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Procedural Information Bulletin

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Resignation and swearing of senators

The first business of the fortnight was the swearing of Senator Carr who was absent in the first sitting week after 1 July owing to ministerial business. In this situation, where a senator has been elected or re-elected at a general election but is not present at the commencement of the term, the senator takes his or her seat at the beginning of the first available sitting day and is called to the table to make the oath or affirmation of allegiance. A different practice applies when a senator who has been appointed to a casual vacancy attends the Senate for the first time. In this situation, the Senate meets, the Usher of the Black Rod announces the new senator and the senator is accompanied into the chamber by two sponsors. This ceremony of introduction is not mandated by the standing orders but is a matter of practice, adopted from ancient custom.

One of the problems with ancient customs is that if they have no apparent rationale, they are susceptible to distortion. Such is the case with this ceremony of introduction which has been confused over the years with the practice of a newly elected Speaker of the House being dragged to the chair. The latter tradition of reluctance was based on the very real fear experienced by 17th century Speakers who, as the channel of communication between the House of Commons and absolute Stuart Monarchs, were often literally in danger of losing their heads in that role. The dragging into the chamber of a senator newly appointed to a casual vacancy is a case of the wrong tradition in the wrong place at the wrong time.

Attached to this Bulletin is an Occasional Note, prepared by the Research Section, on the origins and contemporary use of the ceremony of introduction. The resignation of Senator Coonan on 22 August means that a casual vacancy now exists in the representation of NSW. When a replacement for Senator Coonan is chosen in accordance with section 15 of the Constitution, the ceremony of introduction will be observed when the appointed senator is sworn and takes his or her seat for the first time.

Legislation

The Carbon Credits (Carbon Farming Initiative) Bill 2011 and two related bills were the subject of extensive debate during the fortnight but finally passed on 22 August with amendments moved by the Government, the Australian Greens and Senator Xenophon. All amendments were agreed to by the House. During the debate, the minister tabled draft regulations which are still subject to consultation. On numerous occasions in the past, the Senate has sought draft regulations to inform its scrutiny of the principal legislation, a matter that was the subject of a Procedure Committee report last year.

A package of research and development bills was the subject of both amendments and requests for amendments, one of the bills being treated as a bill imposing taxation, all amendments to which must be moved as requests for amendments in accordance with section 53 of the Constitution. A Government amendment which had been circulated as a request on the advice of the government's drafters was the subject of a statement by the Chairman of Committees, Senator Parry, who indicated that the request would be dealt with as an amendment because it was not in accordance with the precedents of the Senate for it to be moved as a request, lacking as it did a direct effect on an appropriation. The House subsequently agreed to the amendments without demur and made the requested amendments, indicating that the House no longer maintains its former position on this issue. Both Opposition and Government amendments to one of the bills changed the startup date for the scheme but the Opposition amendments, moved as a package, contained other elements as well. When the Opposition amendments were negatived, the government's similar amendments were moved and agreed to. The same amendment rule in standing order 118(2) does not apply in these circumstances because of the differences between the packages.

A private senator's bill relating to the capacity of territory governments to enact legislation without Commonwealth executive government veto was passed on 18 August, having been amended to widen its application beyond the ACT. The amendments, moved on behalf of the Government which is supporting the bill (introduced by Senator Bob Brown), included an amendment to the title of the bill, an amendment which is required under standing order 118(4) to be separately reported.

Orders for production of documents

An order for the production of a specific document relied on to determine High Conservation Value Area boundaries under the recent agreement between the Commonwealth and Tasmania was agreed to on 17 August on the motion of Senator Colbeck. The report, described as advice to the Prime Minister and the Premier of Tasmania, was tabled the following day.

A response to an order for production of a document relating to the design of a process to identify appropriate default superannuation funds in awards was presented by the Productivity Commissioner out of sitting and tabled on 16 August. The response attached advice from the Australian Government Solicitor querying the Senate's power to make such an order. This advice has also been provided to the Committee of Privileges as part of a submission to its current inquiry on the government guidelines for official witnesses appearing before parliamentary committees. The submission and a response to it by the Clerk have been published on that committee's website. The response confirmed the Productivity Commissioner's evidence at budget estimates that a reference of this matter under the Productivity Commission Act was expected next year. Such disagreements are invariably resolved by political rather than legal means.

When he failed to get an answer to part of a question on notice to the Minister representing the Treasurer, relating to act of grace payments, Senator Cormann moved an order for the production of the information specified in the original question. An

amendment moved to the motion, by Senator Bob Brown, by leave, widened the date range for the information sought and Senator Cormann expressed his concern that such a move would provide the Government with an excuse for further delay. A statement tabled the following day, 23 August, confirmed Senator Cormann's fears by indicating that the Government was considering whether compliance with the order would warrant the substantial diversion of departmental resources required to respond to it. As the order sought information about the number of cases in which act of grace payments had been made contrary to departmental advice, that response is somewhat alarming.

Outstanding answers to questions on notice

The procedure in standing order 74(5) which allows senators to seek explanations from ministers where answers to questions on notice are outstanding for more than 30 calendar days was again employed during the fortnight, in some cases for questions that had been asked in 2010. Explanations, such as they were, were the subject of motions to take note of them, one minister noting the inconvenience of the procedure which delayed the commencement of motions to take note of answers to questions without notice. The biannual Questions on Notice Summary, which records the fate of all questions on notice, was tabled on 17 August.

Questions without notice

Several questions without notice were asked in relation to the situation concerning the Member for Dobell. The President affirmed rulings of earlier Presidents that ministers need answer such questions only in so far as they related to their own or their representative portfolio interests. While questions about members of the other House have been allowed in the past, it is not in order for questions to contain personal reflections on such members. In response to a suggestion made by the Leader of the Government in the Senate, Senator Evans, the President circulated to all senators a summary of the rules applying to questions. A copy is attached to this bulletin.

Procedural changes

Two proposals for change that had been on the Notice Paper for some time were moved by Senator Bob Brown and defeated. The first was a resolution requiring questions without notice to be allocated on an equal basis. The allocation of questions is not governed by any specific rule other than the general rules applying to the allocation of the call in debate. In practice, however, it is governed by an informal arrangement that allows for a semi-proportional allocation of questions. The formula was varied recently following the change in party representation in the Senate but it remains an informal arrangement nonetheless (see Bulletin No. 253).

The second proposal was to amend standing order 104 to include a requirement for divisions to be held again in cases of misadventure. The practice of the Senate is to allow divisions to be held again, by leave, once the misadventure has been explained. Defeat of

the motion means that the matter remains a matter to be determined by the Senate on a case-by-case basis.

Petition disputing election

Standing order 207 provides for the tabling of a petition raising any question concerning the election, choice or appointment of a senator which cannot, under the provisions of the Commonwealth Electoral Act, be brought before the Court of Disputed Returns. The standing order is of residual operation only because all questions concerning these matters are now thought to be provided for under the provisions of the CEA. A petition expressed to be a petition under standing order 207, disputing the election of Senator Madigan, was tabled on 17 August. The tabling of the petition has no automatic consequences. An advice from the Clerk, tabled with the petition, explains the options available to the Senate.

Matter of privilege

For the first time since the Godwin Grech affair in 2009, the President gave precedence to a notice of motion, and the Senate (on 17 August) agreed to the motion moved by the Chair of the Rural Affairs and Transport References Committee, Senator Heffernan, to refer a matter of privilege to the Committee of Privileges for inquiry and report. The reference arose from the committee's inquiry into pilot safety and it concerns a possible penalty or injury inflicted on a witness on account of their evidence, and possible improper interference with a witness.

A government notice of motion to expand the membership of the committee by one, to include a cross bench member, was postponed on 25 August.

First speeches

All new senators gave their first speeches during the fortnight pursuant to the order agreed to in the first week in July.

Parliamentary Budget Office

The government's response to the report of the Select Committee on the Parliamentary Budget Office was tabled on 16 August with the government agreeing to all the substantive recommendations made by the committee. Money for the office (approximately $25 million over four years) has already been earmarked in the 2011-12 Budget. The bill to establish the office was introduced in the House of Representatives on 24 August.

Fair Work Australia

A third attempt to vary the order of the Senate requiring the President of Fair Work Australia to attend all estimates hearings where the estimates of FWA were being

considered was unsuccessful on 23 August when, for the second time, formality was denied, preventing Senator Marshall moving the motion (see Bulletin No. 253 and 243). In a statement made by leave, the Manager of Opposition Business, Senator Fifield, indicated that the issue was one that should be debated. Unusually the motion was selected for the general business debate on 25 August but was not concluded in the available time. The original order of 28 October 2009 therefore continues to apply.

Deferred divisions

A consequence of the temporary order providing for consideration of private senators' bills on Thursday mornings is that the Senate meets at 10 am on Mondays, but divisions may not be held till after 12.30 pm. On Monday 22 August, during consideration of the carbon farming initiative package of bills, divisions were called on various amendments being considered in committee of the whole (see Bulletin No. 252 under 'Deferred divisions'). The questions were postponed and, as the committee stage on the bills extended beyond 12.30 pm, the delayed votes were taken then. When a division is deferred, the practice is for the chair to put the question again to confirm that a division is still required.

Committee reports and outcomes

The last Bulletin reported on the reference of draft bills relating to the registration of business names to the Economics Legislation Committee, before the final details were settled by the relevant intergovernmental forum. The committee's report highlighted numerous issues for consideration by Commonwealth and State/Territory ministers in progressing this proposed national scheme legislation, demonstrating, in theory, the usefulness of parliamentary scrutiny of legislative proposals in the development stage. (Somewhat unusually, additional comments from Opposition senators were tabled separately to the committee's report.) However, the bills were introduced into the House of Representatives early in the fortnight and comments by the Scrutiny of Bills Committee in Alert Digest No. 9 of 2011 identified that there were still numerous deficiencies in the bills, including their use of Henry VIII clauses and offence provisions providing for strict liability or reversal of the onus of proof.

Shortcomings of the vocational education and training regulator bills, which were the result of a text-based referral of powers by NSW under section 51(xxxvii) of the Constitution were also reported on in the last Bulletin. The Education, Employment and Workplace Relations Committee had recommended that amending legislation be introduced as soon as possible to address its concerns, once the original bills had been enacted under the referral of powers. A remedial bill was introduced in the Senate on 24 August 2011.

Numerous other committee reports were presented during the fortnight, including a report by the Finance and Public Administration Committee criticising the deferral of subsidies to new drugs under the PBS as a savings measure. The Joint Select Committee on Cyber Safety also presented a report criticising the Cybercrime Legislation Amendment

Bill 2011 on numerous grounds. A report by the Foreign Affairs, Defence and Trade References Committee added to the criticism of the contract for transporting Australian troops to the Middle East.

Unproclaimed legislation

The annual report on unproclaimed legislation required by standing order 139(2) was tabled on 24 August. It listed 15 Acts which commence on proclamation (in whole or in part) and which have not yet been proclaimed. Of these, 8 have default commencement provisions under which they will come into effect 6, or in one case 12, months after Royal Assent (or on a specified date) if a proclamation has not been made. Four depend on interjurisdictional agreements being finalised. Of the remaining three cases, one depends on the alignment of data processes and systems between agencies, one is contingent on whether tobacco companies exploit a particular exemption relating to tobacco advertising, and the third is a section of the *Koongarra Project Area Act 1981* which may be considered for repeal if current negotiations achieve finality. Such action would result in the removal of one of the last two remaining items from the original list of unproclaimed legislation presented in 1988 as a return to order. The order arose from concerns that provisions for commencement of legislation on proclamation allowed the government of the day to delay the operation of laws passed by Parliament, without having to account for the delay.

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/index.htm

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Occasional Note

Swearing-in of Senators and Members Outside of General Elections

A number of jurisdictions within Australia and the Commonwealth stipulate that new members must be sworn in before 'taking their seat'.[1] In many cases this is a constitutional requirement.[2] After an election, by-election or filling of a casual vacancy, and upon the return of the writs, certificates of election or certificates of choice, new members and senators are required to swear an oath or make an affirmation or pledge and sign the Roll[3] before taking their allocated seat and participating in chamber proceedings.

In particular circumstances the members or senators are also 'introduced' to the chamber as part of the swearing-in process. This 'introduction ceremony' involves a new member being admitted to the chamber from either outside the chamber, below the Bar or at the Bar. The new member is accompanied by two members from the same political party to the Table, from where they are sworn-in.

The jurisdictions that adopt versions of this 'introduction ceremony' include the United Kingdom, the Canadian House of Commons, both houses of Australia's Federal Parliament and the New South Wales Legislative Assembly.[4] They all refer to the House of Commons (UK) resolution of 23 February 1688 as the basis for the ceremony.[5] It states:

> That upon new members coming into the House, they be introduced to the Table between two members, making their obeisances as they go up, that they may be better known to the House.[6]

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1 Australian House of Representatives, Australian Senate, Canadian House of Commons, Canadian Senate, New Zealand House of Representatives, New South Wales Legislative Assembly, New South Wales Legislative Council, Australian Capital Territory Legislative Assembly, House of Commons (UK); House of Lords (UK).

2 In Australia this requirement stems from Section 42 of the Constitution.

3 This occurs in the respective chambers of all jurisdictions except Canada where the present swearing-in procedure followed by the House of Commons is more often than not undertaken in the Office of the Clerk. O'Brien & Bosc, *House of Commons Procedure and Practice*, 2nd Ed, 2009.

4 The NSW Legislative Council, the ACT Legislative Assembly and Canadian Senate do not refer to any process of introduction, making reference only to the requirements for the oath, affirmation, pledges and the signing of the roll within the chamber. In New Zealand, the formal introduction process does not occur. McGee, D, *Parliamentary Practice in New Zealand*, 3rd Ed, 2005, Chapt 12.

5 A similar version of the introduction ceremony has been evidenced in House of Lords since 1621. It is a more involved ceremony and its purpose has been to substitute for what used to be the personal investiture of a new peer by the sovereign. It also serves as a means of allowing the House to see and recognise new peers as well as to acknowledge their right to sit and vote as a member. Clerk of the Parliaments, House of Lords, *Companion To The Standing Orders*, 22nd Ed; Select Committee On The Ceremony of Introduction Ceremony of Introduction, *Report*, 1998.

6 Hatsell, J, *Precedent of Proceedings in the House of Commons*, Vol II (1971 reprint of 4th ed., 1818), p 85

These jurisdictions, however, only apply the 'introduction ceremony' to members elected at a by-election or senators who fill casual vacancies.[7] Members and senators elected at general or periodical elections are not required to participate in this process. This has been the case since 1736.[8] Even if such members are late or absent from the swearing in ceremony at the opening of Parliament, they are not subject to an 'introduction ceremony' because they are taken as having been returned at the beginning of the Parliament when no such introduction is customary.[9]

Is the 'introduction ceremony' mandatory?

Jurisdictions that use the 'introduction ceremony' approach it in different ways. The Canadian House of Commons considers the process a 'ceremonial' one. The NSW Legislative Assembly does not consider the ceremony to be mandatory. The right of a member to sit and vote in these jurisdictions is not affected if an introduction does not take place.[10]

Procedural texts for the House of Commons (UK) and the House of Representatives in Australia make reference to the 'introduction ceremony' as being 'in line with ancient order and custom',[11] but it is only in the House of Commons (UK) where the 'introduction ceremony' appears to be a requirement before a member can 'take their seat'. Erskine May indicates that a member returned as a result of a by-election must be 'introduced' to the House before they can be sworn-in and take their seat.[12] The only exception is if the order for such a ceremony is dispensed with by the House.[13] Previous inquiries by both Houses in the UK suggest the 'introduction ceremony' will be retained for the foreseeable future.[14]

Although the impact on the legitimacy of the member or senator's ability to take their seat is not stated with regard to the House of Representatives or the Senate, both Australian chambers have continued to use the 'introduction ceremony' for by-elections and casual

7 If the senator is appointed and confirmed by the respective State or Territory Parliament in the required 14 days the senator is not sworn again *Odgers' Australian Senate Practice*, 12th Ed, 2008, Chapter 4, p 106.

8 Hatsell, J, *Precedent of Proceedings in the House of Commons*, Vol II (1971 reprint of 4th ed., 1818), p 85.

9 Erskine May, *Parliamentary Practice*, 24th Ed, fn p 361.

10 O'Brien & Bosc, *House of Commons Procedure and Practice*, 2nd Ed, 2009; *New South Wales Legislative Assembly Practice, Procedure and Privilege*.

11 Harris, I, *House of Representative Practice*, 5th Ed, p 141, Erskine May, *Parliamentary Practice*, 24th Ed, p 361.

12 Erskine May, *Parliamentary Practice*, 24th Ed, fn 4, p 361.

13 Erskine May, *Parliamentary Practice*, 24th Ed, fn 4, p 361.

14 House of Lords Companion To The Standing Orders 22nd Ed; Select Committee On The Ceremony of Introduction Ceremony of Introduction, *Report* 1998; Erskine May, *Parliamentary Practice*, 24th Ed, p 361.

vacancies[15]. The reasons given for this appear to be for the purpose of identification and/or custom.

The current edition of House of Representatives Practice makes reference to the fact that 'this custom is derived from the House of Commons' such 'that they may be the better known to the House'.[16] *Australian Senate Practice* (6th ed) states that the reason for this ceremony is 'that in early Commons times there was the possibility of impersonation'.[17] There is no mention of the introduction ceremony in any subsequent editions.

Satisfying the identification issue

The New Zealand Parliament (which does not have an 'introduction ceremony') satisfies the identification issue by requiring that the Clerk receive, and the Speaker view, a copy of the writ for the election endorsed with the member's name on it, prior to the member being admitted and sworn-in.[18] This enables the Speaker to be satisfied that a 'person appearing at the Bar to take the oath or affirmation has been duly elected as a member of Parliament'[19].

The perspective held by the Canadian House of Commons and the NSW Legislative Assembly also suggests that the process of 'identification' is satisfied as a result of the provision of the writs or certificates of election/choice and that the 'introduction ceremony' is not for the purpose of 'identification'.

Summary

The requirement that a senator be admitted to the chamber and sworn-in prior to 'taking their seat' is cemented in statute in the majority of jurisdictions, although the requirement for an 'introduction ceremony' is not. In some jurisdictions, the majority of which are upper houses, this ceremony has not been considered, while in others it is considered optional or customary. The United Kingdom is the only jurisdiction where it appears a member is unable to take their seat or be sworn in unless they have taken part in an 'introduction ceremony'.

This suggests that, apart from a desire to follow custom or convention, the need for an 'introduction ceremony' at the federal level in Australia is unnecessary if there is confidence that the election writ and/or certificate of choice is an acceptable method of identifying the new member or senator.

(Research Section)

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15 See footage of Kelly O'Dwyer and Paul Fletcher on 2 February 2010 – House of Representatives and footage of Senator Chris Back on 12 March 2009 - Senate.

16 Harris, I, *House of Representative Practice*, p 141.

17 *Australian Senate Practice*, 6th Ed, 1991, p 152.

18 If this is not yet available, as is often the case with by-elections, the Chief Electoral Officer advises the Speaker by means of a fax indicating who has been returned at the particular by-election. McGee, D, *Parliamentary Practice in New Zealand*, 3rd Ed, 2005, Chapt 12.

19 McGee, D, *Parliamentary Practice in New Zealand*, 3rd Ed, 2005, Chapt 12

PRESIDENT OF THE SENATE

PARLIAMENT HOUSE
CANBERRA

pr.let.sen.xx.17795

26 August 2011

TO ALL SENATORS

RULES FOR QUESTIONS

During question time today, I undertook to circulate a summary of the rules for questions.

The main rules for questions are contained in standing order 73 which provides as follows:

73 Rules for questions

(1) The following rules shall apply to questions:

questions shall not contain:

(a) statements of fact or names of persons unless they are strictly necessary to render the question intelligible and can be authenticated;

(b) arguments;

(c) inferences;

(d) imputations;

(e) epithets;

(f) ironical expressions; or

(g) hypothetical matter;

questions shall not ask:

(h) for an expression of opinion;

(i) for a statement of the government's policy; or

(j) for legal opinion;

questions shall not refer to:

(k) debates in the current session; or

(l) proceedings in committee not reported to the Senate.

(2) Questions shall not anticipate discussion upon an order of the day or other matter which appears on the Notice Paper.

(3) The President may direct that the language of a question be changed if it is not in conformity with the standing orders.

(4) In answering a question, a senator shall not debate it.

These rules are interpreted by the chair so as not to restrict unduly the ability of senators to ask questions on a wide variety of subjects. For instance, although questions may not ask for a statement of government policy, it is in order for a question to seek an explanation of government policy or the clarification of a statement made by a minister. A question inviting a minister to comment on opposition policies is strictly out of order, although questions seeking the minister's knowledge of how other policy proposals would affect matters within that minister's responsibility have been ruled in order.

The prohibition on questions containing statements of fact, arguments, inferences, imputations etc. recognises that the purpose of a question is to seek information and not to provide a senator the opportunity to make a statement or, in the case of a supplementary question, to provide commentary on the answer given by the minister. This reasoning also underlies a long-standing prohibition on the use of quotations in questions.

In practice, the chair has discretion to allow the inclusion in a question of so much material as is necessary to make the question clear.

Standing orders may be supplemented by rulings of Presidents which have the same force unless overturned by a contrary decision of the Senate. Relevant rulings include the following:

- Questions or supplementary questions that begin with statements and arguments are strictly contrary to standing order 73. (*Ruling of President Ferguson*, 23/6/2008)

- The attachment of the names of persons to circumstances in questions, when only the circumstances need be mentioned, is not in accordance with standing orders. (*Ruling of President Calvert*, 21/8/2002)

- Questions would not only be in conformity with the standing orders, but would be more effective and telling, if they were confined to properly framed questions, and did not contain statements, assertions, allegations, insinuations and other extraneous material. (*Ruling of President Calvert*, 6/12/2004)

- Questions may be put to a minister relating to the public affairs with which the minister is officially connected, to proceedings pending in Parliament, or to any matter of administration for which the minister is responsible in a personal or representative capacity. (*Ruling of President Sibraa*, 30/8/1988)

- Questions may ask for clarification of statements made by ministers even if the statements are not clearly within their ministerial responsibility. (*Ruling of President Sibraa*, 18/2/1991)

- Supplementary questions are appropriate only for the purposes of elucidating information arising from the original question and answer. They are not appropriate for the purpose of introducing additional or new material or proposing a new question, even though such a question might be related to the subject matter of the original question. (*Ruling of President McClelland*, 14/4/1986)

- Questions must relate to matters within ministerial responsibility. The Chair will allow a question to be put to a minister on the understanding that the minister might reply only in so far as he considers it his responsibility in any area covered by the question. (*Ruling of President Laucke*, 18/3/1976)

I ask all senators to adhere to these practices in asking questions.

(John Hogg)