DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

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Estimates hearings 31 October—3 November
and
for the sitting period 3—10 November 2005

11 November 2005

ESTIMATES HEARINGS

The supplementary hearings on the budget estimates revealed no concerted government efforts to limit the scope or duration of the hearings, contrary to some expectations. Government senators notably joined in the questioning of some departments and agencies. There was one, ineffectual, attempt by a minister to limit questions to "administrative" as distinct from "political" or "election" matters, and some refusals to provide information on the basis that it was advice to government, but no unusual level of resistance to questions.

The following matters of procedural interest were raised:

- Delays in answering questions on notice, last minute answers and failures to meet deadlines were criticised, but there was nothing out of the ordinary. (The Prime Minister took two years to respond to a question on notice about the cost of functions at Kirribilli House and the Lodge, and then declined to answer the question.) A misunderstanding about how many questions had been answered on the part of one department drew attention to the need for a uniform registration system for questions on notice. The lateness of some annual reports was also considered.

- The non-appearance of CEOs of some agencies and of some other officers whose appearance was expected caused disputation in several cases. In particular, the failure of the Managing Director of the ABC, Mr Balding, to appear, without any excuse or apology, led to bitter attacks by senators. The Director of the National Gallery of Australia indicated the proper course by apologising in advance for his non-appearance, and the apology was accepted.

- A claim by the ABC of commercial confidentiality appeared to be the only serious occasion of this claim being raised.

- Telstra was subjected to close questioning. The great public interest in its activities will no doubt support its continued appearance at estimates hearings.

- The Secretary of the Department of Employment and Workplace Relations, Dr Boxall, appeared to be attempting to raise a claim of cabinet confidentiality in declining to answer questions about when matters were considered by cabinet. When it was pointed out that such questions are routinely answered the question was taken on notice.

- There was one claim that a matter was sub judice, in relation to an officer charged under the Crimes Act.

- Although the government now says that its promised Family Impact Statements are not to be published because of cabinet confidentiality, the process of providing them was described in answers to questions.

- The Audit Office report on compliance with the Senate's order for listing of government contracts was referred to in relation to confidentiality provisions in contracts (see Bulletin No. 195, p. 4).

- The Audit Office report on section 31 agreements, whereby departments retain revenue, was also the subject of questioning.

- Senator Murray suggested to the President that he ought to adopt some informal process for ensuring that privilege matters to which he gives precedence do not become the subject of partisan consideration (see Bulletin No. 194, p. 3).

- Attention was drawn to the inability of a parliamentary secretary to represent a minister at a hearing in relation to the minister's own portfolio, under the relevant Senate resolution.

The following matters of current controversy were considered during the hearings:

- the government's industrial relations advertising campaign (the cost was revealed, for the first time, to be $55 million)

- much information was gleaned about the government's proposed Future Fund

- payment to Iraqi civilians for damage done by the Defence Force
- the Customs import clearance computer problem, which led to great bottlenecks at ports
- the Regional Partnerships Program, which was the subject of a report by the Finance and Public Administration Committee
- the Wheat Board (AWB) Iraqi oil-for-food payments
- the allegedly parlous financial position of the CSIRO
- the long-running subject of the treatment of asylum seekers and detainees
- the performance of Biosecurity Australia in quarantine matters
- the Pharmaceutical Benefits Scheme
- the government's proposals for early closing of the electoral rolls
- the furious dispute between Telstra and the Australian Competition and Consumer Commission, which seems to have been aggravated by evidence at the estimates hearings.

SENATE SITTINGS: SPECIAL SITTING

The Senate was "recalled" at the request of a majority of senators under standing order 55 for a special sitting on 3 November, to consider government legislation designed to make it clear that persons may be charged with plotting terrorist acts without their plotting being directed to particular acts.

A motion moved at the beginning of the sitting authorised the estimates hearings to continue during the sitting.

DEFERRED DIVISION

The first business at the special sitting should have been the deferred division on the motion to refer the substantial anti-terrorist legislation to a committee and the amendment moved by the Democrats to extend the time for the committee inquiry (see Bulletin No. 195, p. 3, under Committee inquiries), but the matter was put off until later in the sitting by a motion moved by leave to determine the day's agenda. When a deferred division is called on the practice is to put the question again, on the basis that the senators who originally called the division may change their minds and allow the question to be determined on the voices. This was

particularly appropriate on this occasion, because the government had decided to accept the Democrat amendment to extend the time for the committee inquiry.

COMMITTEE INQUIRIES

An attempt by the Opposition on 8 November to change the terms of reference and to extend the time by one week for the inquiry by the Employment, Workplace Relations and Education Committee into the government's Workplace Relations Amendment (Work Choices) Bill (see Bulletin 195, p. 3) was not successful.

Similarly, a government motion on 9 November to refer the welfare-to-work bills was the subject of an unsuccessful amendment by the Opposition to alter the terms of reference and extend the time for the inquiry into next year.

A Selection of Bills Committee report on 9 November recommended the referral of some bills to committees, but there was disagreement on the referral of a superannuation tax bill. An amendment to the motion for the adoption of the report to refer the bill was defeated. During the debate some remarks were made about the government restricting committee scrutiny of bills.

On the other hand, an Opposition motion on 9 November to refer to the Employment, Workplace Relations and Education Legislation Committee the government's nuclear waste dump bills was not resisted by the government, but was the subject of a government amendment to shorten the time for the inquiry.

An Opposition initiative to refer matters relating to the shipping industry to the Foreign Affairs, Defence and Trade References Committee was accepted by the government on 10 November.

For the referral of the anti-terrorist package of legislation to a committee, see above, under Deferred division.

GOVERNMENT RESPONSES

Seven government responses to committee reports were tabled on 10 November, perhaps prompted by recent disputation about the failure to provide such responses within the three month period required by the Senate. Among the responses were those to the inquiries by the Community Affairs References Committee into children in institutional care, which aroused great interest at the time of the presentation of the reports.

LEGISLATION

The government majority will probably not cause the Senate to lose its practice in amending bills: government amendments were made to two bills during the period, those relating to evidence taken by video on 7 November and a higher education bill on 8 November.

PROCEDURAL CHANGES: CHASING UP ANSWERS

The Procedure Committee presented a report on 7 November recommending two changes to the standing orders, to extend to estimates questions on notice and to orders for documents the procedure currently applying to ordinary questions on notice, whereby a senator may initiate a debate after question time on any day on a government failure to respond after 30 days. The changes were adopted on 9 November, and represent a significant expansion of senators' rights to hold government accountable.

The procedure may not be much used in the near future in relation to orders for documents: another motion for such an order, relating to CSIRO's budget, was negatived on 10 November.

PRESIDENTIAL RULINGS

The President made a statement on 7 November on the matter raised by Senator Conroy about alleged intimidatory behaviour towards Senator Joyce (see Bulletin No. 195, p. 5, under Unused standing order). The statement treated the matter as simply a question of order and not a matter under standing order 205. The President indicated that he had investigated the allegations but found no evidence of any such behaviour.

The President stated on 8 November that a suggestion that the Minister for Health and Ageing was influenced in his ministerial decision-making by his religious views was not in order under standing order 193, in that it attributed improper motives. He also referred to a 1969 ruling that senators should not refer to other senators' religion in debate, and indicated that this was a sound rule. Some senators subsequently questioned whether this was too wide a prohibition, but did not dispute the ruling.

DELEGATED LEGISLATION

The Regulations and Ordinances Committee presented on 10 November its correspondence with ministers about statutory instruments, indicating the intensity of the committee's scrutiny.

GOVERNMENT ADVERTISING: HIGH COURT JUDGMENT

Before the sittings resumed the High Court handed down its judgment in the government advertising case (*Combet v Commonwealth)*. The majority of the Court declined to determine the question whether the government's expenditure on advertising its industrial relations proposals was in accordance with the appropriation from which it was purportedly drawn. The minority of two would have determined that question against the government. Remarks by the Chief Justice strongly indicated that the task of ensuring that government expenditure is properly authorised by appropriations is a matter for the Parliament. The Clerk has made a further submission to the Finance and Public Administration Committee arising from the judgment; the submission may be found on that committee's website.

ACCOUNTABILITY REPORT

Both the estimates hearings and the consideration of bills by committees appear to have a life of their own and, so far, to be somewhat beyond any major tampering, although there is a tendency to by-pass the Selection of Bills Committee and to limit inquiries.

The High Court judgment has drawn attention to the need for the Parliament, which in practice means the Senate, to reassert its control over government expenditure.

The new procedures relating to estimates questions on notice and orders for documents are one of those small but valuable advances.

OCCASIONAL NOTES

In future this Bulletin will include from time to time occasional notes providing extended information on interesting matters of procedure. The first of these occasional notes is appended to this Bulletin, and is devoted to filibusters.

SENATE DAILY SUMMARY

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, *Senate Daily Summary* may be reached through the Senate home page at www.aph.gov.au/senate

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OCCASIONAL NOTES

FILIBUSTERS

During the debate on the sale of the Telstra package of bills on 14 September 2005, non-government senators accused government senators of "filibustering", by which they meant taking up the time allotted for the consideration of the bills with comments and questions friendly to the government, so that the non-government senators would not have sufficient time to make their points and ask their questions. The term has been used with this kind of meaning in the Senate on other occasions.

This is not only an incorrect use of the term, but is the exact opposite of its original meaning. It is clear that, in its American usage, it historically meant, and still means, legislative obstruction by a *minority* to prevent the *majority* from arriving at a decision that the majority wishes to make.

The term started its life as the Dutch version of the word freebooter, *vrijbuiter*, which referred to pirates who attacked Spanish American possessions and shipping. It passed into Spanish as *filibustero*. In the early 19th century it came to be applied to US military adventurers who sought to overthrow Latin American states or foment rebellion in their territories. By the middle of that century it had come to be applied to obstruction by minorities in the legislature. Because private military expeditions into Latin America were particularly associated with southerners who embarrassed the US government, and because southerners were the principal practitioners of legislative obstruction, the term easily passed from one of their objectionable activities to the other.

The term and the practice came to be particularly associated with the US Senate in the last half of the 19th century, because that chamber, unlike other legislative bodies, did not adopt, and still has not adopted, a procedure whereby a simple majority may terminate debate on an item of business and thereby defeat an attempted filibuster. It was not until 1917 that the US Senate adopted any procedure for closure of debate, and then required a special majority to do so. Its current rules require 60 affirmative votes, out of a total membership of 100, to limit debate, and then by an elaborate and prolonged procedure.

Other legislatures were compelled much earlier to devise procedures to quell obstructive minorities. The British House of Commons adopted procedures whereby a majority could close debate following the obstruction of the Irish nationalists in 1881. The ability of a majority to limit debate has long been a feature of Australian Houses. A form of the closure

was in the South Australian Legislative Assembly standing orders temporarily adopted by the Australian Senate in 1901 and in the Senate standing orders adopted in 1903. The procedure for limitation of debate on bills was adopted in 1926 after it took 22 closure motions to pass the Peace Officers Bill 1925.

Strictly speaking, a filibuster is impossible in the Australian Senate, and the term is inapplicable there, because it is always open to a simple majority to terminate debate on a single-question issue by using the closure (the "gag"), and to limit debate on legislation by an allotment of time (the "guillotine").

Meanings are determined by usage, however, and it may therefore be concluded that the term now has a different, Australian, meaning from its American original, and refers to legislative obstruction of any kind.

Obstruction is not universally regarded as a bad thing. Eminent parliamentary authorities have defended the right of minorities to obstruct overbearing majorities. The Canadian constitutional scholar and politician Dr Eugene Forsey said that obstruction was a reserve power under the constitution, to be approached with great discretion and sobriety.