DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

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16 May 2008

COMMITTEES' SCRUTINY OF LEGISLATION

Senate committees scored some notable successes in their scrutiny of legislation.

The Telecommunications (Interception and Access) Amendment Bill 2008, which expands the power of intelligence and law enforcement agencies to gain access to telecommunications, was the subject of government amendments on 14 May reflecting the report of the Legal and Constitutional Affairs Committee on the bill.

Similarly, the government's legislation to establish a national broadband network, the Telecommunications Legislation Amendment (National Broadband Network) Bill, was amended to reflect issues raised in the inquiry into the bill by the Environment, Communications and the Arts Committee. Some government amendments to the bill were rejected in favour of amendments moved by the Opposition, but the Opposition did not persist with their amendments when the bill returned from the House of Representatives on 15 May (the bill had been initiated in the Senate, so some of the amendments made in the Senate were reversed by government amendments in the House to which the Senate then agreed).

The Rural and Regional Affairs and Transport Committee presented its report on the government's exposure draft of its wheat marketing legislation, and recommended some changes to the legislation. It is not known when the draft will be revised for introduction.

BUDGET DOCUMENTS

Some changes were made to the documentation accompanying the budget, tabled on 13 May, in an attempt to make the documents more transparent. The changes still fall far short of the recommendations of the Finance and Public Administration Committee on its report into *Transparency and accountability of Commonwealth public funding and expenditure*, to which the government has yet to respond, and the matter of the ordinary annual services has yet to be resolved (see Bulletin No. 219, p. 4).

The next two sitting weeks will be occupied with estimates hearings, and the changed documentation may then be subjected to questioning.

The area apparently of greatest future dispute in the budget, the increased tax on alcoholic mixed drinks, was reflected in a major reference to the Community Affairs Committee on 15 May, on the motion of the Opposition, relating to taxing of alcoholic beverages.

PRIVILEGES COMMITTEE: MISLEADING EVIDENCE

The Privileges Committee presented on 15 May its report on the question of whether the Commissioner of the Australian Federal Police and the Secretary of the Attorney-General's Department gave false or misleading evidence at an estimates hearing in relation to the government's knowledge of the "rendition" of Mr Mamdouh Habib to Egypt.

The committee found that there was no contempt, in that the officers concerned did not intend to mislead with their evidence, but criticised their tardiness in answering questions on notice and the quality of their evidence, particularly the narrowness of the answers and the giving of answers which reflected only the information possessed by the officers' particular agencies rather than the full knowledge of the government.

SELECT COMMITTEES

A motion passed on 15 May, in addition to extending the time for the report of the Select Committee on Agriculture and Related Industries, applied to the committee the provisions relating to the appointment of participating members which apply to the legislative and general purposes standing committees, and which were also included in the resolutions of appointment of the other select committees appointed this year.

DELEGATED LEGISLATION: DISALLOWANCE

Two instruments of delegated legislation were disallowed on 14 May on the motions of the Opposition, one relating to the guidelines for grants under higher education legislation, and one relating to the road user charge.

If the government wishes to remake the instruments in the same form, it will have to either wait for six months to elapse or seek the approval of the "new" Senate after 1 July, in accordance with the provisions of the *Legislative Instruments Act 2003*.

ORDER FOR DOCUMENTS

An order for the production of documents was passed on 15 May on the motion of the Opposition relating to defence procurement projects. The order refers to a folder of projects allegedly "brandished" by the Minister for Defence and containing details of "problematic" projects.

LOBBYING

The government having made a statement on 13 May concerning its register of lobbyists and code of conduct for lobbyists who lobby government, a reference was made to the Finance and Public Administration Committee, on the motion of Senator Murray, on 14 May for an inquiry into whether the register and the code should be extended, possibly by joint resolution of the two Houses, to all members of Parliament. It was pointed out that lobbyists habitually lobby senators, and that this activity is expected to increase given the lack of a government majority in the Senate.

REGIONAL GRANTS

The government made a statement on 13 May of its intentions in relation to regional grants, providing perhaps the last echo in the Senate of a vexed issue which occupied the Senate and its committees and the Auditor-General over a period of years. The new government, however, is pursuing an inquiry into the program in the House of Representatives.

ELECTORAL BILL

Senator Bob Brown introduced on 14 May a bill to provide for preferential voting "above the line" in Senate elections, a change which has been mooted ever since above the line voting was adopted over twenty years ago. He also succeeded in having the bill referred to the Joint Committee on Electoral Matters, but was compelled to alter his

motion to extend the inquiry and amalgamate it with that committee's general inquiry into electoral matters.

VACANCY

Senator Ray, whose term was due to expire on 30 June, resigned and was speedily replaced by the Victorian Parliament with Senator Jacinta Collins, who served in the Senate from 1995 to 2005, and who was due to begin a new term on 1 July. She was sworn in on 13 May.

OCCASIONAL NOTE

Attached to this bulletin is an Occasional Note on a matter relating to legislative powers which is before the courts in the United States and which has a long history in the Australian Senate.

RELATED RESOURCES

The *Dynamic Red* records proceedings in the Senate as they happen each day.

The *Senate Daily Summary* provides more detailed information on Senate proceedings, including progress of legislation, committee reports and other documents tabled and major actions by the Senate.

Like this bulletin, these documents may be reached through the Senate home page at www.aph.gov.au/senate

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OCCASIONAL NOTES

EXECUTIVE PRIVILEGE: WILL THE COURTS DECIDE?

Attached to *Procedural Information Bulletin* No. 215 was an occasional note on an issue of parliamentary privilege, the immunity of members of the Parliament from the seizure of their legislative documents by the execution of search warrants. The note briefly recounted cases in the Senate and involving senators, which were influenced by a judgment in an American case, and which led to an agreement between the Senate and the government about the execution of search warrants in the premises of senators. The note reported that these developments in turn were conveyed to American legislative officers involved in another court case there, which resulted in a judgment of the Court of Appeals supportive of the Australian arrangements and favourable to the legislative immunity.

Subsequent to the composition of the occasional note, the US administration sought a review of the judgment by the Supreme Court. There was an apprehension that the Supreme Court might reverse or dilute the earlier judgment, and that this could ultimately have the effect of unravelling the law and the arrangements in Australia, where the US judgment could be persuasive. A paper was published around this possibility (*Parliamentary Privilege and Search Warrants: Will the US Supreme Court Legislate for Australia?*, in *Papers on Parliament* No. 48, January 2008), partly for the purpose of allowing those working on the congressional case to remind the Supreme Court that its judgment could have wide ramifications, and that at least one friendly government did not regard the Court of Appeals judgment as damaging to the course of justice as the US administration claimed. As it turned out, the Supreme Court recently declined to review the Court of Appeals judgment, which therefore stands.

Now another case is before the US courts which could have an indirect, persuasive influence in Australia if it results in an authoritative judgment. This involves executive privilege, the claimed right of the executive government to withhold information from the legislature on public interest grounds.

The Australian Senate, the US Houses of Congress and other legislatures worthy of the name have never conceded that there is any such thing as executive privilege. The position of the Senate was stated as long ago as 1975 in a resolution arising from the Overseas Loans Affair: if the Senate demands the giving of evidence or the production

of documents, and the executive government claims that they should be withheld on public interest grounds, the Senate will consider whether the grounds are made out and determine whether the evidence or documents should be produced. This resolution reflected the position previously arrived at by common law courts, which dispensed with the term "Crown privilege" (also used in executive claims against the legislature), substituted the term "public interest immunity", and held that the courts would determine whether the public interest grounds for a claim of such immunity were made out. Eminent scholars who researched the question from the standpoint of history and law came to the same conclusion[1], and the US Houses have generally maintained this line.

In both countries, the issue has not been resolved as an issue of law before the courts. It has been regarded as a political issue to be determined between the legislature and the executive. The Australian Senate has not resorted to law and the courts when the executive has refused to produce information in response to Senate demands, but has pursued disputes as political matters and sought to impose procedural and political penalties on recalcitrant executives. In the United States, however, the situation is somewhat different because of historical enactments of the Congress. This has brought the matter before the courts in the past and has now done so again.

In all of the past cases, the courts have avoided becoming involved in legislative/executive disputes. Usually such disputes have been settled by some kind of compromise, and often the Congress has gained the better of the arrangements which have been made. The courts have sought to stay out of the confrontations until political settlement comes to the fore. The closest the courts have ever come to intervening was during the Watergate Affair, when it was held that the requirements of a criminal prosecution should take precedence over demands of a congressional committee for judicial enforcement of the committee's subpoenas. Court judgments have suggested that there may be some constitutional basis for executive privilege, but have not ruled on the issue in relation to legislative/executive contests.

Early in 2007 nine federal prosecutors were dismissed. There was a suspicion that they had been deprived of their positions for political reasons, and that the administration was seeking to replace them with others who would be ideologically aligned with the White House. This touched on the impartiality of the prosecution service and the even-handed administration of justice. Congressional inquiries were initiated. Evidence supported the suspicions. The Attorney-General was forced to resign over the affair. The House Judiciary Committee subpoenaed administration officials to tell what they knew. The President claimed executive privilege, on the basis that internal

[1] Eg. Raoul Berger, *Executive Privilege: a Constitutional Myth*, Harvard, 1974.

administration deliberations should be protected from disclosure to preserve confidentiality of advice to the President, and the subpoenaed officials refused to appear. The House then "cited" the officials for contempt.

At this juncture, the House had a choice which would not be open to the Australian Senate. The House could direct that the officials concerned be prosecuted for the criminal offence of contempt of Congress under a long-standing statute which provides for the prosecution of recalcitrant congressional witnesses. There is no such statute in Australia, and, apart from procedural and political remedies, the Australian Senate would have only its power, under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*, to impose penalties directly on the witnesses. The US Houses also possess this power, called there an inherent power because it is not specified in the constitution but has been held by the courts to be inherent in the legislative power constitutionally possessed by the Houses. The choice was made not to go down that route, to the disappointment of commentators, learned and otherwise, who urged the House to use its inherent power, not exercised since the Senate last used it in 1934. The House then sent its "citation" to the Justice Department, in effect demanding that the contemnors be prosecuted. The replacement Attorney-General, however, declined to allow this, claiming that federal prosecutors were not obliged to initiate a prosecution when the President asserted executive privilege.[2] The House then brought a civil action in the US District Court, seeking to support its subpoenas. This potentially involves the court in the question of whether a claim of executive privilege confers immunity against the legislature's demand for information. The Judiciary Committee argued that an attempt by the House to use its power to punish contempts would be contested in court by the administration and thereby would ultimately lead to this situation in any event.

The response by the administration to this action is surprisingly candid. The documents filed by the administration urge that the courts should not determine the issue as one of law, but should leave it as a political matter to be resolved between the legislature and the executive as in the past. In putting forward this position, the executive points out that the Congress possesses ample power to enforce its orders by political means, such as the ability to refuse approval for all future presidential appointments, and to cut off funds for executive agencies. It is remarkable to have an executive government virtually inviting its legislature to exercise these kinds of powers against it.

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[2] If the Australian Parliament ever adopts the oft-made suggestion that all contempts of Parliament should be converted to statutory criminal offences prosecutable in the courts, it should be careful to explicitly provide that each House, or indeed any person, may initiate a prosecution, to avoid this situation.

It remains to be seen whether the court will attempt to follow the precedents and avoid involvement in the dispute, or whether it will throw itself into the pseudo-legal issues involved. Any judgment by the court, which could be unfavourable to the constitutional position of either the legislature or the executive, would almost certainly be appealed and would probably end up in the Supreme Court.

If this occurs, the judgment will be awaited with some anxiety in Australia. It is possible that some future Senate majority will regard the procedural and political remedies of the past as inadequate, and will push a dispute with the executive over the disclosure of information to its limit, for example, by imposing a penalty on a public servant, which the government might then contest in court. A US judgment could then be persuasive in any Australian judicial resolution, for good or ill in the cause of parliamentary accountability.