

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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ESTIMATES HEARINGS

The estimates hearings proceeded with no indication of any general intention on the part of the government to restrict them following the effective limitation of time available for the committees to meet (see Bulletin No. 201, pp 1-2). There was on occasions some increased readiness on the part of ministers to decline to answer questions on incompletely identified grounds. The document circulated to committees in February, entitled *Conduct of Committee Hearings: Rules of the Senate*, was circulated again before the hearings. This led to a discussion with the President in the hearing for the Department of the Senate on his reasons for circulating it, which in turn led to an exchange between Senator Brandis and the Clerk about the ability of chairs of individual committees to establish “practices”. It was pointed out that decisions of individual chairs do not establish practices, and that only the Senate can prescribe a definite rule restricting the right of senators to ask questions at the hearings. The Clerk was also asked about the effect of the reduction of the days for hearings and the government’s prohibition on answering questions about the AWB affair (see also below). There was a question about work being done on restructuring the Senate committee system, of which the Department of the Senate has no knowledge. This may be something within the government which has not yet been revealed.

PROCEDURAL ISSUES

The following issues of procedural or institutional note arose during the hearings.

(1) **“The Parliament”**. In Bulletin No. 200, p. 2, it was suggested that the resolutions passed by the two Houses to authorise the sale of the Commonwealth’s interest in Snowy Hydro did not comply with the requirements of the *Snowy Hydro Corporations Act 1997*, because that statute, in a provision inserted by way of an amendment in the Senate, specifies that the sale cannot occur without the approval of “the Parliament”, and, as a matter of constitutional and statutory interpretation, that means the approval of all three components of the Parliament by a bill passed by both Houses and assented to by the Governor-General.

Senator Bob Brown, an opponent of the sale, obtained a legal opinion to that effect. The Constitution contains, for example in sections 91 and 114, the two different procedures, approval by resolution of each House of the Parliament and approval by the Parliament, and the High Court has explicitly drawn attention to the difference between the two requirements. At first the government rejected this advice, and claimed to have different advice, but it then appeared that the proposed legislation to impose restrictions on ownership after the sale would also include a provision properly approving of the sale. This has now been abandoned with the decision not to proceed with the sale.

(2) The AWB affair. Before the hearings the government confirmed, by way of a letter to senators, its direction that officers would not answer any questions about matters before the commission of inquiry into the AWB Iraq wheat bribery affair. It was pointed out that the ground for the direction had shifted from avoidance of interference with questioning before the commission to avoidance of discussion of the matter while the commissioner prepares his report. There was, however, considerable questioning of departments and authorities about the matter. The Department of the Prime Minister and Cabinet was questioned about the making of the decision to issue the direction. That department was also questioned about its role in responding to the commission and to UN and US inquiries. It was disclosed that there had been a failure to check on who had read emails which allegedly disclosed the affair before the government admitted to knowledge of it. There were some refusals to answer some of these questions. The allegations of bribery in relation to wheat sales to India were also raised. The Wheat Export Authority again answered questions about the matter, although at first there seemed to be some withdrawal from the position that they were not bound by the ministerial direction.

(3) Role of the Governor-General. Senator Murray placed a series of questions on notice designed to establish the extent to which the Governor-General independently assesses decisions which are recommended to him in relation to matters for which he is statutorily responsible. The answers, while repeating that he acts on ministerial advice, gave some information about his ability to independently assess information.

(4) Delays in answering questions on notice. This was again the subject of questioning by senators of some departments. Most departments when asked revealed when answers were sent to ministers' offices, thereby disclosing that the delays are often caused by those offices "sitting on" answers. The Department of Foreign Affairs was awarded Senator Ray's "wooden spoon" for delay; its answers were forwarded on the day after the hearings started, raising the question of whether this is a deliberate expression of ministerial disdain. The Department of Employment and Workplace Relations declined to answer this question on the basis that the forwarding of answers to ministers' offices is in the category of advices, and advices to ministers cannot be revealed. In doing so, the answering officer referred to section

13(6) of the Public Service Act, which requires public servants to preserve “appropriate confidentiality” of dealings with ministers’ offices. It was pointed out that it has long been recognised, including by the government itself, that general statutory secrecy provisions do not inhibit parliamentary inquiry and the provision of information to parliamentary committees. If that provision had that effect, a great many questions routinely asked and answered would be forbidden. Eventually it was explained that there were continuing discussions with the minister’s office on the answers.

(5) Defence. In giving their evidence, officers of the Australian National Audit Office gave very frank answers about the financial problems of the Department of Defence and the adverse audit reports made on that department.

(6) Cost of accountability. It was noted that the Department of Human Services has adopted the practice of adding the estimated cost of answering questions to each answer, and there seemed to be more responses indicating that the cost of preparing answers would not be justified. This led to a suspicion that this claim was to be raised more frequently in the future. On being questioned, the department revealed a method of estimating cost which is likely to exaggerate. There was a discussion in the Finance and Public Administration Committee on the implications of putting a price on accountability.

(7) Contingency funds. Attention was drawn to amounts identified in Portfolio Budget Statements which are not for any specific purpose, but are said to be contingency funds. There were at least two refusals to identify a possible use of these funds, one of which appeared to be a variation on the theme of commercial confidentiality. If these contingency funds proliferate through the estimates, this will pose another significant problem for accountability.

(8) Witnesses. The head of the newly established Future Fund was at first reluctant to appear, but eventually did so, apparently after informal communications. The very large sums of money to be handled by this fund make it an obvious subject for questioning. Telstra was again severely criticised for not sending appropriate officers to the hearings.

(9) Sub-delegation. It was revealed that a statutory body, the Grains Research and Development Corporation, had established a company, apparently to perform some of its work, with governance and functions described as “opaque”. This practice could also add a complication to financial scrutiny.

(10) “Leaking”. The Department of Foreign Affairs and Trade was again questioned about a long-running case, which has seen the officer in question on leave with full pay for three years and some \$800,000 of expenditure, involving disciplinary action against the officer for

alleged “leaking”. It was suggested that an issue of parliamentary privilege might be involved, but it is not clear whether this issue is to be raised.

(11) Other refusals. There were other refusals to answer particular questions in relation to prisoner Hicks (on the ground of preserving his privacy), the activities of the company Woodside in Africa (on the ground of ongoing police investigations) and indigenous communities selected for particular attention (on the ground that this is a matter of ongoing deliberations of Cabinet). The appointment of inquiries into the Kovco and Fahy cases were cited by the Defence Department as grounds for not answering some questions about them.

(12) Membership. The distinction between participating members, the ability of any senator to take part in estimates hearings, and substitute members has caused some uncertainty. Participating members appointed under standing order 25(7)(b)-(d) have all the rights of members except the right to vote. They may not be appointed as chairs, either permanently or temporarily, or as deputy chairs, because the provisions relating to chairs apply only to members of committees. The participating membership system has no application to estimates hearings, except that participating members may be counted towards a quorum if a majority of a committee is not present. Under standing order 26(8) any senator has the rights specified in that provision in relation to estimates hearings (which are not all the rights of a member of a committee). A substitute member appointed under standing order 25(7)(a) is, in relation to the matters for which he or she is substituted, a full member of the committee.

MATTERS EXAMINED

The following major matters were examined in the course of the hearings, and in some cases led to significant revelations of information not previously available.

(1) Judicial commission. The government has apparently decided against having a judicial commission to receive and investigate complaints about federal judges and magistrates, but intends to rely on some kind of protocols.

(2) Commissions of inquiry. Legislation is to be introduced to allow commissions of inquiry, such as the AWB (Cole) Commission, to determine questions of legal professional privilege. This is the subject of a dispute between the Cole Commission and AWB. Some idea of the cost of that inquiry was indicated by a figure of \$1.2 million cost to the Department of Foreign Affairs and Trade alone, excluding the costs relating to ministers.

(3) Indigenous affairs. The distribution of indigenous affairs between different portfolios caused some difficulties in the hearings and suggestions of “buck-passing”. It was revealed

that, in the midst of the current controversy about violence in indigenous communities, the government has not spent the funds available to it for alleviation of that problem.

(4) **Government advertising.** The government has an extensive program of publicly-funded advertising planned for 2007, preceding the expected general election later that year.

(5) **Defence.** The Chief of the Defence Force made an opening statement relating to Defence problems, including the reform of the military justice system which was the subject of a Senate inquiry. The occasion of the estimates hearings was used as an opportunity to gain information about the situation in East Timor, and as the hearing went on the committee was updated on the situation.

(6) **Telstra.** Telstra officers were closely questioned on the relationship between the carrier and a major supplier, and their tendering processes.

(7) **Wind farm.** Questioning about the matter of the proposed wind farm in Victoria and the threat it may or may not present to the orange-bellied parrot led to a major dispute and disorder, basically relating to the government's approach to assessing the project.

(8) **High Commissioner.** The Department of Foreign Affairs and Trade was questioned about the "indulgence" it extended to former senator and now High Commissioner in London, Richard Alston, who was alleged to have intervened in a Liberal party pre-selection.

(9) **Treasury estimates.** It was revealed that the Treasury has greatly and consistently under-estimated Commonwealth revenue and the size of the surplus.

(10) **Workplace relations.** There was a great deal of questioning about the operation of the new Work Choices legislation, revealing, amongst other things, the extent of the elimination of pre-existing terms and conditions now not included in agreements, a matter of great controversy.

(11) **Superannuation changes.** The real cost of the government's superannuation simplification measures was discussed, with an indication that the costs have not been estimated.

(12) **ASIC.** The Australian Securities and Investment Commission was questioned about the Westpoint collapse, and provided the startling view that other such failures are quite likely.

(13) **ACCC.** There was again extensive questioning of the Australian Competition and Consumer Commission about its approach to its responsibilities, particularly in relation to the effect of the sale of Telstra.

(14) **Election grants.** Some funds are granted to organisations and individuals as “election commitments”, and this is taken to fully justify them. Senator Evans, however, over several estimates hearings has been pursuing questions of financial control and accountability in relation to these avowedly political expenditures.

ACCOUNTABILITY REPORT

There has been a marginal increase in refusals to answer questions, and there is still no great appreciation on the part of witnesses of the significance of public interest immunity claims and the associated principles. The continuance of the AWB “ban” increased the quota of refusals.

It has become more noticeable that some departments and agencies are more forthcoming and cooperative in estimates hearings than are others. Sometimes this appears to depend on the minister, but in some cases it is purely a matter of the culture of the organisation.

It is not clear whether the appeal to section 13(6) of the Public Service Act is merely a lack of knowledge on the part of an individual officer or an indication of a search for more grounds for refusals.

RELATED RESOURCES

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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.

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