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15 May 2009

RESTRUCTURE OF COMMITTEE SYSTEM

The Senate on 13 May, on the recommendation of the Procedure Committee (in a report presented during the non-sitting period), restructured the legislative and general purpose standing committees to return to the system of dual committees which was in operation from 1994 to 2006. As under that previous structure, each of the standing committees will have two versions in their subject area, with a legislation committee with a government party majority and a government party chair, and a references committee with a non-government majority and a non-government chair. The legislation committees will inquire into bills, conduct the estimates hearings and carry out the continuing oversight of government departments and agencies, while the references committees will inquire into other matters referred to them by the Senate. Members of the committees were appointed on 14 May, when the restructure took effect.

The Procedure Committee report recommended that the existing select committees be phased out, and that no more than three select committees operate at any one time. The existing six select committees, however, continue to function, and their phasing out will be a matter for future decision by the Senate.

WITHHOLDING OF INFORMATION FROM COMMITTEES

The Senate passed on 13 May an order setting out the process to be followed by public sector witnesses who believe that they have grounds for withholding information from Senate committees. In essence, the order requires that witnesses state recognised public interest grounds for withholding information and, at the request of a committee or any senator, refer the matter to the responsible minister, who is also required to state recognised public interest grounds for any claim to withhold the information.

The order does not change the existing procedures of the Senate, but consolidates the formerly established, but not always followed, process, for the guidance of public sector witnesses in the future.

Attached to this bulletin is the text of the order and a letter, tabled in the Senate, from the Clerk to Senator Cormann, who moved the motion for the order, setting out its background and effect.

COMMITTEES: REFERENCES OF BILLS BEFORE THEIR INTRODUCTION

Two significant orders were passed for the references of bills to committees before their appearance to enable the committees to begin their work as early as possible.

A motion moved by the government on 14 May refers the government legislation on its Carbon Pollution Reduction Scheme to the Economics Legislation Committee. The committee is required to report by 15 June. The bills came into the House of Representatives as the Senate was passing the reference.

A motion moved by the Opposition, also on 14 May, refers all government budget legislation introduced before 5 June and proposed to commence before 11 August to the relevant committees.

Many committee reports, including reports on bills, were presented during the non-sitting period and tabled in the Senate, but the committees received several other major references, indicating that there is to be no let-up in the intense pace of committee work.

ORDER FOR PRODUCTION OF DOCUMENTS

An order passed on the motion of the Opposition on 13 May states that the Minister for Broadband, Communications and the Digital Economy, Senator Conroy, is in contempt of the Senate for his failure to comply with an order of 4 February for the production of documents in relation to the National Broadband Network. The order required the production of the documents on the same day, and also contained a provision postponing the government legislation on the network so long as the government refuses to provide the documents. Neither the documents nor the legislation has appeared.

LEGISLATION

Bills to validate the collection of the "alcopops" tax from the time of its collection at the budget last year until budget time this year was passed on 13 May (see Bulletin nos. 228 pp 2-3, 230 pp 1-2). There has been intense speculation as to whether a continuing refusal by the majority of the Senate to pass legislation to continue the tax will provide the government with a "trigger" for a double dissolution under section 57 of the Constitution. The

government has introduced tariff proposals that enable it to continue to collect the tax without legal challenge, but is also apparently planning to introduce legislation to continue the tax in June, after the three month period required by section 57 has elapsed. There is a question about whether such a bill could actually conform with section 57. Attached to this bulletin is an advice provided by the Clerk to a senator, and released by the senator, considering that and related questions.

Unusual accountability-related amendments were passed on 14 May on the motion of Senators Fielding and Xenophon to the Australian Business Investment Partnership Bill, one of the government's pieces of legislation intended to deal with the global financial crisis. One amendment requires that a ministerial approval of arrangements entered into by ABIP Limited, the body established under the bill, not take effect until the time for parliamentary disallowance of the approval has passed or the approval has been approved by each House. Another amendment requires the Australian Competition and Consumer Commission to prepare for tabling a competition exemption report in relation to exemptions of ABIP Limited from competition laws. The bill and its related bill have not yet been passed, but the government appears to accept the amendments.

ESTIMATES HEARINGS

The tabling of the budget documents on 12 May set in train the process for the estimates hearings, which will occur from 25 May to 5 June.

The portfolio budget statements partly implement the reforms called for by former Senator Murray and the Finance and Public Administration Committee in recent years by providing greater specification of programs, but the problem of the ordinary annual services has not yet been resolved and further changes will be required to completely reform the appropriations system.

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

Inquiries: Clerk's Office
(02) 6277 3364

PUBLIC INTEREST IMMUNITY CLAIMS
ORDER OF THE SENATE 13 MAY 2009

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee,

the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

hl.let.16465
24 March 2009

Senator Mathias Cormann
The Senate
Suite SG.32
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CANBERRA ACT 2600

Dear Senator Cormann

PUBLIC INTEREST IMMUNITY CLAIMS -
YOUR NOTICE OF MOTION OF 17 MARCH 2009

You asked for a note on the background and effect of the notice of motion you gave on 17 March 2009 setting out a process for determining claims by government to withhold information or documents from Senate committees.

The notice of motion if passed would provide an order of the Senate prescribing the process by which claims for withholding information or documents from Senate committees would be dealt with. The order would not seek to determine in advance the merits of particular claims to withhold information or documents, or of the grounds of such claims, but only provide a process for their resolution.

The notice of motion gives expression to the following principles:

- government officers claiming that information or documents should not be provided to a committee should articulate the grounds for such a claim (paragraph (1))

- any such claim should be based on public interest immunity, that is, that disclosure of the information or documents would be contrary to the public interest on particular recognised grounds (paragraphs (1) and (3))

- ministers should have the responsibility of deciding whether particular information held by government should be withheld from a committee (paragraphs (2) and (3))

- as the apprehended harm to the public interest may or may not be overcome by providing the information or documents as in camera evidence, a minister, in making a

decision whether to seek to withhold information or documents from a committee, should indicate whether the harm could be overcome by evidence taken in camera, so that the committee may decide whether to receive evidence in camera (paragraph (4))

- only the Senate, and not a committee or an individual senator, may ultimately decide whether a minister is justified in seeking to withhold information or documents from a committee and whether any further action should be taken in relation to a particular case (paragraph (5))

- any senator may ask the Senate to consider such a matter (paragraph (6))

- mere statements that information or documents are not public, or are confidential, or constitute advice or internal deliberations of government, are not sufficient to establish possible harm to the public interest from disclosure (paragraph (7))

- public bodies that are independent from ministerial direction or control should be similarly obliged to raise, through their highest ranking officers, public interest grounds for any claim to withhold information or documents from a committee (paragraph (8)).

Claims that information should be protected from disclosure because of apprehended harm to the public interest from disclosure are known as public interest immunity claims. They were formerly called claims of privilege, but the terminology was changed to focus on the principle that harm to the public interest is the proper basis of all such claims. This change of terminology was first adopted in the courts of law in relation to claims to withhold information from the courts in civil or criminal cases, and was then also adopted in the parliamentary sphere.

The reference to refusals to provide information as *claims* of public interest immunity recognises the principles that it is for the house concerned in parliamentary cases, and the courts in judicial proceedings, to determine whether a refusal of information is justified and sustainable.

Harm to the public interest also encompasses harm to private interests when it is not in the public interest that such harm should occur. For example, it is not in the public interest that information should be disclosed that would prejudice the defence in a criminal trial; the apprehended harm would be done to the defendant, but it would also constitute harm to the public interest by interfering with the proper conduct of the trial.

The recognised grounds for public interest immunity claims consist of the following:

- prejudice to legal proceedings
- prejudice to law enforcement investigations

- damage to commercial interests
- unreasonable invasion of privacy
- disclosure of Executive Council or cabinet deliberations
- prejudice to national security or defence
- prejudice to Australia's international relations
- prejudice to relations between the Commonwealth and the states.

The notice of motion does not set out these recognised grounds. It would not be advisable for the Senate to do so in any general resolution, because whether these grounds are justified in particular cases very much depends on the circumstances of those cases. Also, the public interest in the disclosure of particular information may outweigh the apprehended harm to the public interest from the disclosure of the information.

These principles have a long history in the Senate. They have been expounded largely with reference to individual cases rather than by general resolutions, but there have been some general expressions of the principles. The history may be summarised as follows.

Having in several cases asserted its right to require the production of information and documents about public affairs, the Senate, in reaffirming that power in a resolution of 1975, also declared that it would exercise its power "subject to the determination of all just and proper claims of privilege", and that "a claim of privilege based on an established ground" would be considered and determined case by case by the Senate. (This resolution belongs to the period before the change of terminology from "privilege" to "public interest immunity" occurred.)

In a series of resolutions, first passed in 1971 and reaffirmed at various times, most recently in 1998, the Senate, in response to claims of confidentiality advanced by officials in estimates hearings, declared that "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 Parliament or its committees unless the Parliament has expressly provided otherwise".

Resolution 1 of the Senate's Privilege Resolutions, passed in 1988, provides in paragraph (16) that officers are to be given reasonable opportunity to refer questions to superior officers or to a minister. This provision is intended to support the principle that ministers should consider any potential claim of public interest immunity, not officers.

In 1992 the Senate declared by resolution that the fact that particular information is exempt from disclosure under the Freedom of Information Act does not automatically provide a ground for withholding that information from the Senate. The then government accepted this point.

In 1994, during an inquiry by the Senate Privileges Committee into public interest immunity claims, the then government conceded the principle that such claims must be made by a minister and are for the Senate ultimately to resolve.

In 2003 the Senate passed a resolution declaring that any claim of public interest immunity on the basis of commercial confidentiality should be made only by a minister and should be accompanied by a ministerial statement of the basis of the claim, including a statement of the commercial harm which might result from the disclosure of the information in question. The terms of this resolution are applicable to public interest immunity claims in general; the expression of the resolution to apply to claims of commercial confidentiality reflects the fact that commercial confidentiality had become the most common basis for such claims.

The *Government Guidelines for Official Witnesses before Parliamentary Committees*, issued in 1989 and still in force, recognised the principles which had been expounded by the Senate. Paragraph 2.28 of the guidelines confirm that claims of public interest immunity should be made only by ministers:

> Claims that information should be withheld from disclosure on grounds of public interest (public interest immunity) should only be made by Ministers (normally the responsible Minister in consultation with the Attorney-General and the Prime Minister).

Paragraph 2.32 recognises the principle that mere claims of confidentiality are not sufficient for a claim of public interest immunity, but that harm to the public interest must be established. The guidelines refer to:

> Material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure would be contrary to the public interest*.

The guidelines also state in paragraph 2.32:

> It must be emphasised that the provisions of the FOI Act have no actual application as such to parliamentary inquiries, but are merely a general guide to the grounds on which a parliamentary inquiry may be asked not to press for particular information, and that the public interest in providing information to a parliamentary inquiry may override any particular ground for not disclosing information.

The basic principles of the notice of motion have therefore been recognised by successive governments in their own instructions to their public servants.

The principles of the notice of motion also have a long history outside Australia, pre-dating our Parliament. It has been recognised over centuries that it is a major function of a representative assembly to require the production of information by the executive government, so as to assure the public that the country is being properly served by executive office-holders, and to determine the grounds on which such information might be withheld.

The past resolutions of the Senate also express the principle that withholding information about public affairs from the representatives of the public in Parliament is a serious step, not to be taken lightly. As such it is not a matter for public servants, but warrants a deliberate decision at the highest level of politically responsible office-holders. The notice of motion would ensure that such decisions are treated in that way.

Yours sincerely

(Harry Evans)

hl.let.16491

17 April 2009

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 validate the increases in taxation contained in the original bills up to the time of the passage of those replacements, and another set of bills to validate 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 validate the tax from its original collection. Such a situation would appear to be possible; the fact that the second set of bills in part duplicated the first would not appear to prevent their enactment or their valid application.

The 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 increase in tax is already validated 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 proposed legislation. If the Parliament has already passed part of a bill about which there was disagreement earlier, how can it be said that there remains a deadlock over the original bill? A government cannot 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)