

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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estimates hearings 13—17 February 2006**

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SENATE SITTINGS

ORDER FOR DOCUMENTS

An order for documents was agreed to on 7 February, breaking the drought of consistent government refusals to accept such orders since the 2005 turnover in Senate places. The order related to genetically modified foods. Some documents were produced on the following day with more promised later. Perhaps the relatively uncontroversial nature of the subject matter accounted for the passage of the order.

WITNESSES

A motion to direct Mr Sol Trujillo to appear at the estimates hearing for Telstra was rejected on 8 February, in spite of earlier declarations by some Nationals senators that he should appear to explain himself. It subsequently emerged that those senators had been placated by an offer of a “private briefing” by Mr Trujillo. There are many precedents for motions in the Senate directing particular witnesses to appear at estimates hearings and other committee hearings.

STATUTORY APPOINTMENTS

A motion by Senator Murray to declare that appointments to statutory bodies should be governed by stated principles was passed on 7 December, but a motion calling on the government to produce the principles was lost on 8 February. It had topicality because of the Gerard affair, but it is a long standing cause of Senator Murray. In spite of the Gerard affair and the earlier resolution, the government appears to be adhering to the view that its discretion in making such appointments should be unfettered.

RESPONSES BY STATES

Some responses were tabled on 7 February to the resolution asking states and territories to respond to the reports of the Community Affairs References Committee on children in care (see Bulletin No. 197, p. 4). In debate on the responses, Senator Murray declared them to be inadequate.

LEGISLATION

The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 extended the government's powers in relation to the use of forces in domestic security situations. It was the subject of one successful Opposition amendment on 8 February, to make it clear that the powers of state and territory police to investigate criminal acts by Defence Force members operating under the bill would not be affected. The existing legislation contained a requirement for the Parliament to meet within six days after the declaration of a general security area. An amendment in the bill renders this provision virtually ineffectual by allowing ministers to declare that it does not apply if it would breach security operations (the explanatory memorandum accompanying the bill misleadingly describes this provision as preventing the broadcasting of the declaration of a general security area). Other provisions enacted by the bill contain no requirement for a parliamentary recall, although all members of the Legal and Constitutional Legislation Committee, which examined the bill, were in favour of facilitating parliamentary consideration of the exercise of ministerial powers. There seems therefore to be little point in leaving the original recall provision in the act. Parliamentary consideration of any use of the powers under the act will, as before, depend on whether the government allows the House of Representatives to meet and whether the Senate can be recalled by a majority of its members. During debate on the bill its constitutionality was questioned, on the basis that it may not conform with section 119 of the Constitution.

Most of the legislative time of the sitting period was taken up by the private senators' bill to remove the power of the Minister for Health and Ageing to approve the use of the drug RU486. This bill was introduced by a cross-party group of senators, and was the subject of a "free vote" (see Bulletin No. 197, p. 2). The bill was also the subject of extensive committee hearings. The bill was given special precedence by a government motion on 8 February and, most surprisingly, was the subject of a special motion limiting the time for debate, which was moved by leave by one of the sponsoring senators on 8 February and passed without a division, only Senator Fielding recording his opposition. It appeared that the senators who strongly opposed the bill accepted the time limitation. If they had decided to resist the bill by all procedural means, they could have made its passage much more difficult. Having been passed by the Senate without amendment, the bill was then passed by the House of Representatives.

PRIVILEGES COMMITTEE REPORT

The Privileges Committee tabled a general report on 7 February, updating its summary of past cases and precedents. The report includes advices provided to the committee since the last general report.

ODGERS SUPPLEMENT

The cumulative supplement to the 11th edition of *Odgers' Australian Senate Practice* was tabled on 7 February, and has been published in printed form and online. It contains updates to the end of 2005.

ESTIMATES HEARINGS

THE WHEAT “GAG”

The additional estimates hearings for executive departments began with a statement by the government that it had instructed all officers not to answer any questions about matters before the commission of inquiry (the Cole Commission) into the Australian Wheat Board Iraq wheat bribery scandal. This led to a great deal of disputation and questioning about the scope of the “gag”. In anticipation of some resistance to questions about the matter, the Clerk had been asked at the hearing of the Senate Department’s estimates and had provided advice to the effect that the Senate’s sub judice convention has no application to executive commissions of inquiry. The government seemingly accepted that point, and explicitly stated that the “gag” was not a claim of public interest immunity, but simply a refusal to answer based on the desirability of leaving relevant questions to the commission of inquiry.

Advice was then sought from the Clerk on precedents for the direction, and the following advice was provided

You asked whether there were any precedents for the government direction referred to by the Minister for Finance and Administration, Senator Minchin, at the opening of the hearing by the Finance and Public Administration Legislation Committee of the Department of Prime Minister and Cabinet this morning. That direction was to the effect that officers must not answer any questions on matters before the commission of inquiry known as the Cole Commission.

Relying on both recollection and search, my colleagues and I have been unable to find any precedents for this direction. There have been occasions when ministers, officers and statutory office-holders have expressed some reluctance to answer questions about matters before commissions of inquiry, but no case of a general instruction by government of the kind referred to by Senator Minchin.

It was alleged by the government that there was a similar “gag” in relation to the uranium mine in Coronation Hill in 1989. The following advice referred to that occasion:

Reference was made in the House of Representatives to an instruction by the then government in 1989 that officers should not answer questions about the Coronation Hill uranium mine. The basis of that direction, however, as was made clear by the responsible minister in the Senate, Senator Richardson, was that Cabinet was deliberating on the question of Coronation Hill at the time of the estimates hearings, not that a commission was inquiring into the matter. (The need to protect the confidentiality of deliberations of Cabinet is one of the known grounds for a claim of public interest immunity.) That occasion was therefore not a precedent.

Remarks by a minister in relation to that advice was the subject of further advice, as follows:

Nowhere in that advice did I say that the direction by government in 1989 about Coronation Hill was justified or valid, contrary to the suggestion of Senator Minchin. The Senate at the time resolved that it was not justified, at least in part. The point of the advice was that that direction was not on the basis that matters relating to Coronation Hill were before a commission of inquiry, and therefore that direction provides no precedent for the current government direction which *is* on that ground.

Subsequently, ministers suggested that the commission of inquiry into the Centenary House matter in 1994 provided a precedent. This claim required further elucidation:

There is no evidence of any general direction by the then government to officers not to answer questions on matters before that commission. On one occasion in an estimates hearing a minister expressed reluctance to answer questions about matters before the commission, and an Opposition senator expressed some acceptance of that position. Some questions about the commission were answered in estimates hearings and in the Senate.

The direction by the government almost immediately ran into difficulties in relation to statutory authorities. When officers of the Wheat Export Authority appeared, the minister in attendance stated that, as that body is an independent statutory authority, it is not subject to the government’s direction. His words could have been construed as applying to all statutory bodies. Officers of the authority then gave lengthy evidence of their knowledge about the wheat bribery matter, and corrected evidence they had given in November 2005 to the effect that they had no material on the subject.

Other statutory authorities, however, were treated differently. The question arose in relation to the Australian Taxation Office, AUSTRAC and AUSTRADE. It was stated that they were subject to the direction because they employed public servants. In relation to AUSTRADE, attention was drawn to the provision in its statute allowing ministerial directions to be given to it, but it then appeared that no specific written ministerial direction had been issued as seemingly required by the act. On the other hand, officers of the Australian Securities and Investment Commission answered questions on the subject. It also appeared that not all agencies had received the direction in writing, but had simply heard about it.

At this stage it seemed that the application of the direction was simply a matter of statutory interpretation of the government's power over various kinds of public bodies. It was necessary to re-emphasise several times the following important point of advice:

The Senate, like comparable legislatures, has never conceded that, with or without any kind of statutory provision, a minister has any power to direct any person not to give evidence to a parliamentary committee. That is a question of constitutional/parliamentary law which has never been adjudicated, except by the Senate itself, not a question of statutory interpretation, and a statutory provision of the kind referred to is not sufficient to override the constitutional/parliamentary law involved.

WITNESSES

There was some consideration of whether the designated future head of the government's Future Fund, which has not yet been statutorily established, could be required to appear in the estimates hearings. It was stated that he was already a consultant to government. Under standing order 26, questions at estimates hearings are to be put to "ministers and officers". In the past some persons stated to be consultants or contractors have appeared. In the course of these hearings there was one other refusal by a minister to allow a person stated to be a contractor to appear.

POSSIBLE PREJUDICE TO LEGAL PROCEEDINGS

There was a claim by the Department of Employment and Workplace Relations not to answer questions on the basis of possible prejudice to future legal proceedings relating to the provision of services by Job Network providers. The department stated that it wished to avoid the giving of evidence which would then be unexaminable in legal proceedings and possibly cause difficulties in those proceedings. This is an issue which has arisen on previous occasions and has caused committees to refrain from taking particular evidence (see Odgers, 11th ed, p. 404). On this occasion, however, the questioning narrowed down to a figure for amounts actually repaid to the Commonwealth by the providers, and it was difficult to see how that could give rise to the apprehended difficulty. The committee accepted the department's claim.

ANSWERS TO QUESTIONS ON NOTICE

Various departments were questioned about their late answers to questions on notice. It has now become something of a pattern for written answers to be provided on the day before the start of the next round of hearings, which senators have repeatedly declared to be unsatisfactory. The problem appears to be that departments provide their answers to ministers' offices in good time, but ministerial staff do not pass on the answers until the last

minute. The Minister for the Environment and Heritage, Senator Ian Campbell, conceded that this was a problem and suggested that his House of Representatives colleagues lack an understanding of Senate processes.

SCOPE OF QUESTIONING

There were several references during the hearings to the Senate's resolution of 1999, adopting a report of the Procedure Committee, to the effect that all questions going to the operations or financial positions of departments and agencies are relevant questions in estimates hearings. There were also reminders that the additional estimates hearings are the first opportunity to examine the annual reports of departments and agencies. There were few serious attempts, however, to restrict the scope of questioning on the basis of relevance.

Purported rulings of chairs of some committees in relation to the scope of questions caused difficulties in some hearings. In the Economics Legislation Committee on 16 February there was serious disorder, with a senator refusing to accept a chair's direction to "move on". The chair referred to his power to ensure the orderly asking and answering of questions, but the problem appeared to have its origin in earlier purported rulings about the scope of questions.

The following advice was provided:

There is no rule of the Senate that prevents senators in estimates hearings asking for advice which passes between departments and ministers. Ministers occasionally agree to release such advice. If ministers refuse to answer such questions, that is their responsibility. It is not a matter for the chair to rule on.

If a senator's questions are being asked in an orderly fashion and meet the test of relevance determined by the Senate, the senator cannot be directed to "move on". If a senator persists in asking questions which a minister has refused to answer, the committee (not the chair) may determine that the question should not be pressed in accordance with the procedures set out in Privilege Resolution 1(10). Following such a decision by the committee, the senator could then be directed not to persist with the question.

The standing orders of the Senate do not authorise a motion that a senator be no longer heard.

Standing order 35(1) provides:

The examination of witnesses before a committee shall be conducted by the members of the committee in accordance with procedures agreed to by the committee, subject to the rules of the Senate.

Normally, the examination of witnesses and the allocation of the call between senators to ask questions is determined by informal agreement between members of the committee. If it is necessary to formally determine an allocation of the call to ask questions between particular senators and any time limits on questioning, this may be done by a formal decision of the committee under that provision.

TELEVISIONING

At one point in the hearing of the Rural and Regional Affairs and Transport Legislation Committee a collection of television cameras appeared in the room without the committee formally granting approval for their presence. They were ejected until formal approval was sought and granted.

MATTERS EXAMINED

The Wheat Board “gag” matter tended to reduce the time available for the examination of other matters of controversy, although, as noted, the Wheat Export Authority was subjected to lengthy questioning about it. Other matters examined included:

- the Iraq war
- the state of the Department of Defence’s finances and management, as revealed by Audit Office reports
- other financial management issues revealed by Audit reports, such as the management of revenue accounts
- the sale of the Snowy Mountains Corporation
- the conduct of the Future Fund
- the numbers of ministerial staff, particularly the expansion of numbers available to the government
- the alleged “gag” of CSIRO scientists
- the seeming recent reticence of the Australian Electoral Commission in commenting on features of the electoral system
- quarantine control

As usual, Telstra and the ABC were extensively questioned. The Australian Federal Police Commissioner made a spirited defence of his officers’ handling of the “Bali 9” case.

ACCOUNTABILITY REPORT

Accountability positives during the period were the passage of the order for documents and the Opposition amendment to the defence bill. Negatives were the failure of the motion to require Mr Trujillo’s presence and that relating to statutory appointments. The wheat “gag” obviously limited accountability in the estimates hearings.

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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