

# DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

hl.pro.prob.16986

**No. 236**

**for the estimates hearings 19—23 October 2009  
and the sitting period 26—29 October 2009**

**30 October 2009**

## **ESTIMATES HEARINGS**

The main procedural focus of interest during the supplementary estimates hearings was whether the Senate's order of 13 May 2009 relating to the raising and disposition of claims of public interest immunity would be properly observed and applied.

The hearings began with a statement by the Special Minister of State and Manager of Government Business, Senator Ludwig, in the Finance and Public Administration Committee, to the effect that the government would fully comply with the order. His statement suggested, however, that there would be a practice of taking questions on notice so as to consider whether public interest immunity claims could be raised, without articulating the grounds of those claims at the hearings. This point was questioned by senators but not fully resolved. (FPA 19/10).

In any event, the old problems intended to be resolved by the order soon emerged, compounded by this ambiguity. In the same committee the Minister for Climate Change and Water, Senator Wong, repeated the mantra that advice to government is never disclosed, which is not true, and is explicitly stated by the Senate's order not to be a reason in itself for refusing information. When pressed on this point, the minister took the question on notice. (FPA 19/10)

The other old problem, of failure to articulate an appropriate public interest immunity ground for not answering questions, also re-emerged: the Official Secretary to the Governor-General declined to reveal communications within Government House without invoking the legitimate ground of freedom of communication between executive officers and their personal staff. (FPA 19/10)

The claim that advice to government is never disclosed was repeated with impunity (EWR 21/10), occasionally confined to legal advice (ECA 19/10) where it is equally false and equally contrary to the order.

Some occasions on which the order might properly have been applied were simply confused: a senator asked about the existence of an Australian Federal Police brief while disclaiming any intention of asking about its content. This simply led to a dispute about whether his questions were about the content, and the chair ruling questions out of order without any proper ground for doing so. The legitimate public interest grounds that could have been raised, relating to law enforcement investigations and national security, were not articulated. (LCA 19/10)

Some exchanges raised the question of whether some departments and ministers intend wilfully to ignore the order contrary to Senator Ludwig's statement. The Secretary of the Department of Education, Employment and Workplace Relations refused to answer questions about priority employment areas, and when asked for a public interest ground, stated that her refusal was not a public interest immunity claim. This could have been ignorance of the Senate's order, but resembles similar answers given in the previous estimates hearings. Some information was provided and questions taken on notice, to the satisfaction of the questioning senator, so the issue was unresolved. (EEWR 21/10)

That committee, however, extracted from another Department of Education, Employment and Workplace Relations officer the concession that he could not claim legal professional privilege as a reason for not answering questions. This was the same officer who once claimed that the Public Service Act provided an all-purpose confidentiality ground for not answering any questions, a claim subsequently abandoned, and which the officer now apparently forgets that he ever made. (EEWR 22/10)

The Australian Broadcasting Commission refused to disclose the salaries of its "star performers", a matter which has a long history, and which led to Senate resolutions from 1971 declaring that statutory bodies do not have a general discretion to withhold information about public expenditure. On this occasion the exchange was inconclusive. (ECA 19/10)

The apparent refusal of the President of Fair Work Australia of a request to appear, seemingly on the basis of his status as a judge, led to an exchange that spilled over into the Senate (see below, under Witness ordered to appear). Committees have repeatedly expressed the wish that departmental secretaries and heads of statutory bodies appear in estimates hearings, although some departmental secretaries still do not do so. (EEWR 21/10)

In the Foreign Affairs, Defence and Trade Committee hearing, "sensitivities" were raised on several occasions as reasons for not answering questions, with a failure to articulate the appropriate public interest grounds of prejudice to foreign relations and national security.

It is clear that, in spite of Minister Ludwig's declaration of compliance, there is some distance to go before the Senate's order is fully understood and complied with.

Other procedural issues raised in the hearings included the lateness of some departmental annual reports, which is partly caused by earlier supplementary estimates hearings and the time taken to complete audits of financial statements. It was noted that reports would be available for the additional estimates hearings in February.

The issue of when questions on notice should be lodged in the supplementary estimates hearings was raised. Advice given in the past suggests that such questions should be lodged before the completion of the hearings of the particular committee, but the Senate's orders are silent on this point and committees are free to make their own decisions.

Other matters raised during the hearings included: incorrect evidence given at earlier hearings about the origin of beef imports (RRAT 27/10); boat arrivals and asylum seekers; the government's stimulus package and economic policy; the military justice system; security of defence bases; the government's proposed National Broadband Network; and the proposed amalgamation of the Federal Court and the Federal Magistrates Court.

## **SENATE SITTINGS**

### **DELEGATED LEGISLATION: REVIVAL OF DISALLOWED ITEMS**

The government's decision to cut the Medicare rebate for eye cataract surgery led to a major political confrontation still unresolved.

Medicare rebates are specified in annual regulations, and under the Legislative Instruments Act the Senate has the ability to disallow any item in the table of rebates. A difficulty arises because the disallowance of an individual item does not revive the provision for that item unless the whole of the regulations are disallowed, including the provision which repeals the previous regulations, the disallowance of the repealing provision triggering the revival. These particular regulations, however, expire annually by force of the statute, so the disallowance of the whole of the new regulations would only temporarily revive the old ones, and the disallowance of a rebate item leaves a gap in respect of that item.

In relation to the reduced rebate for eye cataract surgery, the non-government parties sought to overcome this problem by disallowing the particular items but passing a bill to provide that the disallowance of an item would revive the previous item. In order to achieve this outcome, the business of the Senate was rearranged on 28 October to give precedence to both the bill

and the disallowance motion. The bill and the disallowance motion were duly passed against the resistance of the government.

The issue was somewhat confused because the responsible officer of the Department of Health and Ageing had incorrectly stated at the estimates hearing that the disallowance of a particular item would revive the previous item, a claim that was reversed by subsequent legal advice provided by the government. (This also presented another refutation of the false claim repeatedly made in estimates hearings that legal advice to government is never disclosed.)

The bill and the disallowance motion having been passed by the Senate, the government suppressed debate on the bill in the House of Representatives and claimed that it had legal advice that the bill was “unconstitutional”. The advice not having been revealed, the basis of it is unknown. It appears that the government intends to make a new regulation with a different Medicare rebate for the particular items in question. This will avoid the prohibition in the Legislative Instruments Act on the remaking of an instrument the same in substance as a disallowed instrument. The new regulation, however, may still not meet with the approval of the majority of the Senate, so the whole issue may have to be contested again when the sittings resume.

The Senate on 28 October approved a determination made under the Health Insurance Act consequent on the Senate amendment to the primary legislation making such determinations subject to the approval of both Houses (see Bulletin no. 235, p. 3).

#### **WITNESS ORDERED TO APPEAR**

For the purpose of its estimates hearing, the Education, Employment and Workplace Relations Committee, following a request by the Opposition, asked that the President of Fair Work Australia appear in the hearings to give evidence about the activities of that body. He effectively declined to do so, raising his status as a judge of the Federal Court. The government majority of the committee were willing to accept this situation and put all the questions to the General Manager. The Opposition, however, armed with advice that the President is not a judicial officer when performing his functions as head of Fair Work Australia, and that, in any event, there is no rule that judges could not be required to appear where appropriate, moved in the Senate for an instruction that the President appear in the next round of estimates hearings and in all future hearings where estimates for Fair Work Australia are involved. This motion was passed after some acrimonious debate on 28 October. There are many precedents for the Senate directing particular witnesses to appear before committees (see *Odgers' Australian Senate Practice*, 12<sup>th</sup> ed., 2008, p. 416).

## **ORDERS FOR PRODUCTION OF DOCUMENTS**

The procedure under standing order 74 whereby a senator after question time on any day may move any motion relating to unanswered questions on notice after the thirty day limit for answers set by the standing order, when there is no explanation of failure to answer the questions, was again used on 26 October to order the production of the answers. The answers, also relating to the treatment of eye disorders, were duly tabled on the following day.

Orders were passed for documents relating to Future Fund transactions (26 October), Treasury modelling and the Carbon Pollution Reduction Scheme (27 October) and the Timor Sea oil spill (29 October).

An order on 27 October relating to ministerial correspondence concerning irrigation in northern Victoria, referred to by a minister during estimates hearings, was met with what amounted to a refusal in advance by a ministerial statement before the passage of the order. The statement provided an apparent summary of the correspondence, but the order was passed and the issue remains unresolved.

Returns to orders for documents passed in earlier sittings were a mixed bag. Orders relating to budget cuts and chemotherapy and aged care providers were partially complied with, with some documents produced on 26 October, but with some public interest immunity claims, largely based on commercial confidentiality but including some dubious claims about incompleteness of information in relation to aged care.

An order dating back to September 2008 was met on 26 October with documents relating to a strategic review on climate change.

A response on 26 October to an order for maps of forest areas in effect indicated that the government was working on the response.

In response to the order that effectively postponed consideration of all legislation relating to the National Broadband Network until documents are produced, the government tabled some documents on 26 October but made extensive public interest immunity claims for not producing some documents, mainly based on commercial confidentiality. (Some documents for which commercial confidentiality was to be claimed were tabled by mistake.) This led to a significant notice of motion on 29 October from the Greens and Senators Fielding and Xenophon for an inquiry by the Finance and Public Administration References Committee into a process for determining public interest immunity claims made by the government. The notice includes a proposed resolution of the Senate providing a procedure for resolution of such claims, including the reference of claims of commercial confidentiality to the Auditor-General. The government appeared to support the proposed reference during debate on the

motion to free the legislation relating to the disaggregation of Telstra from the Senate's order (see below, under Legislation).

## **LEGISLATION**

The Senate's order relating to legislation on the National Broadband Network provides for the consideration of all legislation "relating to" the network to be deferred until the tabling of documents required by the Senate (see also above, under Orders for production of documents). The government's bill to provide for the disaggregation of Telstra, while not depending on the National Broadband Network legislation, was explained in the explanatory memorandum and the second reading speech as being related to that legislation and was therefore deferred under the order. The government successfully moved on 29 October to free the bill from the order to allow it to proceed. Whether it actually proceeds presumably depends on the view taken by the Senate in relation to the government's response to the order for documents concerning the National Broadband Network (see above, under Orders for production of documents).

There were four notable successes for scrutiny of legislation by Senate committees: the consumer credit package of bills (26 October), the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008 (26 October), the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (27 October) and the AusCheck Amendment Bill 2009 (29 October) were all substantially amended by government amendments arising from reports of the relevant Senate committees.

An amendment successfully moved by Senator Xenophon to the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009 to put a sunset clause on provisions of the bill appears less likely to succeed, with the government having rejected the amendment in the House.

## **PRIVILEGES COMMITTEE**

The Privileges Committee presented two reports to allow persons to exercise their right of reply to remarks made about them in the Senate, both relating to forestry matters.

The committee still has its two major references relating to the Godwin Grech affair and another about alleged penalisation of a witness.

## **SITTING PATTERN**

A motion was passed on 27 October to set the sitting pattern for 2010, with the minor parties unsuccessfully moving to extend the number of sitting days and the Opposition warning about the possible consequences of the government scheduling an inadequate number of sittings.

## **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 [www.aph.gov.au/senate](http://www.aph.gov.au/senate)

Inquiries: Clerk's Office  
(02) 6277 3364