

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

hl.pro.prob.16018

No. 222

for the sitting period 16-26 June 2008

27 June 2008

RETROSPECTIVE TAX LEGISLATION

Over many years governments have developed a habit of imposing taxes from the time when they are announced and validating their collection by subsequent legislation. Provisions in the customs and excise legislation authorise the collection of customs and excise tariffs from the time of announcement for twelve months before the legislation is passed, by barring legal action against the collection during that period. The difficulties that would arise if the Senate rejected the validating legislation have not yet arisen in practice but have been in prospect on some occasions. On one occasion excess tax collected before legislation was amended was provided to an education fund. (see *Odgers' Australian Senate Practice*, 11th ed., p. 299; Bulletin No. 152, pp 2-3)

The potential problem has arisen again in relation to the government's proposed tax increases on ready-made mixed drinks. The legislation has not yet been presented. The Senate passed a motion on 17 June on the initiative of the Greens expressing opposition to the tax increases in the absence of a more comprehensive plan to deal with alcohol abuse. The possibility of the rejection of a tax already collected for some months is therefore again on the horizon.

TAX BILL REJECTED

The Tax Laws Amendment (2008 Measures No. 1) Bill contained provisions relating to tax concessions for "carbon sinks", plantations created for the purpose of combating global warming. These provisions attracted cross-party opposition because of the absence of any obligation to maintain the plantations after the tax concessions had been gained. It was not possible, however, to overthrow the whole scheme, which was authorised by earlier legislation. The Greens unsuccessfully moved an ingenious amendment designed to cancel that previous legislation (simply repealing it would not have been effective because of the statutory rule that repeal of a repealing statute does not restore the originally repealed

statute). On the last day of the sittings the bill was rejected, and a reference was made to a committee on carbon sinks in general. It was noted that the future operation of the scheme would depend on ministerial guidelines which would be subject to disallowance by the Senate, and future investors were sternly warned in debate not to risk their money until it is clear whether the scheme will go ahead.

OTHER LEGISLATION: GOVERNMENT ACCEPTS AMENDMENTS

The government has already adopted the practice of accepting Senate amendments in preference to losing legislation.

Non-government amendments to the Reserve Bank Amendment (Enhanced Independence) Bill were accepted by the government, including a Democrat amendment on merit selection for appointments which has been previously rejected by governments over many years. One of the amendments formalises the practice whereby the Governor of the Reserve Bank appears before the House of Representatives Economics Committee. Senator Fielding unsuccessfully moved an amendment to require appearances before the Senate Economics Committee, but was given a significant ministerial undertaking that such appearances before the Senate committee would be accepted.

The legislation to modify the marketing of wheat was also subject to amendments which the government accepted. Some of the amendments moved by the Opposition were said not to be effective because the customs legislation still gives the government control over the export of wheat, and an expectation that the bill would be returned from the House of Representatives and thereby subjected to further consideration was disappointed. It is not entirely clear, however, what the final effect of the amendments will be.

Some amendments to the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2008 Budget and Other Measures) Bill 2008 (another extraordinarily long title) were rejected by the government in the House but not insisted on when the bill returned. An amendment requiring a review of the operation of the bill was accepted.

REFERENCES OF BILLS TO COMMITTEES

Several bills arising from the government's budget measures were referred to committees for inquiry during the winter long adjournment, some through the Selection of Bills Committee and some by motion on notice. The government attacked some of these references as sabotage of its budget. The Opposition relented on a reporting date on legislation dealing with discrimination against same-sex couples by bringing forward the date.

There are two options available to the government for cutting short these references when the numbers in the Senate change on 1 July: the committees could report early on the references, in spite of provisions in references ordering them not to report before the due dates, because standing order 25(18) authorises the committees to report proceedings, evidence and recommendations at any time, and the committees could simply present their final reports in the guise of interim reports; or the Senate could pass motions ordering the committees to report early. If a committee reports early on a bill, the Senate still needs to agree to bring the bill on early to consider it.

SCRUTINY OF BILLS COMMITTEE

The Scrutiny of Bills Committee presented its regular report on its work on 18 June. The committee compels ministers and departments to provide further information about many pieces of government legislation, thereby enhancing the scrutiny of legislation even where it is not referred to committees or considered at length in the Senate.

SELECT COMMITTEES

The number of select committees was reduced to three by the Select Committee on Housing Affordability presenting its final report on 16 June. Two more select committees, however, were appointed on 25 June, on Fuel and Energy, and on the National Broadband Network. As the Democrats, the Greens and Senator Fielding supported the establishment of these committees, it would appear that the government will have to accept them.

A further reference was made to the existing Select Committee on Agriculture and Related Industries on 25 June, thereby extending the work of that committee, with a reporting date in November 2009.

ESTIMATES REPORTS

The standing committees presented their reports on the estimates hearings. The reports contained substantive commentary on issues arising during the hearings, and drew attention to matters of procedural interest:

- the dispersal of responsibility for indigenous affairs, and the need to coordinate the hearings in that area in future (Community Affairs Committee)

- new policies incorrectly included in the appropriation bill for the ordinary annual services of the government (Education, Employment and Workplace Relations Committee; Finance and Public Administration Committee)
- the disclosure of legal advice to government and advice to ministers in general (Education, Employment and Workplace Relations Committee; Environment, Communications and the Arts Committee; and Legal and Constitutional Affairs Committee; the latter report includes the advices given on the subject; see also Bulletin No. 221, pp 1-2)
- the government's blanket claim of commercial confidentiality in relation to tenders for the national broadband network (Environment, Communications and the Arts Committee)
- an allegation that a committee had been misled in earlier estimates evidence (Legal and Constitutional Affairs Committee; this is a further example of a committee dealing with a potential privilege question and concluding that no further action was warranted)
- the tardiness of some departments in answering questions on notice (Rural and Regional Affairs and Transport Committee).

COMMITTEE REFERENCES

Apart from the new select committees, the standing committees will be well occupied during the winter long adjournment, with significant references for inquiries initiated by all parties and extensive bills references.

ORDERS FOR DOCUMENTS

The second order for documents of the current Parliament was passed on 17 June, demanding information about government promises of grants to sporting organisations. Some information about approved grants was provided on 23 June, with a promise of more information as further grants were approved. This led to a debate on 26 June, with the Opposition raising the spectre of the "sports rorts" affair of 1993-94. The government claimed that it was performing due diligence studies of each of the grants before approving them, to avoid the mistakes of the equally notorious Regional Partnerships Program.

The earlier order for documents about defence procurement projects (see Bulletin No. 220, p. 3) led to a government response that the documents in question were classified or

commercial-in-confidence. A further order was passed on 25 June demanding that the claim of commercial confidentiality be explained in accordance with the Senate's general resolution of 30 October 2003 about such claims. A brief response was presented on 26 June claiming "commercial harm" from disclosure of the information, but it remains to be seen whether this explanation will be accepted.

Two continuing orders for documents were passed on 24 June, one relating to government appointments and the other to grants by departments and agencies. The orders are linked to the estimates hearings, and require the information to be presented at least seven days before each round of hearings. It also remains to be seen whether the government will fully comply with these orders.

PARLIAMENTARY PRIVILEGE

The Privileges Committee presented a report on 18 June on the problem of "effective repetition", which arises from erroneous (on the parliamentary view) court judgments in other jurisdictions to the effect that reference may be made to parliamentary statements to establish the meaning of extra-parliamentary statements for the purpose of defamation actions. The committee's report suggests that this problem may be overcome by an amendment of the *Parliamentary Privileges Act 1987*, and suggests the shape of such an amendment, but does not recommend the amendment pending further consideration of the matter across other jurisdictions (state parliamentary committees have previously raised the question and called for action to resolve the issue).

The committee tabled on 26 June a response by the Commissioner of the Australian Federal Police to what he took as criticisms of him in an earlier report (see Bulletin No. 220, p. 2).

DELEGATED LEGISLATION

A statutory instrument relating to health insurance and dental services was disallowed on 19 June, the Opposition objecting to the abandonment of a scheme of the previous government.

ACCESS TO COMMITTEE DOCUMENTS

A request from the Commission of Inquiry into the loss of HMAS Sydney for access to unpublished documents of the Joint Foreign Affairs, Defence and Trade Committee was granted on 26 June (see standing order 37(3) and associated resolution for joint committees), with the proviso that committee evidence not be used in any manner contrary to the law of parliamentary privilege. Given the nature of the commission's inquiry it is not anticipated that any problem will arise in that respect.

MINISTERIAL STAFF

The government tabled its code of conduct for ministerial staff on 26 June. The code clearly seeks to answer many of the issues in relation to the lack of accountability of ministerial staff which particularly arose in the context of the “children overboard” affair in 2001-02. The code is detailed and explicitly states that ministerial staff do not have executive functions or the power to direct public servants.

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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