

# DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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**No. 238**

**for the sitting period 2 February – 4 February 2010**

**and additional estimates hearings 8 – 12 February 2010**

**12 February 2010**

## **AMENDMENTS AND REQUESTS**

The year began with a potential controversy affecting the Senate's powers under section 53 of the Constitution. A government amendment to the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009 was circulated in the form of a request with the explanation that, as the amendment broadened the class of persons eligible to apply for funds appropriated to a special account under the *Financial Management and Accountability Act 1997*, its effect was to increase the proposed charge or burden on the people within the meaning of section 53 of the Constitution. On closer examination, it transpired that persons received money from the account only if a court ordered it and the amounts paid to an individual or his or her dependants could not exceed the amounts credited to the fund as a result of proceeds of crime seized from that individual. When the bill was dealt with in committee of the whole on 4 February 2010, the Chairman of Committees made a statement that the Senate regarded only a very direct effect on an appropriation as an increase in a proposed charge or burden on the people and that the amendment had no impact on the amount of funds available. In other words, the same amount of money would simply be accessible by more people. He indicated that it would be dealt with as an amendment, not as a request. The Senate's amendments were accepted later that day by the House of Representatives without demur, although the Speaker made a statement to the House on 10 February to inform members about the issue, concluding that it was not recommended 'that action be taken on the matter at this stage'.

## OTHER PROCEEDINGS ON LEGISLATION

A package of bills dealing with private health insurance incentives met with an unusual fate on 4 February 2010. The standing orders provide two methods of dealing with bills: the deliberate method and the expedited method. Under the deliberate method, different stages of individual bills are dealt with on separate days with a requirement for the bill to be reprinted at different stages. The expedited method allows bills to be taken together and to proceed through all stages without the delays built into the deliberate method. The motion to adopt the expedited proceedings is moved as soon as bills have been presented to the Senate or received from the House of Representatives. When messages transmitting the three private health insurance incentives bills were reported, the minister moved the usual motion, that the bills may proceed without formalities, be taken together and be now read a first time. As is her right under standing order 113, Senator Siewert asked for the motions to be put separately and the second element was negatived. The effect was to prevent the bills being taken together, so the minister moved separate motions for the second reading and the adjournment of that debate in respect of each bill. Senator Siewert explained that the Greens had different positions on the bills and wanted to be able to comment and vote on them separately. As the minister explained, taking bills together does not preclude questions being put separately in respect of individual bills, but the motion was negatived with Opposition support. This was the second occasion in recent months when an element of the compound motion for expedited proceedings on bills was negatived. The motion for the carbon pollution reduction scheme bills to proceed without formalities was negatived in November, meaning that separate stages of the bills had to proceed on different days, a limitation subsequently lifted (see Bulletin No. 237).

The National Security Legislation Monitor Bill 2009 [2010] was significantly amended on 3 February by government and Australian Greens amendments, most of them arising from the report of the Finance and Public Administration Legislation Committee on the bill. Reference was made during the debate to the earlier private senators' bill on this subject, the Independent Reviewer of Terrorism Laws Bill 2008 (No. 2), introduced by Senators Troeth and Humphries and passed by the Senate with amendments in November 2008, following examination by the Legal and Constitutional Affairs Committee. This is an example of a private senator's bill being taken up by the government and progressed as government legislation. The tiny figure of private members' and senators' bills passed into law since 1901 does not take these reasonably regular occurrences into account. The bill passed as the Independent National Security Legislation Monitor Bill 2010 with amendments to both short and long titles and will now be considered by the House of Representatives.

The Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009 was initially passed without amendment on 4 February 2010.

Before the message to the House of Representatives had been dispatched it was discovered that there had been misadventure which prevented a senator attending the chamber to move his circulated amendments. The bill was recommitted by leave later that day and subsequently passed with amendments, including an amendment that had earlier been negated. Although used rarely, this now-streamlined procedure has been used in the past to correct mistakes and ensure the will of the Senate is reflected in the outcome (see Bulletin No. 177, 9 December 2003 and *Odgers' Australian Senate Practice*, 12<sup>th</sup> edition, p.253).

#### **ORDERS FOR PRODUCTION OF DOCUMENTS**

Several returns to order were presented out of sitting over the summer recess and tabled on the first day of sitting. Further bilateral intergovernmental agreements made under the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* were presented, along with information on cataract surgery times, which was the subject of an order of 19 November 2009 (see Bulletin No. 237). The usual details of agency appointments and vacancies, and departmental and agency grants, required before each round of estimates hearings were also tabled.

Despite some orders being complied with, others were not. The government presented a statement out of sitting on 7 December 2009 in relation to its response to the National Preventative Health Taskforce Report (see Bulletin No. 237) indicating that it was still considering its response which would be developed as part of the broader context of health reforms under consideration by COAG.

A new order for production of documents relating to the processing and resettlement of asylum seekers on the *Oceanic Viking* was met, on 3 February 2010, with the production of previously tabled documents and a statement that other information required was held in official cabinet records for which public interest immunity was claimed on the basis that their disclosure would compromise the confidentiality of cabinet. Questions on this matter were subsequently asked at estimates (L&C, 9/2).

An order for the Henry Tax Review was also met with a refusal for the time being, the government indicating on 4 February 2010 that the report would be released "at a later stage in early 2010 after due consideration and with an initial response". The minister's statement was debated and the meaning of 'early 2010' was also pursued in estimates (E, 10/2).

An order made on 3 February 2010 for the production of information referred to in an answer to a question on notice about landholder agreements with an Australian gold mining company operating in the Solomon Islands falls due on 22 February 2010.

## **DEBATE ON AUSTRALIAN TROOPS IN AFGHANISTAN**

Late in the 2009 sittings, Senator Bob Brown gave a contingent notice of motion for the suspension of standing orders to allow the Senate to debate a motion on the deployment of Australian troops in Afghanistan before proceeding to other business on the first sitting day in 2010. The motion for the suspension of standing orders was lost. Had it succeeded, the incident would have provided another example of the Senate controlling its business agenda during a time when government business was due to be considered.

## **OMBUDSMAN'S REPORT ON AFP PROFESSIONAL STANDARDS AND PRACTICES IN RELATION TO CONDUCT**

By amendments made to the *Australian Federal Police Act 1979* in 2006, the Ombudsman is required to present an annual report to the Parliament on the operation of the provisions relating to professional standards. The Ombudsman's report for 2008-09 was tabled on 2 February 2010. The inclusion of similar accountability provisions in legislation is now relatively common.

## **COMMITTEE MATTERS**

Numerous committee reports were tabled during the period, including the report of the Finance and Public Administration References Committee on the mechanism for independent arbitration of public interest immunity claims. Despite evidence in support of such a mechanism, the majority report recommended that it not be adopted. The majority report contains some unfortunate misconceptions about the Senate's powers to require the production of documents.

The Legal and Constitutional Affairs References Committee presented reports on its major references on Australia's judicial system and the role of judges, and on access to justice, and the Community Affairs Legislation committee reported on the contentious Midwives and Nurse Practitioners bills. The Rural and Regional Affairs and Transport References Committee presented a report on its major review of national resource management and conservation programs including Landcare. The Regulations and Ordinances Committee presented its annual Delegated Legislation Monitor and volumes of correspondence between the committee and ministers on 4 February 2010.

Several new references were also agreed to.

On 4 February 2010 a government response was presented to the report of the Joint Committee on Public Accounts and Audit on the efficiency dividend and small agencies, to which inquiry the former Clerk of the Senate had made a submission. Although the committee's terms of reference had not included the issue of parliamentary appropriations, the report recommended that the government establish a parliamentary commission to recommend funding levels for the parliamentary departments. Fortunately the government did not take this recommendation on board, which would have had serious ramifications for the Senate's independence and the role of the long-standing Appropriations and Staffing Committee, instead merely noting that decisions on future funding for the parliamentary departments should continue to be subject to the usual budgeting processes.

#### **PRIVILEGES COMMITTEE**

The Privileges Committee presented its 143<sup>rd</sup> report on 4 February 2010, recommending that the Church of Scientology be permitted to exercise a right of reply under privilege resolution 5 in response to remarks by Senator Xenophon. The report was adopted without debate.

The committee's recommendations in its 141<sup>st</sup> report, relating to the imposition of a penalty on a witness before the Legal and Constitutional Affairs References Committee, were adopted on 4 February 2010, while the recommendations arising from its 142<sup>nd</sup> report on the infamous Godwin Grech matter remain on the Notice Paper.

#### **DEPARTMENTAL PUBLICATIONS**

The latest supplement to the 12<sup>th</sup> edition of *Odgers' Australian Senate Practice* was tabled on 2 February 2010, along with *Business of the Senate* for 2009, the 2009 supplement to the *Consolidated Register of Senate Committee Reports* and the 2008-09 *Questions on Notice Summary. Work of Committees* for 2009 was tabled on 3 February 2010

#### **ADDITIONAL ESTIMATES HEARINGS**

Signs that the Senate's order of 13 May 2009, relating to the raising and handling of public interest immunity claims, was beginning to have an effect in improving awareness in the public service about the Senate's right to information was evident during the additional estimates hearings. There were fewer disputes between committees and witnesses. In the main, better explanations were given when witnesses sought not to answer questions, and these explanations appeared to satisfy the questioners for the most part. There does not seem to have been any resort to the "advice is never provided" refrain.

For many years, senators have expressed frustration at the non-appearance of particular departmental secretaries and agency heads. Matters were brought to a head late in 2009 when the Senate agreed to an order requiring the President of Fair Work Australia to appear at this and subsequent rounds of hearings at which the estimates of Fair Work Australia are considered. The President, the Hon. Geoffrey Guidice, duly appeared and answered questions, but concluded his appearance with a statement that he was not the head of any agency for budget purposes (EEWR, 10/2). As he is the President of Fair Work Australia which is an agency under the Financial Management and Accountability Act, it is assumed that the judge may have been referring to paragraph 658(a) of the Fair Work Act which provides that responsibility for compliance with the FMA Act rests with the general manager. These arguments were put to the EEWR Committee last year. The Senate's view is indicated by its order of 28 October 2009, which is of continuing effect.

The head of Australia Post has been another serial non-attendee of estimates. There was discussion in the ECA Committee (8/2) about the non-attendance of the new head, Mr Ahmed Fahour, who had been specifically requested by the committee to appear. The minister explained that Mr Fahour had been in the job for five days and was still being briefed, but had indicated his willingness to attend in future.

In contrast, the FADT Committee warmly welcomed Mr Dennis Richardson, new Secretary of DFAT, to its hearing on 11 February, the first Secretary of DFAT "in living memory" to appear before estimates. As a former head of ASIO, among other things, Mr Richardson has extensive estimates experience. The Secretary of the Department of the Prime Minister and Cabinet remains the only significant non-attendee among agency heads.

In a return to a useful practice of past years, the ECA Committee requested the attendance of officers from the Australian National Audit Office to respond to questions about a recent performance audit of the "request for proposal" process for the National Broadband Network.

As always, many significant issues of public policy and administration were explored, including:

- appointments to the National Broadband Network company;
- new aviation security measures;
- salaries of high profile ABC presenters (again — the issue was first raised in 1986 and the obligation of the ABC to provide information to committees settled)
- the impact on Australia's relations with India of recent attacks on foreign students;
- the state of the submarine fleet;
- continuing payroll problems in Defence;
- the repudiation of the inquiry into incidents aboard the HMAS Success because of bias;

- the leaking to the press of the report of the Northern Australia Land and Water Taskforce;
- the heavily criticised Green Loans program;
- the problematic home insulation program;
- the timeliness of the provision of answers to questions taken on notice (as ever);
- border protection, with particular reference to the incident involving the *Oceanic Viking*;
- delays in the completion of the Anti-Terrorism White Paper;
- changes in the skilled migration program;
- the role of the Department of Climate Change in analysing Opposition policy;
- the performance of the Australian economy;
- the accuracy of the index underlying the My School website;
- progress in implementing health, housing and other measures for Indigenous Australians.

Committees are due to report on 23 February 2010.

#### **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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