



DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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Budget Estimates hearings by Senate legislation committees have concluded with a large number of Commonwealth agencies being examined.

PROCEDURAL ISSUES

Despite the magnitude of the exercise, there were few procedural issues of note arising.

Opening statements and advice to governments

All chairs in their opening statements referred to the order of the Senate of 13 May 2009 which sets out a process for making claims of public interest immunity and declares that:

A statement that information or a document ... consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of [the resolution].

Despite this, the most common claim made for declining to provide an answer was that the information sought was “advice to government” or “in the nature of advice” and “we do not discuss advice” (in comparison, commercial-in-confidence claims were relatively few). Such blanket claims are not supported by the Government’s own guidelines for official witnesses appearing before parliamentary committees, the [latest draft](#) of which specifies (in paragraph 4.2) three general limitations on officials’ evidence:

- matters of policy
- material that may be the subject of a PII claim
- information where in camera evidence is desirable.

In relation to matters of policy, the guidelines reflect Senate Privilege Resolution 1(16) and emphasise the role of an official witness “to provide, in answer to questions, factual and background material to assist the understanding of the issues involved”. Reference is also made to the right of a witness to refer matters to a minister:

4.3.4 If an official witness is directed to answer a question that goes to the merits of government policy and has not previously cleared the matter with the minister, the official should ask to be allowed to defer the answer until such clearance is obtained. Alternatively, it may be appropriate for the witness to refer to the written material provided to the committee and offer, if the committee wishes, to seek elaboration from the minister or to request that the answer to a particular question be reserved for submission in writing.

In relation to claims of public interest immunity, the guidelines set out the standard grounds for such claims and, in accordance with the Senate resolution, the process for making them. While disclosure of the deliberations of Cabinet is one ground mentioned, references to advice are treated with greater circumspection as follows:

A public interest immunity claim may also be made in relation to material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government where disclosure at that time would, on balance, be contrary to the public interest [emphasis added – see paragraph 4.6.2 of the Guidelines]. Because the Senate Order requires ministers to specify the harm that could result from disclosure of information or a document of this kind, claims for public interest immunity on this ground will involve a greater degree of judgment and subjectivity, and may therefore be less readily accepted, than claims based on the various grounds described in paragraph 8 above. [Attachment A, paragraph 10]

It is apparent that the practice has some way to catch up with the theory, particularly in the articulation of harm to the public interest that could result from the disclosure.

Novel excuses

With the carbon tax legislation coming into effect on 1 July, more information is emerging about bodies which may have liabilities under the scheme. These bodies include local councils which may have liabilities in respect of emissions from landfill rubbish tips, for example. Questions about the liability of a particular Queensland council were met with reluctance on privacy grounds, a novel claim, notwithstanding that officials had already provided some information on this specific case. Both the departmental secretary and minister likened providing such information to providing information about an individual's tax liability, a claim that the committee did not entertain.

Officers and bodies

Questions sometimes arise whether particular bodies are agencies for the purpose of estimates. Standing order [26\(5\)](#) is expressed in very general terms in referring to ministers in the Senate and officers. There have been no attempts to limit the scope of the latter although several tests have been suggested over the years, none of which is determinative. There is no question that statutory bodies, including government business enterprises or government-owned companies or boards set up under legislation are part of the machinery through which government carries out its operations and which are therefore open to estimates scrutiny. There are also other types of bodies in which the Commonwealth has a direct interest. Government-sponsored activity is increasingly carried out through a diverse and expanding range of such bodies.

The List of Australian Government Bodies and Governance Relationships (now produced by the Department of Finance and Deregulation but formerly produced by the Finance and Public Administration Committee and its predecessors) may be of assistance in advising committees about the status of organisations.

The Rural and Regional Affairs and Transport Legislation Committee regularly hears from such bodies and, in this round, took evidence from Meat and Livestock Australia, LiveCorp, Forest and Wood Products Australia Ltd, Australian Pork Ltd and Australian Egg Corp Ltd, all of which are included in the list of government bodies although only two of them present an annual report to the parliament. The Australian Submarine Corporation has now appeared several times before the Finance and Public Administration Legislation Committee while new bodies such as the National e-Health Transition Authority appeared before the Community Affairs Legislation Committee for the first time in this round.

Adverse reflections

The adverse reflections rules in Privilege Resolution [1\(11\)-\(13\)](#) apply to estimates hearings as much as they do to any other type of committee proceeding. The Community Affairs Legislation Committee had one instance of potentially adverse reflections regarding a person involved in programs of the Department of Health and Ageing, and the committee will provide the person with the Hansard and an opportunity to respond.

Use of Budget Papers

In contrast to some previous rounds, there was a great deal of use of the Budget Papers by senators in framing their questions. The documents were of assistance in allowing senators to pursue cuts in departmental funding and in staff positions, many attributable to the additional efficiency dividend imposed on most agencies for the next financial year (although not on some of the smaller cultural agencies). Detailed and technical questions about the mining sector in the Economics Legislation Committee were also supported by close reference to the documents.

During the fortnight corrections were tabled out of sitting to two Portfolio Budget Statements (BCDE and Health and Ageing) and one annual report (Treasury). Despite the extensive nature of corrections to the Health and Ageing PBS, the reasons for the corrections were not probed.

Delegated legislation

The significant part played by delegated legislation in the governance framework was illustrated by questions asked of the Australian Fisheries Management Authority which appeared before the Rural and Regional Affairs and Transport Legislation Committee. Approximately one third of AFMA's budget comes from industry levies which are set by regulation. A disallowance motion currently before the Senate, if agreed to, would have the effect of preventing AFMA from collecting industry fees in 2012-13, possibly requiring the agency to recoup the 2012-13 short fall in a later financial year.

Potentially misleading evidence

Privilege Resolution [6](#) indicates that the Senate may treat as a contempt the giving of false or misleading evidence to the Senate or a committee, and witnesses are obliged to correct their evidence at the earliest opportunity if they have not given accurate evidence. There

were several instances of potentially false or misleading evidence during the estimates hearings.

At the Rural and Regional Affairs and Transport Legislation Committee on 23 May, Senator Colbeck asked a series of questions about certain funding allocated for infrastructure projects in Tasmania. Answers indicated that negotiations were ongoing and that announcements were not imminent. The following morning regional newspapers carried the announcement of a proportion of that funding. Senator Colbeck raised this potential misleading of the committee at the commencement of business on 24 May and the committee has indicated it will follow the matter up in writing with the relevant minister and officials, seeking an explanation of the evidence provided.

In contrast, on 28 May, the Education, Employment and Workplace Relations Legislation Committee received an answer to a question on notice that appeared to contradict evidence given earlier in the day by officials of Fair Work Australia. The committee recalled the officers the following day to provide an explanation. An order of the Senate requires the President of Fair Work Australia to appear before the committee to answer questions when the committee meets to consider estimates of that agency. It was considered that the order had been satisfied by the President's appearance on 28 May and that his presence was therefore not required for the follow up questions on a specific area on 29 May.

The Environment and Communications Legislation Committee, on 21 May, also followed up discrepancies between a written answer to a question on notice and oral evidence at the hearing. On the same day, officers of the Official Secretary to the Governor-General provided a written correction to evidence given earlier in the day to the Finance and Public Administration Legislation Committee, which was the subject of concern to some senators.

Indigenous Business Australia was also questioned further about matters covered at a previous round concerning expenditure on conferences and related matters (Community Affairs cross-portfolio hearing, 1 June).

Opening statements and related matters

Opening statements by ministers or officials can be useful in highlighting current issues of concern for agencies that may be of interest to committees. Over the years the length of some opening statements has become notorious. On one view, such statements provide valuable information but, on another view, their presentation consumes time that could otherwise be spent by Senators questioning the witnesses. Some agencies which traditionally make long opening statements now try to provide committees with a written copy in advance so that the actual delivery may be truncated, although the statement may still give rise to extensive questioning (as occurred with the Defence portfolio on 30 May).

In addition to making an opening statement, the chief executive officer of NBN Co. provided answers to a series of questions he had been asked in writing by Opposition senators in advance of the hearing. The provision of detailed answers, on top of the opening statement, took approximately 50 minutes, a significant proportion of the time allocated to that agency.

Other inquiries

The breadth of estimate inquiries means that it is a common experience for matters to be raised at estimates which are all so the subject of other inquiries by committees. The Department of Parliamentary Services, for example, was questioned about matters that are also relevant to the separate inquiry into that department by the Finance and Public Administration References Committee. The chair of the Joint Select Committee on Cyber Safety also noted the work of that committee during her questioning of officers of the Department of Broadband, Communications and the Digital Economy about cyber safety for older Australians.

There is no rule of the Senate to prevent this, although standing order 25(13) provides that a committee shall take care not to inquire into any matters which are being examined by a select committee of the Senate appointed to inquire into such matters. This rule is intended to prevent duplication of inquiries and is of limited application to estimates hearings which are so broad ranging. A limitation is recognised in one area, however, and that is where a bill has been referred to the committee for inquiry. In this case, it is recognised that questions about the provisions or the impact of the bill should occur in that forum rather than in the estimates hearings, a limitation recognised by senators in the Environment and Communications Legislation Committee on 23 May in relation to provisions of the Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012.

Agency hopping

The complexity of machinery of government changes in recent times has led to some unusual combinations (such as tertiary education being allocated to the Economics Legislation Committee, for example). It can also be a source of frustration for senators to ask questions of one agency, only to be told that they should be asked of another. This was a cause of concern in several committees, including the Community Affairs Legislation Committee hearings on 29 May when questions directed to the Department of Human Services were met with the response that they should have been directed to the Department of Families, Housing, Community Services and Indigenous Affairs, despite advice to the contrary from that department.

It was precisely this type of difficulty that led to the decision some years ago to convene a separate cross portfolio hearing of the Community Affairs Legislation Committee on Indigenous matters. This involves agencies that appear before other committees for their other programs but which attend before Community Affairs for Indigenous issues. The usual cross-portfolio hearing occurred on 1 June.

Application of standing orders to committee proceedings

While chapters 5 and 30 of the standing orders deal with committees and witnesses, respectively, other standing orders apply to committee proceedings to the extent possible. Under standing order [193\(3\)](#), for example, a senator may not use offensive words against a member of another House or impute improper motives or make personal reflections on

those members. This standing order was applied as required during proceedings in respect of numerous questions concerning members of the House of Representatives. Chairs also drew senators' attention to the principle that the Senate may not inquire into the actions of a member of another House, as a member. This restriction does not apply to actions of a person before he or she became a member. Numerous questions concerning both the Member for Dobell and the Member for Fisher were asked across several committees including Finance and Public Administration, Legal and Constitutional Affairs, and Education, Employment and Workplace Relations.

Standing order [168\(2\)](#) provides that a document quoted by a senator (other than a minister) may be ordered to be laid on the table. There were several instances during the hearings where senators quoted from documents which had not been officially published, but standing order [168](#) cannot apply in these circumstances. This is because a committee cannot order a senator to produce the document, just as, under standing order [177](#), a committee cannot order the attendance of a senator before a committee. Only the Senate can make such orders in respect of its own members. The use of standing order 168 to expose the nature and possible source of a document is somewhat hypothetical, as it is usually not in the interests of those on the other side of the witness table for it to be tabled (for example, if it is a leaked Cabinet document).

MATTERS OF INTEREST

Estimates hearings reveal many matters of interest, of greater and lesser significance. This round's list included the following:

- the resignation of the CEO of Airservices Australia and allegations about his credit card use (RRAT, 23/5)
- action taken by the Commonwealth DPP after receiving the report from Fair Work Australia of its investigation into the Health Services Union (LCA, 24/5)
- the fate of commemorative mugs made for the visit of US President Obama that incorrectly spelt his first name "Barrack" (FPA, 21/5)
- the handling by the Australian Human Rights Commission of various complaints made by Mr James Ashby (LCA, 23/5)
- the Skehill report into court administration and the financial deficits in the budgets of federal courts (LCA, 23/5)
- the impact of online shopping on the profitability of Australia Post (not all good news) (EC, 24/5)
- the appearance by Fair Work Australia (EEWR, 28/5)
- recent developments concerning the State Coach Britannia (FPA, 21/5)
- investigations into leaks that led to the abandoning of the Australia Network tender (LCA, 24/5) and lack of progress on the agreement with the ABC (FADT, 30/5)
- the susceptibility of ASIO's new glass building to external surveillance (LCA, 24/5)

- Charter letters from the Prime Minister to ministers (various)
- the impact on NAPLAN results of schools' withdrawing poor performing students from the testing process (EEWR, 30/5)
- the contribution of a recent committee inquiry into koalas to the development of policy leading to the listing of koalas under the EPBC Act (EC, 23/5)
- delays in the rollout of the NBN, take up rate for premium services and costs of replacing equipment in Tasmania (EC, 24/5)
- how a definition of "free range" eggs can accommodate a stocking rate of 20,000 chooks per hectare (or 2 per square metre), compared with the current rate of 1500 (RRAT, 22/5)
- the Future Fund's holdings of investments in tobacco companies (FPA, 23/5)
- establishment of the new think tank, Regional Australia Institute, and the overlap between members of the reference group which recommended its establishment and the board of the new entity (RRAT, 24/5)
- the cost of the DLA Piper Review of complaints about unacceptable behaviour in Defence (\$9 million so far) (FADT, 28/5)
- the tendency of ADF parade boots to fall apart mid-parade (FADT, 28/5)
- the impact of budget cuts on Defence capability and on defence contractors (FADT, 28-9/5)
- mental health of veterans (FADT, 29/5)
- the resignation of the previous foreign affairs minister and arrangements made by the Washington embassy (FADT, 30/5)
- consular assistance to Julian Assange (FADT, 30/5)
- potential conflicts of interest involving the Minister and the Secretary (FADT, 30/5)
- ANSTO's non-compliance with competitive neutrality rules (E, 28/5)
- lessons for the financial regulatory agencies from the Trio collapse (E, 29/5)
- the number of people to be affected by changes to single parent benefits (CA, 29/5)
- changes to compliance arrangements for dentists under the chronic disease dental scheme (CA, 29/5)
- lack of preparedness in FaHCSIA for the mandatory pre-commitment trial for poker machines (CA, 29/5)
- attendance requirements for receipt of the SchoolKids' Bonus (CA, 29/5)
- costs of the Clean Energy Finance Corporation (E, 30/5)
- preparedness of Australian banks, and the Australian economy in general, to deal with the continuing impact of the European financial problems (E, 30-31/5)

- costs of the Gonski review of school funding (on which Mr Gonski worked pro bono) (EEWR, 31/5)
- the Productivity Commission's costings of the proposed National Disability Insurance Scheme (E, 31/5)
- progress on Closing the Gap initiatives, the Northern Territory emergency response measures and Indigenous health, employment and housing (CA, 1/6)

Further details about matters considered by committees on each day are accessible through Estimates at a Glance.

CASUAL VACANCY

Senator Sherry submitted his resignation as a senator for Tasmania on 1 June, having spent his final week chairing the Economics Legislation Committee through its budget estimates hearings. Elected to the Senate in 1990, Senator Sherry has had a long and varied career, serving in most roles available to a senator, other than in the whip's office. Elected as inaugural chair of the Senate's longest running select committee, on superannuation, Senator Sherry also held several ministerial portfolios, particularly financial portfolios.

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Inquiries: Clerk's Office
(02) 6277 3364