

# DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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**for the estimates hearings 21—31 May 2007**

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The estimates hearings resulted in several issues of procedural interest, and, as always, the disclosure of a great deal of information about government activities not otherwise available. Ministers and officers are now able to refuse to answer questions, sometimes on grounds with some past acceptance by the Senate, and sometimes without legitimate grounds or any grounds at all, secure in the knowledge that no effective action can be taken in the Senate due to the government majority. On the whole, however, ministers and officers were reasonably forthcoming with information and there were no serious conflicts.

Written advices were given on issues which arose in the course of the hearings, and the substance of those advices is referred to below as appropriate.

The Clerk's Office is assembling in printed form a set of the written advices relating to estimates hearings given over the past few years, so that staff involved in the hearings can familiarise themselves in advance of future hearings with issues which have arisen.

## **PROCEDURAL MATTERS**

The following matters of procedural interest arose.

(1) In the hearing for the Department of the Senate, there was a discussion about outcome budgeting, the ordinary annual services of the government and section 53 of the Constitution, with the government criticised for not responding to a letter from the Appropriations and Staffing Committee of February 2006. Later in the hearing the minister undertook to respond. (FPA 21/5)

(2) The Department of Immigration and Citizenship refused to provide the agreement between Australia and the United States on the transfer of inmates from Guantanamo Bay on the basis that it is confidential. (LCA 21/5)

(3) A difference was revealed between an answer to a question on notice as provided by CASA and as provided by the minister, giving another indication of how answers are altered in ministers' offices (earlier revelations were of two different versions of an answer to a question on notice in the Senate, and an estimates answer accidentally including the names of officers in the Prime Minister's office who cleared the answer). This case is interesting as it involves a statutory authority. (RRAT 21/5)

(4) The Department of the Prime Minister and Cabinet refused to answer a range of questions about government advertising, on the basis of an "established practice" not to answer about pending campaigns, and there was a lack of recollection on the part of some officers, but a great deal of information about the subject was revealed. (FPA 22/5)

(5) That department also refused to answer questions about costs of particular functions at the Prime Minister's residences, but again a good deal of information was gleaned. (FPA 22/5)

(6) The Department of Immigration and Citizenship refused to provide an audit on AUSCO (yet another "AUS" acronym: Australian Cultural Orientation Programme) on the basis that it was "internal", but then the question was taken on notice. The department also refused to provide options that are being considered for the citizenship test. (LCA 22/5)

(7) The Department of Finance and Administration revealed that it is preparing a response to the report of the Finance and Public Administration Committee on *Transparency and accountability of Commonwealth public funding and expenditure* (see Bulletin No. 210, pp 1-2). It will be interesting to see how long the response takes to appear. (FPA 23/5)

(8) The Australian Federal Police raised commercial confidentiality as a reason for not providing the cost of a contract; this claim was not dealt with in accordance with the Senate's resolution of 30 October 2003, but the committee let it pass. (LCA 23/5)

(9) ASIO refused to answer two questions on the basis of possible interference with pending legal proceedings (a ground sometimes accepted by the Senate in the past) and also declined to discuss some "operational matters". (LCA 23/5)

(10) The Wheat Export Authority, while answering further questions about AWB, declined to answer some questions constituting "advice". (RRAT 23/5)

(11) There were as usual complaints about late answers to questions on notice, but perhaps less than in the past. The Department of Human Services was criticised for presenting answers just before the hearing. The minister, Senator Ellison, agreed to the proposition that

the departmental staff should remain available until the answers had been examined. The department agreed to provide details of when the answers were sent to the minister's office, in contrast to a past claim by the Department of Employment and Workplace Relations that such information constituted advice to ministers. (FPA 24/5) Last-minute answers from the Department of Foreign Affairs and Trade were also noted. (FADT 28/5)

(12) The examination of the administrative operations of the federal courts was fairly extensive. It is notable that the federal courts have never attempted to resist this scrutiny of their operations on separation of powers grounds, unlike the courts in some other jurisdictions. (LCA 24/5)

(13) The Office of Parliamentary Counsel was examined about the preparation of the forthcoming amendments of the workplace relations legislation promised by the Prime Minister, but declined to answer some questions on matters under consideration by Cabinet. (LCA 24/5)

(14) The Minister for Communications, Information Technology and the Arts, Senator Coonan, repeatedly declined to answer some questions on "matters of policy", by which she appeared to mean matters still under consideration by the government, but this was accepted good-naturedly by the questioning senator and no one pointed out that this could hardly be an acceptable public interest immunity claim. (ECITA 24/5) There were other overextensions of "policy", in spite of the scope of the Senate's rule being clearly explained in chairs' opening statements. Attention was briefly drawn to the point that the injunction about asking for opinions on matters of policy in Privilege Resolution 1(16) applies only to an "officer of a department of the Commonwealth or of a state" and not to officers of statutory authorities (the Privilege Resolutions were very carefully drafted). (EC 30/5, LCA 23/5)

(15) There were as usual several refusals to answer questions on the basis that they related to advice, with the category of advice ever extending. Tourism Australia claimed to extend it to draft media releases sent to the minister's office. The Economics Committee went through the process set out in paragraph (10) of Privilege Resolution 1, and decided that the questions should not be pressed. Non-government senators are well advised not to go down that path, unless they have some reason to believe that government senators on the committee will not automatically support the claim. In any event, that provision really relates only to private witnesses; public agencies should formally raise a public interest immunity claim to avoid questions they think should not be answered. Such claims are for ministers or heads of authorities to raise and committees to determine, subject to the rules of the Senate; they are not matters for chairs to rule on. (EC 28-29/5)

(16) Although the government's new workplace relations legislation was introduced on 28 May and thereby was referred to the committee, questions were answered about its content (see Bulletin No. 207, pp 1-2). (EWRE 28/5)

(17) Answers to some questions on notice through the chamber about the Tiwi Land Council were refused on the basis that it is an independent statutory authority, although ministers regularly answer on behalf of such authorities. This situation was corrected in the estimates hearing. (CA 28/5)

(18) There were again refusals to provide forward estimates, on the basis of a government decision that they not be published. (CA 28/5)

(19) The Defence Department provided a briefing to committee members before the hearings to help them find their way through the estimates. Although that department has bigger financial and administrative problems than most, it is also one of the most cooperative, with the secretary of the department and the Chief of the Defence Force attending the hearings and volunteering information. (FADT 30/5)

(20) The problem of questioning of law enforcement agencies about criminal investigations giving rise to evidence protected by parliamentary privilege which then could cause difficulties in prosecutions (see Odgers, 11<sup>th</sup> ed, p. 404 and supplement) was raised in relation to the matter of weapons stolen from the Defence Force. (FADT 30/5)

(21) A minister attempted to argue that questions are confined to *current* activities of departments and agencies, but the terms of the Senate's resolution of 1999 does not give any support to such an assertion. Questions and answers about past activities, throwing light on current activities, are very common. It was also pointed out that there is nothing to prevent questions about the nature of legal proceedings and the issues involved in them if the questions do not attempt to canvas those issues. (EWRE 30/5)

(22) Before commencing questioning on the treatment of a deceased former Defence Force member, senators disclosed that they had the permission of members of the man's family to ask the questions, thereby partly overcoming privacy concerns. (FADT 31/5)

## MATTERS EXAMINED

The following significant matters were examined and considerable information about them unearthed.

(1) Questioning on the costs of furniture in the Prime Minister's office and a proposed alteration to the office (about \$500,000 allocated) led to him indicating that he would abandon the alterations. The costs of his two official residences, Kirribilli House and the Lodge, were also explored. What has not been explored is how and when it came about that the Prime Minister has two official residences. (FPA 21/5)

(2) The government subsidy to the private gift of a royal coach to the Queen was given another airing (subsidy so far \$250,000, transport costs expected to be \$100,000, and the coach not yet finished). (FPA 21/5)

(3) Drugs in sport and enforcement by sporting bodies caused some acrimony. (ECITA 21/5)

(4) The Immigration and Citizenship Department revealed that it would overspend its budget by \$55.4M, and its activities in relation to the proposed citizenship test and 457 visas were again explored, as were the 247 cases of persons unlawfully detained. (LCA 21/5)

(5) Grants to regional projects, the abundance thereof in an election year, and associated transparency and accountability issues, were again explored. An Audit Office report presented on 24 May had some adverse comments, which were the subject of vigorous discussion. (RRAT 21-22/5; CA 28/5)

(6) The Department of Education, Science and Training revealed that one-third of the \$4.4M spent on the voucher scheme for educational underachievers was spent on administration. (EWRE answer to a question on notice)

(7) The government's very large advertising campaigns in an election year were the subject of intense questioning and many revelations, including that \$470,000 was spent on advertisements for the forthcoming workplace relations changes, the advertisements having been ordered by the Prime Minister's office on the Friday before they appeared in the Saturday press, but the committee was told that the advertising was classified as "non-campaign advertising". Figures of \$111M for active campaigns, \$15M for campaigns completed this financial year and \$4M in one week on industrial relations were mentioned. (FPA 22/5)

(8) The proposed citizenship test and “Australian values” pledge, and whether the government’s policy is “assimilation” (referring to statements by the Prime Minister and the departmental secretary) were explored. (LCA 22/5)

(9) Ministerial staff numbers and the apparent refusal of some ministerial staff to undergo security clearances were extensively questioned. (FPA 23/5)

(10) The appointment of a foreign firm as custodian of the Future Fund and that firm’s involvement in the Enron collapse was the subject of questioning, closely followed by everyone with an interest in superannuation. (FPA 23/5)

(11) The ABC was again questioned about alleged bias. In response to a claim that the ABC is a “breeding ground for Labor candidates” a list of ABC journalists who became candidates was produced, showing about an equal distribution between parties. (ECITA 23/5)

(12) Senator Heffernan again pursued his campaign for some statutory mechanism for the consideration of complaints about judges. (LCA 23/5)

(13) The costs of security arrangements for the APEC conference in September were provided: \$169M. (LCA 23/5)

(14) Some millions (exact amount unclear) have been spent on assisting Muslims to integrate, with claims that it is not apparent where the money has gone. (LCA 23/5)

(15) The arrangements applying to the transfer of prisoner David Hicks and the cost were questioned. (LCA 23/5)

(16) The Wheat Export Authority again answered questions about AWB. (RRAT 23/5)

(17) Aspects of the proposed Access Card were extensively questioned, and it was revealed that \$3M has been spent on marketing research and advertising before the shape of the scheme has been determined. (FPA 24/5)

(18) It appears that the Department of Immigration and Citizenship has spent \$70M on setting up its “system for people”, which it is hoped will overcome some of the department’s past problems. (LCA 24/5)

(19) The Employment Advocate was again questioned about the effect of AWAs, and engaged in an exchange about the distinction between collecting and analysing data. (EWRE 28/5)

(20) About \$90M may have been paid incorrectly in regional broadband grants and may be written off. This was the subject of an Audit Office report. (ECITA 24/5)

(21) The tax and other implications of foreign private equity taking over Australian companies were explored, and the Tax Office referred to possible large losses of revenue. The Economics Committee has a reference on this subject. (EC 29/5, 31/5)

(22) The “watchdog” agencies ACCC and ASIC were again extensively questioned, about petrol price-fixing and the dispute with Telstra, and corporate collapses, respectively. (EC 30/5)

(23) There were further revelations about the *Westralia* fire, with a senator producing an allegedly “lost” document previously said in evidence not to exist. The Defence Department indicated that it had asked the Ombudsman to review the inquiry process. (FADT 30/5)

(24) An officer made the startlingly frank statement that, in spite of expensive negotiations and attempts to influence the Chinese, there would be no free trade agreement with China because the Chinese government does not want an agreement. (FADT 30/5)

(25) It was revealed that departments have recently sprouted climate change and water policy sections, an indication of how these issues have “moved up the agenda”. (EC 31/5)

(26) The difficulty of the Commonwealth government attempting to supervise essentially local projects was illustrated by the case of a proposal to locate an aged care facility on land which turned out to be contaminated with unexploded munitions. (CA 31/5)

#### **THE TRENT SMITH CASE**

In Procedural Information Bulletin Nos. 202 and 207 there were references to the dismissal of an officer of the Department of Foreign affairs and a possible question of privilege.

Mr Trent Smith, an officer of the public service, who was formerly on the personal staff of an Opposition member, was subjected to disciplinary proceedings and dismissed from the service for “offences” which included a communication with the staff of a member of the House of Representatives about Senate proceedings. The Opposition staff member sent an email to Mr Smith asking about a particular government publication. He responded to the effect that the information could be obtained by means of a question in the Senate estimates hearings, and that such a question may already have been asked and could be located by consulting the relevant database.

How this communication could possibly constitute an offence under the Public Service Act is yet to be determined. Apart from that, the question arises whether the communication could be protected by parliamentary privilege, as a communication “for purposes of or incidental to” proceedings in Parliament. Informing a member (via the member’s staff) that a parliamentary procedure is available to the member to obtain information would seem to fall within that protected sphere. Even if it could otherwise constitute an offence of any kind, it could still be protected. The advice of the Clerk (revealed in part in estimates hearings) was that it is at least persuasively arguable that the communication was for purposes of and incidental to proceedings in Senate committees, and was therefore protected by parliamentary privilege.

The dismissal was the subject of a public hearing in the Industrial Relations Commission, with various startling revelations. The department was again questioned at this round of estimates hearings about its role in the affair. Officers refused to answer some questions on the basis that they related to matters in issue before the commission, but under persistent questioning confirmed some of the facts already disclosed and revealed others. The following advice was provided to a senator and produced at the hearing:

The Australian Industrial Relations Commission is not a court, it is an industrial tribunal which determines some industrial issues, including termination of employment claims. (The fact that some members of the Commission are judges does not make it a court.) It does not try cases at law. The Senate's sub judice convention therefore has no application to the matters before the Commission. In any event, the Senate's sub judice convention is invoked only where there is a substantial danger of prejudice to legal proceedings before a court by way of influencing persons involved in the proceedings, especially jurors. There are no jurors involved in matters before the Commission, and the members of the Commission would be assumed to be beyond influence by any parliamentary debate or inquiry.

There are no precedents or rulings of the Senate to suggest that there is any barrier to debate in the Senate or questions in a Senate committee relating to matters before an industrial tribunal. Such matters have frequently been debated in the past.

By resolution of the Senate, questions in estimates hearings are directed to the operations and finances of departments and agencies. It would be a very odd limitation on the hearings if departments could not be questioned about their activities simply on the basis that those activities have been examined in an industrial tribunal.

The parliamentary privilege point was not raised, but may yet resurface.



## **ACCOUNTABILITY REPORT**

The estimates hearings have again demonstrated that they are the most productive accountability mechanism available to the Parliament, in terms of the amount of information which is obtained about government activities. The ability of ministers and officers now to readily refuse to answer questions has not prevented a great deal of information being revealed.

## **RELATED RESOURCES**

The *Dynamic Red* records proceedings in the Senate as they happen each day.

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, these documents may be reached through the Senate home page at [www.aph.gov.au/senate](http://www.aph.gov.au/senate)

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