



DEPARTMENT OF THE SENATE

PROCEDURAL INFORMATION BULLETIN

No. 267

19 October 2012

For the sitting period 9 — 11 October 2012

and for Supplementary Budget Estimates 15 — 19 October 2012

LEGISLATION

The only legislative disagreement between the Houses that has occurred so far in the current Parliament was resolved on 10 October when amendments made by the House of Representatives in substitution for amendments made by the Senate to the Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012 (see [Bulletin No. 266](#)) were agreed. The motion not to insist on the Senate's amendments to which the House had disagreed but to agree to the House's amendments instead was extensively debated over two days. The debate addressed constitutional issues and Senator Xenophon tabled advice from the Deputy Clerk about his original, disagreed amendments which was subsequently canvassed in some detail.

Most of the other bills passed during the short, 3-day sitting week were all dealt with as non-controversial legislation.

DELEGATED LEGISLATION

The normal scrutiny regime for delegated legislation is provided for in the disallowance provisions of the *Legislative Instruments Act 2003*. Other Act-specific forms of scrutiny are sometimes agreed to for special purposes. Two such instruments came before the Senate during the sitting period for approval.

The first was the instrument designating the Independent State of Papua New Guinea as a regional processing country for the purpose of section 198AB of the *Migration Act 1958*. This was the second instrument approved for that purpose (see Bulletin Nos. [265](#) and [266](#)) and, like the instrument designating Nauru as a regional processing country, was dealt with as government business to allow it to be considered at a time allocated to government business only. An amendment to the motion moved by Senator Hanson-Young, proposing a 12-month time limit on the detention of a person in Papua New Guinea, was defeated before the substantive motion was agreed to with the support of all parties and independent senators other than the Australian Greens.

The second instrument was a determination made under subsection 10B(1) of the *Health Insurance Act 1973* in relation to the extended Medicare safety net. The requirement for such determinations to be approved by both Houses of Parliament was inserted by the *Health Insurance Amendment (Extended Medicare Safety Net) Act 2009* which was amended by the

Senate to that effect (see Bulletin No. [235](#)). The motion to approve the determination was agreed to as formal business.

In both cases, the necessary explanatory documentation was tabled at the time the notices were given.

DISPUTED COMMITTEE REFERENCE

The report of the Foreign Affairs, Defence and Trade Legislation Committee on the Defence Trade Controls Bill 2011, presented on 10 October, included a dissenting report from both Opposition and Australian Greens senators, noting that the committee had reported earlier than required and recommending that the Government amendments to the bill, which the committee had not had the opportunity to consider, be referred to the committee for further examination of concerns that had arisen in the course of the inquiry. The concerns included possibly unintended impacts on the defence research community, and the report noted that the committee had earlier recommended further consultations with affected interests before the bill proceeded.

Senator Ludlam subsequently gave notice of a motion to refer the amendments to the committee but, by the following day when the notice was dealt with, support for the proposal had evaporated. Rather than being dealt with as formal business, the motion was debated and, because debate did not conclude before interruption by other scheduled business, was resumed in the afternoon ahead of the general business debate which would otherwise have been called on then. Although highly critical of the legislation and the process involved, the Opposition indicated that the ground had shifted and unidentified imperatives pointed to a need for expedited consideration of the bill. The motion was defeated on 11 October with only the Australian Greens voting to support it.

The issue was subsequently canvassed during supplementary estimates hearings and the Chief Defence Scientist outlined consultation that had occurred with the academic community. He also explained the reasons why it was necessary for the different components of the bill to proceed together, given that various measures had to be in place to enable a bilateral treaty between Australia and the USA to be ratified. (FADT, 17/10)

ORDERS FOR PRODUCTION OF DOCUMENTS

An order for production of data analysis from a study of Indigenous children (see [Bulletin No. 266](#)) was complied with by the due date and the information was tabled on 9 October.

An earlier oral response by the Manager of Government Business to an order of continuing effect for statements of monthly revenue collections from the Minerals Resource Rent Tax (see [Bulletin No. 266](#)) was confirmed in a further letter from the Treasurer tabled on 9 October.

Routine orders for production of information relating to departmental and agency grants, and appointments and vacancies fall due before each round of estimates. Many responses had been tabled by the time the relevant hearings commenced.

VALEDICTORY

The President, on 9 October, noted the passing of Charles Comans CBE, QC who was the Senate's first consultant drafter in the 1980s and who helped draft the *Parliamentary Privileges Act 1987*. Mr Comans, a former First Parliamentary Counsel, was also the author of a penetrating article on section 57 of the Constitution. It is recommended reading as it addresses some of the questions left unanswered by the High Court litigation on section 57 in the lead-up to and following the 1974 joint sitting (C.K. Comans, 'Constitution, section 57, further questions', *Federal Law Review*, 15:3, September 1985, p. 243).

SUPPLEMENTARY BUDGET ESTIMATES

The estimates hearings that took place in the week beginning 15 October comprised the supplementary round of hearings to the budget round. Standing order 26(10) provides for senators to give 3 working days' notice of matters "relating to the written answers [to questions on notice] or additional information, or otherwise relating to the proposed expenditure referred to the committee". The shorter time frame for supplementary hearings is a reflection of their more restricted scope. This was not always evident from the programs, however, which generally listed very broad areas or entire agencies for revisiting.

PROCEDURAL ISSUES

– *public interest immunity*

Apart from the usual chorus of reasons for reluctance to provide information, there were few issues of procedural significance. None of the reluctance proceeded to full-blown claims of public interest immunity and many claims were not pressed, including a claim that a report on conflict of interest issues associated with the proposed trial of poker machine reforms in the ACT was part of the "deliberative process" (CA, 18/10). In several cases, information that it was claimed could not be provided, was provided. For example, in relation to questions about the legal proceedings involving Mr Slipper, Mr Ashby and, until a recent settlement, the Commonwealth, the Chief Executive Officer of the Australian Government Solicitor began by explaining why he could not provide the names of solicitors working on the matters or the rate paid to senior counsel. Both pieces of information were provided in response to direct questions. (L&CA, 16/10)

In other cases, however, possible claims of public interest immunity were deferred by the taking on notice of the question or consideration of whether a claim would be made (Acting Secretary, DIAC, L&CA, 15/10; Official Secretary to the Governor-General, F&PA, 15/10). Although senators expressed some dissatisfaction with this response, the order of the Senate of 13 May 2009 was never intended to restrict the right of witnesses to do this. As the Procedure Committee commented in its first review of the order in August 2009 (*Third report of 2009*):

The procedures set out in the order do not affect the ability of ministers and officers to take questions on notice in order to obtain required information or to consider

questions, and also do not affect the ability of officers to refer *any* question to a minister under paragraph (16) of the Senate's Privilege Resolution no. 1.

– *sub judice and related matters*

Before the hearings began, two current legal proceedings were expected to be raised, namely the Slipper-Ashby matter referred to above and the proceedings instituted by Fair Work Australia against the Member for Dobell, Mr Thomson. The canvassing in parliamentary proceedings of matters that are before the courts can, in some circumstances, create difficulties. These difficulties are of two types.

The first is the risk that proceedings before the court could be prejudiced by the canvassing elsewhere of matters before the court and the pre-judgment of the issues to be determined by the court. If such prejudicial conduct occurs in the press, for example, the court has recourse to proceedings for contempt of court. But if it occurs in parliament, the courts have no recourse because proceedings in parliament are absolutely privileged. In the Senate, the practice is followed whereby debate or inquiry is avoided if it would involve substantial risk of prejudice to legal proceedings, not outweighed by the public interest in the debate or inquiry. This is known as the sub judice convention. (Under the standing orders of some houses, the practice is an enforceable rule.)

As is the case in the Senate, committees in following the convention have to make an assessment of the likelihood of prejudice to proceedings. Prejudice to proceedings can occur from the risk that public canvassing of material in a committee hearing could influence a jury to determine the matter other than on the basis of the evidence or submissions put before it, or could influence witnesses about the evidence they give or are to give. It is considered that there may be a case to regard magistrates as more vulnerable to influence than judges who are unlikely to be influenced in forming their judgments by public or parliamentary debate. A danger of prejudice does not arise from the mere mention of a matter but from the canvassing and/or prejudgment of issues that are before a court.

Senate practice has identified three main principles in the application of the sub judice convention:

- There should be an assessment of whether there is a real danger of prejudice in the sense that publication would either create an atmosphere where a jury would be unable to deal fairly with the evidence put before it or that publication would affect a future witness in the giving of evidence.
- The danger of prejudice must be weighed against the public interest in the matter under discussion.
- The danger of prejudice is greater where the matter is actually before a magistrate or a jury.

These principles are canvassed in much greater detail in *Odgers' Australian Senate Practice*, 13th edition, pages 250-57.

The second difficulty arises from the possibility that the parliamentary proceedings could themselves cause difficulties for the legal proceedings. Because of parliamentary privilege, committee proceedings cannot be examined in court. It could be argued by parties to the case that they cannot properly conduct their case without access to the parliamentary material. For example, if a parliamentary witness gave evidence in the court case that was inconsistent with their parliamentary testimony, the court would be unable to examine that testimony. As a result, the credibility of the witness, for example, would be unable to be tested, possibly to the detriment of one of the parties and to the administration of justice.

For these reasons, senators take care to avoid creating difficulties for the courts. It is a practice that involves self-denial of an undoubted right of free speech in order to respect the operations of another arm of government. Ultimately, senators were able to ask questions about both matters without the convention needing to be invoked. (L&CA, 16/10; EEWR, 17/10)

– agency heads as witnesses

Committees have long expected that officers attending estimates hearings will be senior officers with sufficient knowledge of the operations of the agency to answer on the spot most of the questions asked by senators. This has developed into an expectation that the agency head will attend in person, an expectation fulfilled in most cases. The Economics Legislation Committee experienced an unusual concentration of agency-head absences, including the Australian Statistician, the Treasury Secretary, the Chief Scientist and the Commissioner of Taxation. Members of the committee expressed annoyance at the last minute notification of some of these absences and the apparent avoidance of parliamentary accountability (Ec, 17/10).

One head who was unable to appear was the Chairman of the Board of Guardians of the Future Fund, Mr David Gonski. The Finance and Public Administration Legislation Committee will reconvene on 29 October to hear from the Future Fund Management Agency, with Mr Gonski in attendance.

– former senators as witnesses

Although it was not her first appearance at estimates in her new role, the Age Discrimination Commissioner, the Hon Susan Ryan, is one of the few people to have experienced estimates from both sides of the table (L&CA, 16/10). Ms Ryan was a senator for the ACT from 1975 to 1988. Another is the late Hon. Virginia Chadwick, former President of the NSW Legislative Council, who became Chair of the Great Barrier Reef Marine Park Authority and appeared several times. On a related theme, Senator J.A. Spicer, Chairman of the Regulations and Ordinances Committee in the 1940s, became the committee's legal adviser after his retirement from the Senate.

– witnesses generally

While legislation committees have the power under standing order 25(14) to require the attendance of witnesses, they have not exercised their formal powers for estimates purposes (although the Senate has ordered specified witnesses to appear). Individual committee

members contribute to the identification and selection of witnesses but any decisions about who should appear are a matter for the committee as a whole. For estimates, ministers are expected to send or bring those senior officers best equipped to answer the range of questions that is asked at the hearings. A request by a senator made directly to a department for particular persons to appear has no procedural effect (L&CA, 16/10). It is also accepted that ministers may take questions directed at officers should they consider it desirable to do so. Officers also have the right, noted above, to refer any question to a senior officer or minister.

– length of opening statements

The length of opening statements is raised from time to time when senators are concerned that the statements erode the time available for questions. Levels of tolerance vary between committees and change over time. Some agency heads well known in the past for lengthy opening statements have retired while in some committees (FADT, 17/10), the opening statements by the Defence heads provide the structure and content of the opening session (and are provided in advance for that purpose). Concern was expressed about the length of NBN Co's opening statement (E&C, 16/10) but there is no rule about these things which are a matter for the committee concerned.

MATTERS OF INTEREST

The usual range of matters was discussed, most curious, perhaps, being an apparent rush to buy expensive espresso machines on the basis that they represent productivity savings by relieving staff of the need to leave the workplace for regular caffeine fixes. (E&C, 15/10; Ec, 17/10)

The hearings concluded with the usual cross-portfolio hearing into Indigenous matters (CA, 19/10).

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>.

Inquiries: Clerk's Office
(02) 6277 3364