



# Procedural Information Bulletin

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## COVID-19 pandemic response

The Senate convened for the last week of the Autumn sittings in a world upturned. The Parliament's program was swept aside so that each House could focus on the Commonwealth Government's economic response to the coronavirus/COVID-19 pandemic before ostensibly adjourning until the Spring sittings. However, the Houses also adopted resolutions that would allow sittings to occur before that time, including in a different "manner and form" than provided for in their standing orders.

## Unusual sitting

Extended pairing arrangements were foreshadowed in the weeks prior to the sitting. According to *Odgers' Australian Senate Practice*, pairing is an informal arrangement between parties:

...whereby a senator who is absent and who is expected to vote on one side in a particular question is "paired" with a senator who is expected to vote on the other side and who is either also absent or who deliberately does not vote in order to cancel out the effect of the other senator's absence. [[14th ed., p.293](#)]

The rationale of pairing is that decisions of the Senate should not be determined by misadventure or by the fortuitous absence of a senator, and should instead reflect the composition of the Senate as elected. Thirty-nine of the Senate's 76 senators were granted leave from the day's sitting, so just under half were in attendance. However, in the end, no divisions were held, with parties instead recording their dissent from votes by leave.

The Senate adopted some practical and procedural adjustments for the sitting. These included allowing senators to speak from seats other than their own – in practice, in accordance with an unofficial seating plan – and to vote in divisions from a position behind the banks of seats on the relevant side of the chamber, for social distancing purposes.

Other adaptations included committee of the whole being chaired from the President's chair, rather than the chair between the Clerks; doors remaining open throughout the day to enhance hygiene; minimal distribution of papers; and self-serve bottled water and hand sanitiser being made available at strategic points in the chamber.

## Economic response

The government's response package comprised eight bills, containing numerous sizeable fiscal measures directed at supporting businesses and individuals. Those bills passed the House shortly after 5pm, were reported in the Senate around 6.40pm, and passed some 3 and a half hours later. A number

of second reading amendments were passed – expressing views and calling for action in relation to the bills, but not affecting their content – as well as one committee stage amendment, proposed by the Government, to the Coronavirus Economic Response Package Omnibus Bill 2020.

Schedule 11 of that bill applies a “COVID-19 supplement” of \$550 per fortnight (or another amount determined by legislative instrument) to various categories of income support recipients, initially for a period of 6 months commencing in late April 2020. The government amendment proposed an extraordinarily broad, but time-limited, provision empowering the Social Services Minister to modify “any provision of the social security law relating to the qualification of persons for a social security payment, or to the rate of a social security payment” by way of legislative instrument. The Senate is usually wary of provisions which give ministers broad discretion to vary primary legislation (through so-called Henry VIII clauses), which explains the Opposition’s insistence that the power - and instruments made under it - expire after 31 December 2020. Instruments made under this provision are certain to attract the attention of the [Scrutiny of Delegated Legislation Committee](#) in coming months.

The Finance Minister informed the Senate that the power would initially be used to extend the COVID-19 supplement to new categories of income support recipients, namely those receiving Austudy, Abstudy and youth allowance (student) payments, and to vary relevant partner income tests. Ministers also foreshadowed the use of the power in other circumstances.

Although the provision is expected to lead to significant expenditure, the Senate was able to make the amendment despite the constraints on its financial powers in section 53 of the Constitution. The third paragraph of section 53 prevents the Senate amending any bill “so as to increase any proposed charge or burden on the people”. The Senate interprets this as preventing amendments that would “clearly, necessarily and directly” increase expenditure under a standing appropriation: [Odgers, 14th ed., p. 412](#). The Senate could not amend the bill to expand the categories of people receiving the supplement; it could only have requested the House to do so. However, the government amendment empowers the relevant minister to authorise the expenditure by legislative instrument, preserving the government’s financial initiative. As Odgers notes, a request under section 53 is not regarded as necessary where an amendment “authorise[s] ministers to take action which may result in increased expenditure”: [14th ed., pp 413-14](#).

## Supply

On 20 March the Prime Minister and Treasurer announced that this year’s Budget would be postponed to 6 October. As the annual appropriation bills for 2020-21 will therefore not be considered until well into the new financial year, supply bills were passed to ensure that the public (and parliamentary) service can continue to operate until around the end of January 2021; two months longer than recent supply bills: see Bulletins [338](#), [305](#).

Appropriation and supply bills invariably contain provisions authorising “Advances to the Finance Minister”, which enable the Finance Minister to allocate additional funds for “urgent”, “unforeseen” expenditure in the relevant year: see Ryall G., “*Wilkie v Commonwealth* and Parliamentary Control of Appropriations”, Vol. 70, *Papers on Parliament* ([PDF 825KB](#)).

As the determinations allocating funds under the Advance are not subject to disallowance, the Scrutiny of Bills Committee regularly draws the provisions to the attention of senators (see, for example, [Scrutiny Digest 4 of 2019](#), paragraphs 1.19 – 1.24).

Since the 2008-09 appropriation bills the limit on the amount of funds that may be allocated under these provisions has been \$675 million; however this week's supply bills set a limit of \$40 billion. In light of the unprecedented amount available under the provisions, the Government reached an agreement with the Opposition to provide for increased transparency and oversight. Under the agreement, a media release will be issued each week that Advance determinations are made and the Finance Minister will write to the Opposition to seek its concurrence prior to drawing any funding from an Advance for proposed expenditure greater than \$1 billion. Again, the willingness of the Senate to support these provisions with limited oversight speaks to the seriousness of the circumstances.

## Extensions to committee inquiries

In a move to provide committees with more autonomy over their work program during the pandemic, the Senate agreed that, if required, reporting dates of inquiries may be extended by agreement of the committee and notified to the President. This is a departure from the usual practice of committees seeking authorisation directly from the Senate on an inquiry by inquiry basis. Revised reporting dates will be published on the committees' web pages.

## Schedules sittings and extraordinary meetings

Before it rose, the Senate [agreed to an order](#) that suspended its scheduled program of sittings and estimates hearings, and formally postponed its next sitting to 11 August, but provided for flexibility in further altering its sitting program and its manner of meeting.

Under the order, the President, with the concurrence of the Leaders of the Government and Opposition in the Senate, can alter the date and time of sitting, to defer or bring forward the next meeting date. This is the first time the Senate has provided a mechanism for delaying a scheduled sitting date (as opposed to enabling the President to fix a sitting date where none has been set). An absolute majority of senators may also require the President to fix a meeting date prior to 11 August under Senate standing order 55(2).

The other interesting aspect of the order is that it - again with the agreement of the two leaders - empowers the Senate to meet "in a manner and form not provided for in the standing orders" and delegates to the Procedure Committee the power to determine "the rules and orders necessary to constitute such a meeting". The mechanism is intended to deal with circumstances in which urgent legislation is required, but an ordinary sitting is impossible or impractical.

The resolution does not attempt to define the ways in which a meeting might depart from the standing orders. That is to say, it broadly empowers the Senate to change its rules and orders, subject to Constitutional constraints. There are several Constitutional provisions at play here. These include:

- the power of each House to make its own rules and orders (section 50);
- the requirement for "the presence" of a quorum "to constitute a meeting of the Senate for the exercise of its powers" (section 22)
- the requirement that every senator is entitled to vote on every question (section 23)
- the apparent requirement that the Parliament meet at the seat of Government (section 125).

Put simply, the questions that arise should the Senate need to meet in extraordinary circumstances involve determining how these requirements may be met, including the extent to which the physical presence of senators in Canberra is an absolute requirement. It might be expected that the “rules and orders necessary to constitute” an extraordinary meeting would deal with telepresence. The fact that the two Houses have each long-since made orders enabling their committees to meet by technological means provides a logical starting point. For the Senate, standing order 30(3) provides a mechanism for such meetings, and the necessary safeguards:

- (3) A committee is authorised to hold meetings by electronic communication without the members of the committee or witnesses being present in one place, provided that:
- (a) when a committee deliberates, members of the committee constituting a quorum are able to speak to, and hear, each other contemporaneously;
  - (b) when a witness gives oral evidence, members of the committee constituting a quorum are able to hear the witness contemporaneously and to put questions to the witness in each other’s hearing; and
  - (c) the chair of such a meeting takes care to ensure that a quorum is maintained during the meeting and that the standing orders and rules of the Senate are observed.

The order passed by the Senate authorises the Procedure Committee to devise rules of this nature to apply to Senate meetings. Other possible rules might deal with proxy or party votes, which feature in some other Australian legislatures but have not to date been adopted by the Senate. As the most likely catalyst for such a meeting would be the need to deal with emergency legislation, the Senate would no doubt have regard to the approach taken by the House of Representative should it be required to meet under a similar order passed before the House adjourned on 23 March.

In the end, it would be untenable to allow an overly restrictive interpretation of these requirements to prevent the Parliament meeting in response to unprecedented circumstances. One of the purposes of the rules for any extraordinary meeting would be to ensure that the principles embodied in the relevant Constitutional provisions are observed, but are not interpreted in a way which obstructs the Senate in performing its core functions.

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## RELATED RESOURCES

[Dynamic Red](#) – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

[Senate Daily Summary](#) – a convenient summary of each day’s proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the Senate website: [www.aph.gov.au/senate](http://www.aph.gov.au/senate)

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