



Procedural Information Bulletin

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For the sitting period 16 to 19 October 2017 and
Supplementary Budget Estimates – 23 to 27 October 2017

Legislation

Several government bills passed during the sitting week, notably the Australian Border Force (Protected Information) Bill 2017, which narrows the secrecy and disclosure provisions in the principal Act. Two Competition and Consumer Act amendment bills also passed: the Abolition of Limited Merits Review bill, which abolishes unwarranted reviews of regulatory decisions made under national energy laws; and the Competition Policy Review bill, intended to simplify competition laws and implement recommendations of the 2014 Harper review. That last bill was successfully amended on the motion of the Opposition to remove Schedule 6, which proposed to increase the maximum penalty for breaching secondary boycott provisions to align with penalties for other breaches of the competition law.

The balance of government business time was taken up considering a bill to establish a Regional Investment Corporation, to administer farm business loans and financial assistance granted to states and territories in relation to water infrastructure projects. The bill was progressing through a lengthy committee stage at week's end.

A private senator's bill, the Medicinal Cannabis Legislation Amendment (Securing Patient Access) Bill 2017, was also passed and transmitted to the House of Representatives for consideration. The bill seeks to reduce obstacles to importing and accessing medicinal cannabis under laws enacted last year. Four private senators' bills have passed the Senate in the first 13 months of the Parliament.

An unusual order was agreed to in the previous sittings to discharge a bill amending citizenship laws from the *Notice Paper* if the Senate had not completed its consideration by 18 October. Although some proposed amendments were circulated, suggesting that negotiations may have been progressing behind the scenes, in the end the bill was not called on during the week and it was discharged at the close of business on the appointed day.

The government also introduced two bills dealing with the Australian Broadcasting Corporation, in accordance with undertakings given by the government in connection with the passage of its Broadcasting Reform bill in September. Debate was adjourned to the next sittings.

Disallowance and approval

On 16 October, the Senate approved the Health Insurance (Extended Medicare Safety Net) Determination 2017. Such instruments are made under a slightly unusual provision inserted into the Health Insurance Amendment (Extended Medicare Safety Net) Bill 2009. When that bill was considered by the Senate, the then government accepted an amendment requiring that relevant determinations not commence until approved by a resolution of each House of the Parliament. This was seen as an

appropriate measure because of the breadth of the power to make determinations, and the uncertainty that would have been caused by allowing contested determinations to commence, only to be disallowed later.

On 17 October, the Senate rejected a proposal to postpone debate on a motion to disallow the Sugar Code – technically the Competition and Consumer (Industry Code—Sugar) Regulations 2017 – and the disallowance itself was defeated later that day. Although it is rare for the Senate to contest the postponement of business standing in the name of individual senators, the ability to do so demonstrates the Senate’s control over the conduct of its business. These actions meant that uncertainty over the fate of the code did not extend into another sitting week.

There was also debate over two days on a motion to disallow two Citizenship Authorisation instruments, which revoke the authority of local authorities named in the instruments to preside over citizenship ceremonies. The debate was adjourned to the next sittings.

Committee activity

The sitting week saw 12 reports tabled and 8 new inquiries referred, including the establishment of a new Senate select committee on the Future of Work and Workers. The committee will inquire into the impact of technological and other change on work and workers in Australia and will report in June 2018.

Of the 12 reports, 7 were on bills referred to the standing committees via the Selection of Bills Committee process. A bill referred to a standing committee cannot be considered by the Senate until the relevant committee’s report is presented.

The other reports dealt variously with the protection of personal Medicare information (Finance and Public Administration References Committee), the state of Australia’s rail industry (Rural and Regional Affairs and Transport References Committee), Online Poker (Environment and Communications References Committee), the impact of Defence training activities and facilities on rural and regional communities (Foreign Affairs, Defence and Trade References Committee) and an interim report from the Select Committee on Red Tape on the effect of red tape on environmental assessment and approvals.

Supplementary Budget Estimates

Supplementary estimates hearings provide senators with an opportunity to consider answers to questions on notice from Budget estimates or any other matters relating to the proposed expenditure of which senators have given notice that they wish to pursue ([standing order 26\(10\)](#)). The tendency for many years has been for such matters to be framed in broad terms. This, and the Senate’s position that any questions going to the operations or financial positions of departments or agencies are relevant questions, permits wide-ranging questioning of public officials and ministers. The original timing of the hearings at the end of October was linked to the tabling deadline for Annual Reports, presenting an opportunity to examine matters contained therein.

At the heart of estimates hearings is an old contest between the parliament and the executive about how information going to the use of public funds should be made public. The role of committees in that contest is similarly old. The forerunners of today’s committees were the 17th century parliamentary commissions of accounts, examining the accuracy and honesty of the King’s accounts, and reporting those findings to parliament. 350 years ago this year, a Committee of Accounts was established

by the English parliament to deal with ‘the defaults, negligences, frauds, waste and abuses’ in the management of the Royal Navy which had recently been embarrassed when the Dutch navy sailed up the Medway River, found the English fleet unmanned and unarmed, and burned 13 ships and towed away two others. The list of concerns may have changed but the principle remains the same.

The matter that dominated the latter half of the supplementary estimates week related to investigations by the Registered Organisations Commission into the Australian Workers’ Union. By coincidence, the recently established ROC appeared before the Education and Employment Legislation Committee the morning after Australian Federal Police officers, at the instigation of the ROC, executed search warrants at the offices of the AWU in Melbourne and Sydney. The AFP seized documents relating to an ongoing investigation in full view of the media, which had been tipped off that a raid was imminent. Questioning revealed that information about the raid had been provided by an adviser in the relevant minister’s office. Committee members made use of a procedural order (9B), to require an additional hearing on Friday, 27 October, to question the ROC and others further. Standing order 26(3) allows a maximum of 4 committees to hear evidence on estimates simultaneously. Education and Employment was the third committee that had agreed to meet on that day.

Other issues that didn’t receive the same media coverage but which were, nonetheless, the subject of close questioning by committees included:

- a missing manual relating to security in Parliament House;
- ongoing funding for the Parliamentary Budget Office;
- an update on the work of the newly established Independent Parliamentary Expenses Authority;
- the imminent closure of the Manus Island Regional Processing Centre;
- the actions of the chair of Australian Wool Innovation;
- the operations of the Australian Broadcasting Commission;
- developments in the rollout of the National Disability Insurance Scheme;
- particulars of the cashless welfare card policy administration;
- modelling for the National Energy Guarantee;
- the same-sex marriage postal survey; and
- administration of the Northern Australia Infrastructure Facility.

Full details of topics covered can be found in the [estimates daily summaries](#).

Public interest immunity claims

Evidence in estimates hearings must be taken in public but the Senate acknowledges that, occasionally, placing some information in the public domain may not be in the public interest. To that end, the Senate set out in May 2009 the procedures for making a public interest immunity (PII) claim.

No formal PII claims were made until the Education and Employment Committee’s spill-over day hearing on Friday 27 October, referred to above. The Attorney-General (appearing in place of the Employment Minister, who was unavailable) made a claim of public interest immunity, arguing that questions about the leak of certain information could prejudice law enforcement investigations, a ground that has previously been accepted by the Senate (see Odgers 14th ed., p 663). The hearing

proceeded, albeit with considerable robust discussion about which questions approached too closely the matter referred to in the PII claim.

Otherwise, there were a number of discussions in other committees' hearings that could possibly have reached a similar point had committee members pressed the issue. For example, a question was asked of the Department of the Prime Minister and Cabinet about when the National Energy Guarantee policy was put to cabinet. The question was declined on the basis that answering it would reveal cabinet deliberations, a claim that the Senate has previously accepted, noting that cabinet deliberations should be able to be conducted in confidence to preserve the freedom of deliberation of that body. In this case, however, the claim was disputed on the grounds that the timing of a policy being put to cabinet could not be considered cabinet deliberations. The representing minister maintained his refusal to answer and was not pressed to, nor was he required to make a formal claim of public interest immunity.

[Chapter 19 of Odgers](#) provides more information about how these claims could be pressed further.

Qualification of senators

On 27 October 2017, the High Court [made orders and delivered its judgment](#) on questions concerning the qualification of six senators and one member of the House of Representatives referred to the Court of Disputed Returns in August and September (see Bulletins [317](#), [318](#)). In each case, facts emerging over recent months and put before the respective Houses gave rise to concerns that each of the seven may have been dual citizens at the time of their nomination and thereby subject to the disqualification in s 44(i) of the Constitution.

Section 44 disqualifies people from being elected to or sitting in either House on a number of grounds (see Bulletin [309](#)), with s 44(i) directed to preventing split allegiances. The provision disqualifies a person who:

is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power

The court adopted what it termed the 'ordinary and natural language' of the provision, consistent with the majority view in the previous leading case, *Sykes v Cleary* (1992) 176 CLR 77; [1992] HCA 60. In doing so, the court distinguished between the first part of the provision ("acknowledgement of allegiance" etc.), which requires a voluntary act, and the second part ("a subject or a citizen... of a foreign power"), which involves a state of affairs existing under foreign law. Each of the matters referred turned on the construction of the second part of the provision. The court rejected the alternative interpretations put before it, which sought to introduce into the second part questions about an individual's knowledge of their citizenship status and a degree of 'voluntariness' in retaining foreign citizenship.

It is worth repeating in full the court's summary as to the proper construction of s 44(i):

- 71 Section 44(i) operates to render "incapable of being chosen or of sitting" persons who have the status of subject or citizen of a foreign power. Whether a person has the status of foreign subject or citizen is determined by the law of the foreign power in question. Proof of a candidate's knowledge of his or her foreign citizenship status (or of facts that might put a candidate on inquiry as to the possibility that he or she is a foreign citizen) is not necessary to bring about the disqualifying operation of s 44(i).

- 72 A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.

Applying this construction to the facts before it, the court held that Senators Nash and Roberts former Senators Ludlam and Waters, and the Hon. Mr Joyce MP were each foreign citizens at the time of their nomination, and so were ineligible to be elected. The senators' places will be filled by special counts of the ballots for their states, under the supervision of a single justice. Writs were issued on the same day for a by-election for the seat held by Mr Joyce.

Senators Canavan and Xenophon were not disqualified. The court held that Senator Canavan was not a citizen of Italy, as he had not taken administrative steps that might have activated a "potential" citizenship right. Senator Xenophon's recently-unearthed status as a British Overseas Citizen was held to lack the main characteristics of citizenship; the right to entry and the right of abode. Nevertheless, Senator Xenophon had flagged his intention to resign from the Senate to return to state politics. The court's decision means that the resultant vacancy will be filled as an ordinary casual vacancy under s 15 of the Constitution.

RELATED RESOURCES

[Dynamic Red](#) – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

[Senate Daily Summary](#) – a convenient summary of each day's proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the Senate website: www.senate.gov.au

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