



DEPARTMENT OF THE SENATE

PROCEDURAL INFORMATION BULLETIN

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For the sitting period 7 — 9 February 2012
& additional estimates 13 — 16 February 2012

During the first sitting week for 2012 some matters of controversy were dealt with.

DISSENT FROM RULING OF PRESIDENT

A matter outstanding from 2011 was Senator Bob Brown's motion of dissent from the President's determination under standing order 81 not to give precedence to a matter of privilege raised by Senator Brown concerning Senator Boswell's initiation of an inquiry into a business transaction involving a donor to The Nationals (see [Bulletin No. 258](#)). By the time the dissent motion was debated, the President had also determined not to give precedence to two further matters of privilege raised by Senator Brown of a similar character concerning Senators Joyce and Cash, also on the basis that alternative remedies available under the procedures of the Senate had been applied in each case. This is in contrast to a matter raised by Senator Kroger in November 2011 concerning allegations connecting a donation to the Australian Greens with a series of questions asked by Senators Brown and Milne over a period of time. The President did give precedence to this matter and a motion to refer it to the Privileges Committee was supported at the conclusion of the 2011 sittings.

Debate on the motion of dissent ranged widely over all these matters. Although contributors to such debates have traditionally been given the greatest latitude, the chair also cautioned senators against canvassing the specific matters that had been referred to the Privileges Committee. In accordance with past practice, the President spoke in the debate to clarify the ruling and respond to matters that had been raised, particularly the widespread misunderstanding of the nature and effect of a determination under standing order 81 which is a determination going to the handling of the matter as an item of business but not to its merits (beyond ascertaining that it is not of a trivial nature unworthy of the attention of the Senate).

The motion was lost by a wide margin on 8 February but the Opposition pursued the matter further in the general business debate on 9 February with a motion noting reflections by Senator Brown on various people including the President, the Prime Minister and several senators, a debate in which many of the same issues were revisited. An amendment was moved by Senator Milne commenting on the use of general business time. A point of order taken on the relevance of the amendment was dismissed, on balance, a ruling subsequently endorsed by the President. The motion and amendment remain on the Notice Paper, along with a motion in Senator Brown's name querying politicisation of the Privileges Committee by such references as Senator Kroger's. Motions to refer to the Privileges Committee the three matters not given precedence are also on the Notice Paper for 22 March.

LEGISLATION

The bills to implement the controversial minerals resource rent tax and related measures were introduced on 7 February. After their introduction, the Opposition sought to suspend standing orders to move a motion relating to the Government's failure to comply with an order for production of documents concerning the tax. The motion to suspend standing orders was defeated but Senator Cormann subsequently gave notice of the motion which provided for the bills not to be called on until the order of the Senate had been complied with and a subsequent resolution agreed to. The purpose of such a resolution would be to enable the Senate to assess whether the orders had been satisfactorily complied with before agreeing to the bills being called on. The motion also noted the lack of progress on an arbitration mechanism and the number of outstanding orders on the subject. The motion was defeated on 9 February.

FORMAL BUSINESS

The Deputy President again drew the Senate's attention to the Procedure Committee's second report of 2011 and its suggestions for improving the conduct of formal business, particularly in relation to measures to avoid de facto debates on formal motions which are required to be dealt with without amendment or debate. This followed numerous statements by leave in relation to formal motions on 9 February.

ORDERS FOR PRODUCTION OF DOCUMENTS

There were several responses to orders for production of documents during the period, including responses to continuing orders for the production of information relating to government grants, vacancies and appointments, which are required before each round of estimates. Other returns to order were on the following matters:

- a further bilateral intergovernmental agreement in relation to the Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (tabled 7 February, pursuant to a 2009 order);
- information about estimates of budget revenue and expenditure projections relating to the minerals resource rent tax and related measures (tabled 9 February pursuant to an order of 1 November 2011; the tabled information did not include any indication that information was being withheld on public interest grounds);
- implementation of the Australian and New Zealand Government Sustainable Procurement Framework (tabled on 8 February pursuant to an order of 2 November 2011; the listed policy documents were all publicly accessible and were stated to represent all documents relating to the matter);
- a report by independent expert schedulers on harvesting requirements under the Tasmanian Forests Intergovernmental Agreement (tabled 7 February pursuant to an order of 3 November 2011);
- information about actions taken against dentists under the Chronic Disease Dental Scheme (tabled 7 February pursuant to an order of 24 November 2011).

ADDRESS TO THE QUEEN

Standing order 171 provides for an address to the Queen or Governor-General to be proposed by motion on notice in the usual manner. On 7 February a motion for an address to the Queen was moved by leave, congratulating the Queen on the Diamond Jubilee of her accession to the Throne. The address was transmitted by the President to the Governor-General in accordance with standing order 172(1), for forwarding to the Queen. Such addresses are relatively rare, the last one being in relation to the death of the Queen Mother in 2002.

RESPONSES TO COMMITTEE REPORTS AND RESOLUTIONS

There has been a noticeable improvement in the rate and timeliness of government responses to committee reports, with numerous responses presented over the summer recess and during the first sitting week. The listing of the responses on the Notice Paper ensures that senators have an opportunity to debate them. They may also be debated by leave on presentation. Responses presented included responses to committee reports on gene patents, cyber safety, forestry and mining operations on the Tiwi Islands, the system of health practitioner registration, the dairy industry, the impact of supermarket pricing decisions on the dairy industry, government compensation payments, aviation contract tender requests, and equity and diversity health checks in the Royal Australian Navy, many of which were relatively recent.

The President's regular report on government responses outstanding was tabled on 7 February.

The potential value of resolutions of the Senate was acknowledged by Senator Siewert in speaking to several responses to a resolution on hearing health in Indigenous communities on 7 February. The motion, initiated by Senator Siewert, called on state and federal governments to work together to address the issue. Responses from all state jurisdictions have now been tabled and debated.

PREPARATIONS FOR ADDITIONAL ESTIMATES

The machinery of government changes associated with the latest changes to the ministry required the resolution allocating portfolios to committees to be revisited. They included the return of regional affairs to the Rural Affairs and Transport Committee, and the consequent transfer of arts and sport to that committee from the Environment and Communications Committee. Consequential changes of committee names were also made. The motion was extensively debated on 8 February, with Opposition senators expressing dissatisfaction with some of the changes, particularly the allocation of tertiary education to the Economics Committee and the location of arts and sport with RRAT.

Particulars of proposed additional expenditure and Portfolio Additional Estimates Statements were tabled on 9 February and referred to legislation committees along with the Issues from the advances under the various Appropriation Acts (for urgent and unforeseen expenditure).

Before the hearings, some use was made of the procedure under standing order 74(5) to follow up unanswered questions taken on notice at the previous round of estimates. As usual, many overdue answers appeared on the eve of hearings and were the subject of some discussion.

A motion requiring the former General Manager of Fair Work Australia (now a Commissioner) to appear at estimates and answer questions about his former role as General Manager (namely, his involvement in investigations into the Health Services Union) was negatived on 8 February.

ADDITIONAL ESTIMATES HEARINGS

Impact of machinery of government changes

Machinery of government changes led to some scheduling difficulties in the estimates program but all committees finished within the allotted time, Economics allocating extra time on Friday 17 February to hear from the Treasury Secretary, having dealt with its new tertiary education responsibilities earlier in the week. The usual cross portfolio hearing by the Community Affairs Legislation Committee on Indigenous issues also took place on Friday 17 February.

Powers of parliamentary secretaries

An order of the Senate setting out the powers of parliamentary secretaries (for the purpose of Senate procedures) provides that a parliamentary secretary may not represent a Senate minister at estimates. If a Senate minister cannot be present to answer questions about his or her own portfolio, the options are for the committee to proceed without a minister or for the minister to be represented by another Senate minister. Proceeding without a minister has disadvantages for both the officers at the table who are in a sense “unprotected” by lack of immediate recourse to a minister (although they have the protections of Privilege Resolution 1), and for the committee which is denied the opportunity of putting to a minister questions which may require a political response. Machinery of government changes placed the Defence Materiel Organisation under a separate ministry, the Minister for Defence Materiel (Senator Carr) meaning that the Parliamentary Secretary for Defence (Senator Feeney) could not represent Senator Carr in respect of defence materiel issues. Difficulties arose when Senator Carr was appearing before another committee in his representational capacities at the same time that defence materiel issues were being considered by the Foreign Affairs, Defence and Trade Legislation Committee (FADT, 15/2). Although the committee proceeded with the Parliamentary Secretary for Defence present in his capacity as representing the Minister for Defence (the senior portfolio minister) this would not appear to be in keeping with the spirit of the Senate’s resolution which is to ensure that legislation committees have access to the responsible minister when that minister is a senator.

Public interest immunity claims

There are some signs that the intention of the order of the Senate of 13 May 2009 may be becoming more widely appreciated. The order requires that the withholding of information from committees occur only on the basis of a claim of some public interest immunity ground. There is no general discretion to withhold information without a statement of the public interest ground.

While reference to the order is included in every opening statement, signs of adherence to it have been hard to find in some rounds of estimates hearings. At best, public interest grounds have been implied rather than stated. Although this continues to be the case, there were stronger signs during this round of estimates of committees pressing witnesses further to elaborate on the basis of their claims to withhold information. For example, the Chair of the Employment, Education and Workplace Relations Legislation Committee challenged the Australian Building and Construction Commissioner to elaborate on his reluctance to answer questions on a matter that was subject to an internal investigation, stating that, in itself, that was not an adequate ground and some explanation of the potential prejudice to the public interest should be provided. The same chair rebuked the acting General Manager of Fair Work Australia for failing to correct answers previously provided that went to the very sensitive issue of contact between officers of FWA and ministers' offices in the course of inquiries into the Health Services Union. The acting General Manager's claim that she expected the correct answers to come out in further questions was rejected by the chair (EEWR, 15/2).

Questions relating to the HSU investigations and the affairs of the Member for Dobell were asked across several committees of several agencies, including the Australian Electoral Commission (FPA, 13/2), the Department of Health and Ageing (CA, 15/2), the Australian Government Solicitor (LCA, 14/2) and Fair Work Australia (EEWR, 15/2). Possible prejudice to incomplete inquiry processes raised as a public interest ground by officers of the last-mentioned agency proved to be a double-edged sword as it highlighted the length of time being taken to complete inquiries into HSU (which will itself be the subject of an external review commissioned by FWA). The acting General Manager declined to provide the committee with a copy of a report that had been completed (with the follow-up assessment of remedial action still under consideration) on the grounds that it contained potentially defamatory material. While committees should be careful about receiving such material and should not do so without applying the adverse evidence procedures in Privilege Resolution 1, the publication of the report to the committee, being proceedings in parliament, could not of itself give rise to an action for defamation.

Prejudice to ongoing investigations (or their aftermath) and commercial confidentiality were raised as grounds in other committees and generally not pressed (FPA, 14/2; Ec, 15/2; FADT, 15/2). In contrast, when questioned about answers to questions on notice from departments which claimed that information could not be provided because it may impede the audit into the tender for the Australia Network, the Auditor-General indicated that this was not the case (although there were other matters to be mindful of).

Questions about provisions of bills

The question sometimes arises of the extent to which estimates committees should consider the detail of bills, particularly when bills have been referred to committees by the Senate. Advice given in the past and accepted by committees is that the very wide ambit of the estimates process (“any questions going to the operations or financial positions of departments and agencies”) does not extend to questions about the provisions of bills. When a bill has been referred to a Senate committee, this means that the Senate has given the committee the specific task of inquiring into the bill. Questions about the provisions of the bills should occur in that forum (or, if the bill is not referred, in committee of the whole), not at estimates where the operations of departments and agencies are the focus. There was some discussion of these principles in the Economics estimates hearing on 16 February.

Answers to questions taken on notice

The usual difficulties were experienced in relation to answers to questions taken on notice at the previous round, namely:

- answers not provided by the due date;
- large numbers of overdue answers provided at the last minute;
- inadequate answers that did not address the questions asked.

However, the Defence Secretary in his opening statement noted the improvement in that department’s performance in responding to questions taken on notice in October.

Attendance by agency heads

Committees expect that agency heads will attend the hearings. The Friday hearing of the Economics Legislation Committee was scheduled to hear from the Treasury Secretary who was overseas earlier in the week. The same committee expressed its disapproval when informed that the Chairman of the ACCC would not be attending the hearing because he was overseas. The chair indicated that the committee would consider the matter further.

Matters of interest

There were many matters of interest canvassed during the hearings including such regular topics as the HSU inquiries, the NBN rollout, the Future Fund earnings, submarine capability, the various inquiries into conduct of ADF personnel, problems with computer systems supporting the childcare rebate program, the impact of the efficiency dividend on small agencies (and large agencies this time too), pressures on the DIAC budget from the number of irregular boat arrivals, the rollout of computers to schools and the modelling of various new taxes and other economic measures.

Other matters included the following:

- problems with the department's administration of the Tasmanian Community Forest Agreement Industry Development Program, including failure to implement audit recommendations (RRAT, 13/2)
- handling of voluminous FOI requests by the Department of Climate Change (E&C, 13/2) and Department of Health and Ageing (CA, 15/2)
- the number of sub-standard solar panel installations (E&C, 13/2)
- measures to make the administration of the honours system more transparent FPA, 13/2)
- the use by the AFP of a contracted provider of so-called open source intelligence (effectively, what you get from reading newspapers and using Google ...) (LCA, 14/2)
- the cost of the various inquiries into the conduct of ADF personnel flowing from the Skype affair (\$12 million) (FADT, 15/2)
- the cost of installing set-top boxes for pensioners (E&C, 14/2)
- the cost of car industry assistance and the source of the funds (Ec, 15/2)
- the cost of implementing a \$1 betting cap on poker machines (CA, 16/2)
- the amount of money saved by AusAid on advisers (\$90 million) (FADT, 16/2)
- more details about the Australia Network tender process (FADT, 16/2)
- the cost of advertising for a Centrelink information seminar program that was subsequently shelved (CA, 16/2)
- what the NAPLAN testing regime for school students actually reveals about educational standards (EEWR, 16/2).

RELATED RESOURCES

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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.

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