term “day of .... election” clearly means the polling day for the election. This is in accordance with the finding in *Vardon v O’Loghlin*. The day of election is polling day provided that the election is valid; if the election is found to be invalid then no election has occurred and the question of what is the day of election does not arise.

Therefore, if a double dissolution election were to be held such that the polling day occurred after 1 July 2004, the terms of service of the senators then elected would begin on 1 July 2004, but if such an election were held such that the polling day occurred before 1 July 2004, the senators’ terms of service would begin on 1 July 2003.

This creates a difficulty for the synchronisation of Senate and House elections. An early double dissolution may subsequently compel either separate Senate elections, or an early House election to keep the elections simultaneous. (This situation occurred following the double dissolution of 1951: separate Senate and House elections occurred in 1953 and 1954, respectively, and then an early House election in 1955 brought them back together.)