ODGERS'
Australian Senate Practice

As revised by Harry Evans

Supplement to the 14th edition
Updates to 30 June 2019

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Supplement to the fourteenth edition

Updates to 30 June 2019

ISBN 978-1-76010-997-4

National Library of Australia Cataloguing-in-Publication data:

Author:	Odgers, J. R. (James Rowland), 1914-1985.
Title:	*Odgers' Australian Senate practice* / As revised by Harry Evans / edited by Rosemary Laing.
Edition:	14th ed.
ISBN:	978-1-76010-503-7
Notes:	Includes index.
Subjects:	Australia. Parliament. Senate--Rules and practice.
Other Authors/Contributors:	Evans, Harry, 1946-2014 Laing, Rosemary, 1956- Australia. Parliament. Department of the Senate.
Dewey Number:	328.94

Printed by CanPrint Communications Pty Limited, Canberra

Available at aph.gov.au/Odgers

Supplement to the 14th edition: Updates to 30 June 2019

ISBN: 978-1-76010-997-4

Printed by the Department of the Senate, Canberra.

Cover images courtesy of AUSPIC/DPS

Introduction

This supplement updates to 30 June 2019 material in the 14th edition of *Odgers' Australian Senate Practice*. It is published in hard copy and online, and will be updated periodically until the 15th edition is published. Amendments will be incorporated into an ebook version, available from the Senate website at aph.gov.au/Odgers.

Material in the supplement refers to the page and paragraph number of the text in the book or pdf version online.

Richard Pye
Clerk of the Senate
September 2019

Chapter 1—The Senate and its constitutional role

Table 1: Votes and seats in elections, 1949–2019

Page 19, at the end of the table, add:

Election	Party	Australian Senate			House of Representatives		
		% of votes	Seats	% of seats	% of votes	Seats	% of seats
2019	ALP	28.79	13	32.5	33.34	68	45.03
	LP}	30.00	14	35	27.99	44	29.14
	NP}		1	2.5	4.51	10	6.62
	LNP	7.73	3	7.5	8.67	23	15.23
	CLP	0.26	1	2.5	0.27	—	—
	Greens	10.19	6	15	10.40	1	0.66
	PHON	5.40	1	2.5	3.08	—	—
	CA	0.19	—	—	0.33	1	0.66
	JLN	0.21	1	2.5	—	—	—
	KAP	0.35	—	—	0.49	1	0.66
	Others	16.85	—	—	10.92	3	2.00

Page 19, add the following entries to the abbreviation list:

CA	Centre Alliance
KAP	Katter's Australia Party

Table 2: Party affiliations in the Senate, 1949–2019

Page 27, at the end of the table, add:

Year of election	Total number of seats	Government	Non-government	Government majority	Government minority	Party	No of seats
2019**	76	35	41		-6	Liberal◊	30
						Labor	26
						Greens	9
						The Nationals◊	5
						Pauline Hanson's One Nation	2
						Centre Alliance	2
						Jacqui Lambie Network	1
						Australian Conservatives	1

** Composition of the Senate on 1 July 2019

Chapter 2—Parliamentary privilege

Subpoenas, search warrants and members

Page 63, after paragraph 2, insert:

– Guidelines for the execution of warrants involving privilege

Page 64, at the end of paragraph 2, add:

A related matter, alleging possible improper interference with the free performance of a senator's duties and adverse actions taken against people connected to parliamentary proceedings, was also referred to the committee on 1 September 2016, having been raised as a matter of privilege the previous day.

In the first matter, the committee examined the seized material for its connection to parliamentary business, using a test formulated in the preliminary report, and recommended that the claim of privilege made over it should be upheld. The committee also considered how well the stated purposes of the national guideline had been met. The guideline is intended to enable claims of privilege to be made and determined, with seized material sealed until that question is resolved. The committee noted that "Any practice which, in the meantime, allows the use of such material undermines that purpose."

This provided the context for the second matter, involving allegations that information which should have been quarantined at the site of the Melbourne warrants, may have

been used for unauthorised purposes. The committee found that an improper interference had occurred (because protections attaching to parliamentary material had been diminished, to the possible detriment of a person) but refrained from recommending that a contempt be found, noting various mitigating factors. Moreover, the committee noted that an alternative remedy could be effected by the Senate upholding the privilege claim, and so withholding the seized material from the investigation and any future legal proceedings. These findings were contained in the committee's 164th report, tabled and adopted on 28 March 2017.

In its 164th report, and again in its 168th report, the committee raised concerns about short comings in the processes for execution of warrants where privilege might be involved. In the latter report, focusing on the use of intrusive powers more generally, the committee expressed the view that, where information that might attract privilege is seized or accessed, law enforcement and intelligence agencies should follow processes that enable claims of privilege to be raised and resolved prior to the information being interrogated: see 168th report, paragraphs 3.24 to 3.27. The committee recommended that protocols be developed between the parliament and the executive in respect of agencies' use of other intrusive powers: adopted by the Senate on 21/6/2018, J.3251.

These recommendations were reinforced in another report of the committee on the disposition of documents seized by the AFP under warrant in another matter in 2018: see 172nd report. The committee found that the documents satisfied the test it had developed in the nbn co matter, and warranted protection as "proceedings in parliament". The Senate adopted the committee's recommendation that the documents be withheld from the AFP investigation and provided to the senator who had made the privilege claim: 26/11/2018, J.4219. The committee expressed concerns about the scope of the warrants, which named a Senate committee and one of its inquiries, as well as aspects of their execution. The committee later took evidence from the AFP Commissioner and other officers on these matters: see 174th report.

On the final sitting day in 2018, the Senate passed a resolution requiring executive agencies "to observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege" and calling on the Attorney-General to work with the Presiding Officers "to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers, which complies with the principles and addresses the shortcomings identified" in recent reports of the Parliament's Privileges Committees: 6/12/2018, J.4485-6

The intersection between privilege and intrusive powers was also raised by the President of the Senate in a submission to an inquiry by the Parliamentary Joint Committee on Intelligence and Security into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018. The President noted that, although the bill did not deal with privilege directly, it sat "in tension with work being undertaken across the Parliament to properly secure privilege against the exercise of executive investigative powers". Among other things, the bill sought to extend the covert use of investigative powers by intelligence and law enforcement agencies, through computer access warrants and warrants to secure remote access to devices. Where

such approaches are used, there is no trigger for parliamentarians to raise claims of privilege, and no clear path for resolving claims if they are made. When the bill was considered on 6 December, the President tabled a response from the Attorney-General and Acting Minister for Home Affairs, indicating that the government would "give serious consideration" to the procedures governing the exercise of the relevant powers, and work collaboratively with the Parliament to "better address the intersection between parliamentary privileges and lawful access to modern communications.": 6/12/2018, J.4544; SD, p. 9769.

The development of such protocols and procedures remained pending at the end of the 45th Parliament.

Other tribunals

Page 67, at the end of paragraph 4, add:

The committee took the view that action taken within political parties to control the votes of their members – at least, within the rules and practices of those parties – was an internal matter and should not amount to a contempt of coercion or intimidation. In 2019 the committee applied the same reasoning in relation to a dispute between a senator and his former party: Case of Senator Burston, 175th report of the committee. The committee concluded:

> Parliamentary privilege and the associated resolutions of the Senate are designed to protect the Parliament, its committees and individual senators in the performance of their parliamentary duties, not as a mechanism to resolve internal party politics or quarrels between senators. It is the committee's firm view that without compelling grounds to bring these resolutions to bear, such matters should not be subject to its consideration.

Page 68, at the end of paragraph 2, add:

Numerous commissions of inquiry have traversed the same ground as parliamentary committees, and have done so without infringing privilege. For instance, in 2017 the Select Committee on Lending to Primary Production Customers recommended that the newly-established Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry consider the evidence published by the committee in the course of its inquiry. While the Royal Commission had access to the information published by the committee, parliamentary privilege limits its use so that, while people could not be directly questioned on their parliamentary evidence, the commission could use the material to develop its own lines of inquiry.

Parliamentary privilege and statutory secrecy provisions

Page 72, at the end of the penultimate paragraph, add:

In 2018 the Auditor-General withheld information from the Joint Committee of Public Accounts and Audit, which oversees the budget for the ANAO, apparently on the basis of "budget confidentiality provisions": statement by the chair of the committee, SD, 18/6/2018, pp. 2992-3.

Page 73, after paragraph 1, insert:

> While there is a presumption that the "powers, privileges and immunities" of the Houses are not affected by legislation except by express words, it can be unsatisfactory to rely on such a presumption when statutory language deals with matters otherwise thought to be reserved for the Houses themselves. Evidence before the Parliamentary Joint Committee on Intelligence and Security inquiry into the Foreign Interference Transparency Scheme Bill 2017 raised concerns that the bill encroached upon the traditional scope of privilege. Among other things, the bill required the registration of activities intended to influence "proceedings of a House of the Parliament" and proposed to give coercive powers to an executive officer (the secretary of the relevant department) to enforce those requirements. The committee recommended that – to avoid doubt – the bill be amended to specify that the scheme was not intended to affect privilege. Moreover, the committee pressed for an amendment to put privileged material beyond the reach of the secretary's coercive powers: see section 9A, *Foreign Influence Transparency Act 2018*.
>
> The committee went further, in the end, recommending that senators and members be excluded entirely from the registration requirements in the bill, and asking the two Houses to develop a parallel transparency scheme appropriately tailored for the parliamentary environment: see PJCIS report, Chapter 5 and paragraphs 10.140–158. The development of such a scheme was referred to the Privileges Committees of each House, but those inquiries lapsed at the end of the 45th Parliament.

Power of the Houses to determine their own constitution

Page 78, after paragraph 2, insert:

> In 2019, prior to the debate on a censure motion, the President made a statement on the constraints on the Senate's power to suspend a senator, concluding:
>
> > While there is no doubt that the Senate has the power to suspend senators, its acknowledged power to do so is limited to those circumstances in which it is necessary to protect the Senate's ability to manage the conduct of its proceedings in the face of disorder, or where the Senate determines that it is necessary to do so to protect the ability of the Senate and senators to perform their constitutional roles. Any other use of the power may be open to challenge: SD, 3/4/2019, pp. 10618-9.

Rights of witnesses

Page 82, at the end of paragraph 5, add:

> Committees rely upon the integrity of evidence presented to them, so they are obliged to investigate concerns that any person has been improperly influenced, or subjected to or threatened with any penalty or injury, in respect of evidence which may be given: Privilege Resolution 1(18). See Chapter 17—Witnesses, under *Protection of witnesses*.

Reference to Senate proceedings in court proceedings

Page 100, after paragraph 3, add:

> The resolution was considered by the High Court in dismissing a summons from a candidate found incapable of being elected at the 2016 election. The Court rejected an argument that the resolution effects a waiver of privilege: *Re Culleton* [2018] HCA 33 at 14 to 18. As has been noted, the effect of the resolution was to dispense with an anomalous, historical practice requiring the Senate's leave to admit evidence of its proceedings regardless of whether privilege was engaged. Neither House can waive statutory law by resolution: see *"Waiver" of privilege*, above.

Chapter 4—Elections for the Senate

Division of the Senate following simultaneous general elections

Page 133, before the last paragraph, insert:

> The division of the Senate is a matter for the Senate itself. However, there was speculation during the 45th Parliament, with the disqualification of numerous senators under section 44 of the Constitution, whether the High Court might have a role.
>
> If a senator is found to have been disqualified at the time of election, their election is void and the vacancy is filled by a recount of the ballots under the supervision of the Court (a "special count") to determine the person validly elected: see Chapter 6—Senators, under *Qualifications of senators*. The usual form of the Court order following a special count was that a person is "duly elected *for the place for which*" the ineligible candidate was returned. One question agitated in hearings in December 2017 was whether such an order also had the effect of granting the incoming senator the term (that is, the 3- or 6-year term) initially allocated by the Senate to the ineligible candidate.
>
> Nettle J described as "an attractive proposition" the view put by the Commonwealth Solicitor-General that there is "…a very real question as to whether anyone other than the Senate has a role in determining the three- or six-year issue. It may be that the Court has a role in declaring who the people are, and the Senate then chooses who gets three and who gets six years": Re Parry; Re Lambie [2017] HCATrans 258 (13 December 2017).
>
> Moreover, the High Court has held that a person invalidly returned in an election does not have a "term of service" at law for the purposes of section 13 of the Constitution: *Vardon v O'Loghlin* [1907] 5 CLR 201 at 211, 214. That being the case, it is hard to see how an order of the Senate under section 13 could have any effect in relation to that person, and similarly hard to argue that an incoming senator inherits that (non-existent) term.
>
> In February 2018, the Senate moved to remedy any uncertainty by modifying the effect of the August 2016 resolution, so that it would operate by reference to the revised order of election produced in any relevant special count: 13/2/2018, J.2690-1. In doing so, the Senate preserved the principle adopted at the beginning of the Parliament, that the

longer terms be allocated to the senators first elected in the count, and asserted the conventional view that the division of the Senate is a matter for the Senate itself.

Page 133, before the last paragraph, insert:

Alternative method of dividing the Senate

Method of filling casual vacancies

Page 138, after paragraph 1, insert:

This last provision gives the recognised party of a departing senator effective control over the choice of a replacement, including by deeming the choice of the state parliament void if "before taking his seat he ceases to be a member of that party". Following the resignation of Senator Xenophon in 2017, reports that a party member other than the chosen nominee might press a claim to the position came to naught, so the operation of that part of section 15 remains untested: see also *Delay in filling casual vacancies*, below.

Chapter 6—Senators

Qualifications of senators

Page 167, omit the last three paragraphs, substitute:

The High Court, sitting as the Court of Disputed Returns (see below), has adjudicated a number of aspects of section 44 of the Constitution as it applies both to candidates and to sitting senators and members. During the 45th Parliament, ten senators declared elected at the 2016 election were found to have been incapable of being chosen by virtue of disqualifications under section 44, following the referral of matters to the High Court. There were also several cases or prospective cases involving members. While most of these were dual citizenship matters, the Court had cause to consider four of the five paragraphs in section 44, the interaction of sections 44, 46 and 47 (as to which, see *Determination of disqualifications*, below), as well as temporal matters connected to the process of being chosen.

– s. 44(i) foreign allegiance and citizenship

Prior to the 45th Parliament, it was generally understood that paragraph 44(i) applies to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that allegiance: *Nile v Wood* (1988) 167 CLR 133. For these purposes, "foreign power" includes the United Kingdom: *Sue v Hill* (1999) 199 CLR 462. The election of a person who was not an Australian citizen at any material time during the election is void: *Re Wood* (1988) 167 CLR 145. To qualify for election, it was not enough for a person to have become an Australian citizen unless that person had also taken "reasonable steps" to renounce foreign nationality. What amounted to reasonable steps would depend on the circumstances of the particular case: *Sykes v Cleary* (No. 2) (1992) 176 CLR 77.

In October 2017, the High Court made orders and delivered its judgment on questions concerning the qualifications of six senators and one member of the House of Representatives declared elected in 2016 (*Re Canavan* [2017] HCA 45). The Court adopted what it termed the ordinary and natural language of paragraph 44(i), consistent with the majority view in *Sykes v Cleary*. In doing so, the Court distinguished between the first part of the provision ("acknowledgement of allegiance" etc.), which requires a voluntary act, and the second part ("a subject or a citizen…of a foreign power"), which involves a state of affairs existing under foreign law. Each of the matters turned on the construction of the second part of the provision. The Court rejected the alternative interpretations put before it, which sought to introduce questions about an individual's knowledge of their citizenship status and a degree of volition in retaining foreign citizenship.

It is worth repeating in full the Court's summary as to the proper construction of s 44(i):

> 71 Section 44(i) operates to render "incapable of being chosen or of sitting" persons who have the status of subject or citizen of a foreign power. Whether a person has the status of foreign subject or citizen is determined by the law of the foreign power in question. Proof of a candidate's knowledge of his or her foreign citizenship status (or of facts that might put a candidate on inquiry as to the possibility that he or she is a foreign citizen) is not necessary to bring about the disqualifying operation of s 44(i).
>
> 72 A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.

Four senators and the member were found to have been foreign citizens at the time of nomination and so were incapable of being elected. Four further references in 2017 saw four more senators disqualified on the same grounds: Re Parry; Re Lambie; Re Kakoschke-Moore [2017] HCATrans 254 (8 December 2017); *Re Gallagher* [2018] HCA 17

In the last of those cases, the Court further detailed the "constitutional imperative" identified in *Re Canavan*. The Court held that, where foreign law presents "something of an insurmountable obstacle" to renouncing citizenship, a person taking all reasonable steps to do so may avoid disqualification. Two elements are required: first, a foreign law that operates irremediably to prevent an Australian citizen from participation; and secondly, that "that person has taken all steps reasonably required by the foreign law which are within his or her power to free himself or herself of the foreign nationality".

However, the procedure for renouncing – in Gallagher's case – British citizenship was held not to be onerous. The issue was merely one of timing, and the exception could not apply. As the senator remained a dual citizen at the time of the election, the Court

declared her incapable of being chosen. Following the judgment, four members of the House of Representatives whose circumstances echoed those considered in the case resigned their places.

Page 168, after paragraph 1, insert:

– s. 44(ii) disqualifying conviction

Page 168, at the end of paragraph 3, add:

In *Re Culleton [No 2]* [2017] HCA 4 the Court held that he was incapable of being chosen, finding that he was subject to be sentenced for a disqualifying conviction throughout the whole period of the election. The subsequent annulment did not prevent the operation of paragraph 44(ii). The judgment affirmed the proper construction of paragraph 44(ii) – that it covers a person convicted and *either* under sentence *or* subject to be sentenced – and expanded on the meaning of "subject to be sentenced".

Page 168, before the penultimate paragraph, insert:

– s. 44(iii) bankruptcy

Page 168, at the end of paragraph 4, add:

A senator or member who becomes bankrupt or insolvent while serving is disqualified under paragraph 45(ii). On 23 December 2016, the Federal Court ordered the sequestration of a senator's estate, the prima facie effect of which was to cause the vacation of his office as a senator (*Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC8 at 1). The vacancy was notified to the Governor of the relevant state after the President received documents recording the status of the senator as an undischarged bankrupt. The senator was found to have been incapable of being chosen at the 2016 election on other grounds, so the matter was somewhat academic: statement to the Senate, 7 February 2017.

Page 168, before the last paragraph, insert:

– s. 44(iv) office of profit under the Crown

Page 169, after paragraph 1, insert:

In 2017, the Court found that a candidate returned in a special count intended to replace an ineligible senator was herself disqualified having been appointed to the Administrative Appeals Tribunal, and thereby holding an office of profit under the Crown: *Re Nash [No 2]* [2017] HCA 52.

Page 170, after paragraph 3, insert:

In *Re Lambie* [2018] HCA 6 the Court declared that a candidate was not incapable of being of chosen as a senator by reason of paragraph 44(iv) of the Constitution. The court found that the offices of mayor and councillor held by the candidate were not offices "under the Crown"; a determination turning on the degree of control an executive government might exercise over those positions.

Page 170, before the last paragraph, insert:

– s. 44(v) pecuniary interest in an agreement with the Commonwealth

Page 171, at the end of paragraph 1, add:

In *Re Day [No 2]* [2017] HCA 14 the Court found that *Webster* was decided on an overly narrow reading of the provision and should not be followed. The Court found that the purpose of paragraph 44(v) extends to ensuring that members "will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict". The indirect pecuniary interest found to exist on the facts of the case sufficed for the Court to hold that Day was incapable of being chosen, or of sitting, as a senator.

Page 171, before paragraph 2, insert:

– "incapable of being chosen"

Page 171, at the end of paragraph 2, add:

It has also been determined that a candidate must remain clear of any of the grounds for disqualification up until the time they are chosen, even if that process is not concluded until long after the polling day. In several of the matters referred by the Senate to the Court in the 45th Parliament, the eligibility of the person returned in a special count was contested. In one case the Court held that the candidate so returned was herself disqualified, having lately accepted a government appointment. The Court's reasons confirmed that a Senate election is not concluded if it returns an invalid candidate, but continues until a senator is validly elected. Any disqualification which arises in the meantime – in this case, appointment to an office of profit under the Crown, contrary to paragraph 44(iv), a year after polling day – renders the candidate incapable of being chosen: *Re Nash [No 2]* [2017] HCA 52.

Page 171, after paragraph 3, insert:

During the 45th Parliament several senators resigned their places after doubts were raised as to their qualification to be chosen at the 2016 election. The questions in each of these cases were referred to the High Court under section 376 of the *Commonwealth Electoral Act 1918*, which provides that the Senate may refer to the Court any question respecting the qualifications of a Senator or a vacancy in the Senate. Questions are not confined to whether or not a vacancy has occurred, but may also encompass the nature of a vacancy and how it may be filled: see further under *Determination of disqualifications*, below. If a person returned as a senator is subsequently found to be incapable of being chosen, then there is not a casual vacancy (ie, a vacancy to be filled under section 15 of the Constitution); rather, there is an invalid election which must be completed. This position is not altered by the resignation (or purported resignation) of the senator concerned: see *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208-9.

Page 172, at the end of paragraph 2, add:

> In 2018 the Joint Standing Committee on Electoral Matters produced two reports on section 44 matters in the context of the disqualifications occurring in the 45th Parliament.

Determination of disqualifications

Page 172, penultimate paragraph, after "2016", insert:

> , and the numerous dual citizenship matters arising in 2017,

Page 172, before the final paragraph, insert:

> In 2016 and 2017 there were several debates and questions raised concerning the threshold of evidence which the Senate might expect before contemplating a motion to refer questions about the qualifications of a senator: for example: SD, 7/11/2016, pp. 1909-31; SD, 8/8/2017, pp. 4912-8. The Senate's approach has generally been to ask that the Court determine any genuine case where evidence has been put before the Senate indicating that a breach of the constitutional provisions may have occurred.
>
> On several occasions, cross-bench senators proposed an audit of the citizenship status of all senators, by way of a Senate references committee inquiry: 9/8/2017, J.1641-2; 15/8/2017, J.1710-11; 17/8/2017, J.1762; 5/9/2017, J.1850-1. These were resisted, on the basis that they involved a reversal of the onus of proof, and because only the High Court could make an authoritative determination: see for example SD, 8/8/2017, pp. 4912-8. The President had earlier tabled correspondence requesting that the Presiding Officers conduct such an audit; a task beyond the remit of their offices: 8/8/2017; J.1599.
>
> As possible dual citizenship cases continued to arise, however, the Senate agreed to establish a citizenship register, requiring declarations and documentation from senators in respect of their citizenship status, any previous foreign citizenships held and actions taken to renounce them, birth places of parents and grandparents, and associated details. An amendment to require the Committee of Senators' Interests to inquire into the citizenship status of each senator was not supported. The committee was given oversight of the form of the register and procedures for its maintenance. The resolution also provided that knowingly making false statements, failing to provide statements on time, and failing to correct inaccuracies of which senators become aware may be dealt with as serious contempts: 13/11/2017, J.2179-82, J.2196-7. The House of Representatives established a similar register. Subsequently, the Parliament legislated a requirement that candidates complete a qualification checklist when nominating for election: see *Commonwealth Electoral Act 1918*, paragraph 170(1)(d). Amendments to the Act also provided for the checklists of successful candidates to be tabled in the relevant House of the Parliament, where they formed the basis of a qualifications register, established by each House by resolution: for the Senate, see 3/4/2019, J.4836-8.
>
> The resolution establishing the new register also introduced procedural constraints on the reference of qualification matters to the Court of Disputed Returns, so that they may

only be moved if a possible disqualification arises from facts not disclosed on the register. The referral process also encompasses a preliminary investigation by the Senators' Interests Committee, which is required to take expert evidence on foreign citizenship law in relevant matters. One limitation of such procedures is that, like any other order of the Senate, they may be suspended by majority vote if the will to maintain them falls away. An equivalent process was adopted by the House of Representatives.

The rationale for these measures may be found in recommendations of the Joint Select Committee on Electoral Matters. In seeking to balance the need for compliance with the need for certainty, the committee reasoned that full disclosure by candidates at the time of nomination would better-inform those seeking to challenge a successful candidate's qualifications by petition to the Court of Disputed Returns within the existing 40-day window after the return of the writs. In the committee's view, a person's eligibility in respect of matters so disclosed should not be able to be questioned in any other way. This could be achieved by the Houses agreeing to limit their use of the referral power to those matters not, or not fully, disclosed: for more detail, see the committee's report, Excluded, particularly at paragraphs 4.5 to 4.15.

Page 172, at the end of footnote 30, add:

See Webster 22/4/1975, J.628-9; Wood 16/2/1988, J.472; Day 7/11/2016, J.374; Culleton 7/11/2016, J.375, J.400; Canavan, Ludlam and Waters 8/8/2017, J.1599-1600; Roberts 9/8/2017, J.1630; Nash and Xenophon 4/9/2017, J.1788-9; Parry 13/11/2017, J.2179; Lambie 14/11/2017, J.2201-2; Kakoschke-Moore 27/11/2017, J.2275; Gallagher 6/12/17, J.2471.

Page 173, at the end of paragraph 4, add:

In 2018 the High Court held that section 46 does not confer jurisdiction to determine whether a person is disqualified. An action under the Common Informers Act could succeed only where a person had first been found ineligible under one of the methods provided under section 47: *Alley v Gillespie* [2018] HCA 11.

Page 173, before the final paragraph, insert:

In 2017, proposals to curb the parliamentary powers and limit the consideration of bills proposed by two ministers while questions about their qualifications were before the Court, were defeated: 13/9/2017, J.1987-8; 14/9/2017, J.2016-7. At the same time, several questions without notice tested the proposition that the validity of ministerial decision-making may be affected should ministers be disqualified; a position rejected by the government on the basis of legal advice.

Page 174, after paragraph 1, insert:

The Court ruled in February 2017 that Rod Culleton was incapable of being chosen as a senator at the 2016 election, finding that he was subject to be sentenced for a disqualifying conviction throughout the whole period of the election, and declared Senator Georgiou elected to the place for which he had been returned. In May 2017, the President tabled a document from Mr Culleton, framed as a petition under standing order 207 disputing the election of Senator Georgiou, together with advice from the

Clerk: 11/5/2017, J.1351. The petition sought to recontest matters determined by the Court of Disputed Returns, so it was difficult to see how it came within the residual operation of the standing order, which is limited to questions "which cannot, under the provisions of the Commonwealth Electoral Act, be brought" before that Court. Rather than reject the petition for non-compliance, the President tabled it for the information of senators. The Senate took no action in relation to the document. In any case, the relief it sought was beyond the power of the Senate: it asked the Senate to overturn the Court's orders declaring Senator Georgiou elected and reinstate his predecessor. The President subsequently tabled a letter from Mr Culleton's representatives asking that the Senate refer his case back to the High Court: 8/8/2017, J.1599. Again, the Senate took no action in respect of the letter.

Page 174, at the end of footnote 37, add:

, statement on *Re Culleton [No 2]* [2017] HCA 4, 7/2/2017 SD 2

Conduct of senators

Page 178, at the end of footnote 50, add:

; 17/10/2018, J.3965

Page 178, at the end of footnote 51, add:

; 14/8/2018, J.3452-3; 3/4/2019, J.4834. In relation to the last matter, the President made a statement on the constraints on the Senate's power to suspend a senator, see SD, 3/4/2019, pp. 10618-9

Page 179, at the end of paragraph 2, add:

The Procedure Committee considered proposals for different codes of conduct in 2017 and again in 2019, but did not recommend their adoption: First report of 2017; First report of 2019.

Dress

Page 182, after paragraph 2, insert:

These statements are based on rulings of Presidents and Chairs of Committees from the 1960s and 1970s, and on a report of the House Committee, adopted by the Senate in 1972. The House Committee concluded that, "rules relating to dress in the Chamber should not be necessary and that the choice of appropriate clothing should be left to Senators' discretion". This remains the current practice.

The rules of the Senate are directed at creating an appropriate framework for debate, and the conduct of senators is regulated only in so far as it is relevant to the maintenance of order. The question of appropriate dress is a matter that has been left to custom and the judgement of senators, except where a question of order arises. The Procedure Committee considered these matters in its First report of 2017, and recommended no change.

Senators' remuneration and entitlements

Page 182, paragraph 4, omit "*Parliamentary Allowances Act 1952*", substitute:

> Parliamentary Business Resources Act 2017 (which, in part, superseded the Parliamentary Allowances Act 1952)

Page 183, at the end of paragraph 1, add:

> In 2017 the Parliamentary Business Resources Act replaced the work expenses framework under the 1990 Act, based on recommendations from an independent review: *An Independent Parliamentary Entitlements System*, February 2016. The Parliament also established the Independent Parliamentary Expenses Authority to provide independent statutory oversight of expenses and allowances.

Page 183, after paragraph 1, insert:

> As has been noted, laws determining allowances for members of the Houses are authorised by section 48 of the Constitution, and are taken to depend upon those members being validly elected. This became a matter of some interest with the numerous cases of senators being found to have been incapable of being elected during the 45th Parliament (see above under *Qualifications of senators*). In earlier cases, Attorneys-General advised that those whose elections were declared void were not entitled to retain salary payments made to them. However, these were dealt with by the passage of legislation to authorise the payments, or by the government of the day waiving the debts. In 2017 and 2018, the view was taken that payments of salary etc. purportedly made under section 48 of the Constitution were made without proper authority in cases in which the High Court subsequently declared that there was no valid election. Under section 16A of the *Remuneration Tribunal Act 1973*, payments made without proper authority automatically become debts due to the Commonwealth. Ultimately the government waived each of the debts that arose in this manner.

Resignation of senators

Page 183, after paragraph 3, insert:

> During the 45th Parliament several senators resigned their places after doubts were raised as to their qualification under section 44 of the Constitution to be chosen at the 2016 election. The vacancies were notified to the Governors of the relevant states, in accordance with section 21 of the Constitution, together with advice that there were matters to be put before the Senate before the nature of each vacancy could be determined. Questions in respect of each vacancy were referred by resolution to the Court of Disputed Returns: Day 7/11/2016, J.374; Ludlam and Waters 8/8/2017, J.1599-1600; Parry 13/11/2017, J.2179; Lambie 14/11/2017, J.2201-2; Kakoschke-Moore 27/11/2017, J.2275. The Court made orders declaring each senator incapable of being chosen and for the respective vacancies to be filled by a special count of the ballots.

Chapter 7—Meetings of the Senate

Sittings and adjournment of the Senate

Page 193, at the end of footnote 20, add:

> For consideration of a proposal to replace the parliamentary prayer, see Procedure Committee, Second report of 2018.

Page 195, paragraph 4, omit "5, 10 or 20 minutes", substitute:

> 5 or 10 minutes, and the adjournment debate on Wednesday, when senators may speak for 5 minutes

Meetings after prorogation or dissolution of House

Page 197, last paragraph, after "if a prorogation intervenes.", insert:

> For example, in 2019 the early Budget led to considerable speculation about the effect of a possible prorogation on the estimates timetable. Advice was given that the scheduled program of hearings would be swept aside if prorogation occurred before the hearings commenced. If hearings were underway when prorogation took effect, they could continue during that day, subject to any decision of the committee to adjourn. Five scheduled days of hearings occurred, and parliament was prorogued early in the morning before hearings on the sixth day commenced, so that the hearings scheduled for that day did not take place.

Times of meeting

Page 200, last paragraph, omit "12.30pm on Tuesdays", substitute:

> midday on Tuesdays (after a procedural change in effect from 2018)

Suspension of sitting – effect on delegated legislation

Page 202, after paragraph 2, insert:

> The uncertainty was resolved when the *Acts Interpretation Act 1901* was amended in 2018 to insert a common-sense definition of sitting day so that a sitting day extending over more than one day is considered a single day: see s. 2M; see also Chapter 15, under *Disallowance*.

Chapter 8—Conduct of proceedings

Routine of business

Page 206, routine of business for Monday, omit "(i) Government business only", substitute:

> (i) General business orders of the day for the consideration of bills only
>
> (ia) at 12.20pm, government business only

Page 208, routine of business for Thursday, omit paragraphs (i) and (ii), substitute:

(i) Government business only

(ii) At 11.45am, petitions

Government and general business

Page 209, omit the last paragraph, substitute:

Government business (business initiated by ministers) takes precedence over general business (business initiated by other senators) at all times except for periods on Monday and Thursday indicated in the routine of business: SO59. The period after prayers until 12.20pm on Mondays is reserved for private senators' bills ("general business orders of the day for the consideration of bills"). An equivalent period was originally set aside for such bills on Thursday mornings, in accordance with an agreement between the minority government and minor party members in 2010. This was transferred to Monday from the beginning of 2018, in accordance with a recommendation of the Procedure Committee: First report of 2017.

Suspension of standing orders

Page 222, after paragraph 2, insert:

The rule against repeated requests to suspend standing orders was also applied in respect of a "time management" motion in 2018. The motion was put in place on a government suspension motion on 20 June and the Senate rejected an opposition suspension motion the following day intended to remove it: 20/6/2018, J.3200-4; 21/6/2018, J.3235. Neither the President nor the Chair could subsequently entertain further proposals to divert from that agreed procedure. A similar ruling was made in respect of proceedings under a limitation debate on the last day of sitting in 2018: 6/12/2018, J.4498.

Page 222, at the end of footnote 57, add:

; 7/12/2017, J.2509; 27/6/2018, J.3324; 6/12/2018, J.4536, J.4546

Page 222, footnote 58, after "ruling of President Hogg, 25/11/2010, J.439", add:

; rulings of President Ryan, 21/6/2018, J.3237; 6/12/2018, J.4498

Page 223, at the end of paragraph 2, add:

A motion to suspend standing orders may be amended, provided the amendment is relevant to the motion as moved. This follows from the exposition of rulings against repeated suspensions in the Procedure Committee's First report of 1993 and Second report of 2005. For an example, see: 6/12/2018, J.4544-6.

Chapter 9—Motions and amendments

Formal motions

Page 235, at the end of paragraph 1, add:

The use of the formal motion procedure became especially problematic during the 45th Parliament, during which its short-comings in determining complex or controversial motions were highlighted on numerous occasions. Objections to motions being dealt with as formal were frequently met with proposals to suspend standing orders, leading the Senate to determine that such suspension motions should be determined without debate: Procedure Committee, Fourth report of 2018; 28/11/2018, J.4283.

Restrictions on amending or debating motions at this time are increasingly subverted by seeking leave to move amendments or make "short statements". Once rare, such statements have become ubiquitous. Asked to consider what steps might be taken to limit the time spent on formal business, the committee noted:

> One of the main contributors…is the number of statements being made by leave. The committee has previously referred to such statements as "misuse of the procedure" (first report of 2003) and criticised their content and prevalence (first report of 2004, second report of 2011). Nevertheless, senators now see them as a routine part of the formal business process. It is hard to see how the time spent on formal business may be reduced unless senators agree to make fewer such statements.

The committee published some statistics and listed several options to reforming formal business that might be considered in the future: First report of 2019, see Appendix 3.

Rescission of resolutions and orders

Page 238, omit paragraph 2, substitute:

Until 2015, section 48 of the *Legislation Act 2003* provided that an instrument that had been disallowed by a House of the Parliament may not be remade within six months of the disallowance, unless the disallowing House had rescinded its resolution of disallowance. Motions for the purposes of equivalent provisions in the past were regarded as rescission motions within the meaning of standing order 87, and therefore as requiring seven days' notice and an absolute majority. As such a motion, however, in effect gives permission for the remaking of a disallowed instrument and therefore has only a prospective effect, it is not technically a rescission motion and for some years was not therefore considered to be subject to those requirements.[42] In 2015 section 48 was amended to remove the language of rescission, so that a disallowed instrument may be remade "if the relevant House of the Parliament approves, by resolution, the making of a legislative instrument or provision the same in substance as the disallowed instrument or provision": *Legislation Act 2003*, subsection 48(2).

Urgency motions and matters of public importance

Page 243, at the end of paragraph 5, add:

> Adopting the process specified in standing order 7(4) for determining a tied ballot, proposals have conventionally been drawn from a ballot box one at a time, and thereby excluded, until the last remaining is reported to the Senate. This process is sound and defensible when two or three proposals are lodged on any given day, but procedurally there is no reason to prevent a different ballot process being used. During one fortnight in 2017, three or more proposals were lodged each day, each requiring a ballot, with 16 proposals received on 28 March 2017 alone. This was not quite a record: on 10 April 1989, 26 proposals were received, including 25 identical proposals from different opposition senators. Such circumstances have led to a change in practice. Where numerous proposals are submitted, the President now reports the first proposal selected to the Senate.

Chapter 10—Debate

Time limits on debates and speeches

Page 253, at the end of footnote 17, add:

> For an example, see 23/6/2017, J.1568.

Sub judice convention

Page 265, last paragraph, after the second sentence, insert:

> In determining whether to invoke the convention in a committee setting the chair, and the committee ultimately, weighs the risk of possible prejudice to court proceedings against the public interest in the inquiry, and determines whether the questioning should proceed. It is not open to witnesses to invoke the convention as a reason to not provide information. Rather, they should follow the Senate resolution of 13 May 2009 and make a properly-formed public interest immunity claim – presumably on the ground of possible prejudice to legal proceedings – and state the apprehended harm to the public interest that would occur if the information were provided.

Rules of debate

Page 269, at the end of paragraph 4, add:

> The context was a suggestion that a minister was influenced in his ministerial decision-making by his religious views, which was ruled out of order under standing order 193, in that it attributed improper motives.

Page 271, after paragraph 5, insert:

> The Procedure Committee has more recently considered, but not recommended for adoption, proposals for mandatory parliamentary codes of conduct, and to add "adverse reflections on an individual or community on the basis of colour, national or ethnic

origin, culture or religious belief" to the conduct proscribed by standing order 193: see First report of 2017; First report of 2019.

Questions of order

Page 276, at the end of the penultimate paragraph, add:

After a widely-reported exchange between two senators during a division in the Senate, the President made a statement noting the procedural constraints on dealing with the conduct of senators and unparliamentary language where they do not occur within formal proceedings of the Senate: SD, 8/8/2018, pp. 4438-9. A senator was censured in connection with the exchange on a close vote the following day: 14/8/2018, J.3452-3. The Procedure Committee later endorsed the approach signalled in the President's statement, and his observations that personal abuse has no place in the Senate. The technicality that conduct alleged to be disorderly occurs alongside, but not as part of, formal proceedings, does not prevent the chair dealing with it in accordance with the standing orders. However, the committee agreed that it was generally undesirable to change the basis for dealing with disorder, which requires senators to raise points of order at the time of the incident to which they relate: Third report of 2018.

Disorder

Page 279, at the end of the penultimate paragraph, add:

The Procedure Committee made similar observations on the reference of a similar proposal in 2017: First report of 2017.

Page 279, at the end of the last paragraph, add:

In 2018, after an exchange in which other senators were required to withdraw words ruled objectionable, a senator was suspended from the Senate for declining to do so: Senator Di Natale, 27/11/2018, J.4263-4. The President and several other senators made statements about the matter: SD, 27/11/2018, pp. 8693-8; SD, 28/11/2018, pp. 8775-9. This was only the third time a senator had been suspended since the turn of the century, the previous occasions being: Senator Brown, for refusing to withdraw objectionable words, 6/3/2003, J.1567; and Senator Schacht, for persistently and wilfully refusing to conform to the standing orders, 1/3/2001, J.4004.

Chapter 11—Voting and divisions

Divisions

Page 291, at the end of paragraph 1, add:

There is no precise definition of that term, but it suggests that a senator intending to vote was prevented by circumstances from doing so. The practice is based on standing order 104, which provides that a division may be taken again if necessary to ensure that a decision based on confusion or error does not stand.

Page 291, at the end of paragraph 2, add:

The accepted practice is that a senator affected by misadventure seeks leave of the Senate to explain the circumstances of their missing the vote. For example, the second reading vote on the Passenger Movement Charge Amendment Bill 2016, lost on 23 November 2016, was put again by leave the following day, after the senators involved explained their earlier absence: 24/11/16, J.599-600. The Senate has generally accepted such explanations and given leave for the vote to be held again; however, leave may be refused by any senator.

On 13 June 2017, a senator provided an explanation for missing a vote on a disallowance motion the previous sitting day, 11 May. Leave was refused to have the question put again, however, apparently on the basis of a conflicting report of the senator's intention and the delay in her making the explanation. Instead, the proponent of the motion successfully suspended standing orders and the Senate ordered that the vote be taken again: 13/6/2017, J.1374-5. The Procedure Committee later endorsed a note about "misadventure", the circumstances of the particular matter and options for rescinding and revisiting votes: First report of 2017, at Appendix 2.

Chapter 12—Legislation

Proceedings on legislation

Page 301, at the end of paragraph 5, add:

Because the Senate controls its own proceedings, it may step through the legislative process in a deliberate fashion or, for bills deemed urgent, more rapidly. For instance, the Marriage Law Survey (Additional Safeguards) Bill 2017 was introduced, passed by both Houses and assented to – all within 6 hours: 13/9/2017, J.1974-6.

Deadline for receipt of bills from House

Page 306, after paragraph 1, insert:

The deferral of bills caught by the deadline (colloquially known as the "cut-off", and represented by a pair of scissors on the Senate's sitting calendar) may be overcome by a motion to exempt a bill or bills from its operation. The exemption may be moved on notice, by leave or pursuant to a suspension of standing orders. The government typically tables a statement of reasons to bring forward the consideration of the bill. In June 2018, the Senate exempted two national security bills from the requirements of the cut-off by suspending the relevant standing orders, with the support of an absolute majority of senators: 27/6/2018, J.3324.

First reading

Page 310, at the end of footnote 35, add:

> In October 2018 the Senate rejected a private senator's bill at the first reading, having declined to allow its postponement: 18/10/2018, J.3995, J.3997. The Senate rejected another, similar bill from the same senator, the following month: 26/11/2018, J.4241.

Reference to standing or select committee

Page 314, footnote 53, at the end of the list of precedents, add:

> ; 10/5/2017, J.1326; 9/5/2018, J.3069

Role of the Scrutiny of Bills Committee

Page 322, last paragraph, to page 323, second paragraph, omit the paragraphs, substitute:

> The committee's initial scrutiny of each bill is informed by the legal adviser's report, and recorded in the committee's Scrutiny Digest, which is generally tabled on the Wednesday of each sitting week. Adverse comments are set out by reference to the relevant principle. When the digest is tabled in the Senate, the committee's initial comments on a bill are also formally drawn to the attention of the minister responsible for the bill, who is usually invited to make a response to the committee's comments. Given the time constraints which the legislative process generates, these comments are requested in time for them to be considered by the committee at its regular weekly meeting.
>
> If the committee receives a response from a minister, the committee comments on that response in a subsequent edition of the Scrutiny Digest and outlines any differences between the committee's view and that of the minister. The full text of the response is published on the committee's website. In reporting to the Senate, the committee expresses no concluded view on whether any provisions offend against its principles or should be amended. These are regarded as matters for the Senate to decide. The committee may report that ministers have given undertakings to initiate amendments of legislation to conform with the committee's principles.
>
> When bills are referred to Senate standing or select committees, the substantive consideration of the bill by the Senate is deferred until the committee reports: SO 115(3). By contrast, Senate debate on bills is not halted while they are being considered by the Scrutiny of Bills Committee. In November 2017 standing order 24 was amended to provide that, where the Scrutiny Committee has not finally reported on a bill because a ministerial response has not been received, any senator may ask the minister for an explanation of why a response has not been provided prior to debate on the bill. The explanation (of lack thereof) may be debated. Alternatively, the senator who sought the explanation may move a motion relating to the consideration of the bill, for instance, to defer debate until the response to the committee has been received: SO 24(1)(d) to (h). Temporary orders to this effect had been in place since 2016.

Page 324, paragraph 3, omit the last sentence.

Report from committee

Page 333, at the end of footnote 144, add:

; 22/8/2018, J.3582-3

Third reading

Page 336, at the end of paragraph 5, add:

The same principles were observed on 10 May 2018, after senators sought leave to have the vote put again on a set of amendments after the relevant bill had been read a third time. Leave was not granted, but negotiations on the matter continued behind the scenes. The practical obstacle – that the Senate cannot deal with a bill that is no longer in its possession – was avoided when the government indicated its agreement that the bill should not progress until the matter was settled: 10/5/2018, J.3088, J.3105, J.3110.

Discharge of bill

Page 337, at the end of footnote 175, add:

An unusual order proposed that a bill be discharged if it had not been fully considered by a particular date; a kind of "reverse guillotine": 13/9/2017, J.1985-7. The bill was not called on for debate and it was discharged on the appointed day: 18/10/2017, J.2131.

Control of bills

Page 351, at the end of paragraph 1, add:

For similar purposes, non-government senators brought on the government's Home Affairs Legislation Amendment (Miscellaneous Matters) Bill 2018, giving it precedence and applying a limitation of debate, and later brought on the message from the House varying the Senate's amendments: 5/12/2018, J.4445-7; 13/2/2019, J.4613-6. The motion requiring consideration of the message was unusual. It required the message to be reported immediately, and for a single question to be proposed from the chair: That the Senate agrees to the amendments made by the House. Because the government was in a minority in the House of Representatives, the bill was able to pass both Houses with amendments that the government opposed. Despite the government's opposition to the bill as finally passed, the Prime Minister confirmed that the normal processes for assent would be followed.

Page 351, at the end of footnote 238, add:

Marriage Amendment (Definition and Religious Freedoms) Bill 2017, 15/11/2017, J.2241-2; Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015, 27/6/2018, J.3343-4; Discrimination Free Schools Bill 2019, 17/10/2018, J.3951; Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, 29/11/2018, J.4332; 4/12/2018, J.4396

Limitation of debate – urgent bills

Page 352, at the end of footnote 249, add:

> For an extreme example, see proceedings on the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018, which continued for almost 3 hours after the allotted time expired: 6/12/2018, J.4492-4544.

Page 353, at the end of paragraph 4, add:

> An extension may also be granted by leave: see 6/12/2018, J.4544.

Page 354, after paragraph 1, insert:

> Debate has been allowed on proposals to suspend standing orders to extend the time available for debate moved when the allotted time has expired. By contrast, it has been ruled that other suspension motions, and motions by leave, moved after the expiration of time may not be debated: see, for example, SD, 26/11/2010, pp. 2374-5; SD, 6/12/2018, pp. 9698-9. In the second example the rule was expressed as "a motion to suspend the operation of the time-limited debate motion can be debated, but no other motion can be debated". The rationale is the same as the rationale for the rule against repeated suspensions of standing orders, namely, that allowing further debate after the time determined by the Senate had expired would provide a means of permanently obstructing the business of the Senate: see Chapter 8—Conduct of proceedings, under *Suspension of standing orders.*

Page 354, after the last paragraph, insert:

> Once in place – whether under standing order 142 or by another process – a limitation of debate may be overridden by a subsequent decision of the Senate to deal with a bill in a different way. So, for instance, a second reading amendment proposing to refer a bill to a committee (and thereby defer further consideration) is in order. A motion to vary or override a limitation of debate may also be initiated by leave or a suspension of standing orders: see for example a limitation of debate removed after suspension of standing orders, 3/12/2018, J.4351-3; a motion by leave to override an order made the previous day, 5/12/2018, J.4422.
>
> Unusual "time management" motions for bills have included:
>
> - a provision that questions on any message from the House of Representatives be put "immediately without amendment or debate": 20 June 2018, J.3203
> - non-government senators applying a limitation of debate on a government bill against the wishes of the government, to allow amendments to be made: 5/12/2018, J.4445-6
> - non-government senators applying a 30-minute limit on debate of a single question on a message from the House of Representatives: 13/2/2019, J.4613-6

- a variation providing that the question be put on all amendments circulated 30 minutes before the expiration of allotted time, rather than 2 hours as provided for in SO 142: 6/12/2018, J.4537-8
- a limitation of debate being applied to a list of bills, a disallowance motion, a number of general business motions and a motion relating to the conduct of a senator: 3/4/2019, J.4829-34

Another common approach, used especially toward the end of sitting periods, is to extend sitting hours by a motion providing that the Senate not adjourn until proceedings on an agreed list of bills are finalised. In 2018, an amendment moved by leave to the usual motion establishing the list of "non-controversial" bills for consideration from 12.45pm Thursday added provisions that the Senate not adjourn until those and other bills had been completed: 28/6/2018, J.3359. Leave was required to move the amendment, as the minister's authority to move the original motion – standing order 56 – did not permit a motion varying the hours of meeting.

Page 354, at the end of footnote 255, add:

There is inconsistent practice on the right to withdraw circulated amendments prior to time expiring. It has been accepted on several occasions that a senator may indicate – *prior* to time expiring – that they do not intend to proceed with certain amendments However, this sits uneasily against the rationale given here for requiring leave to withdraw circulated amendments *after* time expires.

Governor-General's assent

Page 355, at the end of paragraph 3, add:

For a government bill assented to notwithstanding the government's continued opposition to the bill as finally passed, see the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018.

Chapter 13—Financial legislation

Consideration of appropriation bills

Page 379, at the end of paragraph 1, add:

In 2018, the additional appropriation bills were passed before the date for estimates committees to report. The government acknowledged this did not set a precedent for future bills: SD, 19/3/2018, pp. 1486-7.

Page 379, at the end of footnote 59, add:

; 19/3/2018, J.2796-7

The interpretation of section 53 and related provisions

Page 381, at the end of footnote 64, add:

and in April 2019, before the election on 18/5/2019

Meaning of ordinary annual services of the government

Page 391, after paragraph 2, insert:

The 2017-18 additional appropriations bills were passed without amendment in March 2018. Amendments from the cross-bench regarding the classification of funding for new projects as ordinary annual services were unsuccessful. Government and opposition speakers indicated their satisfaction that the classification of funds was in accordance with the 1999 agreement that new policies within existing outcomes could be classified as ordinary annual services: SD, pp. 1487-90. Without reading too much into these remarks, they appear to be at odds with the position summarised in the 50th report and paragraph 2(e) of the consolidated resolution, referred to above. Nevertheless, the relevant constitutional provisions deal with proposed laws and are, accordingly, non-justiciable. The question whether it is desirable for the Senate to cede this particular ground is a matter for the Senate.

When are requests required?

Page 416, after paragraph 1, insert:

In 2019 these matters were agitated in advice from the Solicitor-General tabled in the House of Representatives, arguing that Senate amendments contravened the third paragraph and also infringed section 56: see proceedings on the Home Affairs Legislation Amendment (Miscellaneous Matters) Bill 2018. The amendments in question established a health advice panel. The Solicitor-General advised that members would hold "public offices" as defined in the *Remuneration Tribunal Act 1973*, and that the obligation to remunerate them would automatically trigger expenditure under a standing appropriation in that Act. The circumstances were therefore similar to those in the Native Title Act matter, mentioned above.

In a statement to the House, the Speaker reported his own advice that section 53 was engaged on this occasion, under the interpretation favoured by the House, but noted that the practice in relation to the appointment of statutory offices had at times varied. Indeed, as well as the amendments held to be valid in the *Native Title Act Case*, there are precedents stretching back over several decades of both Houses accepting that the creation of public offices triggering the same provisions of the Remuneration Tribunal Act may proceed by way of Senate amendments, and without the need for a message under section 56. For instance, similar amendments were made and accepted in the Australian Securities Commission Bill 1988 (establishing the Parliamentary Joint Committee on Corporations and Securities and increasing the number of members appointed to the Corporations and Securities Panel) and the Tourism Australia Bill 2004 (increasing the number of "other members" of the Board of Directors). Likewise, numerous bills have established statutory offices coming within the definition of "public

office" in the Remuneration Tribunal Act, without the requirement for a message under section 56.

In practice, the remuneration for such offices is frequently funded through annual departmental appropriations or cost-recovery arrangements, or offset in other ways. However, the Solicitor-General noted the Government's instructions that it had no intention of otherwise funding the expenditure required. In the end, the House did not adopt the interpretation proposed in the advice, but amended the Senate's amendments to remove the financial aspect.

Chapter 15—Delegated legislation

Types and volume of delegated legislation

Page 432, at the end of the table, add:

Year	Disallowable instruments
2016 – 2017	1482
2017 – 2018	1581
2018 – 2019	1127

Regulations and Ordinances Committee

Page 438, at the end of paragraph 2, add:

For examples of the committee chair giving, and later withdrawing, protective disallowance notices to extend the time for senators to consider instruments initially misclassified as not subject to disallowance, see 27/3/2018, J.2947; Delegated legislation monitors 15 and 16 of 2017.

Page 438, after the last paragraph, add:

In 2018 the Senate initiated a review by the committee of its effectiveness, role and future direction, as well as the adequacy of the existing framework for parliamentary control of delegated legislation. This was intended to be similar to the review undertaken by the Scrutiny of Bills committee in 2012, which led to a number of changes to that committee's operations. The report was tabled in June 2019, and it is expected that its recommendations will be considered early in the 46th Parliament.

Disallowance

Page 445, at the end of footnote 45, add:

; 20/6/2017, J.1505 (in respect of an instrument earlier repealed)

Page 447, after paragraph 1, insert:

This uncertainty was resolved when the *Acts Interpretation Act 1901* was amended in 2018 to insert a common-sense definition of sitting day, which provides that a new sitting day is not created in those circumstances: see s. 2M.

Page 447, at the end of paragraph 3, add:

Similarly, after its repeal, a notice to disallow the Extradition (People's Republic of China) Regulations 2017 was postponed to the last day of the disallowance period, rather than withdrawn. The Senate adjourned with the motion unresolved, having not been reached in debate: 20/6/2017, J.1505. Section 42(2) of the Legislation Act provides that instruments are taken to be disallowed if they are not determined in the prescribed time (see footnote 45, above, for precedents). The presumed effect in this case was to prevent regulations "the same in substance" as the repealed regulations being made within 6 months without the Senate's consent.

Page 447, at the end of footnote 53, add:

Similarly, an overnight suspension from 30 to 31 March 2017 raised uncertainty about the last day for resolving another disallowance motion. That motion was initially defeated on 11 May – the "safer" day for determining the matter – but put again on the next sitting day after standing orders were suspended. While a vote on 11 May avoided the uncertainty, there was no basis for concluding that a vote on the next sitting day was outside the statutory timeframe for disallowance. Therefore the vote proceeded, the motion succeeded and the identified items in the instrument were disallowed: 13/6/2017, J.1374-5.

Page 449, at the end of footnote 71, add:

; 21/11/2016, J.495-6; 10/5/2017, J.1326; 14/6/2017, J.1408; 14/2/2018, J. 2715; 11/9/2018, 3684-5; 3/4/2019, J.4829-34 (as part of a limitation of debate on a list of bills and several other motions). Similarly, disallowance motions have occasionally been given precedence over other business to ensure they may be dealt with: 8/2/2018, J.2630; 16/8/2018, J.3489-90

Page 450, after the last dot point, add:

- disallowance motion put again and passed on a subsequent sitting day, pursuant to suspension of standing orders: 13/6/2017, J.1374-5
- proposal to postpone disallowance motion rejected: 17/10/2017, J.2083-4; 9/5/2018, J.3066
- disallowance motion postponed on another senator's motion: 12/2/2018, J.2666; 14/2/2018, J.2715
- postponed disallowance motion brought on pursuant to suspension of standing orders: 27/3/2018, J.2948, J.2961-4

Page 450, at the end of footnote 75, add:

An unusual motion saw two identical disallowance motions, initially given for different days, ordered to be taken together: 14/2/2018, J.2715.

Amendment and withdrawal of disallowance motion

Page 456, after paragraph 1, insert:

As provided by standing order 78(2), a notice of intention to withdraw may have effect later in the day, if given on the last day for resolving a disallowance motion. For a motion taken over by another senator in such circumstances, see 14/6/2017, J.1403.

Remaking of instruments following disallowance

Page 457, paragraph 5, omit "Section 48 of the Legislation Act provides", substitute:

A safeguard in the disallowance process is that a legislative instrument may not be remade within 6 months of its disallowance without the approval of the House which disallowed it. From 1932 until 2015, the disallowance provisions in the Legislation Act and its predecessors contemplated the relevant House "rescinding" its resolution of disallowance. For instance, until 2015 the section 48 of the Legislation Act provided:

Page 458, after paragraph 1, insert:

That provision was amended in 2015 to remove the language of rescission, so that a disallowed instrument may be remade "if the relevant House of the Parliament approves, by resolution, the making of a legislative instrument or provision the same in substance as the disallowed instrument or provision": *Legislation Act 2003*, subsection 48(2). Although in its earlier form the provision purported to require the Senate to *rescind* the original disallowance resolution, in fact such a motion was entirely prospective in permitting a new instrument to be made: see Chapter 9, under *Rescission or resolutions and orders*.

The development and interpretation of the provision is set out below.

Page 459, after paragraph 3, insert:

In February 2018 the Senate disallowed an amendment to the Murray-Darling Basin Plan, which had been made following a mandatory consultation process. After agreement was reached to remake the instrument, the government introduced a bill to remove the associated consultation requirements. The Senate resolution approving the remaking of the instrument was made by way of a second reading amendment to the bill: 14/2/2018, J.2728; 25/6/2018, J.3286. This was the first time that the Senate passed a resolution to *approve* the remaking of a disallowed instrument since subsection 48(2) was amended in 2015.

"Sunsetting" of instruments

Page 460, after paragraph 4, insert:

> In August 2017, the Chair of the Regulations and Ordinances Committee withdrew a protective disallowance notice given by the committee in respect of a "Sunsetting Exemption" regulation: 15/8/2017, J.1707. At the same time the committee set out its views about exemptions from sunsetting arrangements more broadly, emphasising their importance in ensuring that legislative instruments are kept up to date and only remain in force for so long as they are needed: Delegated Legislation Monitor No. 9 of 2017.

Chapter 16—Committees

Legislation committees considering estimates

Page 480, at the end of paragraph 3, add:

> Similarly, cross-portfolio hearings on Murray-Darling Basin matters are conducted by the Rural and Regional Affairs and Transport Legislation Committee during each round of estimates under an order first agreed to in 2017: 29/3/2017, J.1221.

Page 480, paragraph 4, omit ", although no committee has yet done so", substitute:

> The first (and, to date, only) estimates hearing to occur outside Canberra was a hearing of the Environment and Communications Legislation Committee, which examined NBN Co. in Sydney in November 2017.

Page 480, at the end of footnote 70, add:

> A direction to hold an additional hearing may also contain a direction that particular witnesses appear: for example, 14/11/2017, J.2213; 16/11/2017, J.2259.

Page 481, at the end of paragraph 3, add:

> For example, in a Legal and Constitutional Affairs Legislation Committee estimates hearing on 28 February 2017, a senior official of the Attorney-General's Department expressed reluctance to "traverse matters that are the subject of inquiry by another committee", being the Legal and Constitutional Affairs References Committee inquiry into the liquidation of the Bell Group of Companies. There is no rule of the Senate that prevents senators seeking explanations on such matters at an estimates hearing, and the chair allowed the questions to proceed.

Page 481, omit paragraph 4, substitute:

> As with any other hearing, a committee considering estimates sets its program beforehand and any adjustments require agreement. The method of proceeding echoes earlier procedures for considering appropriation bills in committee of the whole. The chair calls on items of proposed expenditure in the agreed order, generally at agency or program level, and opens those items for questioning. In committee of the whole, questioning continues until senators had no further questions on that item. Generally,

estimates committees have been able to achieve a similar outcome, by agreement, and by the development over time of processes for placing questions on notice.

In 2013 and 2014, after some disquiet about the allocation of questions among senators and about committees adjourning while senators still had questions to ask, the Senate agreed to new procedures affecting the management of estimates hearings. These include procedures requiring committees to schedule further hearings on the initiative of any three members (*see now* continuing orders 9A and 9B) and an amendment to standing order 26(4) that limits the ability of the chair to move through the committee's agreed program. The standing order provides that the chair cannot call on the next item if any senator has further questions on the current item, unless:

- the senator agrees to place their questions on notice; or
- the committee agrees to schedule an additional hearing to allow those questions to be asked.

One consequence is that standing order 26(4) also operates to extend a hearing beyond its scheduled adjournment time unless senators with further questions agree to place them on notice, or the committee agrees to schedule a further hearing. The provisions for spill-over hearings under continuing orders 9A or 9B could be used to secure a further hearing, as could a simple decision of the committee.

A decision of the committee made at any time to schedule a further hearing on the item then before the committee allows the chair to move to the next item on the committee's program or, in the circumstances described above, to adjourn the hearing at the scheduled time.

Committees may also consider the annual reports of departments and budget-funded agencies in conjunction with their consideration of estimates.

Scope of questions at estimates hearings

Page 482, at the end of paragraph 5, add:

The Senate has occasionally directed that particular Senate ministers, or particular officers, appear at estimates: for example, President of Fair Work Australia, 28/10/2009, J.2661-2 [subsequently relaxed to an expectation the President would appear should the committee require it: 13/11/2013, J.100]; Treasury Secretary, 13/5/2010, J.3494; named Defence officer, 23/2/2016, J.3774; named NBN Co. officers, 14/11/2017, J.2213; Minister for Employment, 16/11/2017, J.2259; 3/4/2019, J.4838-40. The Senate has also requested (rather than compelled) the attendance of persons who were formerly officers of a department allocated to a committee, one of whom attended and answered questions: 15/2/2018, J.2741.

Page 482, at the end of paragraph 6, add:

For instance, in the 2017-18 Budget estimates round, the Snowy Hydro Corporation, in which the Commonwealth has a 13% stake, appeared before the Environment and Communications Legislation Committee, while Dairy Australia, whose funding sources include a levy paid by milk producers, as well as Commonwealth and state

governments, universities and research organisations, appeared before the Rural and Regional Affairs and Transport Legislation Committee.

Page 483, after paragraph 1, insert:

One constraint on this broad test of relevance lies in the Senate resolution allocating the oversight of executive portfolios to different committees. For this reason, some questions asked in two estimates hearings during the 2017-18 additional estimates round were ruled not relevant. With this principle in mind, an unusual order required a Senate minister to attend estimates to answer questions in relation to a portfolio she no longer held: 3/4/2019, J.4838-4840.

Role of the Australian National Audit Office

Page 484, after paragraph 1, insert:

More recently, in 2017, officers of ANAO appeared before the Rural and Regional Affairs and Transport Legislation Committee to assist with questions about an ANAO report into the conduct of a tender. The audit had been undertaken following correspondence from the committee to the Auditor General in the previous parliament, raising concerns about the performance of an agency, Airservices Australia. After ANAO officers gave evidence, the agency appeared before the committee; ANAO was then asked to clarify evidence, before the agency was again called.

Joint committees

Page 491, after paragraph 1, insert:

In 2018 the power of a joint committee to summon witnesses was affirmed in the High Court, in a judgment that also reaffirmed the validity of the Parliament's contempt powers and noted the extensive protections afforded witnesses before committees through the Senate's Privilege Resolutions: *Alford v Parliamentary Joint Committee on Corporations and Financial Services* [2018] HCA 57.

The Joint Committee on Corporations and Financial Services had ordered the attendance of two witnesses before its franchising inquiry, after they had declined invitations to appear. Those witnesses sought to challenge the committee's capacity to make those orders and applied for a stay or injunction – the precise relief sought was unclear – to restrain their operation. Her Honour Gordon J found that the witnesses' application lacked merit, and that the issues raised "should generally be resolved by the Parliament, not the courts".

In dismissing the interlocutory application, Her Honour set out the constitutional, legislative and procedural bases of the committee's powers, finding:

> Where, as here, there is an apparently validly appointed joint committee which has a power to direct a person to attend, it is difficult to identify a role for the courts in relation to that exercise of power.

The witnesses later appeared before the committee, as required, apparently armed with advice that parliamentary privilege may not apply to the committee's proceedings, but

could be invoked by incanting the word "privilege" before each response. Thus was the word uttered 422 times in a three and a half hour hearing. There is no magic in the word. As noted above, it is clear that privilege applies to proceedings of joint committees. However, if it did not, the incantation would be to no avail: Parliamentary Joint Committee on Corporations and Financial Services, transcript, 26/11/2018.

Power to take evidence in private

Page 502, at the end of paragraph 3, add:

By contrast, in 2017 the Environment and Communications Legislation Committee published details of executive remuneration at Australia Post, which that organisation sought to provide on a confidential basis. The committee rejected public interest immunity claims made on the grounds of privacy, contractual obligation and commercial-sensitivity, finding an overriding public interest in publishing the information: see correspondence published by the committee, supplementary 2016-17 Budget estimates hearings.

Instructions to committees

Page 507, at the end of paragraph 3, add:

In 2018 the Senate directed a committee to set a particular date as the closing date for submissions (12/9/2018, J.3716) and, subsequently, to conduct public hearings only after the submission closing date (18/9/2018, J.3790).

Page 507, footnote 161, at the end of the list of precedents, add:

; 23/2/2016, J.3774; 14/11/2017, J.2213; 16/11/2017, J.2259; 17/10/2018, J.3967; 3/4/2019, J.4838-40

Page 507, at the end of footnote 161, add:

For an order interpreted as a direction to invite former officers to give evidence, see 15/2/2018, J.2741.

Broadcasting of committee proceedings

Page 521, after paragraph 2, insert:

The prohibition on recording and broadcasting during suspensions or following adjournment of proceedings (paragraph (3) of the above order) operates according to its terms. In December 2017, during a suspension in a public hearing, a member of the media tweeted a conversation overheard between public officers about a committee's proceedings. When proceedings resumed, the Chair reminded officials that, while there are clear rules in place in relation to the broadcasting of committee proceedings, journalists are entitled to be present in the public galleries and may report what takes place, including conversations between public officers: Education and Employment Legislation Committee, supplementary Budget estimates hearing, 1/12/2017, transcript, p. 12.

Role of chair in maintaining order

Page 526, at the end of paragraph 2, add:

> In an estimates setting, the conclusion that a committee faced with those circumstances would have no option but to adjourn would bring the committee into conflict with the 2014 orders requiring hearings to continue while senators have matters to raise. In practice, the question whether a senator may be removed by resolution of a committee is a complex one, for which there are no precedents. In 2017, some of these matters arose in proceedings of the Legal and Constitutional Affairs Legislation Committee, however they were resolved in a private meeting: 2017-18 Budget estimates hearing, 25/5/2017, transcript, pp. 61-63.

Government responses

Page 542, after paragraph 4, insert:

> Since 2016 a practice has emerged of senators proposing orders for the production of documents directed at speeding up the government's responses to committee reports: for example, responses on wind turbines 2/5/2016, J.4175-6; stormwater management 13/9/16, J.171-2; availability of cancer drugs 13/9/2016, J.175; grape and wine industry 10/10/2016, J.262; income inequality 28/11/2016, J.632; prostheses list framework 14/9/2017, J.2012. Occasionally multiple orders have been made in respect of the same tardy response: automotive industry, 14/9/2016, J.196-7; 15/8/2017, J.1710; video game industry: 12/10/2016, J.311-2; 13/6/17, J.1387; 5/12/2017, J.2457.

Chapter 17—Witnesses

Summoning of witnesses

Page 560, at the end of footnote 37, add:

> ; 13/5/2010, J.3494; 23/2/2016, J.3774; 14/11/2017, J.2213; 16/11/2017, J.2259; 17/10/2018, J.3967; 3/4/2019, J.4838-40

Chapter 18—Documents tabled in the Senate

Orders for production of documents

Page 581, before the penultimate paragraph, insert:

> Although the table shows a decreasing compliance rate with orders, the response rate does not reflect the outcomes from subsequent action to pursue the information. In 2015, the Procedure Committee published guidance for responses by ministers (see, *Guidance on responding to orders*, below) and recommended a process for tracking public interest immunity claims (see Chapter 19—Relations with the executive government, under *Orders to ministers and public interest immunity claims*). During the 45th Parliament, there was a much sharper response rate, with substantial compliance

with orders in 52% of cases, partial compliance in a further 18%, and public interest immunity claims made in respect of virtually all of the remaining orders. It should be noted, however, that in several cases, multiple orders (for instance, rejecting public interest immunity claims and reiterating or refining orders) were required before the documents sought were produced.

Page 586, after paragraph 1, insert:

Similarly, in 2018, the Senate ordered the Commissioner of Taxation to provide designated information to the Economics Legislation Committee, including the names of companies in breach of certain tax laws: 14/8/2018, J.3450-1. The order was twice refined and reiterated, but resisted on the grounds that disclosure of individual taxpayer information would harm the public interest by undermining confidence in taxation laws and administration: 16/10/2018, J.3936-8; 26/11/2018, J.4235-6. A final iteration of the order cautioned the commissioner that failure to comply with a lawful order of the Senate may be treated as a contempt: 5/12/2018, J.4457-8. Although the Senate may undoubtedly enforce such orders through its contempt powers, where disputes arise about pubic interest immunity claims they are typically resolved through what have sometimes been referred to as "political or procedural means": see Chapter 19—Relations with the executive government, under *Remedies against executive refusal*. In this case, while the government continued to maintain its public interest immunity claim, a compromise was reached, with the commissioner undertaking to provide the documents to the committee, on the basis that the committee treat the documents as confidential, and agreeing to appear before the committee to provide in camera evidence.

Page 586, after paragraph 3, insert:

Guidance on responding to orders

In 2015, in aid of improving responses to Senate orders for documents, the Procedure Committee agreed that there was value in consolidating guidance for responses by ministers, which it noted was drawn from existing practices: Second report of 2015, pp. 15-16. That guidance was as follows:

- Under standing order 164, orders for production of documents are transmitted by the Clerk to the Leader of the Government in the Senate. A copy is provided to the Senate minister representing the relevant minister.
- Ministerial responsibility to the Senate is reflected in arrangements for Senate ministers to represent portfolios of House ministers, as well as having direct responsibility for their own portfolios.
- Responses to orders for documents are therefore provided to the Senate in the name of the Leader or the responsible Senate minister.
- Returns – meaning documents provided in full compliance with an order – may be provided to the Clerk for tabling.
- Any other response, including responses seeking more time to comply or claiming that it would not be in the public interest to produce all or some of the

documents sought, should be presented to the Senate either by the Leader or the Senate minister responsible for the matter. This can take the form of a letter to the President from the Leader or relevant Senate minister for tabling by a Senate minister, or a statement to the Senate by the Leader or relevant Senate minister for tabling or oral presentation.

- Subject to the determination of any proper claim that it would not be in the public interest to comply in part or in full with the order, ministers are obliged to produce documents to the Senate.
- Any claim that it would not be in the public interest to comply in part or in full with an order must be accompanied by a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the production of the document to the Senate.
- The provisions in standing order 164(3) giving senators procedural rights to seek explanations for non-compliance with orders once 30 days have passed after the deadline, and to take other action subsequently, do not amount to an implied extension of time for compliance.
- Further action on any claim that it would not be in the public interest to comply in part or in full with an order is a matter for the Senate, on the initiative of any senator.

For the development of processes for making and determining public interest immunity claims, see Chapter 19—Relations with the executive government, under *Orders to ministers and public interest immunity claims*.

Resistance by governments to orders

Page 588, at the end of paragraph 3, add:

For further examples, see *Remedies against executive refusal of information*, in Chapter 19. Failure to comply with orders has also led to matters being referred to committees for investigation: for example, 16/2/2017, J.996-7 (including a direction for witnesses to attend).

Chapter 19—Relations with the executive government

Ministerial accountability and censure motions

Page 635, paragraph 3, omit “no motions proposing want of confidence in the government”, substitute:

few motions proposing want of confidence in the government (for a rare example see 23/8/2018, J.3623, no doubt modelled on a motion intended to be moved in the House)

Page 637, footnote 156, at the end of the list of precedents, add:

; 14/8/2018, J.3452-3; 3/4/2019, J.4834

Orders to ministers and public interest immunity claims

Page 662, after paragraph 2, insert:

Tracking public interest immunity claims

In 2015 the Procedure Committee provided guidance about practices which should be followed in making public interest immunity claims: Second report of 2015; see Chapter 18—Documents, under *Orders for production of documents*. In 2017, the committee noted that there had been an improvement in adherence to that guidance, but that the rate of compliance with orders was reasonably low. The committee considered that there was scope for compliance efforts to be sharpened by an order of continuing effect requiring governments to report to the Senate every 6 months on orders that remain on the Notice Paper: First report of 2017. In December 2017 the Senate adopted an order of continuing effect requiring the government to table a list every 6 months showing details of orders for the production of documents made during the current Parliament which have not been complied with in full, together with a statement indicating whether resistance to them is maintained and why, and detailing any changing circumstances that might allow reconsideration of earlier refusals: 7/12/2017, J.2532-4. While the committee's focus was on public interest immunity claims, the continuing order is worded broadly to capture any reasons for not complying in full.

A cumulative list of orders made each parliament, and the responses to them, is also now published on the Senate's business pages.

Public interest immunity claims—potentially acceptable and unacceptable grounds

Page 662, at the end of paragraph 3, add:

A claim to withhold information sought by a Senate committee, or a senator in the course of committee proceedings, must indicate the ground for public interest immunity and specify the harm to the public interest that could result from the disclosure of the information or document: Senate resolution of 13/5/2009 [Continuing order no. 10], see *Development of methods for dealing with public interest immunity issues*, above, p. 653. Similarly, the Procedure Committee has included the following in its consolidated guidance for responding to orders for production of documents:

> Any claim that it would not be in the public interest to comply in part or in full with an order must be accompanied by a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the production of the document to the Senate: Second report of 2015, pp. 15-16.

Page 666, at the end of paragraph 1, add:

In 2018 the Senate rejected a public interest immunity claim made by the government to resist tabling the final report of the Religious Freedom Review Expert Panel: 20/9/2018, J.3842. The claim invoked cabinet confidentiality. The resolution rejecting the claim questioned how the publication of the report could reveal cabinet *deliberations*. The government reiterated its claim later in the day, maintaining that the release of the

document "at this time…would interfere with the proper consideration by and deliberative process of Cabinet": J.3865. The Senate rejected the claim again, particularly in light of extracts of the report being leaked to the media (16/10/2018, J.3940), reiterated the order and required the Minister to explain the non-compliance the following day.

Page 669, at the end of footnote 286, add:

; 17/9/2018, J.3771-2

Statutory authorities and public interest immunity

Page 671, after paragraph 4, insert:

In 2017, the Registrar of the Australian Administrative Tribunal (AAT) sought to resist a request to produce an email attachment to her briefing notes. While the Registrar of the AAT is a statutory office-holder, the Attorney-General advised the committee that it was for him to make a claim of public interest immunity and that on this occasion he would not make one. On that basis, the document was provided to the committee: 2017-18 Budget estimates hearing of the Legal and Constitutional Affairs Legislation Committee, 25/5/2017, transcript p. 130.

At an estimates hearing in 2018, the President of the Senate declined to make a public interest immunity claim on behalf of the Australian Parliamentary Service Commissioner, noting that the commissioner was a statutory officer not subject to general direction, and that it was within the purview of the commissioner to make a public interest immunity claim himself. The President also noted that paragraph (8) of the 2009 order contemplated this approach: 2018-19 Budget estimates hearing of the Finance and Public Administration Legislation Committee, 21/5/2018, transcript p. 101. In 2019 similar matters were considered in hearings of the Education and Employment Legislation Committee after an apparent intervention by the minister at the table in relation to a question taken on notice by the Commissioner of the Registered Organisations Commission: 20/2/2019, transcript, pp. 86-90.

Remedies against executive refusal of information

Page 673, after paragraph 1, insert:

Such orders – modelled on the opportunities for seeking and debating explanations under standing orders 74(5) and 164(3) – became commonplace from 2017: 13/2/2017, J.917-8; 14/2/2017, J.950-1; 28/3/2017, J.1205-6; 6/12/2017, J.2495-6; 6/2/2018, J.2590-1; 14/2/2018, J.2720; 27/3/2018, J.2953; 27/3/2018, J.2959-60; 22/8/2018, J.3592-3; 16/10/2018, J.3940; 4/12/2018, J.4407-8.

Chapter 20—Relations with the judiciary

The parliamentary commission of inquiry

Page 704, at the end of footnote 23, add:

> On 22 June 2017, the President informed the Senate of the Presiding Officers' decision to release the remaining material, which was subsequently tabled and published online on 14 September 2017: see Records of the Parliamentary Commission.

Appendix 3—Committee of Privileges Reports 1966–June 2019

Page 847, at the end of the table, add:

Report, date tabled	Reference	Findings, recommendations, action by Senate
164th Report (Final Report): *Search warrants and the Senate*, PP 68/2017 28/3/2017, J.1209	**Referred by Senate:** President determined precedence 31/8/2016; motion moved by Senator Dastyari at the request of Senator Conroy and agreed to 1/9/2016, J.95.	*Also includes Final Report on status of material seized under warrant* **Recommendations:** • claim of privilege be upheld and documents be returned to former senator, • an improper interference occurred but finding of contempt was made, • the seized material warrants protection on the basis that an improper interference occurred, • the national guideline for the execution of search warrants where parliamentary privilege may be involved requires remedial action to be addressed in its inquiry into intrusive powers. **Action by Senate:** • adopted 28/3/2017, J.1209
165th Report: *Persons referred to in the Senate: Mr. Jamie Ware, Board Chair Redlands College*, PP 214/2017 22/6/2017, J.1552	**Referred by President:** 1/5/2017	**Recommendation:** • a response by Redlands College be incorporated in Hansard. **Action by Senate:** • adopted 22/86/2017, J.1552

166th Report: *Possible improper influence of a witness before the Environment and Communications References Committee*, PP 223/2017 8/8/2017, J.1609	**Referred by Senate:** President determined precedence 8/2/2017; motion moved by Senator Siewert at the request of Senator Whish-Wilson, Chair of Environment and Communications References Committee, and agreed to 9/2/2017, J.883.	**Recommendation:** • unable to conclude with any certainty that there was any attempt to improperly influence a witness and a contempt should not be found. **Action by Senate:** • adopted 8/8/2017, J.1609
167th Report: *Persons referred to in the Senate: Ms. Jane Carrigan,* PP 333/2017 17/10/2017, J.2090	**Referred by President:** 4/9/2017	**Recommendation:** • a response relating to the contents of a tabled document be incorporated in Hansard. **Action by Senate:** • adopted 17/10/2017, J.2090
168th Report: *Parliamentary privilege and the use of intrusive powers,* PP 88/2018 28/3/2018, J.2987	**Referred by Senate:** motion moved by Senator Xenophon and agreed to 28/11/2016, J.630.	**Recommendation:** • to ensure claims of parliamentary privilege can be raised and resolved in relation to information accessed in the exercise of intrusive powers and other investigative powers, the Presiding Officers, in consultation with the executive, develop protocols that will set out agreed processes to be followed by law enforcement and intelligence agencies when exercising those powers. **Action by Senate:** • adopted 21/6/2018, J.3251
169th Report: *Persons referred to in the Senate: Professor Simon Chapman AO*, PP 90/2018 28/3/2018, J.2987	**Referred by President:** 8/12/2017	**Recommendation:** • that a response be incorporated in Hansard. **Action by Senate:** • adopted 28/3/2018, J.2987

170th Report: *Persons referred to in the Senate: Miss Lisa Hay and Dr Geoffrey Robinson*, PP 91/2018 28/3/2018, J.2988	**Referred by President:** 21/12/2017	**Recommendation:** • that the responses be incorporated in Hansard. **Action by Senate:** • adopted 28/3/2018, J.2988
171st Report: *Persons referred to in the Senate: Mr John Lloyd*, PSM PP 357/2018 16/10/2018, J.3942	**Referred by President:** 31/8/2018	**Recommendation:** • that a response, be incorporated in Hansard. **Action by Senate:** • adopted 16/10/2018, J.3942 • reported noted 18/10/2018, J.4015
172nd Report: *Disposition of material seized under warrant*, PP 552/2018 26/11/2018, J.4219	**Referred by Senate**: President made statement 15/10/2018; motion moved by Senator Urquhart at the request of Senator Pratt, Chair of Legal and Constitutional Affairs References Committee and agreed to 16/10/2018, J.3925-6.	**Recommendation:** • the claim of privilege be upheld, and the documents be withheld from the AFP investigation and provided to Senator Pratt. **Action by Senate:** • adopted 26/11/2018, J.4219
173rd Report: *Person referred to in the Senate: Mr Danny Eid*, PP 62/2019 14/2/2019, J.4686	**Referred by President:** 20/12/2018	**Recommendation:** • that a response be incorporated in Hansard. **Action by Senate:** • adopted 14/2/2019, J.4686

174th Report: *Parliamentary Privilege and the use of search warrants*, PP 143/2019 2/4/2019, J.4816	**Referred by Senate:** Extension of reference into the disposition of material seized under warrant	**Findings:** • the structure of paragraph 4.2 of the National Guideline is ambiguous and it would be difficult to prove intent on the AFP's behalf and therefore the matters should not be investigated further. • the MOU and National Guideline should be amended to provide: o the relevant Presiding officer be notified in circumstances where parliamentary proceedings or members of Parliament are include in the terms of the warrant; and o the AFP be required to undertake parliamentary privilege training. **Action by Senate:** • none required
175th Report: *Possible improper interference with a Senator in the free performance of his duties*, PP 144/2019 2/4/2019, J.4816	**Referred by Senate:** President determined precedence 16/10/18; motion moved by Senator Burston and agreed to 17/10/2018, J.3965.	**Conclusion:** • it would be inappropriate to pursue an inquiry as court proceedings had been initiated. • parliamentary privilege is to protect the Parliament and is not a mechanism to resolve internal party politics or quarrels between senators. **Action by Senate:** • none required
176th Report: *Person referred to in the Senate: Mr Ben Davies*, PP 145/2019 2/4/2019, J.4816	**Referred by President:** 12/2/2019	**Recommendation:** • that a response be incorporated in Hansard. **Action by Senate:** • adopted 2/4/2019, J.4816

Appendix 4—Matters of privilege raised and rulings of the President

Page 860, at the end of the table, add:

Date, Journal reference	Senator	Subject	Ruling regarding determination of precedence
8/2/2017, J. 851	Senator Waters, the then Chair of Environment and Communications References Committee	Possible improper influence of a witness to withhold evidence from the Environment and Communications References Committee	Given
16/10/18, J. 3915-16	Senator Burston	Possible improper interference with a Senator in the free performance of his duties	Given

Appendix 5—Private senators' bills

Private senators' bills passed since 1901

Page 864, after Parliamentary Service Amendment Bill 2013, add:

Marriage Amendment (Definition and Religious Freedoms) Bill 2017

Purpose: To amend the *Marriage Act 1961* to redefine marriage as a union of two people and protect religious freedoms.

Senate: Introduced by Senator Dean Smith 15/11/17; agreed to with amendments and read a third time 29/11/17.

HoR: Introduced 4/12/17; read a third time 7/12/17.

Assent: 8/12/17; Act no. 129 of 2017.

Private senators' bills which have passed the Senate since 1901

Page 872, above Low Aromatic Fuel Bill 2012, add:

Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill 2011 [previously Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010]

Introduced by: Senator Bob Brown

Date passed by Senate: 18 August 2011

Page 872, after Low Aromatic Fuel Bill 2012, add:

Parliamentary Service Amendment Bill 2013 [previously ~ 2012]
Introduced by: Senator Hogg

Date passed by Senate: 7 February 2013

Page 873, after the last bill, add:

Fair Work Amendment (Protecting Take-Home Pay) Bill 2017
Introduced by: Senators Cameron, Di Natale and Lambie

Date passed by Senate: 30 March 2017

Banking and Financial Services Commission of Inquiry Bill 2017
Introduced by: Senators Whish-Wilson, Hanson, Hinch, Lambie, Roberts and Xenophon

Date passed by Senate: 15 June 2017

Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017
Introduced by: Senator Gallagher

Date passed by Senate: 10 August 2017

Medicinal Cannabis Legislation Amendment (Securing Patient Access) Bill 2017
Introduced by: Senator Di Natale

Date passed by Senate: 19 October 2017

Marriage Amendment (Definition and Religious Freedoms) Bill 2017
Introduced by: Senator Dean Smith

Date passed by Senate: 29 November 2017

Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018
Introduced by: Senator Rice

Date passed by Senate: 18 June 2018

Taxation Administration Amendment (Corporate Tax Entity Information) Bill 2018
Introduced by: Senator Gallagher

Date passed by Senate: 25 June 2018

Animal Export Legislation Amendment (Ending Long-haul Live Sheep Exports) Bill 2018
Introduced by: Senators Rhiannon, Hinch and Storer

Date passed by Senate: 10 September 2018

Productivity Commission Amendment (Addressing Inequality) Bill 2017
Introduced by: Senator McAllister

Date passed by Senate: 12 November 2018

Appendix 6—List of bills in which the Senate has made requests for amendments and results of such requests, 1901–30 June 2019

Page 919, at the end of the table, add:

HRD pages on which Senate requests appear	Date	Title of Bill and Nature of Request	How disposed of
7557-7558	22/6/17	**Australian Education Amendment Bill 2017** — Two requested amendments to change the basis for calculating funding for certain schools; and 14 consequential requested amendments (both requests and amendments were made to this bill)	Requested amendments made
2627-2629	26/3/18	**Social Services Legislation Amendment (Welfare Reform) Bill 2017 —** Two requested amendments to increase the amount of a one-off payment to certain recipients of youth allowance and jobseeker payment; one requested amendment to provide relief from the activity test for newstart allowance for certain women; and two consequential requested amendments (both requests and amendments were made to this bill)	Requested amendments made
2641-2642	26/3/18	**Treasury Laws Amendment (Junior Minerals Exploration Incentive) Bill 2017 —** One requested amendment to increase the amount of exploration credits available as a refundable tax offset (both a request and amendments were made to this bill)	Requested amendments made

13735-13736	18/2/19	**Industrial Chemicals Charges (General) Bill 2017, Industrial Chemicals Charges (Customs) Bill 2017 and Industrial Chemicals Charges (Excise) Bill 2017** — One requested amendment to each bill to permit the regulations to prescribe different charges or methods depending on the value of industrial chemicals introduced by a person during a financial year, rather than a registration year	Requested amendments made

Appendix 7—Casual vacancies in the Senate 1977–30 June 2019

Page 923, at the end of the table, add:

Vacancy			Appointment		
Senator	**Reason for vacancy**	**Date**	**Senator**	**How appointed**	**Date**
Back, C.J.	Resignation	31/7/17	Brockman, W.E.	WA Parliament	15/8/17
Xenophon, N.	"	31/10/17	Patrick, R.L.	SA Parliament	14/11/17
Dastyari, S.	"	25/1/18	Keneally, K.K.	NSW Parliament	14/2/18
Brandis, G.	"	7/2/18	Stoker, A.J.	Qld Parliament	21/3/18
Rhiannon, L.	"	15/8/18	Faruqi, M.	NSW Parliament	15/8/18
Bartlett, A.	"	27/8/18	Waters, L.	Qld Parliament	6/9/18
Bushby, D.C.	"	21/1/19	Askew, W.A.	Tas Governor	6/3/19
Collins, J.	"	15/2/19	Ciccone, R.	Vic Parliament	6/3/19
Leyonhjelm, D.	"	1/3/19	Spender, D.	NSW Governor	20/3/19

Appendix 8—Committees on which senators served 1970–30 June 2019

Page 926, at the end of the table, add:

Year	Domestic	Estimates	Legislative Scrutiny	Legislative & general purpose	Select	Joint	Total
2017	8	0	2	16	10	20	56
2018	8	0	2	16	9	20	55
2019	8	0	2	16	3	19	48

Appendix 9—Select Committees 1985–2019

Senate Select Committees

Page 930, update the following entries:

National Broadband Network, add: PP 189/2016

Health, add: PP 215/2016

Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, add: (Report — PP 13/2017)

Red Tape, add: (Reports — PP 78/2017, 220/2017, 341/2017, 40/2018, 99/2018, 571/2018 and 579/2018)

Resilience of Electricity Infrastructure in a Warming World, add: (Report — PP 108/2017)

Funding for Research into Cancers with Low Survival Rates, add: (Report — PP 517/2017)

Strengthening Multiculturalism, add: (Report — PP 267/2017)

Page 931, after Strengthening Multiculturalism, add:

National Integrity Commission (Report — PP 308/2017)

Lending to Primary Production Customers (Report — PP 563/2017)

Future of Public Interest Journalism (Report — PP 8/2018)

Future of Work and Workers (Report — PP 297/2018)

Political Influence of Donations (Report — PP 179/2018)

Stillbirth Research and Education (Report — PP 582/2018)

Obesity Epidemic in Australia (Report — PP 591/2018)

Charity Fundraising in the 21st Century (Report — PP 61/2019)

Electric Vehicles (Report — PP 14/2019)

Fair Dinkum Power (Report — PP 206/2019)

Joint Select Committees:

Page 931, correct title of "Retailing Industry" to:

Retailing Sector (Report — PP 174/1999)

Page 931, remove the following entry:

National Disability Insurance Scheme (Report — PP 161/2014)

Page 932, update the following entries:

Cyber Safety, substitute: (Reports — PP 127/2013, 244/2013)

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, add: PP 220/2014

Government Procurement, add: (Report — PP 239/2017)

Page 932, after Government Procurement, add:

Oversight of the Implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (Report — PP 99/2019)

Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (Reports — PP 235/2018 and 569/2018)

Appendix 10—A Chronology of the Senate: 1901–2019

Page 939, at the end of the table, add:

Date	Event
23 December 2016	A senator becomes prima facie subject to disqualification under sections 44(iii) and 45 of the Constitution following the making of a sequestration order against his estate
3 February 2017	On referral from Senate, Court of Disputed Returns holds that a senator was convicted and subject to be sentenced for an offence punishable by imprisonment for one year or longer at the date of the 2016 election and that therefore the senator was incapable of being chosen by reason of section 44(ii) of the Constitution
5 April 2017	On referral from Senate, Court of Disputed Returns holds that a senator had an indirect pecuniary interest in an agreement with the Public Service of the Commonwealth and that therefore the senator was incapable of being chosen by reason of section 44(v) of the Constitution

Oct 2017 – May 2018	On referral from Senate, Court of Disputed Returns holds that eight senators had, at the time that they nominated for election, the status of subject or citizen of a foreign power and that therefore the senators were incapable of being chosen by reason of section 44(i) of the Constitution
22 November 2018	The power of a joint committee to summon witnesses and the validity of the Parliament's contempt powers are affirmed in the High Court
14 February 2019	Amendments to the *Commonwealth Electoral Act 1918* establishing a mandatory qualification checklist for candidates nominating for election pass the Senate
3 April 2019	A Register of Senators' Qualifications is established