

# DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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**No. 248**

**Additional Estimates 21 – 24 February 2011  
and sitting period 28 February – 3 March 2011**

**4 March 2011**

## **ADDITIONAL ESTIMATES – PROCEDURAL ISSUES AND ITEMS OF INTEREST**

Few procedural issues arose during the additional estimates hearings but there was some interesting testimony in relation to issues that have been canvassed in these bulletins.

### *— access to information*

In his last estimates hearing before retiring as Treasury Secretary, Dr Henry responded to a series of questions from Senator Cormann as to why information refused to the Senate in response to orders for production of documents had subsequently been released in response to Freedom of Information requests. Somewhat unfortunately, Dr Henry referred to the response to the Senate as part of 'how our parliamentary system operates', while the FOI decisions were taken in accordance with the requirements of the statute. In other words, information which there was no basis in law to withhold from the public was withheld from the Senate as part of the political process.

The information sought included estimates of revenue foregone under the mining tax model II and the assumptions underlying those estimates. The Senate made several attempts to obtain the information, including seeking a report from the Information Commissioner on the adequacy of the grounds (such as they were) put forward by the Government for not complying with the orders. The Information Commissioner's response was reported in bulletin nos. 245, 246 and 247. Senator Cormann also used the estimates process to question the Information Commissioner about his position, having also raised the issue with the Clerk during estimates for the Department of the Senate (F&PA, 21/2/11). The Commissioner queried the Senate's view of the scope of its powers (as partly expounded last year in the 144<sup>th</sup> report of the Privileges Committee on statutory secrecy provisions) by suggesting that, taken to its logical conclusion, the Senate could issue an order to any statutory officer "or indeed to a private citizen". This is indeed the case (see the Occasional Note appended to bulletin no. 247).

The Productivity Commission was also questioned about refusal on apparently similar grounds to comply with an order of the Senate (Eco, 23/2/11). The Chairman having stated that a request for such information had to come through a minister, officers at the hearing indicated that it was more a matter of whether the Commission could be compelled to create a document based on information that it did not have. Senator Cormann indicated that he would be seeking a resolution to the apparent impasse.

The Chair of the Privileges Committee gave notice on 3 March of a wide-ranging inquiry into the adequacy and appropriateness of current guidance available to officers giving evidence to committees and providing information to the Senate. The terms of reference include the awareness among agencies and officers of the extent of the Senate's power to require the production of information. This will enable the committee to explore related issues. The terms of reference also emphasise the legal and procedural protections available to officers.

In his last appearance, and in relation to the release of information concerning the mining tax (see above), Dr Henry informed the Economics Legislation Committee that he had not made a public interest immunity claim in relation to the information and nor could he contemplate the circumstances in which he would make such a claim. What he had done was to exercise his right to refer the matter to the responsible minister (Eco, 24/2/2011). This is a right that is explicitly recognised in Privilege Resolution 1(16).

— *legal advice*

There were very few clear cases of public interest immunity claims or steps being taken towards them (although officers declined to answer numerous questions but were not pressed for the grounds). In the Finance and Public Administration Legislation Committee on 22 February, Senator Ronaldson requested a copy of advice from the Director of Public Prosecutions that there was insufficient evidence to pursue a prosecution under the Electoral Act. The officer claimed legal professional privilege but referred the claim to the minister at the table who then sought to provide the committee with a response on notice, after consideration. The Clerk's advice was sought on whether it was possible to provide the rationale on notice (F&PA, 22/2/2011). The order of the Senate of 13 May 2009 is silent on whether the rationale should be provided at the time the claim is made. However, paragraph (8) of the order, which allows a minister to consider that a statement should more appropriately be made by the head of an agency (by reason of the independence of that agency from ministerial direction or control), assumes that the minister should have an opportunity to consider matters. It was therefore not unreasonable for the minister to seek to provide the rationale on notice. The significant point for the committee was that it should be provided with a considered and well-founded explanation for the claim. Conceding that the minister may need to take advice and to consider the matter further was not at all inconsistent with the practices of the Senate, but if it appeared to the committee that a different approach was warranted, it would be open to the committee to pursue the issue at the time.

The Murray-Darling Basin Authority also declined to produce legal advice about the Water Act on grounds of legal professional privilege. When Senator Birmingham explained that this was not a ground recognised by the Senate, the Authority took the request on notice, Senator Birmingham indicating that it should consider advice of the former Clerk in the often-circulated document, "Grounds for public interest immunity claims", dated 19 May 2005 (E&C, 22/2/2011).

In contrast, legal advice to the Fair Work Ombudsman regarding an employer's obligation under subsection 90(2) of the Fair Work Act to pay a leave loading on accrued leave on termination of employment was readily tabled (with the minister commenting that he hoped it would not be taken as a precedent). So-called precedents are now so common that the claim lacks all credibility.

— *other advice*

An exception to the supposed convention that officers never comment on advice to ministers occurred in the Legal and Constitutional Affairs Legislation Committee when the Secretary of the Department of Immigration and Citizenship, Mr Metcalfe, gave evidence about decisions and advice on the fate of an orphaned boy who had travelled to Sydney from the Christmas Island detention centre to attend relatives' funerals and who was subsequently returned to the island (21/2/2011).

— *unanswered questions on notice*

Unanswered questions taken on notice at the previous round of estimates were less of an issue in most committees than usual, although the Department of Health and Ageing was an exception (CA, 23/2/2011).

As usual, a great deal of information was put on the public record about a large range of programs and activities.

In contrast to the additional estimates week, the sitting week witnessed several unusual events.

## **PROPOSED CENSURE**

Question time on 28 February reached only the third question before the Leader of the Opposition in the Senate, Senator Abetz, moved a censure motion against the Government for proposing a carbon tax after having ruled it out before the election. This theme was to dominate the week. Rather than moving a suspension of standing orders to provide for the motion to be debated, leave was granted for it to occur and debate continued till around 5 pm when the motion was lost. The Leader of the Government in the Senate, Senator Evans, then formally brought question time to an end by asking that further questions be placed on notice and the Senate continued with its normal routine of business as specified in standing order 57,

but not before the Leader of the Australian Greens, Senator Bob Brown, had attempted to suspend standing orders to allow him to move a motion that question time continue for its normal duration. That motion was also lost.

Censure motions are relatively rare, the last one occurring in February 2010 in relation to the Government's handling of the various climate change programs, including the home insulation scheme and green loans scheme. The motion was successful on that occasion. A censure motion is a serious expression of the Senate's disapproval and, while it has no legal or constitutional consequences, it may have a significant political impact.

### **EARLY MEETING OF THE SENATE**

The Senate meets by its own resolution. Standard times of meeting are contained in standing order 55 while days of meeting are set annually by resolution. Standing order 55 also provides that the Senate may be summoned by the President to meet at a different time at the request of an absolute majority of the whole number of senators. On 1 March, there was a widespread desire for the Senate to meet several hours before its scheduled time in order for senators to pay respects to the victims of the New Zealand earthquake by observing two minutes' silence at the same time as the victims were being honoured in New Zealand. The procedures in standing order 55 were used to facilitate this. Although the President has an independent discretion to alter the Senate's meeting time and has done so on the advice of the executive government, the discretion has been exercised to delay meetings for reasons relating to the orderly conduct of Senate proceedings. In the present circumstances, as there was no impact on the orderly conduct of proceedings, it was considered more appropriate to rely on the procedures in standing order 55. The House, however, met earlier at the direction of the Speaker.

### **PRESENTATION OF ADDRESS-IN-REPLY**

Senators joined the President in formally presenting the Address-in-reply to the Governor-General at Government House on 1 March. The Address is a formal expression of thanks to the Governor-General for presenting her speech at the opening of Parliament. While both events are provided for in the standing orders (standing orders 2 and 3, respectively), they have no real procedural significance. The Speaker, accompanied by members of the House of Representatives, presented the equivalent address from the House on the following day.

### **LEGISLATION**

The major item of legislation considered during the week was the government's package of bills to impose a temporary flood and cyclone reconstruction levy in response to recent natural disasters in Queensland. The bills narrowly passed the House of Representatives in

the preceding week but their passage through the Senate was uncertain with key independent, Senator Xenophon (whose vote is necessary for the bills to pass) expressing reservations about the need for the levy. His concern was the Queensland Government's lack of infrastructure insurance which, he argued, meant that the Commonwealth would carry a larger financial burden than it would otherwise have needed to carry. His support was expressed to be contingent on the government taking action to make adequate infrastructure insurance a pre-condition for states to qualify for natural disaster relief and recovery payments from the Commonwealth. The Commonwealth can do this on the basis of section 96 of the Constitution which provides that the Parliament may grant financial assistance to the states on such terms and conditions as it thinks fit. In a related action, a motion moved by Senator Milne and agreed to on 28 February called on the Government to provide further information on its insurance arrangements and to table communications with the Queensland, Tasmanian and Northern Territory governments on their lack of natural disaster reinsurance for damage to public infrastructure.

By the end of the week, the bills had been referred to the Economics Legislation Committee (on the recommendation of the Selection of Bills Committee) for a short inquiry. The Senate also agreed to a proposal from Senator Xenophon that the provisions of the bills be referred to the references committee, a reference which also called on (but did not, for obvious reasons, order) the Queensland Government to provide relevant documents to that committee. In these circumstances, when the Senate has made a deliberate decision to refer the **provisions** of the bills to a committee, further consideration of the bills in the chamber is not deferred. Once the legislation committee reports, the bills will be available for debate, despite the references committee not being required to report till May. In other circumstances, when the provisions of bills are referred because the bills are not yet in the possession of the Senate, standing order 115(3) operates to defer further consideration of the bills (once they are received from the House) while they are before the committee.

A private senator's bill listed for consideration in the new Thursday morning timeslot was unable to be considered when it was referred to a committee instead. The Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, introduced by Senator Bob Brown, was referred to the Legal and Constitutional Affairs Legislation Committee on an Opposition motion, along with the amendments which had been circulated by Senator Brown to extend its operation to all self-governing territories (namely, the Northern Territory and Norfolk Island). The bill, if passed into law, would give the territories greater legislative autonomy, including in such areas as euthanasia and same-sex civil unions, where previous territory legislation has been vetoed by the Commonwealth. The bill and amendments propose to remove the Governor-General's veto power over territory laws. Territory laws may still be overridden by the Commonwealth Parliament.

The Evidence Amendment (Journalists' Privilege) Bill 2010 (a private member's bill passed by the House of Representatives and subsequently sponsored in the Senate as government

business – see bulletin no. 246) was also the subject of thorough debate in committee of the whole on 3 March. Amendments moved by Senator Ludlam, supported by the Government, were forensically scrutinised by the Opposition and learned arguments were advanced about their effect. Two of the three amendments were agreed to while Opposition amendments to the bill were not supported.

#### **GOVERNMENT RESPONSE TO COMMITTEE REPORT ON A PRIVATE SENATOR'S BILL**

Last year, Senator Xenophon's bill, the Tax Laws Amendment (Public Benefit Test) Bill 2010, was examined by the Economics Legislation Committee. The committee received submissions from the Church of Scientology opposing the bill and from former members of that organisation whose evidence highlighted the need for a public benefit test for organisations to qualify for special taxation status. Although the committee did not support the bill, it made recommendations in favour of a national commission to oversee the not-for-profit sector and also supported the development of a public benefit test. In a response tabled on 28 February, the Government indicated its commitment to undertake a scoping study for a national regulator for the not-for-profit sector, including consideration of a public benefit test.

This provides a good example of how a combination of a private senator's bill and a Senate committee inquiry can draw attention to particular policy issues. Although it may not itself be in an ideal form for implementation, a private senator's bill can nonetheless lead to action by government to take up the ideas.

#### **ORDER IN DEBATE**

During debate on the censure motion on 28 February, a senator was unwilling to withdraw a clear reflection on the chair but did so eventually, thus avoiding being "named" and invoking the disciplinary procedures under standing order 203. On the following day, the President made a statement reiterating the rule against interjections and the duty of chairs to protect senators who seek protection, and emphasising the fundamental importance of respect for the chair to the effective operation of the Senate, a matter for which all senators carry responsibility. During question time on 2 March, the President also made a strong intervention about the need for improved adherence to the applicable standing and temporary orders.

#### **MORE JOINT COMMITTEES**

Two more joint committees were appointed during the week, taking to 50 the number of committees on which senators are currently required to serve. The Joint Select Committee on the Christmas Island Tragedy of 15 December 2010 is to report by 30 June 2011 but the Joint Standing Committee on the National Broadband Network, to be chaired, according to press

reports, by the independent MP, Mr Oakeshott, is to run for the life of the Parliament or until the NBN roll-out is complete (whichever occurs first). Its terms of reference were extensively amended by the Senate on 3 March in relation to its proposed procedures.

### **REFERENCE FOR SENATORS' INTERESTS COMMITTEE**

The Senators' Interests Committee received a rare reference on 2 March, to inquire into the development of a code of conduct for senators. This is another outcome of the various agreements on parliamentary reform and the reference authorises the committee to consult with the equivalent committee of the House of Representatives with the aim of developing a uniform code and uniform implementation processes.

Attempts to develop a code of conduct go back many years and were part of the original endeavours to establish regimes for the registration of pecuniary interests. The Senate did not adopt its resolutions on senators' interests until 10 years after the House and there are some significant differences in the application of the rules between the Houses, including in relation to the interests of spouses, partners or dependent children (which are confidential in the Senate but public in the House).

### **ORDERS FOR PRODUCTION OF DOCUMENTS**

Apart from responses to ongoing orders for production of indexed lists of files, certain details of contracts, agency appointments, grants and vacancies, and the biannual report from the ACCC on anti-competitive practices in the health insurance industry, there were no responses during the week to orders for production of documents. An order proposed by the Opposition for production of documents relating to the appointment of a disabilities ambassador for the International Day of People with Disability was agreed to. A return is due on 21 March.

### **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](http://www.aph.gov.au/senate)

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