



DEPARTMENT OF THE SENATE

PROCEDURAL INFORMATION BULLETIN

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For the sitting period 12 to 15 October and Supplementary Budget Estimates hearings 19 to 23 October 2015

Sitting period 12 to 15 October 2015

CASUAL VACANCY

The fifth casual vacancy for the year was created by the resignation of Senator Penny Wright on 10 September 2015 (see Bulletin [No. 296](#)). The vacancy was filled by Senator Robert Simms who was chosen by the Parliament of South Australia on 22 September and sworn in as a senator on 12 October, making his first speech the following day.

QUESTIONS OF ACCOUNTABILITY

The new ministry and ministerial arrangements, notified to the Senate on 12 October, gave rise to some questions about which minister had responsibility for particular policy areas, including water, the Murray Darling Basin Plan and water buy-backs. [The subject was further explored in the supplementary budget estimates hearings.]

Changes to the Opposition shadow ministry were notified to the Senate on 13 October. The impact on committees of front bench changes and the filling of casual vacancies meant that there were numerous changes in committee membership processed during the week. There were also changes to the temporary chairs panel.

LEGISLATION

The Fair Work Amendment Bill 2014 was passed on 13 October with amendments moved by some cross-bench senators. An attempt to finish the bill the previous evening failed when a motion to extend the hours of meeting was not concluded before the time arrived for the adjournment to be proposed.

Senators exercised their right to require a committee stage on the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 in the absence of circulated amendments. After several hours of detailed questioning on the rationale and expected impact of the proposed trial, the bill passed without amendment on 14 October.

Another bill which passed without amendment on 15 October, the Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Laws) Bill 2015, was later the subject of statements by leave by senators who had intended to participate in the debate but had missed the opportunity.

In an unusual move, Senator Xenophon joined the Attorney-General in sponsoring a bill to amend the *Criminal Code Act 1995* to provide for the retrospective application of offences of murder and manslaughter of an Australian citizen or resident overseas, and to enable prosecution of these offences in Australia, under Australian law, in certain circumstances. An earlier version of the bill had been introduced by Senator Xenophon as a private senator's bill in response to a particular unsolved crime committed against an Australian woman in Brunei in 1994. Members of the woman's family observed the introduction of the bill, known as "Anthea's law", from the public gallery.

SECONDARY LEGISLATION AND DISALLOWANCE

The Regulations and Ordinances Committee, at the request of the then Appropriations and Staffing Committee, has for some time been monitoring regulations made under hastily passed legislation to respond to the High Court's decision in the *Williams (No. 1)* case and in light of the decision in *Williams (No. 2)* (see Bulletin [Nos. 264](#) and [281](#)). In another example of the committee scrutinising the constitutional authority for expenditure authorised by regulation and insisting that the minister provide adequate explanations (see Bulletin [No. 288](#)), the committee again had to maintain a protective disallowance notice in place until the last day for resolving the disallowance under the *Legislative Instruments Act 2003*, in order to receive (on the minister's fourth response) the further information and assurances it required to determine its position on the regulation. The Committee tabled two Delegated Legislation Monitors during the week (Nos. [12](#) and [13](#)) charting its scrutiny of the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [[F2015L00572](#)].

ORDERS FOR THE PRODUCTION OF DOCUMENTS

Two orders for the production of documents agreed in the previous sitting period (see Bulletin [No. 296](#)) fell due on 12 October.

An order for specified documents in relation to NBN Co Limited was partially complied with on the due date in respect of one of the requested items. Another item was not yet available but would be released publicly, while a claim of commercial confidentiality was made in respect of the remaining three items with some attempt to explain the harm that disclosure would cause.

An order for information from a Department of Veterans' Affairs Client Services Survey was met with a response from the House of Representatives minister, referring the initiating senator to a website where partial information was published, and with no public interest immunity claim in respect of the information not provided. Despite these deficiencies in the response, it was at least presented by the deadline.

Further orders were made as follows:

- for redacted copies of reports produced under the Nous Group contract and associated documents – agreed 15 October, not produced. (No claim of public interest immunity was advanced but the report was described as a deliberative document which would not be released. A further response on 21 October produced a work order and variation that were considered to be within the scope of the order.)
- for a KPMG review of the Disability Support Program – agreed 15 October and produced by the same day deadline
- for any advice received by Food Standards Australia New Zealand on the interpretation of the Food Standards Code and terms of reference and a contract relating to nanotechnologies – agreed 15 October, documents produced 22 October.

Most orders for production of documents are one-off in nature but the Senate now has a significant collection of orders of continuing effect that ensure the regular production of a range of information about government activities, including the scope and nature of contracting activities. An order agreed to in 1999 for the ACCC to produce a regular report (initially 6-monthly, now annually) on anti-competitive practices in the private health insurance industry was initiated by Senator Brian Harradine as an amendment to the motion that the report of the committee of the whole (on a health legislation amendment bill) be agreed to.

Since then the ACCC has faithfully complied with the order, producing reports that highlighted consumer issues in relation to private health insurance (see, for example, Bulletin [No. 277](#) and the Occasional Note attached to Bulletin [No. 249](#)). The latest report (which may be the most substantial one yet) was presented out of sitting on 20 October and highlighted potentially misleading claims by private health insurers about 100% cover. Characterised in the press as “scathing”, the report used case studies to describe the complexity of private health insurance products on offer and the pitfalls for consumers arising from unilateral changes to policy conditions, which were potentially unlawful.

FORMAL BUSINESS

In what has become quite a regular practice, the Deputy President, on 12 October, drew the Senate’s attention to the rules for formal motions which require that they be determined without amendment or debate. Following impassioned statements by leave on a motion relating to marine protection, he reminded the Senate of the Procedure Committee’s second report of 2011 and its caution against statements being made by leave which may amount to de facto debate.

Standing order 101 provides for the division bells to be rung for one minute on successive divisions. The result of a division on a formal motion on 12 October was queried when

the numbers of senators voting appeared low. A reason advanced was that the bells had only been rung for one minute. The vote was taken again by leave and the bells rung for four minutes. The margin between the ayes and noes remained identical on the second occasion although the totals on each side increased marginally.

A motion for an order for production of a document (see above under ‘Nous Group contract’) was objected to as a formal motion on 13 October and a suspension of standing orders moved to allow the motion to be dealt with was negatived. A revised notice was given the following day and agreed to as a formal motion on 15 October, apparently after further negotiations to overcome the reason for denial of formality in the first place.

STREAMLINED PROCEDURES FOR EXTENSIONS OF TIME FOR COMMITTEES TO REPORT AND AUTHORISING COMMITTEES TO MEET DURING SENATE SITTINGS

The new streamlined methods for dealing with routine committee business came under the spotlight on two occasions during the week. On 12 October, a senator asked for the question to be put on a one-week extension of time for the report of the Rural and Regional Affairs and Transport Legislation Committee on the provisions of the Shipping Legislation Amendment Bill 2015, apparently as a protest against the feared impact of the bill on Australian employment. The motion was lost and the committee presented its report later that afternoon as ordered. Two dissenting reports on the same legislation were presented separately the following day.

On 15 October, a minister protested that the details of a proposed committee meeting had not been circulated early enough, although the proposal had been listed on the draft order of business considered by the preparatory whips’ meeting. The matter was deferred by leave until later in the proceedings, and dealt with uneventfully then.

RESPONSES TO COMMITTEE REPORTS

The President presented a response on 14 October to the final report of the Finance and Public Administration Legislation Committee on the Department of Parliamentary Services. Some of the recommendations, which were accepted, were for the regular provision of information to the committee prior to each round of estimates, a practice already followed by the Senate Department and the Parliamentary Budget Office in relation to certain information.

PROPOSED MATTERS OF PRIVILEGE

The President made a statement on 12 October in relation to two matters of privilege raised under standing order 81 to which he did not grant precedence. Both matters

concerned the unauthorised disclosure of committee reports prior to presentation. In one case, the President determined not to grant precedence because the committee concerned had not fulfilled the requirements of the 1996 and 2007 resolutions which require committees to attempt to identify the source of the disclosure and make an assessment of the harm done to their capacity to function effectively. Moreover, such matters should only be raised as matters of privilege if the Privileges Committee has been consulted about whether it warrants investigation using the Senate's contempt power.

The second matter was more complicated because it involved the final report of a joint select committee which had ceased to exist and which could not therefore carry out the preliminary inquiries and assessment of harm envisaged by the resolutions. In its 152nd report, the Privileges Committee identified a gap in the resolutions in respect of select committees and suggested that such committees affected by an unauthorised disclosure consider seeking a short extension to consider the matter further. The impracticality of this solution for a joint select committee caused the President to ask the Privileges Committee to consider whether it was prepared to undertake the preliminary inquiries and assessment. The committee agreed to do so and concluded that the matter was not one that warranted an exercise of the contempt jurisdiction. However, the committee – and the President in his statement – reiterated that all unauthorised disclosures are contrary to the standing orders and had the potential to cause harm. The President agreed with the recommendation of the Privileges Committee that he draw the resolutions and their rationale to the attention of all Senate committees.

Supplementary Budget Estimates hearings 19 to 23 October 2015

NEW RULES – PROGRESS

The supplementary budget estimates hearings proceeded largely without incident, although there continued to be pockets of discontent about the amendment of standing order 26 which requires programs to remain open until senators have completed their questions or have agreed to place them on notice. This rule caused some committees to fall behind their programs and to flag additional hearings.

REPRESENTATION OF SENATE MINISTERS BY PARLIAMENTARY SECRETARIES

There were some instances of Senate ministers being replaced for short periods of time in respect of their own portfolios by parliamentary secretaries (currently known as assistant ministers), in contravention of the Senate order which proscribes such practices. A Senate minister may be represented by another Senate minister in accordance with normal ministerial substitution practices but not by a parliamentary secretary. The newly increased number of Senate parliamentary secretaries and ongoing turnover of staff in ministers' offices may have led to some "defamiliarisation" with the usual practices. The purpose of the restriction is to reinforce the accountability of Senate ministers to the Senate in respect of their own portfolios, given that the estimates hearings are, in effect, a substitute for the committee of the whole stage of the appropriation bills.

SUB JUDICE CONVENTION AND OTHER FACTORS INFLUENCING A COMMITTEE'S RECEIPT OF DOCUMENTS

Ministers may advance public interest immunity grounds for not providing information, but committees may also determine whether to receive information. The Rural and Regional Affairs and Transport Legislation Committee decided to exercise caution in exploring an alleged fraud against Horticulture Innovation Australia Ltd and sought advice from the Clerk about the *sub judice* convention, which it subsequently published. This convention is a restriction on debate, applied by the chair, which is designed to avoid debate (or questioning) which could involve a substantial danger of prejudice to proceedings before a court, in the absence of an overriding public interest in the Senate or a committee discussing the matter.

Similarly, the Environment and Communications Legislation Committee determined not to receive a document which a senator sought to table, apparently an internal NBN document containing details of access dates, the disclosure of which it was asserted could result in commercial detriment to the company. However, questions, including questions on notice, were asked about it in an attempt to elicit as much information as possible.

INDEPENDENT STATUTORY OFFICERS

A portfolio secretary was cautioned about answering for a statutory officer, but there were no egregious incidents, as there have been on some occasions in the past, of secretaries purporting to direct statutory officers in respect of their answers. In one committee there was some disputation about whether a minister could add to an answer from an independent statutory officer, and reference was made to advice provided by the Clerk to the Deputy President which had been widely distributed. The relevant part of that advice is as follows:

3. In what cases should a Minister be present at the table if a statutory officer-holder is giving evidence?

It is not possible to be prescriptive about this, particularly as SO 26(5) refers to committees examining estimates seeking explanations from Ministers and officers.

On occasions it may be helpful for an independent statutory office holder to be joined at the table by the responsible Minister (if applicable) and portfolio head (again, if applicable), as a variety of views may assist the committee and the department may have a particular function in relation to the statutory authority that the secretary can answer for. But the statutory office holder should be allowed to give evidence freely and without interruption or hindrance.

This should not be interpreted as preventing a minister from adding to an answer.

EFFECT OF STANDING ORDER 25(13)

While standing order 25(13) enjoins legislative and general purpose standing committees not to inquire into matters that are being examined by a select committee, the restriction refers more to the duplication of inquiries than to merely touching on the same subject matter. There is no basis in the standing or other orders to find that the existence of a references committee inquiry inhibits estimates questioning in similar areas. The only exception is where a legislation committee has a bill reference. Although the rationale is not entirely consistent, the accepted practice is that the committee should not sacrifice time that could be spent on other matters by having a de facto inquiry into the bill in the midst of estimates. This practice is not always followed if there is consensus that a short focus on a bill in estimates may be of greater assistance to a committee in the circumstances.

Indeed, estimates hearings are sometimes a useful opportunity to obtain supplementary information of relevance to other inquiries. The Legal and Constitutional Affairs Legislation Committee, for example, was able to obtain information about the government's response to a recent references committee inquiry (handling of the Man Haron Monis letter), including the encouraging news that the Attorney-General's Department would be engaging with the Senate about training for SES officers in parliamentary accountability.

PUBLIC INTEREST IMMUNITY CLAIMS, ADVICE

The *sub judice* issue surfaced on a couple of occasions but, apart from the matter discussed above, there was no basis for the convention to operate to restrict questions about an executive government inquiry into the conduct of a Deputy President of the Fair Work Commission, or a possible Federal Court appeal in a civil matter (both arising in the Education and Employment Legislation Committee).

While there were no explicit public interest immunity claims, there was discussion around the topic in numerous committees and the usual furphies about advice were canvassed. While there are long-standing practices about committees voluntarily refraining from pressing for detail on matters that may be harmful to the public interest if disclosed, there is no established convention beyond the practices that are articulated in the order of the Senate of 13 May 2009, which includes the following:

- (7) A statement that information or a document is not published, or is confidential, or 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 paragraph (1) or (4).

In other words, there is no established immunity in relation to advice as a class of documents and there is certainly no recognised restriction on questions about the provision and timing of advice or of meetings of Cabinet and its committees. Claims must be made in respect of particular documents.

The range of topics covered was varied as usual:

- damage to a certain marble coffee table (FPA, 19/10)
- economic analysis by the PBO including of the structural imbalance in budgets (FPA, 19/10)
- costs and savings of the now-cancelled move of Immigration and Border Protection from Belconnen and the economic impact on the town centre (LCA, 19/10; FPA, 20/10)
- APSC Commissioner's views about the FOI laws (FPA, 19/10)
- enterprise bargaining developments (various)
- the cost of off-shore detention and the treatment of a pregnant asylum seeker allegedly raped on Nauru (LCA, 19/10)
- potential culprits for an oil spill on the Great Barrier Reef (EC, 19/10)
- the size of the font on maximum-sized Senate ballot papers and reductions in the number of polling booths (FPA, 20/10)

- further projected job losses at the Australian Submarine Corporation and future naval shipbuilding projects (FPA, 20/10; FADT, 21/10)
- Defence staffing losses (FADT, 21/10)
- SBS proposals for engaging with Muslim youth (EC, 20/10)
- *Détente* between the Australian Human Rights Commission and Department of Immigration and Border Protection (LCA, 20/10)
- arts funding (EC, 20/10)
- the decision to withdraw funding from a research centre planned for Flinders University with links to the Copenhagen Consensus Centre (EE, 21/10)
- the Treasury Secretary's economic assessments and gender equity in senior Treasury ranks (Ec, 21/10)
- Future Fund investments (FPA, 20/10)
- ATO scrutiny of Uber (Ec, 21/10)
- resource constraints on the Independent National Security Legislation Monitor (LCA, 20/10)
- ASIC activity in relation to complaints of financial planning scams (Ec, 21/10)
- the incidence of emoji use in diplomatic communications (FADT, 22/10)
- policy changes in relation to family tax benefits (CA, 22/10)
- conduct of a Deputy President of the Fair Work Commission (EE, 22/10)
- APRA regulation of bank lending standards (Ec, 22/10)
- possible cuts to school funding for disabled students (EE, 22/10)
- appointment of a new chief executive at Airservices Australia (RRAT, 19/10).

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.

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