



# DEPARTMENT OF THE SENATE

## PROCEDURAL INFORMATION BULLETIN

No. 279

7 March 2014

Additional Estimates hearings 24–28 February 2014  
and for the sitting period 3–6 March 2014

### ADDITIONAL ESTIMATES HEARINGS 24 TO 28 FEBRUARY 2013

#### ADVICE AND INTERNAL DELIBERATIONS

It was apparent from the additional estimates hearings that the order of the Senate of 13 May 2009 is relied on more and more by senators to require of witnesses better articulated reasons for not providing answers to questions. However, there is less reason to believe that officers have any regard to it, a situation that may change if the revised guidelines for government witnesses are ever finalised, given that the revised guidelines include reference to several orders and resolutions of the Senate including the Privilege Resolutions and the order of 13 May 2009.

The evidence for this was on display in almost every hearing when officers and ministers made bald assertions that advice is never provided and internal deliberations never disclosed. In most cases senators did not press the matter but it would have been open to them or the chair to point out the specific requirements of the 2009 order, referred to at the commencement of every estimates hearing, namely:

- (7) A statement that information or a document ... consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of [the order].

That the chorus of such claims is disingenuous is demonstrated by the number of occasions when governments have voluntarily disclosed advice of various kinds, including legal advice. A list of such occasions over the past 25 years or so is included in the latest supplement to the 13th edition of *Odgers' Australian Senate Practice* (see Chapter 19, [n.181](#)). The list does not include those occasions when advice has been provided in response to orders of the Senate, another category where advice has been provided.

The true position of the government of the day was confirmed some years ago in a [letter](#) from the then Secretary of the Department of the Prime Minister and Cabinet to the then Secretary of the Attorney-General's Department, published by the Legal and Constitutional Affairs Committee in its [2008 report](#) on Budget estimates. Advice is disclosed when it is in the government's interests to do so.

#### ROYAL COMMISSIONS AND PARLIAMENTARY INQUIRIES

In at least two committees (Finance and Public Administration, Legal and Constitutional Affairs), attention focused on the provision to the royal commission on the home insulation scheme of cabinet documents belonging to the previous government. It was explained that the royal commission has the power to order the production of documents, just as it has

the power to order witnesses to appear, and any refusal to comply with an order of the commission may result in contempt proceedings (or criminal prosecution under the Royal Commissions Act). At the same time, the government has indicated that it will make a claim of public interest immunity in respect of the documents, based on the principle of cabinet confidentiality and the public interest in ensuring that cabinet deliberations can take place unimpeded by premature disclosure. (In this case, perceptions of the government's actions were also affected by the convention that an incoming government has no access to the cabinet papers of its predecessor.) The royal commission will then determine the claim.

If this process sounds familiar, it is essentially the same process that applies to parliamentary inquiries, although Commonwealth parliamentary powers, privileges and immunities are provided by the Constitution rather than ordinary statute. Followers of the inquiry by the Legal and Constitutional Affairs References Committee into a claim of public interest immunity in respect of the “on water” operations of Operation Sovereign Borders will be aware of evidence from the Clerk of the New South Wales Legislative Council describing the Council’s procedures for determining public interest immunity claims over documents it has ordered to be produced to it. These procedures include the government handing over all papers in response to an order for production of documents, with any documents subject to a claim of public interest immunity being examined by an independent arbiter who reports back to the Council. The Council then determines whether to publish the arbiter’s report and, in appropriate cases, whether to publish the disputed documents. The Council’s powers to obtain documents, and the government’s obligation to hand them over, were confirmed in a series of court decisions in the 1990s (*Egan v Willis* and *Egan v Chadwick*). The need to clarify the Council’s powers arose from the absence of any constitutional conferral of powers on the legislature (unlike the Commonwealth Houses) but the courts found that the inquiry powers of the Council were inherent, and extended to whatever was reasonably necessary for the Council to undertake its functions as a legislature in the context of a system of responsible government (even though the courts also confirmed that the Council did not have a general power to punish for contempt).

Why are these procedures not followed in the Senate with its much greater powers? This is a very complex question that is addressed to some extent in chapters 2 and 19 of *Odgers*. In part, the answer lies in the approach the Senate has always taken to disputes with the executive branch of government. Rather than enforce its undoubted powers through the contempt jurisdiction (by, for example, citing and punishing for contempt ministers who fail to comply with its orders), the Senate has sought to resolve these matters by political means, at the same time declaring its right to determine properly founded claims by governments to withhold information. The fact is that there is no agreed process for determining such claims and the opportunity for the courts to determine the extent of the Senate’s powers is unlikely to arise as it did in NSW. Governments resist handing over documents to the Senate because they get away with it.

In this case, officers cited the sanctions in the Royal Commissions Act as a compelling reason to comply with the royal commission’s orders. The irony of the differing approaches

to the two kinds of inquiries (both backed up by substantial powers) appeared lost on everyone.

#### BORDER PROTECTION MATTERS – PURPORTED PENALTY AGAINST A SENATOR

One area where the flow of information was effectively non-existent continued to be in relation to the government’s “on water” border protection activities which come under the operational name of Operation Sovereign Borders which, although not a military operation, is commanded by a lieutenant-general on secondment from the ADF. Senators’ frustration with the government’s approach spilled over at several points but one widely-reported incident involved a senator accusing the lieutenant-general of being involved in a political cover-up. The hearing was briefly suspended and, on its resumption, the senator withdrew the comment.

On the following day, the House of Representatives purported to “admonish” the senator concerned for his conduct **in a Senate estimates hearing**, on the motion of an independent member who was apparently a classmate of the lieutenant-general at military school. Such an action by another House is of no effect and is an offence against the principles of comity that are a reflection of the independence of each House. While a House of Parliament may inquire into the conduct of its own members and exercise full disciplinary control over them, it has no such powers over the members of another House, not least in respect of proceedings of that other House. It is not the first time that the House of Representatives has purported to pass judgement on the conduct of a senator as a senator. (For other examples, see Odgers, [p. 589](#).) In contrast, the Senate has declared by resolution that it would not be proper for the Senate to seek to censure a private member of the other House. The impropriety of the House’s action on this occasion is perhaps tacitly acknowledged by the reference in the *Votes and Proceedings* to “the Opposition Defence spokesperson” rather than to Senator Conroy by name. However, the Hansard leaves no room for doubt.

#### ALLOCATION OF TIME

In several committees, there was much discussion of time allocated to senators to ask questions and some suggestion that the bulk of the time should be allocated to non-government senators. It is open to committees to determine in advance the allocation of time to particular agencies or outputs. Given that any senator may attend estimates hearings and ask questions, it may not be practicable for committees to pre-program in minute detail the allocation of time to individuals. Generally, committees follow the practices of the Senate where the standing orders applying to committees do not provide for particular matters. Thus, a committee chair would be expected to follow the practices of the Senate in allocating the call amongst senators in attendance. In practice, most questions at estimates are asked by non-government senators but there is no rule preventing or limiting the participation of government senators in the process.

## CHAIRS AND DEPUTY CHAIRS

Standing order 25(9)(d) provides for the deputy chair of a references or legislation committee to act as chair when the chair is absent from a meeting of the committee. For the purposes of estimates hearings, it has often been the case that, in the absence of the chair, another government senator has been elected to the chair. It was therefore noteworthy that in the absence of the Chair of the Rural and Regional Affairs and Transport Legislation Committee from the estimates hearings on the afternoon and evening of 25 February, the Opposition deputy chair took the chair and conducted the proceedings without controversy or incident.

## APPEARANCE OF AGENCIES AT ADDITIONAL ESTIMATES

For the most part, agencies appear at estimates hearings at the request of the relevant committee and without demur. Sometimes, questions arise as to the status of particular agencies and whether or not the staff are “officers” for the purposes of estimates. There is no definition of “officer” and, over the years, committees have examined bodies that have a relationship with the budget, whether it be in the form of recipient of funds, contributor of dividends (Australia Post, Telstra when it was government-owned), or performer of statutory functions. The list of government bodies, originally developed and maintained by the Finance and Public Administration Committee and its predecessors and now maintained by the Department of Finance, was an attempt to map the extent of government activity including by creating the first list of statutory authorities. It can be used as a guide but has not been adopted as definitive.

For additional estimates, one factor may be whether the agency in question is receiving any funding through the additional appropriations, but most mainstream agencies are willing to appear to assist committees with their inquiries, regardless of whether they are receiving funds. An example close to home is the Department of the Senate which appeared at the additional estimates despite having no funding in the relevant appropriation bill.

In contrast, the responsible minister objected to the appearance of the Copyright Agency Ltd because of its status as a company limited by guarantee. It was pointed out that the agency performed statutory functions under the *Copyright Act 1968* but the committee did not press the matter and the agency did not appear. In these circumstances, it is always open to a committee to put questions on notice to an agency.

## USE OF DOCUMENTS AT COMMITTEE HEARINGS

In the previous Parliament, most committees adopted a practice of requiring senators who intended to question witnesses on the basis of documents in their possession to provide a copy to the witness, at the least. When questioning officers of the NBN on 25 February on the basis of documents in his possession, a senator refused to provide a copy to the witnesses. Another senator drew on the standing orders that usually apply to debate in the Senate to move that the senator table the documents he was quoting from. It is not clear whether a vote was taken, but when the senator refused to table the

documents, the chair noted that the refusal could be reported to the Senate. Unlike the Senate, committees have no power to enforce decisions by applying sanctions, although, in this case, the chair could have given the call to another senator.

### MATTERS COVERED

During five days of hearings, many different subjects were covered including such matters of controversy as the withdrawal of the food star rating website and a conflict of interest affecting the chief of staff to the Assistant Minister for Health, the provision of Cabinet documents to a royal commission, industry assistance and job losses (the automotive industry, SPC Ardmona, Qantas), Australia's border protection activities and the impact on relations with Indonesia, events on Manus Island in the detention centre, and the execution of search warrants by the AFP on the offices of the Seven Network in relation to possible payments to Schapelle Corby. Budget cuts and job losses loomed large for most agencies, many of which were expecting significant deficits.

Other matters covered included the following:

- changes at the top of the Future Fund
- the purchase of lifeboats for use in conjunction with Operation Sovereign Borders
- progress in the roll-out of the NBN, a perennial estimates topic
- the ABC's corrections policy
- the cost of the forthcoming half-Senate election in Western Australia
- Treasury's macroeconomic outlook
- inquiries by the Australian Sports Anti-Doping Authority into allegations of doping within football codes
- the adequacy of the ACCC's powers
- diplomatic relations with various parts of the world
- the proposed sale of various Defence assets
- costs of the various Fair Work Commission inquiries into the Health Service Union
- proposed cuts to the foreign aid budget
- ASIO's new and, as yet, unoccupied building.

Hearings concluded with Indigenous matters on 28 February, although with most Indigenous policy and programs now located in the Department of the Prime Minister and Cabinet, the hearings are less of a cross-portfolio exercise than in previous times.

No committees made use of the procedures for spill-over days (see Bulletin No. [278](#)).

## SITTING PERIOD 3 TO 6 MARCH 2013

### WESTERN AUSTRALIAN HALF-SENATE ELECTION

The Court of Disputed Returns handed down its decision on three election petitions challenging the outcome of last year's half-Senate election in Western Australia after it had been revealed that 1370 ballot papers were lost. The Court held that it was precluded by the *Commonwealth Electoral Act 1918* from reconstructing the result from earlier records of the lost ballot papers. As the lost ballot papers, combined with the closeness of the count, inevitably affected the result of the election, the Court declared the election void.

The President tabled copies of the orders provided by the Court when the Senate met on 3 March. The President also tabled a letter from the Prime Minister on 4 March setting out advice that had been provided to the Governor-General in relation to the proposed election timetable. The Western Australian Governor issued writs on 28 February for an election to be held on 5 April. The writs are to be returned by Sunday, 8 June which should ensure that all newly-elected senators can begin their terms on 1 July 2014.

### LEGISLATION

The second bill in the group of carbon tax repeal bills, the Climate Change Authority (Abolition) Bill 2013, was negatived at second reading on 3 March, joining the Clean Energy Finance Corporation (Abolition) Bill 2013 which was negatived on 10 December. The remaining bills in the package were then brought together and debated but the second reading debate had not been concluded by the end of the week. For background to these bills, see Bulletin No. [277](#).

The Social Services and Other Legislation Amendment Bill 2013 was extensively amended on 5 March by the Government, Opposition and Australian Greens, including to remove the provisions relating to charities, interest charges and student start-up loans. Also passed was the bill establishing salary arrangements for the incoming Governor-General.

### ORDERS FOR PRODUCTION OF DOCUMENTS

Of several orders due, only one was complied with, an order for the modelling and associated reports referred to by the Prime Minister and the Minister for Trade outlining the economic costs and benefits of the Korea-Australia Free Trade Agreement. The Minister for Finance, on 3 March, provided a report on the subject prepared by the Centre for International Economics (a private economic research agency) for the Department of Foreign Affairs and Trade, despite its commercial-in-confidence marking.

Also on 3 March, the following orders were not complied with for the reasons stated:

- for the report of the advisory panel convened to advise the Minister for Industry on government assistance to SPC Ardmona – declined on the basis that the report contained commercial-in-confidence material that the company had requested not be released, and that the report was used specifically for the purposes of Cabinet;

- for a copy of the Review of Operation Sovereign Borders Vessel Positioning and accompanying documents identified in part 10 of the Review terms of reference – Executive Summary produced but accompanying documents declined for reasons of possible damage to national security, defence or international relations (including information obtained in confidence from other governments), possible prejudice to law enforcement investigations and methods, and possible endangering of life or physical safety;
- for details of the number and cost of lifeboats purchased for use in border protection obligations and details of the procurement process – some general information provided and a total cost of \$2.5 million disclosed but documents withheld on the same grounds as above;
- for the 2006 KPMG report on the adequacy and efficiency of ABC funding commissioned by the Howard Government – declined on the basis that it would disclose the deliberations of Cabinet.

New orders agreed to during the week were for any reports received from the National Commission of Audit (due 17 March) and a copy of the letter provided to the Assistant Health Minister by her chief of staff on his engagement (due 5 March). The Finance Minister declined to produce the Audit Commission's Phase 1 report as it was being considered by Cabinet as part of budget preparations. The Assistant Minister for Health declined to produce her chief of staff's letter on privacy grounds and was censured for failure to comply with the order among other things (see below). Notices given for further modelling on the Korea-Australia Free Trade Agreement and the National Education Reform Heads of Agreement with the states and territories and associated documents were not reached on 6 March.

#### PUBLICATION OF IN CAMERA EVIDENCE PROVIDED TO A COMMITTEE

One of the most significant decisions of the Senate during the week led to the publication of evidence provided to a committee in the previous Parliament and not published by the committee. The evidence comprised thousands of pages of annexures to a report by the Fair Work Commission into the National Branch of the Health Services Union, involving allegations against the former member for Dobell, Mr Thomson. While the former Education, Employment and Workplace Relations Legislation Committee published the 1100 page report, it did not publish the annexures but made them available for confidential inspection by senators.

With criminal proceedings against Mr Thomson having concluded in the Victorian courts, Senator Fierravanti-Wells moved a motion authorising publication of the documents which had passed into the custody of the Senate at the end of the previous Parliament. Senator Faulkner moved an amendment to the motion noting that, while the publication of in camera evidence was unusual, the passage of time, the publication of many of the documents in other contexts, the completion of criminal proceedings, and the absence of any grounds on which to invoke the Senate's sub judice convention had reduced the sensitivity of the material.

## PRIVILEGES COMMITTEE

**O**n the motion of the Chair of the Privileges Committee, Senator Collins on 4 March, the Senate adopted the conclusions and recommendation of the committee in its 152nd report that no contempt be found in respect of the possible unauthorised disclosure of the draft report of the Select Committee on Electricity Prices. This was a matter outstanding from the previous Parliament.

## CENSURE OF MINISTER

**A**fter several weeks of questions in the Senate and estimates hearings about an alleged conflict of interest on the part of the chief of staff to the Assistant Minister for Health and instructions from the minister's office to the department to remove a health star rating website, the Leader of the Opposition in the Senate, Senator Wong, moved a motion censuring Senator Nash, during question time on 5 March. The censure motion was moved pursuant to a suspension of standing orders after leave was refused to move the motion. The motion censured Senator Nash for misleading the Senate, failing to respond to an order for production of documents (see above) and failing to account to the Senate for her actions. The motion was agreed to.

## COMMITTEE INQUIRIES

**N**ew references committee inquiries were agreed to in relation to recent events at the Manus Island detention centre, the use and appropriateness of environmental offsets, alleged breaches of Indonesian territorial waters by Australian vessels in connection with Operation Sovereign Borders, initiatives to maintain Qantas as a strong national carrier, and investigative methods of the AFP in relation to non-criminal matters. Several bills were also referred to committees including the bill to amend the Qantas Sale Act and the latest tranche of amendments to the Fair Work Act.

In relation to committees conducting inquiries into controversial events overseas, the scope of the inquiries will no doubt be influenced by the fact that parliamentary privilege does not operate extraterritorially.

## DISALLOWANCE

**P**rotective disallowance notices given by the Chair of the Regulations and Ordinances Committee (see Bulletin No. [277](#)) were withdrawn after the committee received satisfactory answers from the relevant minister. Motions to disallow civil aviation instruments and a determination revoking the Clean Energy Finance Corporations ability to auction carbon credits were both negated on 6 March.

## PUBLIC INTEREST IMMUNITY CLAIMS

**T**he Legal and Constitutional Affairs References Committee presented its report on a claim of public interest immunity made by the Assistant Minister for Immigration and Border Protection in relation to the "on water" operations of Operation Sovereign

Borders. The committee recommended that the Procedure Committee examine the process for independent arbitration of public interest immunity claims employed by the NSW Legislative Council, and its possible adaptation to the Senate. The recommendation, which includes conferral of inquiry powers on the Procedure Committee for the purpose of the inquiry, was adopted by the Senate.

---

---

## 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).

Inquiries: Clerk's Office  
(02) 6277 3364