

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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NATIONAL BROADBAND NETWORK

The final sitting period for the year was dominated by the issue of the National Broadband Network and whether the government would release the business plan provided to it by NBN Co. and, if not, whether the Senate would consider and pass the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (to achieve the structural separation of Telstra prior to further agreements with NBN Co.). A combined motion on 17 November from the Opposition and the Australian Greens for the production of the document and the government's response to the implementation study was not complied with by the same day deadline and the government indicated it would not be releasing the plan until it had been considered by Cabinet, and subject to the redaction of commercially sensitive information.

On 18 November the Senate agreed to another order for the production of documents relating to the complete "Red Book" about the NBN, parts of which had been publicly released earlier in the week. Also on 18 November, the Opposition sought leave to move a motion relating to the government's failure to produce the NBN business plan and, when leave was refused, successfully moved to suspend standing orders to enable debate on a comprehensive motion to apply a range of sanctions for the government's refusal to comply with the order. The sanctions included postponement of any legislation relating to the NBN, a requirement for the minister to provide an explanation to the Senate each day after question time for failure to comply with the order, for senators to be able to move a motion to take note of any explanation (or failure to provide one), and refusal to receive any other documents relating to the NBN or consider any other NBN-related business until the order was complied with. The

substantive motion was lost by two votes but the debate ventilated a range of views on the issues and put parties' negotiating positions on the record.

The Opposition apparently intended to move an identical motion again on 22 November but was advised of the risk that the "same question" rule under standing order 86 would be applied to rule it out of order. This rule is only rarely invoked because the Senate has taken a liberal view of its application and has accepted that the passage of time or changing circumstances can readily transform the same text into a different question. On this occasion, however, it appeared that nothing had changed in the three days since the original motion was determined by the Senate and the motion was not proceeded with.

Pressure was also maintained on the responsible minister at question time, and the NBN business plan was the subject of the general business debate on 18 November and of an MPI discussion on 23 November.

Notwithstanding attempts to delay it, debate on the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 commenced on 22 November but was protracted as the government negotiated to secure the necessary support for it to pass. Extraordinary confidentiality agreements were apparently entered into by some crossbench members and senators in exchange for briefings on the business plan. It was reported that these agreements contained 7 year confidentiality clauses which one senator commented elevated commercial confidentiality above national security as a ground for claiming to withhold information from the Senate. Had a senator or member subsequently disclosed any of the information in the course of proceedings in parliament, no action could have been taken against them because of the law of parliamentary privilege. To this extent, the clauses were ineffectual. Although the confidentiality clauses were successively reduced (and later attributed by the responsible minister to excessive zeal on the part of officials), Senator Xenophon refused to enter into any such agreement and thereby forced the government to release a summary of the plan. Acceptance by the government of amendments moved by Senator Xenophon and Senator Ludlam on behalf of the Australian Greens resulted in the bill gaining the necessary support to pass the Senate on 26 November 2010.

For procedural devices employed by the Opposition in an attempt to prevent debate commencing and to extend the debate, see below under "Suspension of standing orders".

INDEPENDENT YOUTH ALLOWANCE

The other topic of controversy during the fortnight was the question of eligibility of regional students for the independent youth allowance which was the subject of a private senator's bill

introduced by Senator Nash and of a resolution agreed to by the House of Representatives and transmitted to the Senate for concurrence. On 16 November, Senator Nash sought leave to move a motion to bring on debate on the bill and the message from the House of Representatives and, when leave was refused, she moved a suspension of standing orders, a motion which was lost on an equally divided vote.

In the meantime, the government gave notice on 16 November of a motion to refer the bill, the Social Security Amendment (Income Support for Regional Students) Bill 2010, to a committee for inquiry. The motion was agreed to the following day and the President also tabled correspondence he received from the responsible minister, Senator Evans, attaching an opinion from the Attorney-General to the effect that the bill was unconstitutional and should not be introduced in the Senate.

The letter urged the President to take steps to ensure that the bill did not proceed. In his reply to the minister, which was also tabled, the President indicated that he was happy to bring the Attorney-General's concerns to the attention of senators by tabling the opinion but that it was inappropriate for a minister to ask him to take steps to intervene in the Senate's consideration of a bill. This particular bill was within the Senate's powers and it was up to the Senate to decide its fate. The Clerk has subsequently made a submission to the relevant committee on the bill and its constitutional status under section 53 of the Constitution. Senator Nash also made an adjournment speech on the issue on 23 November and asked a question without notice of Senator Evans on 24 November in answering which, Senator Evans noted the consistent views of Senate Clerks on this matter and complimented the President for his independence on the issue.

QUESTION TIME

The temporary order relating to question time and, in particular, the rule that answers must be directly relevant to the question was the subject of a statement by the President on 17 November and of a motion later that day to take note of the statement. The debate raised no new issues but highlighted the role of the presiding officer in keeping ministers focused on a question while not directing them how to answer it.

CONSIDERATION OF PRIVATE SENATORS' BILLS

The consideration of private senators' bills has been before the Procedure Committee for some time but the issue received an added impetus from the various agreements on parliamentary reform drawn up after the last election. The committee reported on

18 November, proposing that a scheme for the consideration of private senators' bills be tried in the first six months of 2011. The Senate adopted a temporary order giving effect to the committee's recommendations on 22 November, to take effect on the first sitting day of 2011. As a consequence, the Senate will meet from 10 am on Mondays to consider government business while the first two hours and 20 minutes of Thursday mornings will be devoted to consideration of private senators' bills. The normal Thursday morning routine of business will then commence. Bills to be debated at this time are to be selected informally by the whips and the selected item is to be the subject of a motion in the Senate in the preceding week. A motion identifying bills to be debated on 10 February 2011 was agreed to on 26 November 2010.

PRIVATE MEMBERS' BILLS

While a procedure has been developed to deal with private senators' bills, the question remains of how the Senate will deal with private members' bills transmitted by the House for its concurrence. The first such bill passed under the "new paradigm" was the Evidence Amendment (Journalists' Privilege) Bill 2010 (introduced by Mr Wilkie MP) which was introduced in the Senate on 15 November and was the subject of a motion to rearrange business to allow it to be considered as if it were a government business order of the day. Debate on the bill proceeded immediately but it was referred to the Legal and Constitutional Affairs Legislation Committee for inquiry and report as the result of a second reading amendment moved by Senator Brandis. The reference also instructed the committee to consider the bill in conjunction with a bill of the same name introduced by Senator Brandis. The committee reported on 23 November 2010 recommending that the Senate pass the Wilkie bill. The bill is yet to be further considered by the Senate but it is now on the list of government business orders of the day on the Notice Paper.

LEGISLATION

Early in the fortnight, there was extensive debate in committee of the whole of the National Security Legislation Amendment Bill 2010 with the Australian Greens moving a significant number of amendments to wind back some of the earlier features of the post-9/11 anti-terrorism laws. None of the amendments was successful. A related bill in the package recast the current Parliamentary Joint Committee on the Australian Crime Commission as the Parliamentary Joint Committee on Law Enforcement with an extended brief to cover additional law enforcement agencies in its program of scrutiny.

Otherwise, much time was spent on the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 which, as already noted, was finally agreed to with amendments on 26 November 2010. The usual number of relatively non-controversial bills was also passed.

SUSPENSION OF STANDING ORDERS

Numerous attempts to suspend standing orders were moved during the fortnight, most of them in connection with consideration of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010. There are two main methods of suspending standing orders. The first is through the use of contingent notices which circumvent the requirement in the standing orders for motions to suspend standing orders to have the support of an absolute majority. The second method is suspension without any notice (requiring an absolute majority). Both methods were employed during the fortnight. Suspensions moved pursuant to a contingent notice of motion usually involve an intermediate step where, once the standing orders have been suspended, a motion is required to give precedence to the motion for which the suspension has been moved. While debates on motions to suspend standing orders are subject to a 30-minute time limit, debates on the precedence motion are unlimited.

The government's attempt to suspend standing orders on 24 November (to put in place a limitation of debate on the telecommunications bill) was thwarted when the precedence motion was debated and the matter was unresolved before the time arrived for the adjournment to be proposed. Consequently, as soon as the Senate met the following day, the government tried again, this time with a motion to suspend standing orders to give immediate precedence to the telecommunications bill over all business till determined. This motion included provision for an additional sitting day on 26 November. Such a motion moved at this time has the effect of suspending all other business, including that scheduled at specific times, but the motion made an exception for questions to be asked at 2 pm for an hour. The motion also included a limitation of debate on the telecommunications bill and provision for certain other business to be transacted once proceedings on the telecommunications bill had been completed.

The Opposition used multiple procedural devices in an attempt to thwart the putting in place of the government's motion. In response, the government moved the closure on multiple occasions (the closure being a motion "That the question be now put" which is not subject to amendment or debate and which may not be moved by a senator who has already spoken, unless they are a minister). After the substantive motion had been agreed to, the Opposition sought to vary its terms by leave and by proposed suspension of standing orders on two

occasions. On the second occasion, the President made a ruling that he could not receive another motion to suspend standing orders. The Senate had already declined to suspend the standing orders to depart from the agreed business and such motions were therefore not capable of being repeatedly made because that would provide a means of permanently obstructing the business of the Senate. The ruling was based on long-established practices (see *Odgers' Australian Senate Practice*, 12th edition, page 169) and was not disputed, although Opposition senators sought leave to take note of it and, when leave was denied, moved to suspend standing orders to enable a motion to take note of the ruling to be moved (also unsuccessfully).

Further procedural manoeuvres were tried when time expired for the consideration of the bill in the committee stage but none was successful and the amended bill eventually passed. The suspension of standing orders in committee to extend the time available is subject to the subsequent adoption by the Senate of the committee's action.

COMMITTEES

At the 40th anniversary conference on the Senate committee system, Senator Milne gave a critical assessment of the future of Senate committees with particular reference to the risks of senators being asked to spread themselves too thinly across too many committees and too many inquiries. When the Select Committee on Reform of the Australian Federation, on 17 November, sought an extension of time to report, she made a statement objecting to the extension and criticising the operations of the committee, its lack of meetings and the risks such operations posed for the credibility of the committee system as a whole.

The realities of the new paradigm were revealed during the fortnight when the Senate received a message from the House of Representatives requesting a change to the membership formula of the Joint Select Committee on Cyber Safety. The change was to decrease the membership by one when a minor party or independent member for the committee could not be identified.

Yet another joint select committee was established, on 22 November, to inquire into a parliamentary budget office and how it might be established and operated. The committee is to report by the end of the autumn sittings in 2011.

There were also attempts to establish an NBN inquiry in the Senate, Opposition senators expressing dissatisfaction with the government's proposed scrutiny vehicle which would be dominated by government members and by members of the House of Representatives.

The dates for estimates hearings for 2011 were set by a resolution on 25 November.

ORDERS FOR THE PRODUCTION OF DOCUMENTS

There was a great deal of activity on this front during the fortnight, not all of it positive. The most significant level of responsiveness occurred in relation to a motion "calling on" the government to produce documents relating to coal seam gas projects rather than ordering the government to produce them. The attachments to the minister's statement in response included 128 documents numbering many thousands of pages and filling 20 document boxes. Copies were also provided on compact disc.

As noted above, the various orders in relation to the NBN met with refusals for the time being with an indication that some of the information would be released at a later date.

Orders agreed to in the previous sitting period for the production of documents relating to the proposed mining tax contained a fall-back feature for the Information Commissioner to examine grounds advanced by the government for nondisclosure of the documents and to provide a report to the Senate (see Bulletin No. 245). The response of the Information Commissioner was tabled on 15 November and indicated the Commissioner's view that he was not empowered by his statute to perform the function asked of him by the Senate or by the agreements on parliamentary reform. A further motion agreed to by the Senate on 22 November drew the Information Commissioner's attention to the powers of the Senate under section 49 of the Constitution and the lack of any legislative constraint on those powers in his enabling statute, and ordered him to reconsider his position. A further order for production of documents on the NBN, agreed to on 23 November, contained the same mechanism for review by the Information Commissioner.

A motion agreed to on 16 November ordered that the Productivity Commission produce a report by the end of May 2011 on the design of a process for selection and review of the inclusion of default superannuation funds in awards and agreements.

Other orders in relation to the BER cost data, the mechanism for varying the GST Agreement with the States and the defect rate for the foil insulation program met with the usual range of responses (the BER reporting structure is still to be agreed with all 22 Education Authorities, the 1999 GST Agreement is no longer in force and it is up to COAG, foil insulation response delayed by circumstances in the chamber on 25-26 November).

On 24 November, the government finally tabled the report of the inquiry into the Montara oil spill last year.

DISALLOWANCE

Notice of a motion given by Senator Kroger for the disallowance of the Extradition (United Arab Emirates) Regulations 2010 had been postponed to the first day of sitting in 2011, the last day for resolving it under the provisions contained in the *Legislative Instruments Act 2003*. When the Senate added an extra day to its program of sittings, it brought forward the last day for resolving the matter to 26 November. Failure to resolve the motion on that day would have resulted in the regulations being deemed to have been disallowed.

On that day, Senator Kroger sought leave to withdraw the motion on the basis of undertakings she had received from the government. There are, however, special procedures for the withdrawal of disallowance notices that preserve the rights of other senators to pursue the matter but who would now be prevented from giving a fresh notice because the statutory window of opportunity had closed. Under these procedures, Senator Ludlam took over the notice and moved it on 26 November but could not convince a majority of the Senate to support the disallowance.

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

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