



# DEPARTMENT OF THE SENATE

## PROCEDURAL INFORMATION BULLETIN

No. 277

13 December 2013

For the sitting period 2–12 December 2013

### LEGISLATION

The first legislative disagreement for the Parliament was resolved when the House of Representatives accepted the Senate's compromise offer on the Commonwealth Inscribed Stock Amendment Bill 2013 after initially disagreeing to the Senate's amendment to reduce the debt ceiling from \$500 billion to \$400 billion. Proceedings were somewhat unusual in that the Senate made a request, as well as amendments, on the consideration of the message from the House disagreeing to the Senate's amendment.

Standing order [140](#) which elaborates on the procedures available to the Senate to give effect to the fourth paragraph of section [53](#) of the Constitution provides that a request may be made at specified stages in the consideration of a bill, including on consideration of any message from the House of Representatives referring to the bill. Despite the availability of this procedure since the standing order was first agreed to in 1903, it is not apparent that the Senate has ever made a request at this late stage in proceedings, as part of an alternative package consequent on the rejection of the Senate's amendments. It has, however, made a request on consideration of a message from the House pointing out that a particular amendment should have been a request for an amendment (Sugar Bounty Bill 1903). The request was a substitute for the original amendment and not an alternative proposal.

Section [53](#) of the Constitution provides that the Senate may not amend a bill so as to increase any proposed charge or burden on the people. It also provides that a request may be made at any stage. The compromise position on the bill involved removal of the debt ceiling altogether and implementation of a range of reporting and accountability measures to ensure that more comprehensive information about government debt was made available to the Parliament. Government debt is funded by the issuing of bonds which are funded from a standing appropriation in the *Commonwealth Inscribed Stock Act 1911*. The projected increase in debt and the need to issue more bonds to cover the debt involved an increase in the charge or burden on the people within the parameters of the Senate's traditional interpretation of the third paragraph of section [53](#). Consequently that part of the compromise package was framed as a request while the other elements of the package were framed as amendments.

When the message was considered in committee of the whole on 9 December, the minister moved a motion that the committee not insist on the amendment disagreed to by the House, to which Senator Milne moved an amendment attaching the request and amendments to give effect to the compromise. Both the request and the amendments were conveyed to the House in the same message. When requests are made at an earlier stage in proceedings, the bill is not read a third time in the Senate and any amendments are not conveyed to the House, until the House has transmitted its decision on the requests to the Senate and the Senate has accepted

the decision. In this particular case, however, the bill had already been read a third time in the Senate, negotiations were proceeding on the disagreement and there was no reason to separate the requests and amendments in different messages. No rights of the Senate were affected by continuing both amendments and requests in one message.

The House of Representatives made the requested amendment, agreed to the further amendments and sent a message to the Senate accordingly.

The major legislative preoccupation during the fortnight was consideration of the package of measures to repeal the carbon tax. The package comprised 11 bills which were reported on 2 December 2013. Standing order [113](#) allows proceedings on bills to be expedited by providing for individual bills to proceed through the various stages prescribed by the standing orders without the inbuilt delays. It also provides for bills to be taken together and a single question put on the package at each stage. At the request of any senator, the chair must divide the question applying the expedited proceedings to enable the separate elements of it to be debated and voted on. In relation to the carbon tax package, the element of the question providing that the bills may be taken together was negated and the bills therefore proceeded separately.

In a related move, an Opposition amendment to a scheduling motion provided for two of the bills to have precedence over the others in the group. The Clean Energy Finance Corporation (Abolition) Bill 2013 was considered first and negated at second reading. The Climate Change Authority (Abolition) Bill 2013 followed but debate was not concluded before the Senate adjourned on 12 December. The remaining bills were not reached.

## DISALLOWANCE

Regulations giving effect to the government's policy on Temporary Protection Visas were disallowed on 2 December 2013.

A Residential Care Subsidy Amendment (Workforce Supplement) Principle and an Aged Care Subsidies Amendment (Workforce Supplement) Determination were disallowed on 12 December 2013.

In the past, the Regulations and Ordinances Committee regularly gave what were known as protective notices for disallowance of particular instruments. This allowed the committee to negotiate with the relevant minister over matters of concern and provided the incentive of a deadline for the minister to cooperate. In a welcome return to past practices, the committee, on 2 December, gave two such notices in respect of two Veterans' Entitlements Determinations. The notices were given for 15 sitting days hence, which on the current sitting pattern will fall on 17 March 2014. Such notices are commonly withdrawn if the committee receives satisfactory undertakings or explanations from the minister.

## CASUAL VACANCY

Senator O'Neill was sworn in on 2 December, having been chosen by the New South Wales Parliament to fill the vacancy caused by the resignation of Senator Bob Carr in respect of his term ending on 30 June 2014 (see Bulletin No. [276](#)). The New South Wales

Parliament has yet to fill the vacancy commencing on 1 July 2014 but Senator O'Neill was nominated for both vacancies by her party.

## ORDERS FOR PRODUCTION OF DOCUMENTS

Several orders for production of documents were agreed to, and fell due, during the period with signs that the new government is developing a slightly more considered approach to making claims of public interest immunity. There were also some signs of flexibility by the Senate in return.

The most contentious refusal by the government to provide information to the Senate continued to be on the topic of “on water operations” by the border protection task force known as Operation Sovereign Borders. Further to the response to the order of the Senate of 14 November 2013 (see Bulletin No. [276](#)) Senator Hanson-Young, also on behalf of Senator Carr, moved a motion noting that only publicly available information had been presented and that the order had not been complied with. A further deadline was imposed and the Senate indicated that it did not accept the claims of public interest immunity or the grounds for making them (which included possible damage to national security, defence, international relations and possible prejudice to law enforcement or danger to the physical safety of persons). The same documents were again tabled by the new deadline and the same claims of public interest immunity advanced.

Another order was agreed to on 5 December for details of an incident that occurred near Christmas Island where an Indonesian vessel was towed (and allegedly damaged) by an official Australian vessel. No documents were provided and very similar claims of public interest immunity were advanced. An almost identical response was provided to an order of 11 December for details about an undetected boat arrival thought to have landed on Christmas Island in early December carrying 27 asylum seekers.

Although Senator Hanson-Young withdrew a notice of motion instructing the Legal and Constitutional Affairs Legislation Committee to hold a further estimates hearing on these “on water operations”, the Legal and Constitutional Affairs References Committee received a reference on 10 December for an inquiry into the claims of public interest immunity raised by the Assistant Minister for Immigration and Border Protection, Senator Cash, and the authority of the Senate to determine the application of such claims. The committee is due to report by 21 February 2014.

Other orders for production of documents were agreed to on the following issues (with only the last one falling due outside the sitting period):

- the East West Link project and documents provided to Infrastructure Australia by the Victorian Government (2 December)
- the Strategic Review of the rollout of the National Broadband Network (3 December)
- the Trans-Pacific Partnership plurilateral free trade agreement (the final text to be provided before signing) (4 December)
- the Korea-Australia Free Trade Agreement and other bilateral or plurilateral trade agreements (at least 14 days before signing) (11 December)

- the WestConnex project and documents provided to Infrastructure Australia by the New South Wales Government (12 December).

No documents were provided in response to any of the orders. This, together with the provision of only publicly-available information on border protection issues, means that the new government has a 100% non-compliance rate with orders of the 44th Parliament, an unprecedented situation.

However, statements responding to each order provided more developed reasons for non-compliance than have generally been provided in the past. Some attempt to identify the potential harm to the public interest that might result from disclosure was also apparent in each case. Claims of public interest immunity were based on the following:

- commercial confidentiality and potential harm to the Victorian government's commercial position; disclosure of Cabinet documents ("which obviously attract executive privilege and public interest immunity"); prejudice to Federal-State relations (East West Link)
- prejudice to the Commonwealth government's commercial interests and NBN Co's ability to negotiate with vendors (NBN Strategic Review)
- potential damage to Australia's standing as a negotiating partner but an undertaking given to table the text in Parliament in accordance with usual practices for examination by the Joint Standing Committee on Treaties (TPP and Korea-Australia FTA).

In contrast, responses continue to be provided to continuing orders for production of documents and the ACCC provided its annual report to the Senate on anti-competitive and other practices by health insurers and providers in relation to private health insurance (tabled 10 December). This year's report focused on the impact of end of financial year advertising in an attempt to persuade consumers to take out private health insurance. The report identified a number of potential problems with such campaigns and proposed some solutions to these problems for consumers including better practices by insurers in relation to the provision of information to consumers.

## INTELLIGENCE AND SECURITY MATTERS

The Attorney-General, on 4 December, made a statement to the Senate about his approval of search warrants executed by the Australian Security Intelligence Organisation on legal counsel to Timor-Leste and a key witness to Permanent Court of Arbitration hearings in The Hague. This followed an unsuccessful attempt by Senator Milne, earlier in the day, to suspend standing orders in order to move a motion calling on the Attorney-General to provide such an explanation to the Senate. During that debate the usual reluctance to speak about such matters in public was widely canvassed and generally supported, although this case raised particularly controversial issues.

## ELECTION PETITIONS

During the period, three separate petitions to the High Court sitting as the Court of Disputed Returns were tabled, each challenging the outcome of the Senate election

in Western Australia. The [first petition](#) was lodged by the Australian Electoral Commission itself following the loss of 1370 ballot papers from the poll, and the very small margins which determined the elimination of particular candidates at certain counts.

## DAYS OF MEETING AND ESTIMATES HEARINGS FOR 2014

The Senate, on 3 December, agreed to its [days of meeting](#) for 2014 which will include a fortnight of sittings beginning on 7 July. An amendment moved by the Australian Greens to relocate these sitting weeks to later in the year was unsuccessful. The pattern of estimates hearings for 2014 and groupings of legislation committees were agreed to on 4 December.

The government was unsuccessful in having the sittings extended on 12 December, after making two attempts to do so.

## CHANGES TO STANDING ORDERS

Standing order [18](#) which establishes the Committee of Privileges was amended on 2 December on the motion of Senator Milne to increase the number of members of the committee from 7 to 8 and provide for one of the members to be a senator nominated by a minority party or independent senator. Such an arrangement had operated in the previous Parliament under a temporary order.

The Procedure Committee presented its [Second report of 2013](#) on 12 December, recommending permanent adoption of the tiered speaking times for the open-ended adjournment debate on Tuesdays and removal of the final gender-specific terminology from the standing orders. The report is due to be considered on the first day of sitting in 2014.

## COMMITTEES

Since the beginning of the Parliament, legislation and references committees have received 45 new inquiries and three Senate select committees have been established. Early indications are that the record levels of reliance by the Senate on its committees, evident in the 42nd and 43rd Parliaments, will continue in the 44th Parliament. The latest select committees are on school funding and the Abbott Government's Commission of Audit. References committees, in particular, received a wide range of new references in addition to the re-adoption of some inquiries from the previous Parliament.

Some proposed references were also defeated, including a reference on the question of clarifying the Commonwealth's powers in relation to marriage, an issue subsequently elaborated on by the High Court's decision to invalidate the ACT's same-sex marriage legislation, handed down on 12 December. A proposal for a select committee on electronic surveillance was defeated on 10 December, but a reference to the Legal and Constitutional Affairs References Committee on a review of the *Telecommunications (Interception and Access) Act 1979* was agreed to on 12 December.

Controversial legislation referred to legislation committees in the last period of sittings by the Selection of Bills Committee was again referred to references committees, along with wider terms of reference, for report early in 2014. In each case, the provisions of

the bills were referred but the motion specified the intention of the Senate that the bills themselves not be called on for debate until the committees have reported, in accordance with standing order [115\(3\)](#). The legislation included the bills to re-establish the Australian Building and Construction Commission and the provisions of the Fair Work (Registered Organisations) Amendment Bill 2013.

In addition to the usual joint committees, two additional joint committees were established, on Northern Australia and on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (briefly established in the last Parliament). The Senate amended the terms of reference of two of the committees (Electoral Matters and Northern Australia) to reflect particular interests of senators. The amendments were subsequently agreed to by the House.

In addition to the referral of the public interest immunity claims of the Assistant Minister for Immigration and Border Protection to the Legal and Constitutional Affairs References Committee (see above), the Senate referred another matter of great institutional interest to the Finance and Public Administration References Committee; namely, the Senate's [continuing order](#) for the production of information regarding contracts entered into by government agencies. The suggestion has again been made that the information required by the Senate is available elsewhere (on the AusTender database). The order, which dates from 2001, was reviewed by the committee in 2002 and 2007 and this further review will serve to show whether the order has achieved its original aim of reducing the unnecessary use of confidentiality clauses in contracts. The role of the Auditor-General in providing regular reports to the Senate on compliance with the order is also expected to be reviewed.

The Regulations and Ordinances Committee recommenced its practice of presenting annual reports on its work, another welcome development.

The dissenting [interim report](#) of the Environment and Communications Legislation Committee on the performance of Australia Post in relation to licensed post offices revealed tensions within the committee over the conduct of the inquiry.

The Privileges Committee presented its [155th](#) report on 12 December, recommending the incorporation in Hansard of a response by Father Frank Brennan, SJ, AO, to remarks made by Senator Brandis on 4 December, demonstrating yet again the speed and simplicity of the right of reply remedy. The report was adopted and the response incorporated in Hansard accordingly.

## CLOSING THE GAP – AN UNUSUAL PROPOSAL FOR CONSIDERATION

The Senate's newest member, Senator O'Neill, formerly a member of the House of Representatives, initiated an unusual motion on 12 December for consideration of the Prime Minister's annual report on the COAG programs for Indigenous Australians, known as Closing the Gap. She was joined by several senators in proposing that the importance of the occasion be highlighted by a "joint meeting" (in other words, a meeting of the House of Representatives to which senators are invited), to which senior

Indigenous leaders would also be invited. The resolution, which was agreed to, also proposed special procedures for consideration of the report in the Senate. Those parts of the resolution relating to the “joint meeting” were transmitted by message to the House of Representatives for its concurrence in accordance with standing order [154](#).

## STATEMENT OF MINISTERIAL STANDARDS

A revised version of the Statement of Ministerial Standards was tabled by the Leader of the Government in the Senate, Senator Abetz, on 11 December. The document includes as an appendix the updated Lobbying Code of Conduct.

## BROADCASTING RESOLUTIONS

Following an inquiry by the Joint Committee on Broadcasting of Parliamentary Proceedings earlier in the year, both Houses adopted revised resolutions on broadcasting of their proceedings and those of their committees. Media commentary focused on the removal of the prohibition on the use of proceedings for satirical purposes which could be said to have been in potential conflict with the principle of freedom of political communication.

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## 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 [http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures).

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