

[9.01 am]

Department of the Senate

CHAIR—I thank the department for again providing the committee with updated information on Senate committees. Mr President, do you wish to make an opening statement?

The PRESIDENT—No.

Senator CORMANN—Clerk, I have a series of questions about the status of orders of the Senate. I will start off with trying to assess whether freedom of information requests are somehow more compelling than orders of the Senate. I ask because in the *Financial Review* last week there was an article about the mining tax that talked about \$60 billion less in revenue as a result of changes in the mining tax that had been negotiated by the government. There were two committees of the Senate—the then Senate Select Committee on Fuel and Energy and the Senate Select Committee on Scrutiny of New Taxes—that sought information specifically about the breakdown between mining tax revenue on coal and iron ore, which were never provided to the committee by the government. No explanation was ever provided to us as to why it was not in the public interest for that information to be provided. Yet, in response to an FOI request by a media outlet that information was provided spontaneously. I am just interested in your comment about how appropriate it is for the government to ignore reasonable and legitimate requests for information from the Senate, yet when there is an FOI request by a media outlet somehow that does not seem to be a problem?

Dr Laing—That sounds like a very disappointing situation. The fact is that the FOI regime is a statutory regime for anybody to seek access to information held by government. It began in 1982. It was seen as one of the big reforms of the time. The power of the houses to order the production of documents goes back centuries and it is very disappointing if government departments see that power as now being almost secondary to the FOI Act. The two things cannot really be compared, but the power of the houses exists over and above the FOI Act. Public servants should be aware of this and it is very disappointing if they are not.

Measuring the provision of information in particular to the Senate in terms of the FOI Act, many years ago a government leader in the Senate suggested that the FOI Act exemption provisions would perhaps perform a benchmark for assessing public interest immunity claims. The Senate very firmly rejected that, and it was referred to the Procedure Committee. The Procedure Committee said that the exemption grounds in the FOI Act had nothing to do with the power of the Senate to require the production of information and that such claims should not be advanced in the future. So there is a very clear distinction between FOI and the underlying and overarching power of the houses. I think we just have to try and educate people.

Senator CORMANN—But we do not seem to have that much power, though, because the government gets away with ignoring orders—ignoring them totally—that are passed by the Senate. The government does not even provide an explanation as to why the information is not provided in response to an order of the Senate, whereas with FOI requests there appears to be some process to achieve resolution if governments are not prepared to release that information. What power does the Senate ultimately have if governments can just thumb their noses at us?

Dr Laing—The Senate has a broad range of powers. Yes, there is a statutory framework in the FOI Act that provides for internal review and then external review. We now have an Information Commissioner to oversee that whole process. As far as the Senate's powers are concerned, ultimately it has the power to imprison and fine for contempt. It also has the power to impose a whole range of procedural penalties. You would know that in these circumstances the solutions are political ones rather than in terms of exercising actual powers—and they always have been. By that I mean that the houses of parliament have in these circumstances tended to refrain from using their full powers, and the solutions have been political ones. Sometimes procedural penalties or procedural mechanisms can encourage governments to comply. For example, the Senate has in the past imposed numerous procedures to encourage government compliance and has often been successful. Those procedures range from simple things like requiring ministers to provide explanations for lack of provision of documents, delaying the consideration of relevant legislation, requiring question time to go on for longer—although, I am not sure how that is actually a penalty; but that is an editorial aside—and all sorts of things like that.

Senator CORMANN—So when you say 'solutions are political'—

Dr Laing—Sorry, if I could just say one more thing. It is up to a majority of the Senate to take that step and impose the penalty.

Senator CORMANN—When you say ‘the solutions are political’, if the Treasurer continues to ignore the Senate and continues to refuse to provide information in response to requests, we have just got to name and shame. Is that what you are suggesting?

Dr Laing—The solution is in the hands of a majority of the Senate.

Senator CORMANN—You mentioned the Information Commission. The Senate on a number of occasions has sought to take advantage of what was supposed to be a new arrangement to arbitrate disputes between the houses of parliament and the government about the release of information. This was part of a deal that the minority government entered into with the Greens and some Independents. We have sought to get the Information Commissioner to get himself involved in this. He has refused, saying that he has not got the power to do so. Do you share his view?

Dr Laing—Could I make one distinction first. The Senate on its own does not have the power to require the Information Commissioner to arbitrate. What it has the power to do is require him to produce a document. It has the power to require a document to be created for the purpose of satisfying a Senate order—and there are many, many examples. I think you tabled a list, Senator Cormann, where the Senate required statutory authorities to produce a document which was the result of some inquiry or analysis. That, to me, seems settled practice. I am quite surprised that the Information Commissioner has taken the line that he has, which is one of very strict statutory interpretation. His statute does not encompass this specific function; therefore, he claims that he is not empowered to produce the document. My argument is that the power to require the production of the document is an overarching and underlying power that in some senses makes the statute irrelevant.

Senator CORMANN—The Senate has required the Information Commissioner to produce a document in relation to some of the information we were after. It is quite clear that the Senate has the power to do so and that the Information Commissioner should comply. There is ample precedent for that.

Ms Laing—That is so.

Senator CORMANN—A pretty bad trend seems to have developed in recent months, Clerk, because the Productivity Commission has also come back to us about a report asked for by the Senate on the subject of superannuation funds under modern awards. The Information Commissioner has expressed a view that these sorts of reports can only be commissioned by the Assistant Treasurer. That would not seem to be right either, then.

Ms Laing—I have not seen any detailed reasons from the Productivity Commissioner—

Senator CORMANN—There was a very short letter.

Ms Laing—Yes, and they have not expanded on that. It seems to me that the Productivity Commissioner is looking at the task only in terms of his enabling statute. That statute sets up a process for the commission to carry out inquiries and undertake research—it carries out its enquiries at the instigation of a minister. I think this is another case where there is some tunnel vision on the statute and a lack of appreciation of the wider power of the houses. Again, I think the Senate was asking the Productivity Commissioner to produce a document. Within that task, obviously, some research would have been involved. Again, there are many examples where statutory authorities have done this sort of work in the past.

Senator CORMANN—Yes, I have a long list of examples from the period of the Hawke and Keating governments and from the period of the Howard government where statutory agencies complied with these sorts of requests. This phenomenon of statutory agencies declining to comply seems to be a recent one. What can the Senate do to educate some of these agencies about what they are obliged to do as agencies set up by the parliament?

Ms Laing—Perhaps it is time for a reference to go back to the Privileges Committee on this matter. Statutory authorities themselves are a relatively new phenomenon. It was in the second half of the twentieth century that we started getting a lot more statutory authorities. The Senate had a long struggle throughout the seventies and eighties to, if you like, exert its authority over statutory authorities and at the back of the standing orders volume there is a whole string of resolutions which say things like, ‘there is no area of public expenditure which is beyond the power of the Senate to inquire into’ and ‘statutory authorities are as accountable as everybody else.’ There was a long battle with the ABC in the 1980s and a number of resolutions came about as a result of that. So there is a body of Senate practice and Senate resolutions on this.

Back in the nineties, the Privileges Committee required all heads of executive departments to provide a document to the Senate indicating what training their senior officials had had in matters of parliamentary law

and practice. At the time the Public Service Commission ran courses which looked at this issue in particular. The Senate department did and still does run courses for senior officials—the course is called Parliament, Privilege and Accountability. We are still running those courses and maybe it is time for the whole issue to be looked at again—to see what can be done to raise the knowledge of senior officials about the practices of parliament. I think there has been a huge generational change in the Public Service and some of the old-fashioned mandarins who did know the role of parliament—who could spell it—have been retired and have been replaced by people who, while obviously fantastic at what they do, have had less emphasis on that accountability to parliament.

Senator CORMANN—There seems to have been an attitudinal change as well as a generational change, Clerk. If the government were true to its word, that this was going to be a new era of openness and transparency, we would all be much better off. I will leave it there.

Senator FAULKNER—Clerk, I want to ask you some questions about the tabling of petitions, because I believe in some of the recent press coverage I have seen about this there may be some misunderstanding about the conventions in relation to this matter. I wonder if you, as Clerk, would outline to the committee what your understanding is of the conventions that apply when senators table petitions—that is, any petition, whether or not they happen to agree with its content?

Dr Laing—As you know, petitions circulate in the community. Many members of parliament have, or certainly used to have, petitions in their offices that people sign. But, by whatever means, petitions are formulated and sent to a member or senator to present to the parliament. It is one of those ancient rights, I guess, that goes back before representative democracy. The Senate has standing orders regarding the presentation of petitions and they set out some benchmarks about the form and content of the petitions. There is no judgment made about the substance of the content and, provided a petition conforms with those formatting rules—in other words, it has to be addressed to the Senate and it must require an action that is within the competence of the Commonwealth—the senator to whom the petition has been sent simply certifies the number of signatories on the face of the document and drops it in the petitions box and it is presented. There is no notion that by doing that the senator is in any way signing up to the content of the petition. What the senator is doing in presenting that opinion, which is out there in the community—it may be held by as few as one person—is acting as a conduit between the community and the Senate. A petition with one signature on it is as valid as a petition with 100,000, provided it conforms with those basic rules in the standing order. The senator is acting as a conduit between the community and the Senate in presenting the petition and not associating themselves with the content.

Senator FAULKNER—Thank you for that. I think that is a very good encapsulation of how this process has worked. Would you describe the terminology process? Is it fair to say that that process is a longstanding convention of the Senate?

Dr Laing—In terms of presenting a petition that you may not agree with?

Senator FAULKNER—Yes.

Dr Laing—Yes, certainly it is. There have been a lot of petitions presented over the years and, in my experience as a person working in the Table Office, 20 years ago you would get many orphan petitions. Petitions would be dropped in the petitions box without a signature from a senator, stating how many signatures there were. We would go around to the whips offices in those days and say, ‘We’ve got some orphan petitions,’ and the whips would say, ‘Leave them with us. We’ll fix it.’

Senator FAULKNER—What happens now in that circumstance?

Dr Laing—Similar things. I believe that still happens. We probably get fewer orphan petitions these days because the rules are better known. We have more online resources, for example, talking about how to go about presenting these things and containing the proforma. But if a senator asks any of us as officers to look after a petition because they do not want to present it, we would find a home for it.

Senator FAULKNER—Are you able to tell us, Dr Laing, how long you understand this convention has been in place?

Dr Laing—Forever. For as long as there has been a Senate.

Senator FAULKNER—There has been some change, hasn’t there, in the way the presentation of petitions is dealt with before the chamber?

Dr Laing—Yes, there has.