



DEPARTMENT OF THE SENATE

PROCEDURAL INFORMATION BULLETIN

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Tumultuous events characterised the last week of the winter sittings, which may also be the last sitting week for the 43rd Parliament. The week ended with a new Prime Minister, Deputy Prime Minister, Leader of the Government in the Senate and Deputy Leader of the Government in the Senate, along with several ministerial resignations. The Senate spent the last week under strict time management, which resulted in many bills being passed but severe truncation of opportunities for the presentation of committee reports, Auditor-General's reports and other accountability documents, and consideration of disallowance motions. However, several hours were devoted to the consideration of private senators' bills and to a first speech and valedictory statements for retiring senators.

LEGISLATION AND GUILLOTINES

During the fortnight the Senate's focus was on dealing with a large number of bills which, it was claimed, required passage before the Senate rose. Many of these were significant policy measures in relation to which senators claimed that there had been inadequate scrutiny. While many of the proposals had been examined by committees, there was little time to examine the reports of those committees or to consider amendments, let alone to debate the measures at any length. However, the timely and efficient work of Senate committees ensured that numerous government amendments could be moved to bills before they left the House of Representatives. For example, 73 government amendments in response to recommendations of the Legal and Constitutional Affairs Legislation Committee in its report on the Public Interest Disclosure Bill 2013 were made by the House before the bill received less than an hour's consideration by the Senate.

Twenty three bills were considered as non-controversial bills on Thursday 20 June while 55 were scheduled for consideration under a limitation of time (known as a "guillotine") in the week beginning 24 June. Several other bills were passed at other times. While 23 bills may be a record for one day's non-controversial bills, it is a sad fact that the guillotining of 55 bills is not a record. That number was exceeded in June 1992 when the government of the day guillotined 57 bills with allotments of time ranging from 1 to 4 hours per package for a total of 37 hours, or just under 39 minutes per bill.

Other comparisons with 1992 are illustrative. Procedures in 1992 followed the method set out in standing order 142 for a motion declaring bills to be urgent, followed by a motion for the allotment of time. The first motion is not subject to debate while the second motion may be debated for up to an hour. Senators have contingent notices on the *Notice Paper* for the suspension of standing orders, when such contingencies occur, to provide, in the first case, for the declaration of urgency to be debated and, in the second case, for the allotment of time to be debated without limitation of time. Putting a guillotine in place under these procedures allows for the minority to voice their concerns, while ensuring that the will of the majority ultimately prevails. Preservation of such rights is a hallmark of parliamentary debating rules.

The 2013 version involved notice being given of a motion to vary the days and hours of meeting and the routine of business, to provide for the consideration of the specified bills to have precedence over other business, to allot times to each bill or package of bills and to indicate that the procedure was to operate as if it were a limitation of debate under standing order 142. Although parliamentary purists may regard the concept of a guillotine as offensive, pragmatists would argue that it is sometimes a necessary evil. These arguments were well canvassed when the Senate's guillotine procedures were adopted in 1926 after episodes of determined stonewalling by a minority of senators. (For the history of the guillotine, see the [Annotated Standing Orders of the Australian Senate](#). "Stonewalling" was the term of art before the US term "filibuster" – which actually has quite a technical meaning there – was adopted.)

Applying standing order 142 to the "soft" guillotine procedures preserves some important rights of senators, including the right to have the question put on all amendments circulated at least two hours before the allotted time expires, a prohibition on the introduction of any other amendments, new clauses or schedules, and a prohibition on the use of the closure (a motion that the question be now put or "gag") while the guillotine is in operation.

The closure is another method of bringing debate on a question to a premature end. It is considered to be an inefficient means of dealing with business that involves numerous questions, such as bills in committee of the whole to which numerous amendments are proposed, because the closure must be moved on each separate question. In committee of the whole, the closure cannot be moved within 15 minutes of it having been moved previously, which puts some brake at least on a determined majority. Notwithstanding these shortcomings, the closure was used on multiple occasions during the committee stages of the Environment Protection and Biodiversity Conservation Amendment Bill 2013 to bring proceedings to a conclusion.

It was also used to force a vote on the second reading of the Marriage Act Amendment (Recognition of Foreign Marriages for Same-Sex Couples) Bill 2013, considered during the time for private senators' bills on 20 June. While that bill, and the Migration Amendment (Reinstatement of Temporary Protection Visas) Bill 2013 (considered at the equivalent time on 27 June), were negatived at second reading after use of the closure, the Marine Engineers Qualifications Bill 2013 passed through all stages on 27 June, also after use of the closure.

By the end of the final week, 54 of the original 55 bills had been passed. Three bills intended for consideration under the guillotine were not received from the House of Representatives and therefore missed their places on the program but two, including one on the controversial issue of 457 visas, were rescheduled. This highlights one of the potential traps of proceeding in such haste when the bills required to be passed by one House have not even been introduced there.

Time pressures on the legislative process were well illustrated in the case of the package of aged care bills when circulated requests for amendments were not proceeded with, apparently on the basis of assurances from the responsible minister that the issue would be dealt with. The assurances were contained in correspondence which was tabled during the debate. Numerous amendments to the main bill were agreed to by the House of Representatives. Had there been requests for amendments as well, the bill would have had

to take two journeys to the House of Representatives, first to deal with the requests, and then the amendments.

LEGISLATION REQUIRING SPECIAL MAJORITIES FOR PASSAGE

Bills to alter the Constitution are in a category of their own because of the requirement in [section 128](#) of the Constitution, reflected in [standing order 135](#), for such bills to be passed by an absolute majority of each House (subject to the exception where a proposal may nonetheless be put to a referendum on the recommendation of only one House in certain circumstances). See [Bulletin No. 273](#) for an explanation of methods for ascertaining whether an absolute majority has supported such a bill.

The Constitution Alteration (Local Government) 2013 was passed under a limitation of time on 24 June. A second reading amendment that would have postponed further consideration of the bill until equal funding was provided for the “Yes” and “No” cases was unsuccessful. (The funding question was the subject of a Matter of Public Importance discussion on 19 June.) Although there were divisions on the second reading amendment and on the second reading itself, no division was called on the question that the remaining stages of the bill be agreed to and the bill be now passed. The President therefore indicated to the Senate that the bells would be rung and a recorded vote taken to ascertain whether an absolute majority of senators supported the bill. In the ensuing vote, 46 senators voted in favour of the bill, exceeding the requirement for 39 affirmative votes, while 8 senators opposed it. Numerous senators abstained from the vote.

DIVISION OF QUESTION

Requests to divide a question are not unusual. [Standing order 84\(3\)](#) provides that the President may order a complicated question to be divided. Successive Presidents have indicated that the discretion should be exercised to protect the rights of senators. Thus if senators indicate that they wish to vote differently on different parts of a question that is capable of division, the chair will exercise a discretion to divide the question so that senators are not forced to vote for (or against) a proposition with which they disagree (or agree). In the absence of such an indication, the chair may decline such a request. (See [standing order 113](#) for a circumstance in which senators have an absolute right to have a question divided.) During consideration of the Environment Protection and Biodiversity Conservation Amendment Bill 2013 on 19 June, a senator was granted leave to move numerous amendments together but indicated that she would like separate votes on groups of the amendments. Subsequently, all senators who spoke indicated opposition to all the amendments, and the closure was moved successfully on the question (including with the support of the senator moving the amendments). In these circumstances, the chair declined to divide the question, a decision in line with precedent and with the principle that the intention of the Senate in agreeing to the closure could be undermined by the division of the question into multiple parts. Further precedents for the chair declining to divide a question where no senator has indicated that they wish to vote differently on component parts of the question are listed in [*Odgers’ Australian Senate Practice*](#).

DISALLOWANCE AND APPROVAL OF DELEGATED LEGISLATION

On 25 June, regulations made under the *Australian Charities and Not-for-profits Commission Act 2012* were approved by resolution of the Senate. The regulations come into effect either following an affirmative resolution in each House or after the time for disallowance of the regulations under the *Legislative Instruments Act 2003* has passed. The regulations were also the subject of disallowance notices which were subsequently withdrawn on 27 June. Had the disallowance notice remained on the *Notice Paper*, the regulations could have been prevented from coming into effect until well into the new Parliament, in the absence of an affirmative resolution.

Motions to disallow an Export Market Development Grants Determination, a Civil Aviation Order and a Carbon Credits (Carbon Farming Initiative) Amendment Regulation, remained unresolved by the end of business on 28 June. Six disallowance notices were given for the maximum period of 15 sitting days in respect of several Commonwealth Marine Reserve Management Plans, made under the Environment Protection and Biodiversity Conservation Act. Under the terms of the Legislative Instruments Act, if a notice of disallowance remains unresolved at the conclusion of a Parliament, the relevant instrument is deemed to have been tabled on the first day of the new Parliament, providing a fresh period of 15 sitting days for disallowance action to be initiated. However, it remains to be seen whether the end of the Parliament has indeed been reached.

While it has been some time since the Regulations and Ordinances Committee has given a disallowance notice, the committee apparently having developed satisfactory procedures for negotiation on instruments that may offend its terms of reference, the Parliamentary Joint Committee on Human Rights, on 18 June, gave its first disallowance notice in respect of the Customs (Drug and Alcohol Testing) Regulation 2013. Following the practice established by the Regulations and Ordinances Committee, Senator Stephens, on behalf of the PJCHR, made a statement outlining the committee's concerns with the instrument.

The lack of time for anything other than government business was evidenced by the unusual treatment of the motion to disallow the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013. Instead of being debated in accordance with normal practice, which ensures the arguments in relation to a legislative decision are on the public record, the motion was dealt with as formal business on 27 June and negatived. This was the only possible opportunity to enable a decision on the motion.

COMMITTEES

Committees of all kinds kept up their prodigious output of reports, including several final reports from the plethora of joint select committees established during the life of the 43rd Parliament. What must surely be the final joint select committee for the Parliament was established by resolution of both Houses. The Joint Select Committee on DisabilityCare Australia will monitor the implementation of the National Disability Insurance Scheme.

A new Senate select committee on cyber safety was established on 27 June to report by 30 August on the issue of "sexting" by minors. The committee will apparently take up where

the joint select committee on that subject (which presented its final report on 24 June) left off.

At the same time as committees were presenting large numbers of reports, referrals to committees continued, with the Selection of Bills Committee recommending the referral of 12 bills on 18 June with a range of short and longer-term reporting dates and four bills on 27 June with longer reporting timeframes. Senators reported criticism from witnesses about the time-frames provided for some of the inquiries, with some inquiries providing less than 48 hours for provision of submissions. Other new inquiries included the controversial issue of the performance of the Australian Securities and Investments Commission (Economics References Committee) and the merits of imposing, as a carrier licence condition on Telstra, the requirement to produce national number directories (Environment and Communications References Committee). Many significant references and other committee reports were presented during the period but there was little or no time available for any debate on them. For details of reports presented see the [*Senate Daily Summary*](#).

The House Committee presented a rare report on 19 June on its recent activities which include providing a forum to gauge senators' satisfaction with services provided by the parliamentary departments.

The Privileges Committee presented two reports on 24 June, one recommending a right of reply be given to persons referred to in the Senate ([154th report](#)). The committee's [153rd report](#) was its long-awaited report on guidance for officers giving evidence and providing information to the Senate and its committees. The committee noted various improvements to the 1989 'Guidelines for Official Witnesses appearing before Parliamentary Committees' but observed that it was important for officers to appreciate the underlying principles in their interactions with the Houses and their committees, since no set of guidelines could adequately deal with all eventualities.

The committee also made some useful observations about recent orders for the production of documents that have been resisted by statutory officers, noting that statutory officers were not immune from the inquiry powers of the Houses and their committees, and that the orders were nothing other than orders for the production of documents, to be considered and responded to on that basis. The committee foreshadowed updating its general report to include more comprehensive guidance for officers and others appearing before committees.

A motion to increase the membership of the Privileges Committee from 7 to 8 with the addition of a minority party or independent senator was denied formality on 24 June. For much of the current Parliament, in accordance with a temporary order, the committee's membership has been increased by one minority party member. The motion sought to make this change permanent. It was briefly debated on 28 June under further time-management arrangements but not concluded.

Several committees presented reports in relation to time-critical bills referred under the established procedure for the referral of bills to committees while the House of Representatives is sitting but the Senate is not (because of estimates hearings). The order applies to bills with substantive provisions commencing on or before 1 July 2013. Committees may determine not to consider such bills, by unanimous decision, if there are

no substantive matters requiring examination. Committees are required to report any such determinations to the Senate.

When the final statistics for the 43rd Parliament are compiled, it is expected that records in relation to numbers of inquiries and reports will have been approached. On the one hand, this is a conclusive demonstration of the value of Senate committee inquiries in contributing to public policy development, review and, in particular, to scrutiny of legislation. On the other hand, overworked committees with overstretched secretariats cannot produce their best work. An appropriate balance is usually reached by the fact that senators available to serve on committees have a finite capacity to undertake multiple inquiries.

The Scrutiny of Bills Committee launched a new publication during the fortnight. *Scrutiny News* is intended as an online newsletter to draw attention to key scrutiny matters discussed in each *Alert Digest* and report.

ORDERS FOR PRODUCTION OF DOCUMENTS

An order for the production of the Hawke review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*, and the government's response to the review, was agreed to on 25 June but the government indicated that the order could not be complied with as the Hawke review had not yet been provided to government.

An order for the production of an overdue report by the National Transport Commission on road rules and vehicle standards was agreed to on 26 June.

PARLIAMENT AND FREEDOM OF INFORMATION

A bill to restore the excluded status of the parliamentary departments in relation to freedom of information legislation was agreed to on 18 June. The bill was explained as an interim measure, pending consideration of the Hawke review, and necessary to preserve the right of Parliament to legislate on this matter. The previously understood position had been reversed in revised guidelines issued by the Australian Information Commissioner and there was some doubt as to what position a court might take on the issue should the matter come before the courts for resolution. Amendments moved by the Australian Greens to make the parliamentary departments subject to the FOI Act in respect of defined administrative documents, while preserving parliamentary privilege, were not supported on the grounds that they were premature while the Hawke review was ongoing.

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 <http://www.aph.gov.au/About/Parliament/Senate>.

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