

# DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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**for the sitting period 16 November—2 December 2009**

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## **LEGISLATION**

The focus of political interest during the period was the government's Carbon Pollution Reduction Scheme package of bills, but they also gave rise to some points of procedural interest. When the bills were received the question that they be passed without formalities under standing order 113 was negated, which meant that, after the first reading, the second reading had to be put off to the next day of sitting. This decision was subsequently altered to allow the third reading debate to take place immediately after the committee stage. After a lengthy consideration, the bills were amended to reflect the government's agreement with the Opposition, but following the change in the Opposition's position, the bills were rejected on the last day of sitting, thereby providing the government with unambiguous grounds for a dissolution under section 57 of the Constitution. If there is such a dissolution and the bills are presented to a joint sitting of the Houses, the government will be entitled to present them with any of the amendments agreed to by the Senate. The government has indicated an intention to reintroduce them in February; a further consideration of them at that time could, in any future court case, perhaps confuse the issue as to whether the bills had qualified for a dissolution on 2 December. If the bills are rejected in February and rejected again after the required three month period, the government could establish a fresh "trigger" for a dissolution.

In a demonstration of the principle that the Senate controls its legislative agenda, the Health Insurance Amendment (Compliance) Bill 2009 was brought on by a vote of the non-government senators and given precedence over other business, against the wishes of the government, to allow amendments to be moved to it on 23 November. Among the amendments passed were amendments to the Health Insurance Act to provide for the revival of disallowed medical services table items (see Bulletin no. 236, pp 3-4, and below, under Orders for documents). The message containing the government's rejection of the amendments was also brought on by the non-government senators on 26 November and the amendments insisted on. The matter remained unresolved at the end of the sittings.

The Social Security and Other Legislation Amendment (Income Support for Students) Bill 2009 was passed with Opposition and Green amendments on 17 November. When the message indicating the government's rejection of the amendments was considered on 24 November there were equally divided votes on the question that the amendments not be insisted on, meaning that the amendments were lost (see *Odgers' Australian Senate Practice*, 12<sup>th</sup> ed., 2008, p. 258). Compromise amendments proposed by the government were similarly lost. Then the motion for the adoption of the report of the committee of the whole was negatived on equally divided votes, meaning that the message remains before the committee of the whole, and the bill in effect in limbo. This issue was not resolved at the end of the sittings, and results in no payments to some students next year until the matter is settled.

Not all transactions on legislation resulted in disagreements between the Senate and the government, however. The government agreed to Senate amendments to the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 on 19 November, with one substitute amendment. On 24 November the Senate was notified of government agreement to Senate amendments to four bills. On 16 November the Senate resolved not to insist on Senator Xenophon's amendment for a sunset provision in the Corporations Amendment (Improving Accountability on Termination Payments) Bill.

#### **ORDERS FOR THE PRODUCTION OF DOCUMENTS**

There were several battles involving the Senate seeking information on significant issues and the government declining to produce the required information.

The term "battle" certainly applies to the transactions relating to the disallowed items in the general medical services table (see Bulletin no. 236, pp 3-4). An order was passed on 17 November for the production of the government's claimed legal advice underlying the assertion that the bill passed by the Senate is "unconstitutional". This was met with a refusal on 18 November, with the extraordinary claim that disclosure of the advice might prejudice the Commonwealth's position in future legal proceedings. As section 53 of the Constitution is not justiciable, this claim clearly has no foundation, as there cannot be any legal proceedings about whether the bill is "unconstitutional". Senator Cormann tabled four advices by the Clerk and one from a firm of lawyers refuting the government's claims. A further order for the advice was made on 23 November, and a government bill was brought on and amended by adding the provisions contained in the bill passed by the Senate (see above, under Legislation). The government again refused to produce the legal advice on 24 November, citing some grounds already refuted, and a further advice from the Clerk was tabled on 26 November. In the meantime, a government determination under the Health Insurance Act to replace the disallowed table items was also disallowed (see below, under Delegated legislation). There the matter rests, no doubt to be resumed next year.

An order was passed on 19 November for information on cataract operations, the subject of the dispute over the medical services table items. The government's response on 23 November indicated that more time was needed to comply with the order, but repeated the misconception that, because standing order 164 allows a senator to raise in the Senate without notice any failure to comply with an order for documents after thirty days, there is in effect a thirty day extension to comply with every order for documents. It is suspected that government officials know full well that this is not the case, but intend to keep repeating the misconception as an excuse for non-compliance.

The government response to an order of 19 August for information about aged care providers, which was met with a claim that some data was not available, led to a further order on 17 November and much the same response on 18 November, with an additional claim that two documents were the subject of "Cabinet deliberations".

Two orders were met with responses to the effect that the information would be forthcoming in the future. An order of 17 November about carbon storage sites elicited the response the following day that there was no such document, but that something would be released in the future. A further order on 25 November met with the same excuse on the following day. Similarly, following a government promise of information in response to an order of 16 September about forest cover maps, a further order was made on 18 November which was met the following day with a further promise of future cooperation.

The consideration of bills which rely for their operation on future regulations is a matter of growing concern among senators. An order on 25 November for draft regulations to be made under legislation relating to midwives and nurse practitioners was met with the response that the regulations had not been drafted. The bills remain before the Senate, but have been referred again with proposed government amendments to the Community Affairs Committee.

Where orders for documents are met with incomplete responses, the orders remain on the Senate Notice Paper and are regarded as unfulfilled. This is the case with orders made on 27 and 29 October relating to government assessments of alternative carbon emission reduction schemes and the Montara oil spill, respectively, which were met with such incomplete responses on 16 November.

Not every order for documents was met with government refusals. An order relating to the Future Fund made on 26 October was met with a complete response on 16 November. Similarly, a notorious CSIRO paper, the "Spash paper" on global warming, alleged to have been "censored", was produced on the same day that the order for it was made on 26 November.

An order was made on 17 November for information about the appointment of a Labor Party figure to the National Broadband Network Company, and was complied with on the following day. An order passed on 18 November requiring the production of inter-governmental agreements under the Fair Work legislation was complied with on 19 November with a promise of further information when available.

An order made on 26 November requires the production of the government response to the National Preventative Health Taskforce report.

#### **PUBLIC INTEREST IMMUNITY CLAIMS**

Frequent government refusals to produce information have led to one significant development: a reference was made to the Finance and Public Administration Committee on 16 November for inquiry into the feasibility of independent arbitration of government public interest immunity claims. On the following day the government made a clarifying statement indicating that it had not opposed this reference.

#### **DELEGATED LEGISLATION**

A determination by the government under the Health Insurance Act to replace the disallowed medical services table items relating to cataract operations (see Bulletin no. 236, pp 3-4) was in turn disallowed on 25 November, leaving no provision for payments for such operations (see also above, under Legislation and Orders for documents). There were indications that the government intended to wait until the Senate has risen to make replacement determinations which the Senate will not be able to disallow until next year.

Two disallowance motions were debated and resolved on the last available day on 17 November. One, a Greens' motion relating to disease control plans, was passed, while an Opposition motion relating to a Coral Sea proclamation was negated. On the second motion, the closure was used, moved by the Greens, to ensure a vote took place and the proclamation was not disallowed by default (see subsection 42(2) of the Legislative Instruments Act).

A motion was passed on 25 November to allow the remaking of export control regulations disallowed on 15 September, as a result of agreement between the Opposition and the government relating to new regulations.

An illustration of the ability of the Senate to disallow any self-contained provision of a legislative instrument was provided when notice was given to disallow a definition in some regulations relating to parliamentary entitlements. The notice was subsequently withdrawn following an undertaking by the government.

(See also below, under Suspension of sittings.)

#### **PRIVILEGES COMMITTEE**

The Privileges Committee presented its 141<sup>st</sup> Report on 23 November on a case of alleged penalisation of a witness as a result of her evidence. Although the action against the witness had been withdrawn by the employing body concerned, there appeared to be a lack of acceptance on the part of that body that it could not take action against the witness because of her Senate committee evidence, and she had left her employment. The committee did not find a contempt, but its inquiry and report reinforce the principle that any adverse treatment of a witness as a result of their evidence is unlawful and a contempt.

On 25 November the committee presented its 142<sup>nd</sup> Report, the much awaited report on the Godwin Grech affair. The committee was required by the Senate to report on whether there had been any adverse treatment of Mr Grech as a result of his evidence to the Economics Committee, and whether there had been any false or misleading evidence presented to that committee. The committee looked at media behaviour at the committee hearing and treatment of Mr Grech, and action taken by the Australian Federal Police and the Treasury Department in relation to him. The committee found that no contempt was committed in that regard, but emphasised the need for proper control of the media at committee hearings. The committee found that misleading evidence had been given to the Economics Committee, but was unable to pursue that matter further because of Mr Grech's mental state and health.

#### **PROCEDURE COMMITTEE**

The Procedure Committee presented a report on 24 November relating to the operation of the Senate's order of 13 May 2009 in relation to public interest immunity claims in the supplementary estimates hearings in October. The committee found that there was still some lack of understanding of the order amongst public officers.

The report also recommended an extension for the remainder of this Parliament and the first two sitting weeks of the next Parliament of the temporary order relating to question time, with an amendment to restrict supplementary questions to thirty seconds.

## **SUSPENSION OF SITTINGS**

The sitting of the Senate on 26 November was extended to the following day by means of a suspension of the sitting, and the sitting on 30 November was extended into 1 and 2 December by suspensions of the sitting. Departments and agencies have been reminded that they should count these days as sitting days for the purposes of tabling delegated legislation.

## **RELATED RESOURCES**

The *Dynamic Red* records proceedings in the Senate as they happen each day.

The *Senate Daily Summary* provides more detailed information on Senate proceedings, including progress of legislation, committee reports and other documents tabled and major actions by the Senate.

Like this bulletin, these documents may be reached through the Senate home page at [www.aph.gov.au/senate](http://www.aph.gov.au/senate)

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