



Procedural Information Bulletin

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For the sitting period 5 to 16 February 2018

Senators

Four senators were sworn during the fortnight: Senator Molan, declared elected by the High Court following the disqualification of Fiona Nash and Hollie Hughes (see [Bulletin 321](#)); Senators Colbeck and Martin, following the disqualification of Stephen Parry and Jacqui Lambie; and the Hon. Kristina Keneally, chosen by the New South Wales Parliament to fill the vacancy caused by the resignation of Sam Dastyari.

Senator the Hon. George Brandis QC resigned his place as a senator on 7 February, creating a vacancy for the Queensland Parliament to fill under section 15 of the Constitution.

One further matter referred by the Senate last year was finalised by the High Court, which found on 24 January that NXT senator Skye Kakoschke-Moore had been ineligible to stand at the 2016 election. On 12 February the Full Court rejected arguments:

- that, having rectified her citizenship, Ms Kakoschke-Moore ought be included in any special count for the vacancy, and
- that the next candidate on the party's ticket, who had ceased to be a member of the party (in circumstances alluded to in the discussion of s 15 of the Constitution in [Bulletin 320](#)), ought not.

The former candidate, Tim Storer, was declared elected on 16 February. Although he won't be sworn in until the next sittings in late March, the new senator will be able to participate in the upcoming round of estimates hearings.

One matter remains before the court: the referral of questions concerning Senator Gallagher (see [Bulletin 321](#)) will next be heard by the Full Court on 14 March.

As well as the unprecedented rate of turnover in senators occurring during this parliament, principally due to dual citizenship and other disqualifying circumstances, this Senate has seen a large number of senators change their party status. In this fortnight Senator Anning, elected on a One Nation ticket, formally announced his intention to sit as an independent senator; recently-independent Senator Gichuhi, a Family First candidate, announced she would sit as a Liberal Party senator for South Australia, and incoming Senator Martin, apparently removed from the Jacqui Lambie Network, announced that he would sit as an independent senator for Tasmania. Whether Senator Storer will make a similar announcement remains to be seen.

Rotation of senators redux

The previous [Bulletin](#) noted commentary in High Court hearings on the Nash, Parry and Lambie matters about the form of the court order declaring senators elected. There was conjecture that the usual form of the order – that a person is “duly elected *for the place for which*” the ineligible candidate

was returned – might affect the length of the term of the incoming senator. To date, the published judgments of the court have not addressed this matter, however, the orders made by the court have since avoided the phrase, simply declaring persons “duly elected as senators” for the respective states.

The Senate has moved to remedy any uncertainty about senators’ terms by revisiting the resolution it made on 31 August 2016, which divided the Senate into long- and short-term senators. On 13 February 2018, the Senate passed the following resolution:

- (1) As soon as practicable after the High Court orders a special count of the ballots from the 2016 Senate election for any state and makes an order declaring that a person identified by that count is duly elected as a senator for that state, there be laid on the table a copy of the Statement of Results Report for that count.
- (2) If such a report is tabled in relation to any state then the order of the Senate of 31 August 2016 made pursuant to section 13 of the Constitution have effect in relation to senators from that state as if a reference to the certificate of election were a reference to the most recent Statement of Results Report.

The resolution does two things. First, it operates as an order for the production of documents, requiring that copies of “Statement of Results” reports be tabled. Although relevant court orders return only the names of senators declared elected, they do so by reference to the report of the special count undertaken by the Australian Electoral Commission at the court’s direction, and returned by affidavit. It is well-established that the Senate can direct orders to independent statutory officers, so the order might be interpreted as being directed to the Australian Electoral Commission, which generates the reports and [publishes them on its website](#). [For more on orders directed to statutory officers, see Privileges Committee 153rd report, at [5.18–5.33](#).]

The resolution then provides that the section 13 order operate by reference to the latest such results report for any state. In doing so, it preserves the principle adopted at the beginning of the Parliament, that the longer terms be allocated to the senators first elected in the count. It also effectively asserts the conventional view that the division of the Senate is a matter for the Senate itself.

For the most part, the resolution has the effect of shuffling terms within parties or party groupings, so that some candidates originally allocated 3-year terms are “promoted” to a 6-year term ahead of colleagues further down the ballot paper. However, the resolution leads to Senator Martin (elected eighth in the special count) receiving the balance of a 3-year term, rather than the longer term allocated to his predecessor Senator Lambie, who was elected fourth on the original count. That result would seem to indicate a substantial drift in Senator Lambie’s personal vote away from the second candidate on her ticket.

Senator Martin and Senator Hinch both spoke in opposition to the motion, with Senator Hinch reasserting his view that the Senate should have adopted the recount method inserted into the Electoral Act in 1983, but never used (see [Bulletin 306](#)). Other senators also voted against the motion, apparently on similar grounds, but it was passed with a large majority, 40 Ayes to 11 Noes.

The President received a response from the AEC out of sitting, attaching the affidavits provided to the court in relation to the relevant special counts, and these were deemed to be tabled. The tabling provides the trigger for the Senate department to publish [revised information about senators’ terms of service](#).

Orders for documents

A number of other orders for documents were made during the fortnight, including orders:

- again seeking documents relating to the Future Frigate project – some additional documents were provided, with the minister noting that the tender evaluation process which had formed the basis of a previous public interest immunity claim had concluded
- requiring assessments of adjustment mechanisms connected to the Murray-Darling Basin Plan
- reasserting an order made in December 2017 in relation to West Lorengau Haus on Manus Island
- requiring the Australian Industry Capability Plan connected to the Future Submarine project – about which the government has raised a public interest immunity claim
- requiring correspondence relating to the Northern Basin Review under the Murray-Darling Basin Plan – the government has partially complied
- requiring documents connected to the National Partnership Agreement on Remote Housing.

The recent practice of the Senate requiring ministers to explain their responses to orders for documents was again used, with the Defence Minister required to make an explanatory statement in relation to the Future Frigate project on 8 February, with an ensuing debate. The order noted above relating to the National Partnership Agreement on Remote Housing also requires a statement from the relevant Minister on 20 March.

Further details about orders made and responses to them can be found [online](#).

Legislation

The Senate passed a number of bills during the fortnight, with some detailed consideration of amendments in committee of the whole. Among them, the Regional Investment Corporation Bill 2017 was passed, with the government accepting amendments providing additional oversight measures; a bill to establish the Banking Executive Accountability Regime was passed, although Australian Greens amendments to impose caps on remuneration were not accepted; and a bill to extend the use of cashless debit cards was passed with government amendments, after opposition amendments designed to constrain the proposed expansion to allow only a further 12-month trial were defeated. A bill to establish a civil penalty regime, overseen by the eSafety Commissioner, against the non-consensual sharing of intimate images (including, colloquially, “revenge porn”) was passed, with amendments which introduce criminal offences and penalties. The government opposed the addition of those offences, arguing that the ground was already covered by existing, broadly-framed criminal offence provisions. The amended bill was transmitted to the House of Representatives for consideration at the end of the sittings.

Disallowance

A number of disallowance motions were considered during the fortnight, with time-management motions put in place to avoid instruments being deemed to be disallowed when legislative deadlines expired. In this vein, a motion proposing to disallow Social Services (Administration) (Trial Area) Amendment Determination (No. 2) 2017 was given precedence over government bills on 8 February, debated and defeated, so the determination (connected to the cashless debit card trial) continued in

force. A similar motion to prioritise debate on Basin Plan Amendment Instrument 2017 (No. 1) was withdrawn on the morning of 14 February 2018, but a time-management motion was later put in place by leave, and the instrument was disallowed after an hour-long debate. Some procedural quirks led to two identical motions standing in the name of the same senator on that day. There is no prohibition on identical motions appearing on the Notice Paper – this often happens when motions are given for different days – however they were dealt with as a single debate and vote. The same question rule in standing order 86 would have prevented a second version of the motion being called on in any case (see [Bulletin 311](#)).

Items in the Illegal Logging Amendment (Due Diligence Improvements) Regulations 2017 were also disallowed after debate on 8 February.

Committee activity

Senate committees started 2018 as they finished 2017; pursuing more than 60 inquiries into bills and other references.

The Select Committee on the Future of Public Interest Journalism reported in the first week of the sitting fortnight. The committee made eight recommendations about ways to encourage and maintain a healthy media ecosystem in an effort to support an essential component of Australia’s democratic system. A number of other reports on bills and other references were tabled covering matters as diverse as the postal survey concerning same-sex marriage and provision of services under the NDIS Early Childhood Early Intervention Approach.

New matters put before committees over the fortnight included inquiries into regional inequality in Australia and the site selection process for the National Radioactive Waste Management Facility, both of which were referred to the Economics References Committee, underlining the diverse nature of the work of individual committees.

Government responses

It is the Senate’s view that the government should provide a response to committee reports within 3 months of tabling. This timeline is often not met and it is open to senators to raise the matter in the Senate. To assist senators to keep track of overdue government responses, the President of the Senate provides a twice-yearly report, the most recent of which was tabled on 5 February. It is not often discussed but, on this occasion, Senator Bartlett moved, during consideration of documents, that the Senate take note of the report. The senator’s comments are a useful reminder of the important role committees play and the value of ensuring the government of the day responds to their reports:

It’s not the sole purpose of a Senate committee inquiry to produce recommendations for a government to decide whether or not then to act on, but it’s a pretty important part of it. All of us here know that we get great value out of hearing from the community, of going to places and seeing what’s happening on the ground, and of looking at all those submissions and considering things in more depth. But the end result is often but not always a report which makes recommendations—often unanimous, sometimes not—proposing that the government do things to address the problem that the committee has identified and the solutions they’ve identified based on the public feedback.

The President’s report can be found [here](#).

Additional estimates – attendance of witnesses

An indication that the next round of estimates is not far away came in the form of a notice of motion requesting (and that word is important) two senior public servants to appear before the Economics Legislation Committee while the committee is examining the Department of Industry, Innovation and Science. One of the public servants was formerly the secretary of the Industry department but is currently secretary of Health. The other was the recent head of Geoscience Australia but has now apparently retired. The motion was agreed to by the Senate so it might be expected that the committee will write to those concerned inviting them to appear.

These types of motions are not uncommon, but they usually require (“order”, “direct”), rather than “request”, the attendance of nominated officers. For instance, in November 2017 the Senate directed ‘the Chief Executive Officer, the Chairman, the Chief Financial Officer and the Chief Network Engineering Officer’ of NBN Co to appear at a spillover hearing of the Environment and Communications Legislation Committee. An interesting consequence of that order was that the committee held the estimates hearing in Sydney rather than Canberra to facilitate the appearance of those public officials; a first for Senate committees hearing estimates.

In 2016, a similar motion was agreed that a specific public servant appear before the Foreign Affairs, Defence and Trade Legislation Committee at a specified time. Similarly, in 2010, the Senate required the then Secretary of the Treasury, Dr Ken Henry, to appear before the Economics Legislation Committee.

The nominated public servants appeared as required in each of the above examples. It would be difficult to argue that the request in the latest motion carries the same element of compulsion.

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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