

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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PARLIAMENTARY PRIVILEGE MATTERS

The President on 7 September declined to give precedence under standing order 81 to a motion to refer a matter to the Privileges Committee. The issue, raised by Senator Milne, related to evidence given by various corporations to the two Senate committees that inquired into the government's Carbon Pollution Reduction Scheme legislation. It was suggested that the corporations may have given false or misleading evidence to the committees, because they had given to the committees quite different assessments of the effect of the legislation on their operations compared with the material contained in their disclosures to shareholders, investors and the stock market. The Australian Conservation Foundation had brought a charge of misleading information before the Australian Competition and Consumer Commission, but the Commission found there was no case, and also noted that it could not inquire into the statements made to the committees. The President noted that, in relation to those statements, it was not alleged that contradictory disclosures had been made to the market, but that the material presented to the committees was not included in those disclosures. He therefore held that the matter did not meet the criteria he was required to apply, given that the Privileges Committee and the Senate in the past had indicated that a deliberate intention to mislead was required for the offence to be established. He noted that his determination did not prevent senators from initiating an inquiry into the conduct of the companies through other procedures.

Precedence under the standing order was given, however, to another matter dealt with by the President on 9 September. The Legal and Constitutional Affairs References Committee presented a report stating that one of its witnesses may have been interfered with as a result of her evidence to the committee in the course of its inquiry into access to justice. The witness's employer, an Aboriginal legal service, had threatened her with disciplinary action because of her evidence. Although the threat was withdrawn, she had resigned from her

employment. The President noted the past statements by the Privileges Committee that interference with witnesses was the most serious contempt, and the rigour with which possible cases of such offences had been investigated in the past. The matter was referred to the Privileges Committee on 10 September.

There was another case of the right of reply under the Senate's Privilege Resolution no. 5 being exercised by an organisation, when a response by the Tasmanian Medical Council to statements made in the Senate was published on 14 September.

DELEGATED LEGISLATION

There were two occasions of the transfer under standing order 78 of notices of motion for disallowance to other senators after the senators who gave the notices wished to withdraw them. Both instances involved the disallowance of instruments on the last day for resolving the notices under section 42 of the Legislative Instruments Act.

A notice relating to aviation security regulations, originally given by the Regulations and Ordinances Committee, was taken over by Senator Xenophon on 8 September 2009 and the regulations were disallowed on 10 September. The issue of concern to the committee was an element of strict liability imposed on pilots for unauthorised access to aircraft cockpits. The committee was satisfied with the minister's explanation of the relevant provisions, but the majority of the Senate was not satisfied on that and other issues.

A notice relating to export control regulations given by the Greens was taken over by Senator Fielding and moved together with an Opposition motion that covered only one of the instruments included in the Greens' notice, and the regulations were then disallowed on 15 September. The issue involved was the imposition of additional costs on industries that use export inspection services. The Greens were satisfied with ministerial undertakings that had been given, but again the majority was not.

ORDERS FOR THE PRODUCTION OF DOCUMENTS

A report of the National Preventative Health Taskforce was tabled on 7 September in response to an order made on 19 August. The Opposition complained about having to force the government to produce the report.

An order made on 16 September on the motion of the Greens, for the tabling of maps of Australian forest cover for each year since 1990, is returnable by 26 October. The motion does not refer to any particular maps known to exist, but appears to require the production of maps from computer data.

Senate resolutions which “call for” information to be provided are not technically orders for documents, but they are often treated as such. A resolution of 15 August calling on the government to provide a full report on the situation in North Korea was met on 17 September by a comprehensive report.

Similarly, resolutions expressing opinions or concern about matters, particularly within the responsibility of Australian or foreign governments, are regularly responded to, sometimes with lengthy replies, notably by foreign governments.

LEGISLATION

One set of bills hastily passed during the period demonstrated that the judgment of a Senate committee may well be more accurate than that of the government’s advisers. The Senate Foreign Affairs, Defence and Trade Committee, in its report on reform of the military justice system, had recommended that a new military court be established as a fully fledged court under the Constitution, but the former government at the time rejected this recommendation and established a quasi-court, which the High Court, in a judgment on 26 August, found to be unconstitutional. Two bills were speedily passed on 10 September to fill the resulting gap with a temporary arrangement.

Legislation that depends on regulations for its operation often leads to demands in the Senate for the draft regulations to be revealed before the legislation is passed. This occurred in relation to the Health Insurance Amendment (Extended Medicare Safety Net) Bill. Draft determinations under the bill were tabled on 9 September in anticipation of a second reading amendment to defer the bills for three sitting days after the tabling of the draft. The amendment was still passed, and the bill deferred for three sitting days. Some doubt arose as to whether the tabled draft determinations met the requirements of the Senate’s resolution, but the bill was brought on by a motion moved by leave on 16 September, thereby avoiding the question of whether the condition for calling on the bill had been met. The bill was then passed with an amendment requiring approval of each House of the Parliament for the commencement of determinations made under the bill. There are precedents for this kind of provision in other statutes, usually inserted by Senate amendments where the Senate wishes to have a greater degree of control over the making of delegated legislation than is provided by the usual disallowance power.

The Fairer Private Health Insurance Incentives package of legislation, which would mean test the private health insurance rebate, was negatived at the second reading on 9 September. The government immediately threatened to recall the Senate in mid December, after the three month period required by section 57 of the Constitution for a dissolution of both Houses. The methods by which the Senate might be recalled was the subject of advice by the Clerk which was published (see *Odgers’ Australian Senate Practice*, 12th ed., 2008, pp 148, 150).

Two bills were extensively amended after scrutiny by the Legal and Constitutional Affairs Committee, the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill, and the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill, both on 16 September. The second bill was the subject of a dispute about the proposed closure of the Hobart registry of the Federal Court. A Greens amendment to stop the closure was not supported on the basis that a more appropriate bill would soon allow such an amendment to be considered, but there was no government undertaking that the amendment would be accepted by the government.

Two bills which were the subject of disagreement between the Senate and the government were eventually passed because of unwillingness to prevent the passage of the beneficial contents of the bills. The Safe Work Australia Bill, dropped by the government in December 2008 because of disagreement with Senate amendments, was passed without amendment on 7 September. The Automotive Transformation Scheme Bill, providing for grants to motor vehicle manufacturers, was passed on 16 September with the Senate not insisting on an amendment, rejected by the government, that would have required disclosure of the amounts paid to individual companies. The government claimed commercial confidentiality as the reason for not disclosing those amounts; the bill requires the disclosure of the total amounts granted.

Another bill involved in the government's planned National Broadband Network was adjourned on 15 September until documents are produced in accordance with the order of the Senate of 13 May, which put aside all such bills until the order is fulfilled. The bill, the Telecommunications Legislation Amendment (National Broadband Network Measures—Network Information) Bill, was also put off under the deadline for the introduction of bills contained in standing order 111. It is not known how the government plans to respond to the order, which effectively prevents any National Broadband Network legislation being dealt with until the information is produced.

UNANSWERED QUESTIONS

The procedure whereby senators may seek explanation for failure to respond to estimates questions on notice, and initiate without notice a debate on the subject (standing order 74(5)) was used on 10 September for the first time in a considerable period. It is remarkable how infrequently senators use this procedure, given the tardiness of some departments in answering questions (some questions from the May-June estimates hearings remain unanswered).

The same comment applies to the similar procedure relating to orders for production of documents (standing order 164(3)). Documents recently tabled in the Senate indicate that

some ministers and departments have assumed that, because that procedure does not become available until thirty days after a response to an order is due, this gives them a thirty-day extension of time in responding to every order. This misconception should by now have been dispelled.

COMMITTEE REFERENCES

As a result of references made on 8 and 9 September, two Senate committees now have the responsibility of conducting inquiries into two major aspects of the government's strategy for combating the global financial crisis. The Economics References Committee was given a reference on the government's stimulus expenditure for report by 2 October, with a requirement that the Secretary of the Treasury and the Reserve Bank Governor, amongst other witnesses, be invited to give evidence at public hearings. The Education, Employment and Workplace Relations Committee was given a reference on the government's Primary Schools for the 21st Century Program.

ORDINARY ANNUAL SERVICES

A resolution was passed on 16 September, with the support of government senators, requiring that the Minister for Finance and Deregulation respond by 16 November to the reports of the Appropriations and Staffing Committee and the Finance and Public Administration Committee on the vexed issue of the ordinary annual services of the government (see *Odgers' Australian Senate Practice*, 12th ed., 2008, pp 286-7). The resolution notes that this matter has been in dispute since 2005.

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

Inquiries: Clerk's Office
(02) 6277 3364