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SUPPLEMENTARY BUDGET ESTIMATES HEARINGS – PROCEDURAL ISSUES

Late answers

By far the loudest complaints during the supplementary budget estimates hearings were in relation to the late provision or non-provision of answers to questions taken on notice at the previous round. Some departments explained that they had provided answers to ministers' offices before the election but that they had not been dealt with. Some answers were returned for revision or rewriting after the election but some simply languished unattended to. Committees did not generally accept that the caretaker convention prevented action on answers and at least one minister, Senator Sherry, in the Finance and Public Administration Legislation Committee's hearings, agreed that it was neither satisfactory nor appropriate that no answers to questions taken on notice in relation to regional matters had been provided, notwithstanding the changes in administrative arrangements in this area (F&PA, 19/10/2010).

Parliamentary Budget Office

Interesting comments were made about the caretaker conventions by the Secretary of the Department of Finance and Deregulation who pointed to a need to review the conventions which do not cover the involvement of public servants in providing post-election costings of both government and opposition policies (F&PA, 19/10/2010). While this may have been a phenomenon peculiar to the recent election because of its outcome, the secretary noted the potential conflict for public servants and their legislative duty to serve the government of the

day, and observed that the proposed Parliamentary Budget Office may provide a solution to these problems. The potential role of a PBO, however, remains to be determined, a point made by officers of the Department of Parliamentary Services earlier in the hearings (F&PA, 18/10/2010).

In the Department of Finance and Deregulation's so-called Red Book, released following the election with some redactions, the department envisaged that the PBO may be the best body to resolve the long-running dispute between the Senate and the executive over the meaning of "ordinary annual services of the government" in section 53 of the Constitution. It also called for an early decision about this matter, indicating that the department had failed to register the Senate's resolution of 22 June 2010 on the subject. A PBO is unlikely to have any useful role or expertise in the matter which is essentially a dispute between the Senate and the government.

Refusals to answer questions

The usual range of half-formulated reasons for not providing answers to questions was trotted out during the hearings, most of them not pressed by committees. The resolution of the Senate of 19 May 2009 requires an assessment of the harm to the public interest that could ensue from disclosure of particular information, but this aspect of the resolution remains to be fully implemented by committees. In a nod to the Senate's resolution of 30 October 2003 dealing with claims of commercial confidentiality, Minister Wong agreed to provide written reasons for why the release of price and volume assumptions behind the minerals resource rent tax revenue projections on the grounds that they were provided commercially in confidence by companies was not in the public interest (Economics, 21/10/2010).

There were also some other signs that senators were pursuing alternative means of obtaining information. For example, refusal by the Civil Aviation Safety Authority to provide copies of reports of the Industry Complaints Commissioner on the grounds that they contained confidential material was met with a request by the senator concerned for copies of the reports to be provided with names of persons removed. This question was taken on notice (RAT, 21/10/2010). In hearings on Centrelink, a senator asked questions about the agency's fraud investigation procedures which officers were reluctant to answer in public. The issue was resolved when, at the suggestion of the committee chair, the minister agreed that a private briefing be provided to the senator concerned (CA, 21/10/2010). These strategies are not unusual.

Lengthy questioning occurred about legal advice provided by the Australian Government Solicitor to the Treasury Department in relation to the MRRT which the department had released in part under Freedom of Information legislation. Requests for the redacted parts of

the advice to be released were taken on notice, with claims of legal professional privilege being questioned on the ground that the Treasury had waived such privilege by releasing parts of the document. The advice concerned potential constitutional flaws in the original version of the MRRT on the grounds that it would give preference to certain states over others, contrary to section 99 (L&C, 18/10/2010, Economics, 20 and 21/10/2010).

Claims by officers from Austrade in the budget estimates round that they could not answer certain questions about investigations into the company Securrency because of the secrecy provision in the Australian Trade Commission Act were modified in answers to questions taken on notice to the more plausible ground that the Australian Federal Police had requested that the information not be disclosed at this stage for operational reasons (FADT, 18/10.2010). Another absurd claim for not releasing information on the grounds that to do so would "frighten the horses" was made in relation to questions about the number of inspections under the home insulation safety program that had uncovered faulty installations (E&C, 18/10/2010).

Committees did not press refusals made on the basis that disclosing information would preempt inquiries or potentially prejudice matters before the courts or other tribunals and, in some cases, claims of commercial confidentiality were also not pressed.

Appearance of officers

These hearings were marked by another first in the appearance of the managing director/chief executive officer of Australia Post for the first time (E&C, 19/10/2010). When Mr Fahour expressed his pleasure at appearing before the committee, he was warned by the minister against giving false or misleading evidence, in one of the many lighter moments that do occur from time to time during the estimates process. The President of Fair Work Australia also appeared pursuant to the Senate's order and answered many questions about the work of the agency, as every other statutory agency head is expected to do (EEWR, 20/10/2010).

Parliamentary secretaries

Following the election, the Senate now has five parliamentary secretaries, an unusually high number in historical terms. An order of the Senate provides for parliamentary secretaries to exercise the same powers and perform the same functions as ministers, except that they may not answer questions without notice or represent a Senate minister at estimates hearings. This last restriction was specifically devised to ensure that Senate ministers would always appear in respect of their own portfolios at estimates hearings. In the event of their unavailability, they may be replaced only by another Senate minister. The new complexities

of the administrative arrangements orders raised some questions about representation but all were resolved.

Incorporation of material

A minor procedural issue arose in one committee about the incorporation of material into the committee Hansard (E&C, 18/10/2010). As a committee has control over its own records and proceedings, it is within the inherent powers of a committee to determine whether material should be incorporated in Hansard. Such decisions are made by the Senate on a frequent basis.

SUPPLEMENTARY BUDGET ESTIMATES HEARINGS – MATTERS OF INTEREST

As usual, there were many interesting revelations on a wide variety of issues. Some examples are as follows:

- the significant reduction of its Telstra shareholdings by the Future Fund
- the revelation that work had commenced on excavations for a third stage of the Curtin detention centre in north-west Western Australia, the government having previously indicated that it did not propose to expand the centre beyond the second stage (the departmental secretary explained that this was "prudent contingency planning")
- the pressure to increase staff numbers at DIAC to cope with increasing numbers of asylum seeker arrivals
- the disclosure of legal advice under FOI warning the government about possible constitutional problems with the MRRT
- the Auditor-General's analysis of lessons learnt following the green loans, BER and home insulation audits, and the value of such lessons for better public administration generally
- an apparent change of direction for the Australian Building and Construction Commission under its new commissioner, involving better scrutiny of the use of coercive powers and better recognition of the wide range of interests in the industry
- the absence of any Health Department input to the choice of locations for the so-called GP super clinics
- approximately half of all the 21 million doses of swine flu vaccine purchased by the government will reach their expiry date without being used
- measures taken by the chairman of the Australian Competition and Consumer Commission to deal with potential conflicts of interest between his public duties and his private business interests
- the impact of the extra efficiency dividend on small agencies, including the Australian War Memorial which has had to cancel its long-running Christmas carol event and the

Australian Law Reform Commission which has had to cut its education and publication programs

- the lack of access to the Prime Minister by the Chief Scientist despite the importance of scientific issues in the government's major policy initiatives
- the need to extend deadlines for a large proportion of BER projects
- the levels of obesity amongst ADF personnel
- the performance of ASIC in monitoring share market activities, a role it has taken over from the Australian Stock Exchange
- the disclosure that only 44% of computers promised for schools in the 2007 election campaign have been installed
- the outcome of investigations into allegations of cheating in the Naplan literacy and numeracy tests.

DEBATE ON AFGHANISTAN

The major portion of business time during the sitting week beginning 25 October 2010 was devoted to a debate on Australia's commitment to Afghanistan. The undertaking to hold a debate in both Houses was a feature of the various agreements on parliamentary reform between the government and minor parties and independents. Several speakers in the debate canvassed the merits of having the decision to commit troops to overseas combat made by the Parliament rather than by the executive. A bill to achieve this has been on the Senate *Notice Paper* in various forms since 1985, having first been introduced by Australian Democrats Senator Colin Mason, an acknowledgement made by its current sponsor, Senator Ludlam.

ACKNOWLEDGEMENT OF COUNTRY

Another feature of the agreements on parliamentary reform was the commitment to include an acknowledgement of country at the commencement of each sitting. The Senate agreed without debate to an amendment to standing order 50 on 26 October to include an acknowledgement of country after the prayer each day. This is the first amendment of standing order 50 since its adoption, first as a sessional order in 1901 and then as a standing order in 1903. The first acknowledgement under the amended standing order was made on 27 October 2010.

QUALIFICATION OF SENATORS – COURT OF DISPUTED RETURNS

Senator Abetz made a statement to the Senate on 25 October 2010 about a challenge to his election regarding his qualifications under section 44 of the Constitution. The petition to the

High Court sitting as the Court of Disputed Returns was tabled by the President in the previous sitting period (see Bulletin No. 244). The applicant has now signalled an intention to withdraw the challenge, but certain administrative procedures need to be carried out before the matter is finalised.

LEGAL ADVICE TABLED

Community reaction to the release by the Murray Darling Basin Authority of a guide to the draft Murray Darling Basin Plan led to the government seeking legal advice on the priorities mandated by the *Water Act 2007* and whether the MDBA was required to have regard to environmental considerations over social and economic ones. A ministerial statement outlining the process to be followed in developing the plan was tabled on 26 October 2010. At the same time the government tabled legal advice (characterised as a paper) from the Chief General Counsel, Australian Government Solicitor, yet another instance of governments tabling advice when it is in their interests to do so.

In a footnote to the debate on parliamentary reform and the controversial proposal for the Speaker's vote to be "paired" (see Bulletin No. 244), Senator Brandis tabled legal advice on 26 October that he had provided to the Leader of the Opposition on the issue. Although Senator Brandis indicated that the matter was now of historic interest only, he tabled the advice to address misrepresentations of it.

IF AT FIRST YOU DON'T SUCCEED ...

The inherent truth of this adage was demonstrated during the sittings when Senator Birmingham again moved an order for production of a copy of the audit report by PricewaterhouseCoopers into aspects of the Green Loans Program. The document (dated October 2010) was tabled the following day, having not been produced in response to an earlier order of 12 May on the grounds that it was a draft that had not been considered by ministers and, in any case, had been commissioned by an advisory body and was thus not an Australian Government document. The tabling of the document notwithstanding the latter objection perhaps shows the influence of the "new paradigm" at work. Incidentally, the Green Loans Program was the subject of yet another adverse report on 27 October, this time from the Environment and Communications References Committee.

On the other hand, orders for the production of documents relating to the proposed mining tax, initiated by Senator Cormann, met with no better success than previously. These motions, however, included provision for examination by the new Information Commissioner on the grounds for non-disclosure, a mechanism which is yet another feature of the

agreements on parliamentary reform. The Information Commissioner's report is due on 15 November 2010.

PROCEDURE COMMITTEE REPORT

The Procedure Committee presented its *Third report of 2010* on 27 October. The report recommended that the temporary order relating to question time (which provides for two-minute answers to primary questions, 30 seconds each to ask two supplementary questions and answers to be directly relevant to the questions) be extended to early in 2011. The committee also examined the need for an amendment to standing order 104 to provide for divisions to be held again automatically in cases of misadventure rather than by leave following the provision of an explanation to the Senate of the cause of the misadventure. The committee recommended against any change, maintaining that current practices are satisfactory.

Before the committee's report was adopted the following day, there was another demonstration of the reliability of the current practices when Senator Ludlam inadvertently missed a division on a contentious amendment moved to a proposed committee reference. The outcome should have been an equally divided vote resulting in the amendment being lost but without Senator Ludlam's vote, the amendment initially succeeded. The matter was deferred, Senator Ludlam subsequently explained his absence and apologised to the Senate, and leave was granted for the division to be held again, this time resulting in the correct outcome.

The enhancement of opportunities to deal with private senators bills, another feature of the agreements on parliamentary reform, remains under consideration by the committee.

FORMAL MOTIONS

The procedures for dealing with formal motions are the subject of regular complaint. Standing order 66 requires that formal motions shall be put and determined without amendment or debate. Frequently, however, amendments are moved by leave and senators seek leave to make statements in relation to the motions to explain their positions. By these means the intention of the standing order is regularly subverted. After a particularly chaotic episode on 28 October in which one formal motion took approximately 40 minutes to resolve, the President made a statement drawing senators' attention to the requirements of the standing order and encouraging better performance in the future.

On this occasion, an Opposition senator moved an amendment, by leave, to omit two parts of a three part motion moved by the Leader of the Australian Greens. Given that there was an indication that senators wished to vote differently in respect of the two paragraphs to be omitted, the President used his discretion under standing order 84(3) to divide the question on the amendment. Senators attempted to argue that the two paragraphs were inextricably linked and could not be divided but this was clearly not the case and the divisions on the two parts of the question in relation to the amendment confirmed that senators had exercised their right to vote differently. Presidents have long ruled that they will exercise their discretion to divide a complicated question where there is an indication that senators wish to vote differently. See *Odgers' Australian Senate Practice*, 12th edition, page 217.

ACCESS TO COMMITTEE RECORDS

At the end of the 42nd Parliament, a significant number of bills were before the legislation committees. These bills lapsed at the end of the Parliament but many were reintroduced following the commencement of the current Parliament. Several have been referred again to committees so that the work begun in the last Parliament can be completed. Standing order 25 provides that the records of the legislative and general purpose standing committees remain in the custody of the Senate after inquiries have been completed. To enable the newly established committees to have access to records of those committees in the previous Parliament, motions were moved, by leave, after the adoption of the relevant Selection of Bills committee reports to authorise this. Some transfer of inquiries also occurred between the Community Affairs References Committee and the new Joint Select Committee on Gambling Reform. The transfer was accompanied by authorisation for the recipient committee to access the records of the relinquishing committee.

TRANSMISSION OF BUSINESS BETWEEN THE HOUSES

Standing order 154 provides that a motion may be moved at any time, without notice, that any resolution of the Senate be communicated by message to the House of Representatives. Such messages have been relatively common but messages coming in the other direction are virtually unknown except where the resolution arose from a government initiative. In another sign of the new paradigm at work, the Senate received a message from the House of Representatives on 28 October transmitting a resolution for concurrence. The resolution had its origin in a private member's motion and related to the issue of criteria for independent youth allowance. This was the subject of a private senator's bill introduced earlier in the day by Senator Nash. The Senate also received a private member's bill passed by the House, the Evidence Amendment (Journalists' Privilege) Bill 2010, initiated by Mr Wilkie.

Consideration of both messages was made in order of the day for the next day of sitting to allow arrangements for sponsoring both measures in the Senate to be negotiated.

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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