DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

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14 February 2011

ROUTINE OF BUSINESS

The 2011 sittings began with a day devoted to condolence motions in the wake of devastating floods in Queensland and other natural disasters. There was also a condolence motion for former Deputy President and Chairman of Committees, Senator Maunsell, who appears in volume 3 of the *Biographical Dictionary of the Australian Senate*. The normal routine of business was put aside by a motion moved by leave to enable this to occur and the Senate adjourned early as a mark of respect to the deceased.

SENATE POWERS QUERIED

Normal business was resumed on 9 February and a large number of documents was tabled, many of which had been presented out of sitting, including responses to orders of the Senate from the Australian Information Commissioner. The orders had asked the Information Commissioner to report on the reasons proffered by the government for not complying with earlier orders for information about the proposed mining tax and the proposal to vary the GST agreements in exchange for a different health funding model (see Bulletin Nos. 245 and 246). The Commissioner argued that he could not comply with the order because what it required him to do was beyond the powers and functions conferred upon him by his statute. He went on to query the extent of the Senate's power to make such orders. In debate on a motion to take note of the responses on 9 February, Senators Cormann and Ludlam disputed the Commissioner's position and put forward arguments to the contrary. Both emphasised, however, the need to find a solution that would give effect to the agreements on parliamentary reform without derogating from the Senate's established powers and practices.

An order to the Productivity Commissioner, similar in terms to the order to the Information Commissioner agreed to on 22 November 2010, was passed on 10 February. The order requires the Productivity Commissioner to reconsider his position on an earlier Senate order requiring him to produce a document on superannuation default funds in industrial

agreements and awards. In a response tabled on 9 February, the Productivity Commissioner also appeared to suggest that the order was outside the terms of his statute. Like the *Australian Information Commissioner Act 2010*, the *Productivity Commission Act 1998* contains no explicit limitation on the powers of the Houses under section 49 of the Constitution which would be required if the Parliament had meant to limit itself in this regard.

An occasional note on the power to order the production of documents is attached to this bulletin.

PRIVATE SENATORS' BILLS

The Senate's powers under section 53 of the Constitution were also the subject of debate in relation to the Social Security Amendment (Income Support for Regional Students) Bill 2010, introduced by Senator Nash (see Bulletin No. 246). The arguments for and against the Senate's initiation of bills such as this are contained in the Clerk's submission to the Education, Employment and Workplace Relations Legislation Committee's inquiry into the bill and advice prepared by the Attorney-General, also provided to the committee and tabled in the Senate on 17 November 2010. Now that the bill has passed the Senate, it will be up to the House to determine its position. In 2008, the House declined to consider a comparable bill (see Bulletin No. 224).

Matters involving section 53 of the Constitution are matters for the Houses themselves to sort out, not the courts, because section 53 relates to "proposed laws" and is therefore non-justiciable, a principle stated as early as 1911 in *Osborne v Commonwealth* 12 CLR 321.

The bill was the first to pass the Senate under the new procedures for consideration of private senators' bills on Thursday mornings. Under a temporary order, the routine of business is altered to set aside time exclusively for the consideration of general business orders of the day relating to bills. The order does not vary any other standing orders, meaning that bills considered at this time are subject to all the normal rules that apply to any other bills (although, in this case, informal arrangements had been made to limit speaking times on the second reading). The normal rules include the following:

- standard speaking time limits apply, namely, 20 minutes per speaker on the second reading and 15 minutes in committee of the whole, without a total time limit;
- second reading amendments may be moved as normal, including second reading amendments that have an effect on further consideration of the bill (such as referral to a committee or postponement of subsequent stages);
- a separate opportunity exists for a motion to be moved immediately after the second reading to refer the bill to a committee (standing order 115(2));

- if amendments or requests for amendments are circulated to the bill, or a senator so requires, then it must be considered in committee of the whole (standing order 115(1));
- instructions may be given to the committee of the whole in respect of the bill (standing orders 115(2), 149, 150 and 151);
- if the bill is referred to a standing or select committee after it has been listed in the motion specifying the business for Thursday mornings, then the bill is not available for consideration at that time until the committee reports (nor is it available for consideration if it is already before a committee and the committee has not reported) (standing order 115(3));
- if consideration of a bill is not completed before the available time expires, then it returns to the Notice Paper as a general business order of the day and must be specified in a future motion if it is again to be considered at either of the general business opportunities on Thursdays;
- a declaration of urgency under standing order 142 may be moved only by a minister but other senators may move motions (subject to the normal procedures of the Senate) for consideration of bills under limitations of time that may have the same effect as a motion under standing order 142;
- if the bill is agreed to during this time and read a third time, it is transmitted to the House of Representatives for concurrence in the normal way and standing orders 125 to 127 apply to the bicameral consideration of the bill.

UNANSWERED QUESTIONS

The procedure for following up unanswered questions on notice, or estimates questions on notice, under standing order 74(5) was used on 9 February in respect of both categories of unanswered questions for the first time since late 2009. Senators expressed their dissatisfaction with the explanations provided by taking note of them and using most of their allotted speaking times, thus demonstrating one impact of the mechanism in taking up available time for government business. The 445 answers outstanding to estimates questions on notice, the subject of the motion, were lodged with the secretariat two days later.

ADDITIONAL ESTIMATES

The particulars of proposed additional expenditure were referred to legislation committees on 10 February ahead of the additional estimates hearings scheduled for the week beginning 21 February. The subject of unanswered questions taken on notice at the previous round will no doubt be raised at the hearings.

COMMITTEE REFERENCES

Several new matters were referred to committees including the impact on the dairy industry of supermarkets' milk pricing policies, the impact of a South Australian Government decision on the timber industry in that region, capital markets for social economy organisations, Defence procurement policies, and the relationship between the *Water Act 2007* and the development of the Murray Darling Basin Plan. Amongst the reports presented was a significant and unanimous report on donor conception practices, presented by the Legal and Constitutional Affairs References Committee on 10 February. For details of other reports, see the *Senate Daily Summary*.

ORDERS FOR PRODUCTION OF DOCUMENTS

Two orders agreed to on 9 February for the production of legal advice, respectively, on the interpretation of the *Water Act 2007* and underpinning bilateral agreements on the "Building the Education Revolution" (BER) program were met with refusals on 10 February. The refusals took the form of statements tabled by the duty minister but contained nothing on the face of the documents to indicate who was providing them, not even a letterhead of the responsible minister. In refusing to produce legal advice on the Water Act, the government repeated the assertion that release of legal advice would go against long established convention and practice, conveniently ignoring the equally well-established practice, recorded in these bulletins, that governments release legal advice when they consider it is in their interests to do so. There was a reference to "important public interest grounds, long recognised by successive governments" – but not by the Senate – "for having such material remain confidential". The statement referred to a summary of the legal advice already released (presumably summaries are not subject to the long established convention) and concluded with confirmation that the Australian Government Solicitor had advised the department that its advice on the issue was consistent with the summary advice published by the Minister. The statement in relation to the BER, although short, did identify a public interest immunity ground for not producing the document and included a minimal explanation of possible harm that could ensue from the disclosure, as required by Senate orders, together with a reference to a Procedure Committee report recognising that particular ground as a ground which had received some degree of acceptance by the Senate in the past.

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

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OCCASIONAL NOTE

ORDERS FOR THE PRODUCTION OF DOCUMENTS: ORIGINS AND DEVELOPMENT OF THE POWER

Questions have been raised about the power of the Senate to order the production of documents. Such questions are perhaps more accurately characterised as questions about possible constraints or limitations on the exercise of the power, because it cannot seriously be proposed that a house of parliament in a constitutional system of parliamentary government in which the executive is responsible to the parliament does not have the power to exercise that necessary supervision of the executive. It cannot be reasonably argued that the supervised body is able to set the terms of the supervision or that the supervising body must accept those terms. This is a distortion of the principles of parliamentary government, no doubt brought about over time by the characteristic numerical domination of lower houses of parliament by governing parties.

The power to order the production of documents, both in existence and created for the purpose, has deep historical roots and has also evolved with use. Its evolution includes a presumption that the creation of a document to satisfy an order may involve analysis as well as collation of information. Both houses of the Australian Parliament were given the powers, privileges and immunities of the House of Commons in the United Kingdom at the date of the Constitution. The Parliament was also given the power to declare its powers, privileges and immunities by legislation. The starting point in any assessment of these powers is therefore the powers exercised by the House of Commons in 1901. There is, of course, no exhaustive or authoritative list of the powers, privileges and immunities of the House of Commons which have evolved over centuries through a combination of custom, practice and statutory law. The extent of these powers, privileges and immunities must be established by consulting the authorities and the practices of the House itself as recorded in the House of Commons Journals. General statements in the authorities are based on the practices and precedents of the House.

The foremost authority on House of Commons practice is *Erskine May's Treatise of the Law, Privileges, Proceedings and Usages of Parliament*. The edition available in 1901 was the 10th edition, published in 1893 and edited by R. F. D. Palgrave and Alfred Bonham-Carter. Chapter XXI, dealing with "Accounts, Papers, and Records Presented to Parliament", starts with this statement:

> Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information. (p. 507)

The chapter then goes on to describe the two methods of obtaining documents: by direct order in respect of certain matters and by address to the Crown in matters connected with the

exercise of the royal prerogative or where the relevant agency was under the control of a secretary of state.[1] On page 509, Erskine May goes on to say:

> Returns may be moved for, either by order or address, relating to any public matter, in which the house or the Crown has jurisdiction. They may be obtained from all public offices, and from corporations, bodies, or officers constituted for public purposes, by Acts of Parliament or otherwise: but not from private associations, such as Lloyds, for example, nor from individuals not exercising public functions.

In the article cited in note 1, Greg Taylor disputes the validity of this supposed limitation on obtaining documents from private parties and observes, first, that the limitation is not recognised in Australian practice or law and, secondly, that it has not subsequently been adhered to in House of Commons practice either.[2]

Other contemporary references and authorities that were certainly available to, and consulted by, early Senate Clerks (because we still have their copies of them) are a *Manual of Procedure in the Public Business of the House of Commons, prepared by the Clerk of the House for the use of Members and laid on the table by Mr Speaker*, dated 1904, and Josef Redlich's *Procedure of the House of Commons: A Study of its History and Present Form*, translated from the German with an introduction by the then Clerk of the House of Commons, Sir Courtenay Ilbert, dated 1908.[3] While the *Manual* simply restates the House's practice ("the House, by means of orders, or of addresses to the Crown, obtains returns supplying information on matters of public interest"), Redlich's commentary is rather more expansive:

> The House of Commons has long maintained as a principle of its customary law that it is entitled to demand the use of every means of information which may seem needful, and, therefore, to call for documents which it requires. This claim may be enforced without restriction. In its most general form it is displayed in the right of the House to summon any subject of the state as a witness, to put questions to him and to examine any memoranda in his possession. Practically speaking, in its constant thirst for information upon the course of administration and social conditions, the House generally turns to the Government departments as being the organs of the state which are best, in many cases exclusively, able to give particulars as to the actual conditions of the life of the nation and as to administrative action and its results from time to time.
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1 The historical evolution of these practices and their inapplicability to any Australian jurisdiction is well covered in an article by Greg Taylor, "Parliament's Power to Require the Production of Documents — a Recent Victorian Case", *Deakin Law Review*, Vol 13, No 2, pp. 17-48 at pp. 22-37.

2 Greg Taylor, *ibid*, pp. 38-43.

3 The *Manual of Procedure* belonged to E. G. Blackmore, first Clerk of the Senate, while Redlich's work was purchased for the Senate chamber.

> Let us remark in passing, that in the unlimited character of the claim for information, which may in principle be made at any time, there lies a fundamental parliamentary right of the highest importance; it is a right which, both constitutionally and practically, is a condition precedent to all English and parliamentary government. (pp. 39-40)

Redlich then goes on to explain the difference between orders and addresses and concludes:

> For this reason the distinction between different kinds of parliamentary papers on the score of the legal nature of their contents, some being claimed and some prayed for, though still formally maintained, is devoid of any great political importance. (p. 41)

His conclusion on executive refusal of some addresses has a surprisingly contemporary ring to it:

> The exercise of the prerogative, in the present case a refusal of information [in response to an address], no longer points to a right of the Crown as against Parliament, but is a device, supported by a technically impregnable title [secretary of state], by which the Ministry can baffle the Opposition or, under certain circumstances, even a section of its own supporters. (p. 41)

The Journals of the House of Commons from the period contain numerous examples of orders or addresses for returns, and both *Erskine May* and Redlich contain discussions of the types of information governments were reluctant to provide. Then, as now, the House did not generally exercise its formal powers to obtain the information but a political solution was invariably reached. Interestingly, for present purposes, there are also examples of orders to non-departmental bodies to provide returns[4] on various matters. These include:

- an order to the Corporation of Trinity House of Deptford Strond (a "fraternity of mariners", independent of government which, from 1604 to 1987, had the exclusive right to license River Thames pilots) to prepare a return of certain income from the pilots, separately identifying poundage paid on the pilots' earnings (House of Commons Journals, vol. 85, 23 March 1830, pp. 216-223)
- an order to the Irish Land Commission for detailed information about land sales following foreclosures (House of Commons Journals, vol. 146, 4 December 1890, p. 29)
- an order to each savings bank in England, Wales, Scotland and Ireland for the creation of a document containing a wide variety of information (House of Commons Journals, vol. 146, 17 February 1891, p. 95)

[4] A "return" is distinguishable from "documents" or "papers". The latter are in existence already while the former is created in response to the order or address.

- a further order to the Irish Land Commission for the creation of a document providing details of the Commissioners (House of Commons Journals, vol. 146, 23 February 1891, p. 104).

Early Senate practice was to make regular use of orders for production of documents, both in existence and created for the purpose. For example, in the first three sessions of the Commonwealth Parliament (1901-03), the Senate agreed to 54 orders, the majority of them being satisfied by the tabling of documents.[5] The power to order the production of any documents was exercised by the Senate, as it had been exercised by the House of Commons, and access disputes were resolved, not by testing the limits of the power in the courts (assuming any aspects of an access dispute were justiciable), but by political settlement and the exercise of self-restraint on the part of the Houses.

One modification of the doctrine of exclusive cognizance that occurred in the 19th century was the acceptance of the principle that it was for the courts to establish the existence of a power but for the parliament to determine its application. A leading case was *Stockdale v Hansard*[6] which concerned the right to publish reports of parliamentary proceedings. Another was *Kielley v Carson*[7] in which the Privy Council found that the House of Assembly of the Island of Newfoundland did not possess the power to arrest a person in pursuance of an investigation for contempt, but possessed only such powers as were reasonably necessary for the proper exercise of its functions and duties as a local legislature. It was in the wake of *Kielley v Carson* that the legislatures of self-governing colonies began to be given statutory grants of power, commonly by reference to the powers of the House of Commons. While it was too late for New South Wales which continues to operate on the basis of reasonably necessary powers (as confirmed by the High Court in *Egan v Willis*[8]), later Australian colonial legislatures, and the Commonwealth itself, were endowed in their foundation statutes with House of Commons powers at particular dates (for example, 1855 for Victoria, 1901 for the Commonwealth).

In the Senate, reliance on orders for production of documents waned after the first decade or so, and their use was not revived till the 1960s. Reasons for this are many and varied. For the more routine information sought from the executive, questions on notice were an alternative mechanism and one which could be used by individual senators without the need for a resolution of the Senate. For possible reasons of a more complex social and political character, see Harry Evans' introduction to Volumes 1 and 2 of the *Biographical Dictionary of the Australian Senate*.

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5 Orders covering the first three Parliaments from 1901-10 are listed in *Business of the Senate 1901-1906*, Department of the Senate, 1999, and *Business of the Senate for the Third Parliament 12 December 1906-19 February 1910*, Department of the Senate, n.d.

6 (1839) 9 Ad & El 1.

7 (1842) 4 Moo PCC 63; 13 ER 225.

8 (1998) 195 CLR 424.

In 1967, the Senate agreed to an order for production of documents about the use of the Royal Australian Air Force's VIP Flight by ministers and other members of parliament (and, it transpired, by others including family members).[9] The Opposition sought to use the full range of Senate powers and procedures to hold the government to account over this matter, including giving notice of a motion for the Secretary of the Department of Air to be called to the bar of the Senate to answer questions about the affair. This became unnecessary when the documents were produced.

Another scandal in 1975, in relation to the government's attempt to secure alternative funding from Iraq through a shadowy intermediary, led to a stand-off between the government and the Senate, resulting in a declaration by the Senate of the basis on which it would consider claims of public interest immunity. This was the occasion when public servants were summoned before the bar of the Senate to answer questions about the loans affair. They duly appeared and were sworn but, on instruction from their various ministers, claimed Crown privilege (now known as public interest immunity) in respect of the evidence to be sought from them. The Senate's resolution, agreed to on 16 July 1975, affirmed its possession of the powers and privileges of the House of Commons, as conferred by section 49 of the Constitution, including the power to summon persons to answer questions and produce documents, files and papers. The resolution went on to declare that it was the obligation of all such persons to answer questions and produce documents and that, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate would consider and determine each such claim. That remains the position and further resolutions of the Senate have elaborated on the procedures to be followed by ministers and public servants in seeking to advance claims of public interest immunity. The most recent resolution was agreed to on 13 May 2009. The position has also been reiterated in orders to the Australian Information Commissioner and the Productivity Commissioner.[10]

In 1987, the Parliament used the power given to it under section 49 of the Constitution to make a partial declaration of its powers, privileges and immunities in the *Parliamentary Privileges Act 1987*. One catalyst for the enactment of this legislation was provided by certain decisions of the New South Wales Supreme Court, whose effect was to permit the use in court proceedings of evidence, including *in camera* evidence, given to the Senate select committees inquiring into the conduct of Mr Justice Murphy. The Act, in section 16, reiterated the application of article 9 of the Bill of Rights 1688 to proceedings of the Commonwealth Parliament and went on to provide a definition of proceedings in parliament. Under paragraph 16(2)(d), proceedings in parliament include the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published. The power of the Houses to

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9 For accounts, see Ian Hancock, "The VIP Affair 1966–67: The Causes, Course and Consequences of a Ministerial and Public Service Cover-Up", *Australasian Parliamentary Review*, Vol. 18, No. 2, Spring, 2003; and Tom Frame, *The Life and Death of Harold Holt*, Allen & Unwin, 2005, pp.226–34.

10 Order to the Australian Information Commissioner, 22 November 2010, *Journals of the Senate*, p. 367; to the Productivity Commissioner, 10 February 2011, *Journals of the Senate*, p. 572.

order the production of documents thus has explicit statutory recognition, although this, of course, is not a source of the power.

Just as reference to practice and precedent was instrumental in understanding the nature and extent of the powers of the House of Commons in 1901, so usage continues to inform the scope of those powers today. From time to time, questions have been raised about whether the Senate has the power to order the creation of a particular document. The most cursory reference to House of Commons practice before 1901, and to Senate practice in the years after Federation and since the late 1960s, indicates that this is a power that has been used on countless occasions. More recently, the question has been asked whether the Senate can require inquiries to be undertaken for the purpose of creating a document for presentation to the Senate. Again, reference to practice and precedent confirms that this is indeed the case. A document tabled by Senator Cormann on 9 February 2011 lists numerous occasions since the early 1990s on which statutory bodies have responded to Senate orders for documents recording the outcome of particular research, analysis or inquiries.[11]

Clerk's Office
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[11] The document is available on the Senate website, in Statsnet, under "Documents" at the following url: http://www.aph.gov.au/Senate/work/statsnet/documents/opds/OPD.pdf.