

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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In what may be the last round of estimates before the federal election (which must be called by 11 February 2011 when the House of Representatives expires), senators pursued the usual wide range of questions on everything from an individual shipment of seahorses which fell foul of US Customs because of a paperwork bungle by the Australian Customs Service, to the administration of the home insulation scheme and other programs related to the Government's economic stimulus package, now about to enter its third financial year of expenditure. (The seized seahorses, an endangered species, will apparently now be donated to zoological schools.)

DOCUMENTS TABLED OUT OF SITTING

Standing orders 38 and 166 provide for committee reports and other documents including Auditor-General's reports and government documents to be presented out of sitting to the President, Deputy President or a Temporary Chair of Committees, and authorised for publication. During the estimates process, another method of presenting documents is to provide them to a committee which could then exercise its power under standing order 37 to authorise publication. Before the relevant provisions of standing order 166 were adopted, it was reasonably common for corrigenda to the portfolio budgets statements (and their predecessors) to be tabled by presenting them to the relevant committee. In the lead up to the Budget estimates hearings, several such corrigenda were presented pursuant to standing order 166, ensuring that they would be available to the relevant committee ahead of the hearings.

The Auditor-General presented several important performance audits and reviews in the week after the Budget, ensuring their availability for the relevant estimates process. One of those reports was an assurance report on advertising campaigns assessed by the Auditor-General in

the period from July 2009 to March 2010 when this function was removed from the Auditor-General and allocated to an independent committee of former public servants, appointed by the Special Minister of State. (The chair of that independent committee had, in fact, conducted the review that led to the removal of the function from the Auditor-General). The assurance report included a copy of the Auditor-General's letter to the minister expressing concern about the lack of consultation with his office about the changed arrangements and disputing numerous claims and statements in the review. This was the subject of extensive questioning of several agencies at the estimates hearings of the Finance and Public Administration Legislation Committee the following week, campaign advertising being a perennially sensitive topic (see below).

On Friday 28 May, following the completion of the F & PA committee's estimates, standing order 166 was again employed for the presentation of a statement of reasons by the Special Minister of State as to why he had exempted the government's proposed advertising campaign on the Resources Super Profits Tax from the requirement for vetting by the independent committee. The timing of the release was questioned (along with the reasons given for the exemption) and further action on this matter is expected when the Senate next meets.

All of the documents presented out of sitting will be formally tabled on the next sitting day. There is then an opportunity for any senator to seek leave to take note (i.e., to debate) any of the documents.

PARLIAMENTARY PRIVILEGE AND STATUTORY SECRECY PROVISIONS

The Privileges Committee presented an important report out of sitting on 4 June 2010 on the provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009. The report addresses the issue of statutory secrecy provisions and parliamentary privilege, an issue considered long-settled until the introduction of this bill which confuses the issue and proposes to make it a criminal offence in some circumstances for a witness to provide information to a committee, an idea which the Privileges Committee regards as obnoxious, along with various other features of the provisions. The committee has recommended the removal of the offending provisions and attached amendments to its report to achieve this.

ORDERS FOR PRODUCTION OF DOCUMENTS

The procedure for tabling documents out of sitting was also used to present numerous returns to orders for the production of documents. Two continuing orders require information about grants approved by each agency, and appointments to and vacancies in all Commonwealth bodies, to be provided no later than 7 days before the commencement of each round of estimates. A large number of responses to these orders was tabled.

Responses were also provided to orders of the Senate of 12 May relating to the home insulation program. These included ministerial correspondence with the "Cabinet-in-confidence" or "in-confidence" markings ruled through, the covering letter explaining that these had been "declassified" because their content was largely in the public domain. A further letter was withheld on the grounds that its disclosure would reveal Cabinet deliberations, in accordance with the "precept" that Cabinet deliberations are "secret so Cabinet's discussion and debate is free, recognising that all ministers will be publicly bound by Cabinet's final decision". As with previous claims about legal advice or other advice to government, these claims should be read with the silent qualification, "until it suits the government otherwise". The fact that a document has a security marking on it does not affect its provision to or receipt by a House of Parliament or a committee, since the act of providing it is protected by parliamentary privilege.

An order of the Senate of 13 May 2010 for the modelling behind the government's response to the "Henry Review" was responded to with a stack of documents in the public domain, including Budget Papers and a copy of the review itself, among other things.

PROCEDURAL ISSUES

The usual range of procedural issues arose during the estimates hearings.

What is an "officer"?

Standing order 26(5) provides that the "committees may ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure". The term "officer" has not been defined to include or exclude any particular persons or classes of persons but it has been interpreted in the past as covering the officers of any Commonwealth department or agency, including any Commonwealth statutory body, and any Commonwealth-owned company, regardless of whether they receive funds directly through the appropriation bills. Persons who do not fall into the category of officers technically may not be examined in an estimates hearing (although this rule has not been strictly adhered to on occasion when consultants, contractors or others have appeared).

The question arose during F & PA estimates of whether the members of the Independent Communications Committee were "officers" for the purposes of the standing order. In this case the absence of an employment relationship with the Commonwealth suggested otherwise but the committee was advised that it could call the ICC members before it in one of its other, non-estimates modes. Officers of the Department of Finance and Deregulation who provided secretariat support to the committee were subsequently questioned. It also arose in the hearings of the Education, Employment and Workplace Relations Legislation Committee in

relation to the Chair of the BER Implementation Task Force whose willingness to appear was noted although he was not required to answer questions on that occasion.

In another example of the variety of estimates, board members of Australian Wool Innovation appeared before the Rural and Regional Affairs and Transport Legislation Committee, alongside departmental officers, to respond to questions about recent controversies involving the Board. People who are not officers cannot be required to appear at estimates although they may sometimes volunteer their cooperation.

Witnesses required to appear

In contrast, two witnesses appeared by order of the Senate: the President of Fair Work Australia and the Secretary to the Treasury who had previously indicated that he would not be available during estimates because of overseas personal commitments. As chief architect of the recent taxation review, the Treasury secretary's testimony was considered essential for proper scrutiny of the resulting resources super-profits tax proposal. The Opposition initiated an order for Dr Henry to appear at another time, to be mutually agreed between Dr Henry and the committee but, in any case, not later than 30 June. Dr Henry duly appeared and a great deal of information was placed on record.

The President of Fair Work Australia appeared pursuant to an order of continuing effect and asked the committee to reconsider the continuing requirement for him to appear, for reasons which were not entirely clear but included a perception of possible damage to the independence and impartiality of the tribunal. Any change to the requirement would need to be made by resolution of the Senate.

Order of the Senate setting the estimates program

It is the Senate which sets the scheme of meetings for estimates hearings, determining the dates and the groups in which the legislation committees will meet. The order requiring Dr Henry to appear raised some challenging issues when it appeared that the only possible day for the Economics Legislation Committee to meet with Dr Henry was a day that was already allocated to four other legislation committees. In the end, the Finance and Public Administration Committee agreed to meet from 10 am on the day in question, providing a two-hour window of opportunity for the Economics Committee to meet from 7.50 am. For the committees to have swapped days would have been difficult (though not impossible) to justify within the terms of the timetabling order but it could have been argued that the Senate's later, specific order relating to Dr Henry permitted modification of the original order to the necessary extent. In the end, it was not necessary to address this issue.

Is a minister's presence required?

From time to time, the question arises whether it is essential to have a minister present at the hearings. The grouping of committees is premised on the number and representational responsibilities of Senate ministers but there is no procedural requirement for a minister to be present at all times during the hearing. The terms of standing order 26(5) suggest that ministers should be available to answer questions, as well as officers, and the absence of a minister means that an officer cannot immediately refer a question to a minister under Privilege Resolution 1(16), but it is recognised that ministers may need to absent themselves for short periods.

The case of the revolving portfolios

Recent changes to the administrative arrangements orders, particularly involving the responsibilities of the Departments of Environment, Water, Heritage and the Arts, and the Department of Climate Change and Energy Efficiency, led to queries about where particular questions should be asked, especially where they related to the recent past rather than the future. There is no hard and fast rule about this. In such cases in the past, the usual practice has been for questions to be directed to the agency that has assumed responsibility for the function. A transfer of function is usually accompanied by the transfer of the relevant staff and resources to the new agency. In such cases it is useful if the minister or secretary advises the committee where questions relating to the particular function should be asked – preferably before the receiving agency appears.

Ordinary annual services of the government

This issue was raised at the hearings of the Education, Employment and Workplace Relations Legislation Committee on 2 June in relation to an appropriation for an item in a previous year, which had been divided between a special appropriation and the bill for the ordinary annual services of the government. Accounting errors had been made, with corrections following in the Mid-Year Economic and Fiscal Outlook Statement and Portfolio Budget statements.

Public interest immunity claims

While there was some reference to the order of the Senate of 13 May 2009 relating to the process for making and determining claims of public interest immunity, and some insistence on reasons being provided for the withholding of information, the practice of ministers and officers taking anything mildly controversial on notice appears to have become well entrenched. The Procedure Committee is keeping the matter under review.

One exception to taking questions on notice was the case of the Auditor-General who, as a statutory officer, makes his own claims. When asked to provide copies of departmental comments on the draft performance audit report on Building the Education Revolution (BER), the Auditor-General gave the reason that he was concerned that disclosure of this type of information could close off the flow of information between the ANAO and agencies. The Auditor-General is one of the very few officers who could claim that a provision in his authorising statute limits the type of information he is required or permitted to provide to the Parliament and its committees (see below under 'Statutory secrecy provisions and parliamentary privilege'). He did not make that claim on this occasion (F&PA, 26/5).

An issue of possible commercial confidentiality continuing from previous rounds of estimates concerned the ABC's reluctance to provide the Environment, Communications and the Arts Legislation Committee with information about the remuneration of one of its top billing employees, Kerry O'Brien, presenter of the *7.30 Report*. Issues of principle had been explored and settled long ago in relation to questions asked at estimates in the 1980s about the remuneration of Geraldine Doogue, then presenter of the ABC's new 7.30 pm current affairs flagship, *The National*. (The 1986 report of the former Senate Standing Committee on Finance and Government Operations, *ABC Contracts and their confidentiality*, is available online under 'Significant reports tabled before 1997.') Having reminded the ABC of the history of this issue, the committee has now reached agreement with the ABC for an *in camera* hearing into the ABC's annual report at which information encompassing the remuneration of "key presenters" (including Mr O'Brien) will be provided. During the estimates hearings on 24 May, the instigating senator, Senator Macdonald, thanked the ABC for their anticipated cooperation.

Statutory secrecy provisions

This issue arises from time when officers claim that certain information is "protected information" under particular statutes – in other words, it is protected by a secrecy provision. In some statutes, it is information of a particular character that is specified as protected and although such statutory provisions have no application to parliamentary committees (unless this is expressly specified), committees often refrain from requiring the information to be produced. Other types of secrecy provisions apply more generally to information or classes of information acquired by officers in the course of their duties. An example is section 94 of the *Australian Trade Commission Act 1985* which officers of Austrade asserted prevented them from answering particular questions about the problematic activities of the firm, Securrency International, which have been widely publicised (FADT 3/6). As the 144th report of the Privileges Committee (see above) reiterates, statutory secrecy provisions have no application to the operations of the Houses of the Parliament or their committees unless there are express

words to that effect. This is because the powers, privileges and immunities conferred by section 49 of the Constitution may only be altered by an express statutory declaration. (Also see *Odgers' Australian Senate Practice*. 12th edition, pp. 52-54.)

Late provision of answers to questions on notice

Frustration was expressed on numerous occasions with the timing of the provision of answers to questions taken on notice at previous rounds of estimates. Answers often appear only on the eve of the next round of hearings, having been delayed at critical transitional points along the way.

ISSUES RAISED AT ESTIMATES

As well as being the principal means of scrutinising the operations of government agencies in detail, estimates hearings are renowned for the variety and scope of information about those operations that is placed on the public record. Indeed, it has been suggested that the potential public focus on this information as a barometer of government performance contributed to the abandonment of the former practice of "estimates-only" weeks. For some years, the hearings have been held concurrently with sittings of the House of Representatives. Nonetheless, there continues to be a reasonable degree of media interest in the hearings and regular coverage in the press and electronic media of matters raised.

During the hearings, there was a strong focus on the major issues of administration and policy involving the implementation of the National Broadband Network, the home insulation program, the BER program, the new health funding arrangements and the proposed resources super-profits tax. A small sample of some of the many other issues raised follows:

- The decision of the Classification Board and Classification Review Board on the DVD release of a controversial and previously banned 1970s film, *Salo* (L&C, 24/5)
- Changes to the plan to merge the Federal Magistrates Court with the Federal and Family Courts (L&C, 24/5)
- Minister Conroy's views on alleged breaches of privacy by Google (ECA, 24/5)
- The Auditor-General's criticism of the process for changing scrutiny of government advertising campaigns (F&PA 25/5)
- Further criticism of the "Plimer view" of climate change by the Government's Science Advisor (ECA 27/5)
- The provision of funds to the High Court to finally enable it to carry out major repairs to its forecourt and fountain (L&C, 24/5)
- Possible impacts of the Moran review of the public service, as elaborated on by the Public Service Commissioner (F&PA, 24/5)

- The state of the Murray-Darling Basin and whether floodwaters from Queensland will eventually make their way through the whole system to the river mouth in South Australia (they won't according to the responsible authority) (ECA 26/5)
- How officials in the Department of Climate Change and Energy Efficiency became aware of the Government's decision to postpone the emissions trading scheme (ECA 27/5)
- Whether funding for the Department of Immigration and Indigenous Affairs was predicated on projected numbers of asylum seekers (it wasn't) (L&C)
- Changes to the child care rebate arrangements involving a freeze on indexation of the rebate for the next four years (EEWR 2/6)
- The quality of many items of uniform and equipment used by combat troops (the minister has announced a review of the complaints procedures in this area) (FADT, 1/6)
- The admission by Treasury that it had erred in compiling its analysis of the impact of the stimulus package by including only positive comparative data (whereas inclusion of data from all G20 economies would not necessarily have supported the study's conclusion) (Eco, 2/6)
- The frustrating pace of implementation of measures associated with the Northern Territory intervention (CA, 4/6).

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