

Procedural Information Bulletin

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For additional estimates 26 February to 2 March
and the sitting period 19 to 28 March 2018

2017-18 Additional estimates

Order and relevance

A committee chair has two substantive roles in estimates hearings: to ensure that questions are put and answered in an orderly manner; and to ensure that the questions are relevant. The parameters of these tasks are set by standing orders and other orders of the Senate. Of particular relevance are standing order 26 (Estimates), Privilege Resolution 1 (protection of witnesses) – particularly paragraphs (9) on the relevance of questions and (10) on witnesses declining to answer questions – and the Senate order of 13 May 2009 on public interest immunity claims, which builds on the principle in PR1(10).

Questions about both order and relevance were raised during this round of estimates.

Order

As with any other hearing, a committee considering estimates sets its program beforehand, and any adjustments require agreement. The method of proceeding echoes earlier procedures for considering appropriation bills in committee of the whole. The chair calls on items of expenditure in the agreed order, generally at the agency or program level, and opens those items for questioning. In committee of the whole, questioning continues until senators had no further questions on that item. Generally, estimates committees have been able to achieve a similar outcome, by agreement, and by the development over time of processes for placing questions on notice [see [standing order 26](#) in the *Annotated Standing Orders of the Australian Senate*].

In 2013 and 2014, after some disquiet about the allocation of questions among senators and about committees adjourning while senators still had questions to ask, the Senate agreed to new procedures affecting the management of estimates hearings. These include procedures requiring committees to schedule further hearings on the initiative of any three members (see now [continuing orders 9A and 9B](#)) and an amendment to standing order 26(4) which limits the ability of the chair to move through the committee's agreed program. The standing order provides that the chair cannot call on the next item if any senator has further questions on the current item, unless:

- the senator agrees to place their questions on notice; or
- the committee agrees to schedule an additional hearing to allow those questions to be asked.

A question sometimes raised is how these procedures affect the scheduled adjournment time for a hearing. The requirements of standing order 26(4) would seem to apply in their terms. That is, they

operate to extend the hearing beyond the scheduled adjournment time unless senators with further questions agree to place them on notice or the committee agrees to schedule a further hearing. The provisions for spill-over hearings under continuing orders 9A or 9B could be used to secure a further hearing, as could a simple decision of the committee.

A decision of the committee made at any time to schedule a further hearing on the item then before the committee allows the chair to move to the next item on the committee's program or, in the circumstances described above, to adjourn the hearing at the scheduled time.

These changes have occasionally had the effect of blowing out proposed timings for hearings, requiring spill-over hearings to question departments and agencies that couldn't be accommodated in the original program. Despite several examples of committees falling behind, however, there were no spill-over hearings confirmed at the end of the round, although three further hearings were eventually held to meet various needs.

Relevance

In relation to estimates hearings, the Senate has resolved there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Senate or its committees unless expressly provided otherwise. The underlying principle is the Senate's overarching right to obtain information; a right supported by the inquiry powers it possesses under section 49 of the Constitution.

However, one constraint on this broad test of relevance lies in the Senate resolution allocating the oversight of executive portfolios to different committees. Sometimes political imperatives don't quite line up with agreed programs. For this reason, some questions asked in the Community Affairs Legislation Committee of Minister Fierravanti-Wells in her capacity as representing the Minister for Human Services, the Hon. Michael Keenan MP, were ruled not relevant. A senator had been seeking information about the involvement of staff in Minister Keenan's office when he was Minister for Justice (prior to becoming minister for Human Services) in briefing media ahead of the AFP raid on the Victorian offices of the Australian Workers' Union.

Similarly, the relevance of questions put to Minister Cash, while representing the Minister for Industry, about comments she had made in the Education and Employment Legislation Committee was also the subject of heated debate.

Public interest immunity

Procedurally, the week was dominated by discussion of public interest immunity.

While asserting its inquiry powers, and the breadth of questioning at estimates, the Senate has always acknowledged that there is information that it would not be in the public interest to disclose. The [2009 order concerning public interest immunity claims](#) provides the process for witnesses seeking to withhold information to explain why it would not be in the public interest to disclose it, and for the committee – and ultimately, the Senate – to determine that claim.

One claim made in the previous estimates round concerning an AFP investigation continued to resonate. This was the subject of a [public interest immunity claim](#) made by the former Attorney-General in October 2017. As the investigation remained on foot, Minister Cash told the Employment and Education Legislation Committee that the claim stood. This was contested by opposition senators as the

AFP had discussed the investigation in some detail at the previous day's Legal and Constitutional Affairs hearing. The minister took a range of related questions on notice.

The second formal claim made in the Employment and Education estimates hearings concerned responses to questions taken on notice at the previous hearings. In October 2017, Employment department officials made several references to privileged legal advice during an exchange on the Federal Court case involving the former Commissioner of the ABCC. The questions then taken on notice were the subject of a public interest immunity claim by Minister Cash arguing harm to the administration of justice if the information was released. The government dominated committee agreed to accept the Minister's claim. Odgers' Australian Senate Practice records that it has never been accepted in the Senate that legal professional privilege provides grounds for a refusal of information. The Senate has, however, accepted claims based on possible prejudice to legal proceedings.

In addition there were the familiar negotiations between senators and officers about how information should be released which didn't quite proceed to formal claims for immunity.

For example, senators in the Legal and Constitutional Affairs legislation committee pursued questions about a report by the Australian Commission for Law Enforcement Integrity into the head of Australian Border Force. The question of whether the report could be provided to the committee was taken on notice. The report was subsequently leaked to the Daily Telegraph the following day.

Officers of the Export Finance and Insurance Corporation declined to answer questions from a senator relating to possible EFIC investments on the basis that secrecy provisions in EFIC's enabling legislation prevented them from discussing this. Unless a statutory secrecy provision expressly limits the powers of the Houses, it is subservient to parliamentary inquiry powers. The senator did not press the matter further.

Request for a witness to attend

There were two separate requests for specific witnesses to attend estimates. The Rural and Regional Affairs and Transport Legislation Committee requested (in accordance with Privilege Resolution 1) that a particular witness attend to answer questions about the 2017 grounding of Falcon Air pilots by the Civil Aviation Safety Authority, which apparently led to the cancellation of a flight transporting a heart intended for a transplant operation.

And, in a slightly unusual occurrence, the former secretary of the Industry department, currently secretary of Health, in response to a motion agreed by the Senate on 15 February requesting her to appear before the Economics Legislation Committee (see [Bulletin 322](#)), agreed to do so to answer questions about her previous role.

Accountability

Other areas of expenditure of public funds which received close examination by senators included:

- monitoring the effects of large-scale coral bleaching on the Great Barrier Reef
- the Mobile (phone) Black Spot Program in regional and remote Australia
- the disclosure of classified cabinet documents
- the operation of the PFAS Contamination Taskforce

- the agreement with the United States in relation to asylum seekers
- increases in the costs of private health insurance products
- national aged care quality regulatory processes
- the Productivity Commission’s inquiry into horizontal fiscal equalisation
- underpayment of Queensland apprentices
- schools funding
- the Future Submarine program and
- the operation of the Northern Australia Infrastructure Facility.

Sittings, 19 to 28 March 2018

Senators

The High Court reserved its judgment in [*Re Gallagher*](#), after its hearing on 14 March.

On the same day, the court published its reasons in [*Re Lambie \[2018 HCA 6\]*](#). The court had earlier declared that Steven Martin was not incapable of being chosen as a senator by reason of s 44(iv) of the Constitution, which prohibits a person holding an office of profit under the Crown. In its reasons the court found that the offices of mayor and councillor held by Mr Martin were not offices “under the Crown”, turning on the degree of control an executive government might exercise over those positions.

On 19 March, Tim Storer was sworn as a senator for South Australia, vice NXT senator Skye Kakoschke-Moore, who had been disqualified as a candidate on citizenship grounds (see [Bulletin 322](#)). Senator Storer informed the Senate on 21 March that he would sit as an independent.

On 21 March, the Queensland Parliament chose Amanda Stoker to fill the casual vacancy caused by the resignation of Senator the Hon. George Brandis QC, returning the Senate to its full complement of 76 senators for the first time since the resignation of Senator Ludlam on 14 July 2017. Senator Stoker was sworn in the following day.

Orders for documents

A number of orders for documents were made during the fortnight, on diverse subjects including:

- an unpublished report to the government by KPMG on the funding of federal courts
- regional forest agreements and meetings of Forestry Ministers
- National Health Reform Agreement funding
- the Australian Pesticides and Veterinary Medicines Authority Digital Strategy.

The Senate also passed an order on 21 March rejecting claims of public interest immunity made in estimates hearings concerning the Australian Building and Construction Commission, and requiring that the documents be tabled. At the end of the fortnight the government indicated more time was required to respond.

Details of responses to these and earlier orders are published [online](#).

Twice during the fortnight, ministers were required to make statements to the Senate in relation to unmet orders for documents: on 20 March, in relation to the National Partnership on Remote Housing; and on 28 March, in relation to the funding of federal courts. The Senate also ordered that a similar statement be made on 10 May in relation to the Future Submarine Project.

Legislation

The key piece of government legislation considered in the first week was the Social Services (Welfare Reform) Bill 2017, an omnibus bill containing 18 schedules intended to streamline payments and make numerous substantive changes across social security law. Negotiations on the bill appeared to have stalled at the end of 2017, but it was passed with amendments and requests on 21 March, after substantial consideration in committee of the whole. Sixteen other government bills were also passed during the fortnight – including several taxation and treasury laws amendments – some with government amendments.

‘ordinary annual services’

The usual additional appropriations bills were passed on 19 March, without amendment. Senator Leyonhjelm proposed amendments regarding a long-running concern about the classification of funding for new projects as comprising part of the ‘ordinary annual services of government’. Put simply, the amendments sought to transfer funding for new initiatives into the bill which the Senate is able to amend, rather than the bill to fund continuing measures (‘ordinary annual services of the government’), which it cannot. Both the government and the opposition indicated their satisfaction that the classification of funds was in accordance with an agreement, struck between the Senate and the Executive in 1999, that new policies within existing outcomes could be classified as ordinary annual services.

Without reading too much into these remarks, they are slightly at odds with the position summarised in the [50th report](#) of the Senate’s (then) Appropriations and Staffing Committee, which contests that classification, and the [consolidated resolution](#) passed by the Senate in June 2010 which, among other things, reiterates that appropriations for expenditure on ‘new policies not previously authorised by special legislation’ are not appropriations for the ordinary annual services of the government.

Nevertheless, the relevant constitutional provisions deal with proposed laws and are, accordingly, non-justiciable. The question whether it is desirable for the Senate to cede this particular ground is a matter for the Senate.

For more on the Senate’s consideration of this matter, see *Odgers’ Australian Senate Practice*, 14th edition, [pp 385 – 391](#).

Disallowance

On 27 March, the Chair of the Regulations and Ordinances Committee, Senator Williams, gave notice of his intention to withdraw four disallowances notices. The notices had been given as ‘protective’ notices, to extend the time for the committee and the Senate to deal with the subject instruments, which had been misclassified as not being subject to disallowance. The committee’s consideration of the instruments is set out in its [delegated legislation monitors](#) 15 and 16 of 2017.

On the same day, the Senate considered and rejected a motion moved by Senator Pratt to disallow

five Marine Parks Network Management Plans. The disallowance motion had been postponed to the next day, but was brought forward for debate after the government moved to suspend standing orders for that purpose. The following day, Senators Pratt and Whish-Wilson jointly proposed new motions to disallow each of the five management plans, scheduling debate for the August sittings.

Committee reports

Some important reports were tabled by Senate committees over the fortnight.

The Community Affairs References Committee tabled its consensus report on [transvaginal mesh implants](#). The report makes disturbing reading. The committee noted that it had ‘accepted written personal accounts from over 500 women throughout the inquiry. The committee is indebted to each of these women for bravely coming forward to discuss these deeply private and frequently traumatic experiences.’

The Community Affairs Legislation Committee tabled its report into the provisions of the [Commonwealth Redress Scheme](#) for Institutional Child Sexual Abuse bills which included 10 recommendations for improving the scheme.

The Environment and Communications References Committee concluded its long-running inquiry into the protection of [Aboriginal rock art of the Burrup Peninsula](#) in WA. It commenced in November 2016 with a reporting date of 21 March 2017 which was extended several times, reflecting something of the complexity of the issues involved touching on the tension between conservation and industry.

There were also significant reports by the joint committee on Law Enforcement into [crystal methamphetamine \(ice\)](#) and by the joint committee on Corporations and Financial Services on the [life insurance industry](#).

New inquiries

New references included inquiries [into industrial deaths in Australia](#), and mental health of [first responders and emergency service workers](#) (both to the Education and Employment committee), [mitochondrial donation](#), and [mental health services in rural and remote Australia](#) (both to Community Affairs), and the operation of the [franchising code of conduct](#) (to the joint committee on Corporations and Financial Services). In addition, the Select Committee on [Stillbirth Research and Education](#) was established to report in early 2019. Finally, a joint select committee [on constitutional recognition relating to Aboriginal and Torres Strait Islander Peoples](#) was agreed to by both Houses, to be co-chaired by a senator and a member; one nominated by the government, the other by the opposition.

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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