



DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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For the sitting period 13 – 22 March 2012

LEGISLATION (INCLUDING SECTION 53 ISSUES)

The last sitting fortnight for the autumn sittings – although it followed only two sitting weeks for the year and one estimates week – took on the character of a mid-year or end of year ‘end of sitting rush’, the Government putting in place a time management mechanism with the support of the Australian Greens to deal with numerous bills. A time management mechanism is distinct from a guillotine under standing order [142](#) in being simpler to implement, but it applies the essential features of the standing order otherwise. Importantly, it provides for the question to be put on all amendments circulated at least two hours before the expiration of the time for the bill or package of bills. Debate on the implementation of the mechanism was truncated by use of the closure, which is a tool provided by the standing orders to address the potential elongation of debate by a determined minority. The closure was moved on several occasions during the fortnight in a variety of circumstances.

One effect of a time management mechanism is that, like a guillotine under standing order [142](#), it supersedes the requirement for a separate motion to exempt a bill from the provisions of standing order [111\(5\) to \(8\)](#), allowing it to be considered in the current period of settings. A motion requiring a bill to be dealt with under an allotment of time has the same effect as a motion to exempt it from the cut-off.

Before the time management mechanism was implemented, the National Radioactive Waste Management Bill 2010 was finally passed with amendments, having been the subject of extended consideration over several weeks. Amendments moved by the Government, Opposition and Australian Greens were agreed to. Opposition amendments provided for the establishment of a National Repository Capital Contribution Fund to which entities wishing to use the nuclear waste facility would be required to pay a capital contribution fee for the storage of radioactive waste. The fund was created as a special account under the *Financial Management and Accountability Act 1997* but the amendments involved no appropriation of money and did not therefore offend any of the provisions of section [53](#) of the Constitution. Moreover, the capital contribution fee, as a fee for service, is excluded under section [53](#) from being considered as an imposition of taxation. The amendments were thus able to be initiated in the Senate and were subsequently agreed to by the House of Representatives.

Among the contentious bills dealt with during the fortnight were the [private health insurance incentives bills](#) (applying a means test to the 30 percent health insurance premium rebate), the

minerals resource rent tax package, the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012 and the road safety remuneration bills. There was significant criticism of the limited time available to consider bills under the time management arrangements.

Controversy attended the final stages of the minerals resource rent tax bills when a request for an amendment to the main bill was ruled out of order. The request sought to add gold, uranium and rare earth metals to the materials taxed by the scheme, thus broadening its base and applying the tax to minerals not previously taxed. Although the main bill was not otherwise a bill imposing taxation, the addition of previously excluded minerals to the tax base turned it into a bill imposing taxation, according to the precedents of the Senate. Under the first paragraph of section 53 of the Constitution, the Senate may not initiate an imposition of taxation. In the past, there has been some inconsistent treatment of such amendments and it had been argued that they could be moved as requests under the third paragraph of section 53 which relates to increasing a 'charge or burden' on the people. This view, however, leads to significant difficulties of interpretation.¹ As President Calvert advised in relation to an amendment of a similar character that had been withdrawn by its proposer when the problems were identified:

The better interpretation is that such amendments should not be moved in the Senate at all as they amount to initiating an imposition of taxation. (Senate Debates, 16/9/2003, p. 15275)

This interpretation underpins current Senate practice and was referred to in the Clerk's statement required by the order of the Senate of 26 June 2000 to accompany requests for amendments to advise the Senate whether the requests are in accordance with the precedents of the Senate. The advice was attacked by the proposer of the request who criticised the Clerk both for providing it and for not providing an alternative strategy. The proposer cited a 1999 example of the earlier, confused – and now superseded – practice to validate the request. That the proposer and another senator had also circulated a second reading amendment calling for the tax to extend to all minerals at a uniform higher rate was not acknowledged. This is the standard alternative strategy advised by clerks to provide a vehicle for senators to argue a proposal that is otherwise beyond the power of the Senate for whatever reason. While that amendment was defeated, another second reading amendment, moved by Senator Xenophon and calling for the release of a summary of the Government's legal advice confirming the package's constitutional soundness, was agreed to.

Bills introduced into the Parliament during the period included the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 which provides for the establishment of parliamentary commissions to investigate allegations of judicial misbehaviour and to advise the Houses before they consider resolutions praying for the removal of judges pursuant to section 72 of the Constitution. Some earlier private members' versions of the bill would have had the effect of undermining the operation of section 16 of the *Parliamentary Privileges Act 1987* by allowing the cross-examination of

¹ See chapter 13 of *Odgers' Australian Senate Practice*, 12th edition, under When requests are required: (c) proposed charge or burden (ii) taxation bills.

witnesses on evidence given to parliamentary committees. The approval of such a practice by Justices of the New South Wales Supreme Court in the trial of Mr Justice Murphy was, in fact, the catalyst for the enactment of the *Parliamentary Privileges Act 1987* in the first place.²

A private senator's bill introduced on 14 March, the [Solar Hot Water Rebate Bill 2012](#), provides for the money already appropriated by the Parliament to fund a solar hot water rebate scheme to continue to be available for expenditure until the end of the financial year. The bill is a response to the Government's announcement of the scheme's early closure but it cannot enforce the expenditure of the money. This is the case with all appropriation bills. They authorise expenditure but do not create an obligation to spend the money. The bill was debated on 22 March and defeated at the second reading.

The last bill passed in the period was the [Family Law Amendment \(Validation of Certain Orders and Other Measures Bill\) 2012](#) which had a swift passage through both Houses. The bill addresses the consequences of failures to proclaim the referral by states and territories of jurisdiction to the Family Court. It also removed the need for proclamation of such referrals in the future to avoid a repetition of the omission.

CASUAL VACANCY

The New South Wales Parliament chose Senator Bob Carr on 6 March to fill the vacancy created by the resignation of Senator Arbib. Senator Bob Carr was sworn as a senator on 13 March, sworn as a minister later that afternoon and fielded his first questions without notice as a minister in the Senate on 14 March. He made his [first speech](#) during consideration of the additional appropriation bills on 21 March, a now unusual practice.

NEW JOINT STATUTORY COMMITTEE AND BALLOT FOR MEMBERSHIP

Legislation to establish a parliamentary joint committee on human rights was passed at the end of 2011. The Senate passed the enabling resolution on 13 March, the House having passed it the previous sitting week, taking to 18 the number of joint committees on which senators serve. The [committee](#), among other things, will examine statements of compatibility with seven specified international human rights instruments. These statements are to be included in explanatory memoranda to bills and explanatory statements for legislative instruments. The Act provides the formula for the committee's membership which had been appointed by the end of the fortnight. The place for a minor party or independent senator was determined by a ballot on 22 March, with an Australian Greens senator being elected.

2 See *Odgers' Australian Senate Practice*, 12th edition, chapters [2](#) and [20](#).

PRIVILEGES COMMITTEE REPORTS

The Privileges Committee presented two reports on two contempt references.

The [150th](#) report concerned a matter of privilege raised by Senator Kroger, concerning Senators Bob Brown and Milne and the question of improper influence in relation to a political donation. The committee found that the evidence before it did not support the allegations of contempt referred by the Senate and concluded that no question of contempt arose from its examination of the terms of reference. As has become customary, the committee commented on several issues arising from the reference, including participation by certain committee members in the inquiry, the misunderstood process of raising matters of privilege and the role of the President in this, and the reimbursement of legal costs.

The committee did not entertain a thesis advanced by counsel for the senators that the Senate's processes in investigating and adjudging contempt matters are reviewable by the High Court and various hypotheses that flowed from this. Such a conclusion would be contrary to the law of parliamentary privilege as it is understood to operate by virtue of section [49](#) of the Constitution and the partial declaration effected by the *Parliamentary Privileges Act 1987*. By providing for resolutions of a House imposing a penalty of imprisonment (and for warrants committing the person to custody) to set out particulars of the matters determined by the House to constitute the offence ([s. 9](#)), and by including a definition of contempt ([s. 4](#)), the Act provides for limited judicial review only of the most significant penalty applicable by the Houses, the deprivation of a person's liberty. There has been only one case of a House imposing a penalty of imprisonment for contempt, the House of Representatives in 1955 in the case of [Browne and Fitzpatrick](#) where the two men were committed to prison on the basis of warrants in general terms stating that each had been found guilty of a serious breach of privilege. An action for *habeas corpus* that followed was dismissed by the High Court on the basis that, while courts could judge the existence of a privilege, the manner of its exercise was entirely a matter for the House concerned. In relation to warrants, the Court said:

If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.

The inclusion of section [9](#) in the Act was essentially a response to the Browne and Fitzpatrick case to allow the High Court this limited review in the most serious cases.

A motion to endorse the committee's findings and refer to the Procedure Committee the process for raising and referring matters of privilege was adopted on 22 March, but the fortnight ended with the proposer of the reference rearguing the case on the adjournment debate.

The reference of the matter and its consideration by the committee continued to provoke controversy and led to further proceedings during the period, including motions to instruct the committee to present an interim report (negatived), to provide information about its administrative processes (negatived), and in relation to the nature of references

to the committee (negatived) and the reimbursement of legal expenses (postponed). Proposed references of other matters involving alleged improper influence of senators (see Bulletin Nos [258](#) and [259](#)) were withdrawn on 22 March. There were also personal explanations and proposed suspensions of standing orders connected with the same matters. A motion expressing confidence in the President's handling of the issue and noting comments critical of the President by the Australian Greens Leader was considered on 22 March. The Government whip was denied leave to move an amendment to the motion but the question was divided under standing order [84\(3\)](#) at the request of another senator (see below under Questions – division and reading of). The first part of the motion, expressing confidence in the President, was agreed to, with the remainder negatived.

On 22 March, the committee also presented its [151st](#) Report concerning the possible imposition of a penalty on, or interference with, a witness before the Rural Affairs and Transport References Committee. The matter arose from the latter committee's inquiry on pilot training and airline safety and was referred by the Senate in August last year (see Bulletin No. [254](#)). A motion to endorse the findings and conclusion of the Privileges Committee that a contempt should not be found in relation to the case remains on the Notice Paper. The committee reiterated its view that the protection of witnesses is the most important work it does on behalf of the Senate.

USE OF ACCOUNTABILITY MECHANISMS

Orders for the production of documents and the reference of matters to committees for inquiry and report are significant accountability mechanisms employed to great effect by the Senate. However, motions for such matters moved during the period met with only limited success. Attempts to refer various matters connected with the [Building and Construction Industry Improvement Amendment \(Transition to Fair Work\) Bill 2012](#) were unsuccessful, as was a further reference on coal seam gas issues and the liquid natural gas exploration and export industries. However, a [reference](#) to the Economics References Committee on developments in the banking sector arising from the impact of the global financial crisis was agreed to on 14 March.

Motions for orders for the production of immigration detention centre training manuals, correspondence between the Member for Dobell and ministers regarding NSW central coast matters and a report on so-called fugitive emissions, and information about a meeting between officials, as was a motion for the production of a memorandum of advice concerning the views of board members of the Future Fund on its next chair.

It is interesting to note that in Victoria a member of the Legislative Council has initiated legal action in response to the continued refusal of the Government to produce a report on the troubled Myki ticketing system. The Government has claimed that the Legislative Council lacks the power to order the production of documents. Greens MLC, Greg Barber, is seeking a declaration in the Supreme Court that the Council does have the power to order production of documents, including documents prepared outside Cabinet and considered by Cabinet (as the Myki report apparently was).

SUSPENSIONS OF STANDING ORDERS

A larger than usual number of motions for the suspension of the standing orders was moved during the period, all being defeated. The contingent notice for the suspension of standing orders to be moved upon a senator being refused leave to make a statement was used on two occasions. On 21 March, after a motion for an order for production of documents was defeated, Senator Fierravanti-Wells moved to suspend standing orders to provide for the consideration of a matter, namely a motion to give precedence to a motion of censure. This three step process is a common method for introducing a completely new item of business. The first step provides for standing orders to be suspended. The second step ensures that the substantive item (the third step) will have precedence over other business. On this occasion, however, the first step of the process, to suspend standing orders, was interrupted by a requirement imposed by an earlier order of the Senate that the Senate proceed to certain business at 4 pm. When a motion to suspend standing orders is interrupted in this way, the motion lapses and is not capable of being revived at a later time. On one occasion a motion to suspend standing orders was moved to allow further consideration of the [minerals resource rent tax](#) bills without a limitation of time.

QUESTIONS – DIVISION AND READING OF

Standing order [195](#) provides that a senator may require the Clerk to read the question before the chair at any time during a debate. This is not an absolute right as rulings of the President have modified it to provide that the chair may decline to have the question read if, for example, it is available in print. (Legislative amendments are circulated in the chamber while notices of motion appear on the [Notice Paper](#).) The existence of a discretion allows the chair to assess the circumstances in which the request is made. When the President declined a request to have a question read on 19 March during the conclusion of proceedings on the minerals resource rent tax bills, he was challenged but referred to the rulings on which the ability to exercise a discretion was based.

Standing order [84\(3\)](#) provides for the chair to divide a complicated question. This is also at the President's discretion but Presidents have allowed a complicated question to be divided where senators indicate that they wish to vote different ways on the component parts of the motion. Such was the case with a motion moved by the Leader of the Opposition in the Senate on 22 March in relation to the first of the privilege matters referred to above.

OTHER COMMITTEE REPORTS

Numerous [reports](#) from other committees were presented during the period, including reports by legislation committees on annual reports (15 March) and on additional estimates (20 and 22 March). There were also several reports presented on bills. At the end of the period, the Senate adopted a report of the Selection of Bills Committee recommending the referral of multiple bills to committees over the break, including the referral of a package of shipping reform bills to two committees. For details, see the [Senate Daily Summary](#).

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 [http://www.aph.gov.au/About Parliament/Senate](http://www.aph.gov.au/About_Parliament/Senate).

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