



AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

hl.let.16491

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Senator the Hon G Brandis
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Brandis

“ALCOPOPS” TAX BILLS – CONSTITUTION, SECTION 57

You asked for a note on the issue of whether proposed legislation to replace the customs and excise tariff bills that were rejected at the third reading by the Senate on 18 March 2009 (the “alcopops” tax bills) could fulfil the requirements of section 57 of the Constitution and thereby provide the basis for a simultaneous dissolution of the two Houses of the Parliament under that section.

If the bills were to be presented in exactly the same form, three months or more after their first rejection, and were again rejected, undoubtedly the requirements of section 57 would be fulfilled in respect of the bills.

It appears, however, that the government is contemplating legislation to replace the bills. It seems that the replacement legislation will consist of two sets of bills, one to impose the increased taxation contained in the original bills up to the time of the passage of those replacements, and another set of bills effectively to extend the imposition of the tax increases after that date.

The contention that the second set of replacement bills could fulfil the requirements of section 57 appears to be based on a suggestion that those bills would be identical in text to the bills rejected on 18 March. If they were so identical, they would in part duplicate the effect of the first set of replacement bills. There would then be two sets of bills which would impose the increased tax from its original collection. Such a situation would appear to be possible; the fact that the second set of replacement bills in part duplicated the first would not appear to prevent their enactment or their valid application.

There would still be a question, however, as to the identification of the second set of replacement bills with the original bills rejected on 18 March. Section 57 specifies that, if bills rejected or unacceptably amended or failed to pass by the Senate are again passed by the House of Representatives, after the required interval of three months, the first condition of the section is met. Clearly the section requires, in referring throughout to “the proposed law”, that the bill which is rejected etc for the second time must be the same bill that was rejected etc on the first occasion. There is therefore general agreement that the bill presented again

must be identical in text to the bill originally rejected etc (subject to what section 57 says about the inclusion of amendments “made, suggested, or agreed to by the Senate”, not relevant for present purposes).

Identity of text, however, may not be sufficient. It may be persuasively argued that the bills again presented would have to be identical in legal effect, otherwise they would not be the same bills. In construing the section, the High Court is likely to have regard to the substantive effect of legislation rather than its mere form. Clearly, in the scenario apparently now postulated, the second set of replacement bills would not be identical in legal effect to the bills originally rejected on 18 March. If the first set of replacement bills is passed, then the increased tax is already imposed for the specified period, and the second set of replacement bills would be redundant in part and therefore not the same as the bills originally rejected.

This is not a mere academic argument, but can be strongly related to the purpose of section 57, which is to resolve deadlocks between the Houses over particular pieces of proposed legislation. If the Parliament has already passed part of a bill about which there was disagreement earlier, can it be said that there remains a deadlock over the original bill? Can a government claim that it is deadlocked in seeking to pass the original bill when both Houses have agreed to pass part of that original bill? Section 57 does not allow simultaneous dissolutions on the basis that part of a bill has been rejected etc.

This issue has not been resolved by the High Court in the past cases relating to section 57, and, by its past judgments, the Court would not resolve the issue in relation to a piece of legislation until after the whole process of section 57 has occurred, including passage of disputed legislation by a joint sitting, and there is then legislation on the validity of which the Court can decide. The Court has indicated in its past judgments that it will not intervene at an earlier part of the process, for example, to restrain the Governor-General from granting a simultaneous dissolution. In other words, in order to secure a dissolution of both Houses, a government has only to persuade the Governor-General that the conditions of section 57 have been met. The Governor-General, in deciding whether to grant a simultaneous dissolution, may or may not be swayed by the issue here summarised.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely



(Harry Evans)