DEPARTMENT
OF THE SENATE

Procedural Information Bulletin

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For the sitting period 27 November to 7 December 2017

Senators

The sitting year ended as it began, with questions before the Court of Disputed Returns on the qualification of senators under section 44 of the Constitution.

Prior to the sitting fortnight, Senator Kakoschke-Moore resigned her place as a senator for South Australia, in light of information she had received from British authorities while preparing material for the citizenship register established during the previous sitting week (see Bulletin 320). Questions relating to the resulting vacancy were referred to the court on 27 November. Similarly, on 6 December 2017, questions relating to the qualification of Senator Gallagher under s 44(i) were referred to the court, after she made a statement to the Senate about the steps taken to renounce British citizenship in advance of the 2016 election and the lengthy delay in authorities confirming her renunciation.

The focus of these matters is the prohibition on senators and members holding a foreign citizenship from the time they nominate as candidates for election. The single exception stated in the High Court's reasons in its recent omnibus judgment (*Re Canavan* [2017] HCA 45) concerns the "constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government" (at 72). This is intended to carve out those circumstances where renunciation is impossible under the relevant foreign law, or where the steps required to do so are unreasonable. The question engaged by Senator Gallagher's case is whether this exception may also apply where a person has taken *all necessary* steps to renounce, but foreign law – or, possibly, foreign bureaucracy – has not operated to effect a change in status prior to nomination.

Questions relating to one member of the House of Representatives were also referred, however, an impasse developed in relation to a number of members. Senator Gallagher's matter may be seen as a test case for members whose circumstances are similar.

Meanwhile, the High Court on 6 December published its reasons in *Re Nash* [No 2] [2017] HCA 52. The court held that Hollie Hughes, the candidate returned in a special count to replace Senator Nash, was herself disqualified for having lately accepted a government appointment. The court's reasons confirmed that a Senate election is not concluded if it returns an invalid candidate, but continues until a senator is validly elected. Any disqualification which arises in the meantime – in this case, appointment to an office of profit under the crown, contrary to s 44(iv) – renders the candidate incapable of being chosen.

Rotation of senators redux?

After a double dissolution election, the Senate must divide state senators into two classes, receiving 3- and 6-year terms, respectively, to re-establish the normal rotation of the Senate and half-Senate elections: Constitution, s. 13. (Territory senators' terms coincide with those of members of the House, under electoral laws.) The method of doing so is a matter for the Senate, which has invariably given the longer term to senators elected first, according to the certificate returned with the election writ. To that end, the Senate made the following order on 31 August 2016:

> That, pursuant to section 13 of the Constitution, the senators chosen for each state be divided into two classes, as follows:
>
> (1) Senators listed at positions 7 to 12 on the certificate of election of senators for each state shall be allocated to the first class and receive 3 year terms.
>
> (2) Senators listed at positions 1 to 6 on the certificate of election of senators for each state shall be allocated to the second class and receive 6 year terms.

Questions concerning the operation of that order were put before the court after a further special count was undertaken in the Nash matter. On 11 December, Gageler J declined to make an order declaring the next candidate duly elected when questions were raised about the allocation of 3- and 6-year terms. The same matters were raised before Nettle J, on 13 December, considering the outcome of a special count of Tasmanian ballots following the disqualification of Stephen Parry and Jacqui Lambie.

To date, the form of the court order following a special count has been that a person is "duly elected for the place for which" the ineligible candidate was returned. The question agitated in these hearings is whether such an order also has the effect of granting the incoming senator the term (that is, the 3- or 6-year term) that the Senate allocated to the ineligible candidate. And if it does have that effect, should the court instead make orders in a different form; simply that a person is duly elected?

Without reading too much into the transcript of a preliminary hearing, Nettle J described as "an attractive proposition" the view put by the Commonwealth Solicitor-General that there is "…a very real question as to whether anyone other than the Senate has a role in determining the three- or six-year issue. It may be that the Court has a role in declaring who the people are, and the Senate then chooses who gets three and who gets six years."

Moreover, the Hight Court has held that a person invalidly returned in an election does not have a "term of service" at law for the purposes of section 13 (*Vardon v O'Loghlin* [1907] 5 CLR 201 at 211, 214.) That being the case, it is hard to see how an order of the Senate under section 13 can have any effect in relation to that person, and similarly hard to argue that an incoming senator inherits that (non-existent) term.

The purpose of section 13 is to fix the term of service of senators elected in ordinary and regular rotation. If the operation of the order of 31 August 2016 is uncertain – for instance, because it refers only to people listed on the original state election certificates – then the Senate must be able to remedy that uncertainty: the Constitution does not give that power to anyone else. The question whether it is possible for the Senate to reallocate a senator from one class to another has not been tested, but arguably it must be able to do so to maintain the principle expressed in its 2016 resolution; that the

senators elected first received the longer terms. No doubt the Senate will be watching the summer court proceedings with interest.

Legislation

The first sitting week saw the Senate pass the Marriage Amendment (Definition and Religious Freedoms) Bill 2017, with sittings extended to accommodate lengthy debate. The bill was described by its proponents as a compromise arrived at following the report of the Select Committee which examined a government exposure draft bill earlier this year. A number of technical amendments were agreed to, but the many substantive amendments which sought to either expand or restrict the bill's operation were rejected. In particular, there was substantial opposition to amendments dealing with matters outside the sphere of marriage itself, some of which may be taken up through a broader review of laws connected to religious freedoms which is slated to occur next year. The same amendments met the same fate in the House the following week, and the Act was assented to on 8 December and commenced the following day. The Act became only the 16th private senator's bill to pass both Houses in the Parliament's 117 years.

Proceedings on a foreshadowed private senator's bill to establish a commission of inquiry into banks did not eventuate, after the government determined that it would establish a Royal Commission on related matters.

A handful of government bills were also agreed to, several with amendments, most of which were still pending before the House at the end of the sitting year. The Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 was amended to insert a new schedule intended to protect penalty rates. In moving the third reading of the bill, the Minister indicated that the government could not support the bill with the amendment attached, and government senators voted accordingly. The other matters in the bill are not connected to penalty rates, however the amendment was in order according to Senate precedents because of the very broad 'long title' of the bill: A bill for an Act to amend the *Fair Work Act 2009*, and for related purposes.

Despite extended hours in the second week, the Senate was not able to finally deal with the omnibus Social Services Legislation Amendment (Welfare Reform) Bill 2017.

Disallowance

The opaquely name Migration Legislation Amendments (2017 Measures No. 4) Regulations were disallowed on 5 December 2017. The regulations primarily dealt with arrangements for health insurance for temporary visa holders and changes to the 'character and integrity' visa refusal and cancellation framework. While the government argued the changes should be uncontroversial, other parties considered they extended existing powers too far and involved a denial of natural justice.

Statements required by order

On 30 November, Senator Dastyari made statements in the Senate – including a statement required by an order of the Senate made earlier that day – relating to media reports alleging he provided 'counter-surveillance advice' and reports of a June 2016 press conference apparently at odds with his subsequent account of the event. Further media reports led the government to propose on the final sitting day a Privileges Committee inquiry concerning the nature of questions asked by Senator Dastyari

at estimates hearings. Shortly after the sittings, Senator Dastyari announced his intention to resign his place as a senator for New South Wales.

On 7 December, pursuant to an order agreed on the previous day, the Minister for Employment made a statement about public interest immunity and sub judice claims made in relation to matters connected to the execution of search warrants in the offices of the Australian Workers' Union. The order allowed senators to debate the statement for a limited time.

Committee activity

Among the fortnight's reports, the Legal and Constitutional Affairs References Committee concluded its inquiry into *Whether the conduct of the Minister for Communications conformed to the principles of the Ministerial Code of Conduct in relation to his knowledge of the former Senator Parry's dual-citizenship status*. No submissions were called for and a single public hearing was held at which the minister and officers from two departments appeared. The report made no recommendations.

The Select Committee on Lending to Primary Production Customers tabled its report, which recommended that the newly established Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry consider the evidence published by the committee in the course of its inquiry. While the Royal Commission will have access to all of the published evidence and information received by Senate committees, the law of parliamentary privilege means that there are limitations on its use. For example, people cannot be directly questioned on their parliamentary evidence but the Royal Commission could use this material to develop its own lines of inquiry, follow up matters and independently pursue inquiries. Chapter 2 of *Odgers' Australian Senate Practice* has more information about royal commissions and the operations of the Senate.

Three committees held further estimates hearings. The Environment and Communications Legislation Committee convened a hearing, at the direction of the Senate, with NBN Co. This hearing was slightly unusual for two reasons. First, the hearing was held in Sydney making it the first estimates hearing to be held outside Canberra. Second the relevant minister did not attend. Contrary to popular parliamentary belief, there is no standing order requiring a minister to attend an estimates hearing. However, it is generally desirable for ministers to attend so that public servants have the full benefit of the protection in the Privilege Resolutions allowing them to refer questions to the responsible minister.

The motion requiring the hearing also stipulated which NBN Co officers should attend. The Chair of NBN Co was unable to attend the Sydney hearing but made himself available for a follow-up hearing on 5 December, an arrangement apparently acceptable to the committee.

Similarly, the Education and Employment committee held a spill-over day, again required by the Senate. This hearing attracted considerable media attention and saw the Minister for Employment questioned by senators about the disclosure of information by her office in relation to the execution of search warrants obtained by the Registered Organisations Commission. An earlier claim of public interest immunity, the information in question being the subject of an ongoing police investigation, meant a good deal of the hearing was taken up by robust discussions about just what information was subject to that claim.

During a suspension in the public hearing, a member of the media tweeted a conversation overheard between public officers about the committee's proceedings. When proceedings resumed, the Chair reminded officials that, while there are clear rules in place in relation to the broadcasting of committee proceedings, journalists are entitled to be present in the public galleries and may report what takes

place, including conversations between public officers.

New inquiries were established on a range of matters, including s 44 of the Constitution (Joint Standing Committee on Electoral Matters), mobility scooters (Rural and Regional Affairs and Transport) and the South Australian TAFE system (Employment and Education).

The Procedure Committee's first report for 2017 recommended some minor but useful changes to the Senate's routine of business, which will commence on a trial basis from the beginning of 2018, and declined to recommend any changes to standing orders in relation to a proposed code for protecting cultural diversity.

Other changes to the standing orders were made on 29 November when the Senate agreed to amend standing order 24 to provide that, where the Scrutiny of Bills committee has not finally reported on a bill because a ministerial response has not been received, any senator may ask the minister for an explanation of why a response has not been provided prior to debate on the bill. In the period that a similar but temporary order operated, the committee considered that there was a marked improvement in the provision of timely ministerial responses.

Orders for documents

A number of orders were made during the fortnight:

- documents relating to a joint training exercise between the Royal Australian Navy and its Saudi Arabian counterpart—copies of the required documents were produced, redacted in line with public interest immunity claims
- documents relating to a data breach at the Department of Human Services—the response indicated there were no documents in two of the areas sought; the documents provided in relation to the third area were heavily redacted, again in line with public interest immunity claims
- the government response to the Environment and Communications References Committee report on Australia's video game development industry—the government indicated the response would be produced before the end of 2017
- documents relating to Mr Don Burke, which were produced a week later
- documents relating to the definition of "broad community support" in consultation over the radioactive waste management facility in Kimba, South Australia, which were produced on 8 December
- documents relating to donations made to the Liberal Party of Australia by Ms Sally Zou—the government responded that it does not hold such documents; political donations are the responsibility of political parties and disclosed through the AEC
- documents relating to the construction of East Lorengau Refugee Transit Centre and West Lorengau Haus.

Further details about orders made and responses to them can be found online.

The Procedure Committee has recommended, and the Senate on 7 December adopted, an order of continuing effect in the following terms to assist in the tracking of public interest immunity claims:

Report on outstanding orders for documents

(1) That there be laid on the table by the Leader of the Government in the Senate, not later than 2 calendar months after the last day of each financial year and calendar year, a list showing details of all orders for the production of documents made during the current Parliament which have not been complied with in full, together with a statement indicating whether resistance to them is maintained and why, and detailing any changing circumstances that might allow reconsideration of earlier refusals.

(2) This order is of continuing effect.

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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