ODGERS' AUSTRALIAN SENATE PRACTICE REVIEWED

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Odgers' Australian Senate Practice is an enduring and invaluable text, having first been published in 1953. It is also the only comprehensive work on the history and operation of the Senate and its 21 chapters deal with practical issues related to the Senate and its committees, including:

- meetings of the Senate;
- conduct of proceedings;
- motions and amendments;
- debate;
- voting and divisions; and
- how the Senate deals with legislation.

There are also extensive chapters on Senate committees, the procedures applying to witnesses before Senate committees and how delegated legislation is managed.

It should be remembered, however, that *Odgers'* deals with 'lore' (a term used in the order form) rather than law and that the reference very much represents the views of the Senate and, on some issues, the views of its current editor, the Clerk of the Senate, Harry Evans. A few examples may assist in giving a flavour of those views.

The Preface to the 12th edition opens with the following statement:

> At the end of the preface to the eleventh edition of this work, it was noted that the then government had gained a party majority of one in the Senate in the 2007 general elections, and the possible effect of this on the performance by the Senate of its essential task of holding the executive government accountable was mentioned. A detailed study of Senate activity during the period between that majority taking effect and the following general election concluded, unsurprisingly, that the accountability function was diminished. It is almost a law of nature that executives will seek to avoid accountability, and that independent legislatures are needed to impose it. The structures and measures built up by the Senate over many years to achieve accountability, however, remained in place during that time. The party majority was lost in the general elections of 2007, and the Senate returned to what is now regarded as the normal situation of no party holding a majority. It is to be hoped that this situation will support the Senate's accountability role. This work, as with previous editions, seeks to perform the task of recording the Senate's accountability and other activities in the past as a guide to the future.

The Preface concludes with the following statement:

> This edition appears when the country is entering upon an era of life-and-death policy issues and extremely difficult decisions. As always, there are demands for power to be concentrated in the hands of the central executive government, supposedly to allow it to solve the problems that must be confronted. As always, such demands are misconceived. In this era, scrutiny and accountability of

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> government will be more vital than ever. The greater the policy issues and the more difficult the decisions, the more likely it is that mistakes will be made, and parliamentary scrutiny and control is essential to disclose and remedy those mistakes. Government itself is weakened by lack of accountability. The Senate and its processes provide a large part of the scrutiny that will be required. The means by which it may do so are here recorded.

The latter statement is quoted on the order form.

The Preface to the equivalent text in 'the other place', *House of Representatives Practice* (5th edition, 2005, edited by Ian Harris) contains no such lofty statements. The only vaguely similar statement is the following:

> The work of the House and its committees is important to the good government of Australia.

An issue of interest to lawyers is what *Odgers'* has to say about parliamentary privilege. The most important recent development in parliamentary privilege was the passage of the *Parliamentary Privileges Act 1987*. As *Odgers'* notes (at p 34), the Act 'was enacted primarily to settle a disagreement between the Senate and the Supreme Court of New South Wales over the scope of freedom of speech in Parliament as provided by article 9 of the Bill of Rights of 1689'.

Two pages are devoted to discussion of the 'disagreement', which was manifested in two NSW Supreme Court decisions in 1985 and 1986, by Hunt and Cantor JJ in the context of the prosecution of Lionel Murphy J for attempting to pervert the course of justice. Article 9 of the Bill of Rights came into issue because there had been two Senate committee inquiries prior to the criminal proceedings and there was a question as to the extent to which evidence taken in the parliamentary proceedings might be used in the criminal proceedings. Mr Evans was the Secretary to both Senate committee inquiries.

Article 9 provides:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Odgers' states that '[t]he history of the establishment of freedom of speech [ie as articulated in Article 9] makes it clear that the parliamentary intention was to exclude examination by the courts of parliamentary proceedings' (at p 35). In the relevant two cases, the Senate took issue that witnesses before the parliamentary proceedings were cross-examined about their evidence to the parliamentary committee, including as to the truthfulness and the underlying motives of that evidence. This occurred in spite of the opposition of, and criticism by, the Senate.

Having set out this background, *Odgers'* states (at p 37):

> The judgments, even in the absence of statutory correction, did not represent the law. It was unlikely that they would be followed by other courts, and subsequently there were contradictory judgments, including one by another judge of the Supreme Court of New South Wales.

Lawyers might find this statement a curious way of reflecting on judgments that the author clearly did not agree with. It is one thing to say 'I do not agree with the judgments'. It is another thing to assert that they did not represent the law. It is also (as a matter of law) incorrect. Clearly, unless over-turned, either by a superior court or by statute, the two judgments <u>did</u> represent the law, whether Mr Evans likes it or not.

House of Representatives Practice deals with the issue of the two judgments in Ch 19 (at pp 721-2) in five paragraphs that lack the editorial flourishes exemplified above. While this may be thought to reflect the fact that the Senate had a greater interest in ensuring that the difficulties created by the two judgments were resolved, the fact remains that the value of the discussion in *Odgers'* is undermined by the contestable, personal views of the author. For the record, the Parliamentary Privileges Act settled the 'disagreement' between the Senate and the New South Wales Supreme Court by 'enact[ing] the traditional interpretation of article 9'. This was largely achieved in s 13 of the Parliamentary Privileges Act, which provides (in part):

> **Parliamentary privilege in court proceedings**
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> **16 (1)** For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.
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> **(2)** For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
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> (a) the giving of evidence before a House or a committee, and evidence so given;
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> (b) the presentation or submission of a document to a House or a committee;
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> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
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> (d) 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.
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> **(3)** In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
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> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
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> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
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> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

Later on in the *Odgers'* chapter on parliamentary privilege, the following statement appears:

> Contrary to academic misconception, findings by a court, on evidence lawfully before it, which indirectly call into question parliamentary proceedings (for example, a finding that a statement outside parliamentary proceedings was false, which would mean that a similar statement in the course of parliamentary proceedings was also false), are not prevented by parliamentary privilege (*Mees v Roads Corporation* 2003 FCA 306).

As no particular 'academic misconception' is identified presumably all 'academics' who have written about parliamentary privilege are equally guilty of 'misconception'. On the subject of academics, it is interesting to note that the chapter contains no reference to Professor Enid Campbell's excellent 2003 text, *Parliamentary privilege*. It contains a single reference to Professor Campbell's 1966 text on the same subject.

Leaving aside the question of parliamentary privilege, there was recently a 'disagreement' between the Clerk of the House of Representatives and the Clerk of the Senate as to whether a Bill introduced in the Senate by the Opposition, the effect of which would have been to increase pensions, was constitutional. Mr Evans took the view that it was. The Clerk of the House of Representatives, Ian Harris, editor of the 5th edition of *House of Representatives Practice*, took the view that it was not.

Mr Evans was subsequently asked about the disagreement in Senate Estimates, where the following exchange took place:

> **Senator FIFIELD**— …. I am just wondering if you have had the opportunity to examine the advice that the Clerk of the House furnished and, if that is the case, if you could take us through where you think that the advice of the Clerk of the House was in error.
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> **Mr Evans**—First of all, I do not know that it is right to characterise it as a dispute between the two houses. I think it was a dispute between the majority of the Senate and the government, which is often the case with these things.
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> **Senator FIFIELD**—Between the majority of the Senate and the government?
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> **Mr Evans**—Yes.
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> **Senator FIFIELD**—I am missing the distinction there.
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> **Mr Evans**—I think the government took a position on it and said that the government had advice on it, and the motion in the House of Representatives was moved by the government and there was no debate on the motion—the debate on the motion was gagged. So there was not really an opportunity for a House position to be expressed, even if there were a House position—but I pass over that, anyway.
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> …
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> **Senator FIELDING**—Perhaps I should have characterised it as a disagreement between the clerks of the two houses.
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> **Mr Evans**—As I have said before, over many years I have discovered it is an amazing coincidence that when government has advice on these matters—and it is governments of all persuasions—the advice always supports the position of the government of the day. It is an amazing coincidence, but there we are.[1]

It is surprising that such statements could be made (and possibly more surprising that they should go unchallenged). More recently, the former Official Secretary to the Governor-General, Sir David Smith, was quoted as having asserted that Mr Evans had 'claimed the right to use a reference book on the Senate as a vehicle for [his] personal opinions'[2] There is ample evidence that Mr Evans not only has opinions but is not backward in expressing them.

Regardless of these criticisms however, *Odgers'* is an invaluable resource for those who deal with the Senate and its committees. Importantly, it is a resource that is also available on-line (and at no charge), at http://www.aph.gov.au/Senate/pubs/odgers/index.htm.

To the extent that *Odgers'* reflects personal opinions, those opinions are vital to understanding the likely approach of the Senate on any particular issue, as the persons expressing the opinions are also the persons advising the Senate. As the order form notes, it is 'lore' that *Odgers'* deals with, not law.

Endnotes

1 See the Proof *Hansard* of the Senate Standing Committee on Finance and Public Administration's Supplementary Budget Estimates hearing on 20 October 2008.
2 See Ramsey, A, 'Correspondents pack an epistle', *Sydney Morning Herald*, Weekend Edition, 1-2 November 2008, page 35.