



Procedural Information Bulletin

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For the sitting period 7–16 February 2017

Odgers, Evans and Laing

At the start of the 2017 sittings the President informed the Senate that the 13th Clerk of the Senate, Dr Rosemary Laing, had commenced a period of leave pending her retirement. The President also tabled the [14th edition](#) of *Odgers' Australian Senate Practice*, the second edited by Dr Laing and her final substantive contribution as Clerk. The work, which has borne the name of its originating author, James Rowland Odgers, since its seventh edition, has acquired a new subtitle – *As revised by Harry Evans* – to acknowledge the unsurpassable contribution of the Senate's longest-serving Clerk. As the preface notes, 'The documentation and analysis of the work and the rationale of the Senate undertaken by these two Clerks is a legacy of inestimable value.'

'incapable of being chosen'

On 7 November 2016, the Senate referred to the Court of Disputed Returns questions about the eligibility of Rodney Norman Culleton to stand for election or to continue to sit as a senator (see [Bulletin No. 309](#)). The court delivered its [judgment](#) on 3 February 2017, unanimously holding that Mr Culleton had been convicted and subject to be sentenced for a disqualifying offence at the time of the 2016 federal election. He was therefore incapable, under s 44(ii) of the Constitution, of being chosen as a senator. The court held that the subsequent annulment of the conviction did not affect that state of affairs. ['To say...that the conviction "ceases to have effect" is to acknowledge that it has been in effect to that point', [2017] HCA 4 at 29.] The judgment affirms the proper construction of s 44(ii) – that it covers a person convicted and *either* under sentence *or* subject to be sentenced – and also fleshes out the meaning of 'subject to be sentenced'.

The court ordered that the resulting vacancy be filled by way of a special count of the ballot papers, under the supervision of a single justice. The President tabled the court's order on 7 February 2017.

Two questions arise about Mr Culleton sitting in the Senate despite being ineligible to do so. The first is what effect his disqualification has on Senate proceedings in which he took part. As Odgers notes:

The presence in the Senate of a senator found not to have been validly elected or to be disqualified does not invalidate the proceedings of the Senate in which the senator participated.
[14th edition, p 174]

This matter was determined by the High Court in *Vardon v O'Loughlin* (1907) 5 CLR 201, per Griffiths CJ at 208, and restated in *Re Wood* (1988) 167 CLR 145.

The second question is whether Mr Culleton would be required to repay any salary or allowances paid to him as a senator. In previous cases, Attorneys-General advised that those whose elections were declared void were not entitled to retain salary payments made to them, but such debts were, in effect,

waived. Under current legislation, unauthorised payments automatically become debts due to the Commonwealth. The decision whether to waive such debts is one for the Government, not the Senate.

‘an undischarged bankrupt or insolvent’

The President also informed the Senate that Mr Culleton had been disqualified on a separate ground, when a sequestration order – effectively a declaration of bankruptcy – was made against his estate on 23 December 2016. [As the Federal Court later noted](#), ‘The prima facie effect of the order... was to cause the vacation of his office as a Senator for Western Australia.’ This consequence flows automatically from sections 44 and 45 of the Constitution. Section 44(iii) disqualifies a person who ‘is an undischarged bankrupt or insolvent’, and s. 45 provides that the place of a senator who becomes subject to such a disability ‘shall thereupon become vacant’, triggering a requirement for the President to notify a vacancy, under s. 21.

On 11 January 2017, after receiving formal notification of the bankruptcy, the President had therefore notified the Governor of Western Australia of a vacancy, at the same time advising Her Excellency that the method for filling the vacancy depended on the matter then before the Court of Disputed Returns. A similar approach had been taken following the resignation of former Senator Bob Day. Mr Culleton argued that the notification was ‘premature’, but in an article detailing the ‘[litigious imbroglios](#)’ of the matter, Emeritus Professor Tony Blackshield described the action as consistent ‘with the idea of the inexorable self-executing operation of the Constitution’. In the end, the bankruptcy disqualification is somewhat academic given the judgment of the Court of Disputed Returns.

‘the same in substance’

A rare outing this fortnight for the same question rule in standing order 86, which prevents questions being proposed which are ‘the same in substance as any question which has been determined during the same session’ unless 6 months has passed or the original has been rescinded. Two identical disallowance motions were listed on 8 February 2017. After the first was passed the Acting Deputy President declined to call on the second, citing this rule. Odgers notes that the rule is seldom applied ‘because it seldom occurs that a motion is exactly the same’, and a different context, an elapse of time or different grounds for moving a motion may alter its effect even where its terms are identical [14th edition, pp 238-9]. None of those considerations applied here.

Protection of witnesses

On 9 February 2017 the Senate referred to the Privileges Committee questions about the treatment of a witness before the Environment and Communications References Committee 2015 inquiry into fin-fish aquaculture in Tasmania. The catalyst was an ABC *Four Corners* program broadcast on 31 October 2016 which alleged that representatives of Tassal may have improperly interfered with the right of a witness to appear before the committee. Committees rely upon the integrity of the evidence presented to them, so any credible suggestion that a witness has been improperly influenced is therefore likely to warrant investigation. Privilege resolution 1(18) obliges committees to investigate (among other things) concerns that witnesses have been improperly influenced, so when the matter was first raised in November last year the President drew it to the attention of the references committee, asking that the committee make the necessary inquiries and to report to the Senate, should the facts warrant it.

The committee's then chair, Senator Waters, wrote to the President on 27 January 2017 to report on those inquiries. The letter sets out the relevant facts and a summary of evidence, recording the committee's conclusion that the witness may have been improperly influenced in relation to the evidence he was to have given. The only remedy for such concerns is resort to the Senate's contempt powers. The President therefore granted the matter precedence in debate and tabled the relevant correspondence. The matter was referred to the Privileges Committee the following day.

Orders, explanations and inquiries

For many years this bulletin has recorded the passage of orders for the production of documents, and responses to them, noting their varying degrees of success in eliciting the information sought. The Senate has always insisted on its right to determine what information it requires to undertake its work and to determine for itself any claim from the executive government that information should be withheld. According to long-standing practice, claims to withhold information or documents may be raised only on accepted 'public interest immunity grounds'. It is for the Senate to decide whether or not to accept public interest immunity claims when they are made, and what action to take if dissatisfied with responses to orders.

Several procedures were invoked this fortnight to follow up on non-compliance. An order made on 13 February required the Minister for Finance to attend the Senate the following day to provide an explanation for his not complying with several orders for documents relating to the Perth Freight Link. The order provided a mechanism for senators to debate the explanation. A similar order agreed to on 14 February required the Attorney-General to explain a list of unanswered questions, including estimates questions, and respond to an order for documents. Numerous answers were produced prior to the minister's explanation, and a brief debate ensued. These procedures were modelled on the opportunities for seeking and debating explanations under standing orders 74(5) and 164(3). In response to failure to comply with further orders on the Perth Freight Link, the Senate on 16 February referred the matter to a references committee, directing it to hear evidence in Perth and ordering that several specified witnesses be invited to appear to answer questions.

In a similar vein, a second reading amendment moved on 13 February concerning the 'Youth Jobs Path: Prepare, Trial, Hire' bill sought to defer further consideration of the bill until the government provided further information about its intended operation. The amendment was still pending at the end of the period.

Legislation

A number of bills introduced into the Parliament during this period passed both Houses, facilitated by extended sitting hours. After a short inquiry, a bill to amend the Building and Construction Industry (Improving Productivity) Act – one of the triggers for last year's double dissolution election – was passed by a slim majority. Bills dealing with parliamentary entitlements and establishing an authority to provide independent oversight of, and guidance on, parliamentarians' work expenses were passed with broad support, although numerous amendments to expand or adjust the proposed arrangements were rejected along the way. The Criminal Code (Firearms Trafficking) Bill provided a good example of legislating, with negotiations in the form of amendments to amendments taking place on the floor of the Senate during its committee of the whole stage. Finally, it's worth noting that the Competition and Consumer (Country of Origin) Bill – a government bill passed during the period – picked up on policies

developed and progressed in earlier parliaments through private senators bills.

Swings and roundabouts

Senate committee activity continues apace. More than 100 references have been placed before committees since the beginning of the 45th Parliament, including 25 or so readopted from the 44th. Among the reports tabled this fortnight were reports on the Superannuation (Objective) Bill, the Building and Construction Industry (Improving Productivity) Amendment Bill and the Competition and Consumer Amendment (Misuse of Market Power) Bill (another government bill covering territory developed in earlier private senators' bills).

The report of the Select Committee on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill was debated at length after its presentation on 15 February. The committee received wide-ranging praise for coming to a consensus in a number of areas, on a subject that encompasses many diverse views.

While numerous reports were presented, 19 new inquiries were established, including eight new bill references, eight 'references committee' references, the privileges inquiry mentioned above and two new select committees.

RELATED RESOURCES

Dynamic Red – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

Senate Daily Summary – a convenient summary of each day's proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the Senate website: www.senate.gov.au

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