DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

hl/pro/prob/15195

No. 206

for the sitting period 9—19 October 2006

20 October 2006

LEGISLATION

Two significant packages of bills occupied most of the legislative time of the period, and were the subject of somewhat unusual proceedings.

The Environment, Communications, Information Technology and the Arts Committee's report on the bills to change the media ownership laws was tabled on 9 October, having been presented to the President out of sittings after the committee's speedy inquiry ("rushed" according to the non-government parties). It transpired that the bills were to be passed with extensive amendments to overcome concerns in the government parties, and the government had gained the support of Senator Fielding to cancel out the lack of support of Senator Joyce. The bills were twice deferred on 9 and 10 October, it was presumed because negotiations were continuing. The bills were finally passed on 12 October with extremely voluminous amendments.

Two of the bills were initiated in the Senate and two in the House of Representatives (one because it was a bill imposing taxation). When the two bills were received from the House they were put together with the bills already in the Senate on which debate had commenced. In that circumstance, senators who have already spoken to the bills in the Senate may speak again, so that they do not lose the opportunity to speak on the other bills in the amalgamated proceedings.

A special motion on notice to impose time limits on the consideration of the bills was passed on 9 October (a "Clayton's guillotine"). Such a motion, also used for the RU486 legislation, but moved by a non-government senator on that occasion, avoids some of the complications of putting a real guillotine in place under standing order 142. As it turned out, the total time was not used.

The other bill was the Trade Practices Legislation Amendment Bill (No. 1) 2005. This bill had failed to pass last year when a schedule in the bill was struck out on equally divided votes with Senator Joyce voting against the government. The government rejected this amendment in the House of Representatives and presented the bill again with further amendments. It transpired that these amendments were also designed to secure the support of Senator Fielding to cancel out the dissent of Senator Joyce. A motion was moved that the Senate not insist on the amendment originally made (the striking out of the schedule) and agree to the further amendments. To this motion Senator Joyce moved an amendment to make further amendments to the bill. That amendment was defeated on equally divided votes, but then Senator Fielding moved a similar amendment to make further amendments to the bill, having apparently extracted further concessions from the government. That amendment was passed and the bill proceeded with the substantial amendments.

The non-government parties called a division on the motion that the report of the committee of the whole be adopted. Senator Joyce voted against that motion. Had that motion been negatived on equally divided votes, the bill would have been put back into the committee and could have been kept in limbo.

Proceedings on the bill in committee of the whole led to an application of the seldom-invoked rule in standing order 144(6) that 15 minutes must elapse between closure motions.

These kinds of proceedings on bills, with complex amendments in committee of the whole to motions to secure agreements on bills, were much more common in the Senate before the government gained its majority.

SELECTION OF BILLS COMMITTEE

Debates on reports of the Selection of Bills Committee have signalled tensions about the way in which the government is handling references of bills to committees.

On 11 October the motion for the adoption of the committee's report was the subject of an unsuccessful amendment to extend a reporting date, a sign of discontent with the government setting extremely tight schedules for committee inquiries into bills.

On 19 October the committee reported that it was unable to agree on which committee the Medibank sale bill should be referred to, and the government moved an amendment to refer it to the Finance and Public Administration Committee. An unsuccessful amendment to that amendment attempted to refer it to the Community Affairs Committee. The basis of this dispute is that the government wants to treat the bill as purely a financial measure, while the

non-government parties want to consider it in the context of private health insurance. In the course of the debate opposition senators accused the government of "going through the motions" and "keeping up appearances" with the reference of bills to committees, maintaining an appearance of the system still operating while severely restricting it and pushing legislation through. References were made to the increasing practice of bills being referred before they have even appeared, with only outlines, as supplied by the government, known.

COMMITTEE RECOMMENDATIONS FOR AMENDMENTS

On the other hand, there have been some notable successes for committees recommending amendments to bills, particularly the Legal and Constitutional Affairs Committee.

For example, the Privacy Legislation Amendment (Emergencies and Disasters) Bill was the subject of government amendments on 17 October explicitly stated to arise from the report of the Legal and Constitutional Affairs Committee. The Corporations (Aboriginal and Torres Strait Islander) bills arrived in the Senate already amended in the House of Representatives as a result of scrutiny by the committee. The Crimes Amendment (Bail and Sentencing) Bill was also the subject of recommendations for amendments by the committee in a report presented on 16 October.

The contribution of committees to amending bills is not always acknowledged, particularly when amendments are made in the House of Representatives, and is not always obvious. Often amendments arise from committee reports without the precise wording recommended by the committees being adopted.

Because of this situation, the Committee Office will attempt to compile a list of all amendments made to bills arising from committee reports.

SCRUTINY OF BILLS COMMITTEE

There are also signs that the Scrutiny of Bills Committee may still be exercising some influence. In an unusual debate on a report of the committee on 18 October senators drew attention to significant search and seizure provisions contained in the Environment and Heritage Legislation Amendment Bill (No. 1) 2006, and complained of the inadequate explanation of these provisions in the explanatory memorandum accompanying the bill, and failure to meet the government's own standards for such provisions. As this criticism was bipartisan, some amendments may well be made to the bill.

PRIVATE SENATOR'S BILL: STEM CELL RESEARCH

Senator Patterson's bill on stem cell research (see Bulletin No. 205, p. 1) was presented to the President out of sittings and immediately referred to the Community Affairs Committee in accordance with the motion passed on 14 September. The bill was tabled on 9 October and introduced on 19 October. A motion was passed on that day to allocate virtually the whole of the next sitting week, after the estimates hearings in November, to consideration of the bill, with extended sitting times.

ESTIMATES HEARINGS AND TELSTRA

There was a debate on the adjournment on 19 October over an apparent attempt by the government to prevent Telstra officers appearing in the supplementary estimates hearings to be held in November.

Although Telstra does not receive any money from the annual appropriation bills, its officers have always appeared in estimates hearings because of the great significance of its operations for public finance and telecommunications policy. It appears that the government now does not want Telstra to appear in the hearings because of the pending sale of the remaining public shareholding.

An attempt was apparently made by government members of the Environment, Communications, Information Technology and the Arts Committee to pass a motion that Telstra officers not appear. Because the meeting of the committee did not meet the requirements of standing order 33 for meetings during the sittings of the Senate, this attempt was frustrated, and another meeting of the committee will have to be held to decide the matter.

If Telstra officers do not appear, senators will still be able to put questions to the Minister and Department of Communications, Information Technology and the Arts, and will be able to put questions on notice directed to Telstra.

ACCOUNTABILITY: PUBLIC WORKS

Senator Murray took advantage on 9 October of a bill to amend the legislation relating to the Joint Public Works Committee to move a series of amendments designed to strengthen the ability of the committee to scrutinise public works and to prevent the government limiting the scope of the committee's scrutiny. The amendments were unsuccessful.

COURT APPOINTMENTS

Senator Murray also made a speech on 11 October on a motion to take note of answers at question time about court appointments, urging some limitation on the government's unfettered power to appoint judges. In a subsequent speech he referred to the government thinking that it "has the numbers on the High Court". There have been several indications in recent times that court appointments may become the subject of more debate in the future.

ORDERS FOR DOCUMENTS

Four motions for the production of documents were routinely rejected during the period. Attached to this bulletin is a list of all the documents which the government has refused to produce to the Senate since the government gained its majority on 1 July 2005.

STATE OF ACCOUNTABILITY REPORT

The rejection of Senator Murray's amendments in relation to the Public Works Committee supports the thesis that accountability measures, however modest, will not be supported by any "rebels" in the ranks of the government parties, but rather "rebellions" will be confined to major matters of policy.

If the concerns about the references of bills to committees prove correct, the system may be headed for long-term decline.

The routine rejection of motions for documents, however innocuous they may appear, indicates an unwillingness of government to produce any documents of interest to senators.

The list of amendments to bills arising from committee reports, when it is compiled, may give a more positive picture.

OCCASIONAL NOTE

Attached to this bulletin is an occasional note on an interesting situation involving parliamentary privilege in Tasmania.

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

DOCUMENTS REFUSED TO THE SENATE

1 JULY 2005—20 OCTOBER 2006

COMMUNICATIONS—TELSTRA—Documents held by Telstra Corporation relating to shareholder attitude surveys conducted by Crosby/Textor.

DEFENCE—IRAQ—DEPLETED URANIUM—Report of the Australian Defence Force on the presence of depleted uranium in the Australian area of operations in Al Muthanna province in southern Iraq.

EDUCATION—VOLUNTARY STUDENT UNIONISM—Documents relating to options for voluntary student unionism.

EMPLOYMENT—COMMUNITY PARTNERS PROGRAM—The review of the Community Partners program, as commissioned by the Office of the Employment Advocate and conducted by Deloitte Touche Tomatsu.

ENVIRONMENT—NORTHERN TERRITORY—URANIUM MINES—Documents relating to the Commonwealth Government's authority to unilaterally approve uranium mines in the Northern Territory.

FAMILY AND COMMUNITY SERVICES—NATIONAL DISABILITIES ADVOCACY PROGRAM REVIEW—The National Disabilities Advocacy Program Review 2006, carried out by Social Options Australia.

FAMILY AND COMMUNITY SERVICES—SMARTCARD PROPOSAL—Documents relating to the smartcard proposal.

FINANCE—BOARD OF THE RESERVE BANK OF AUSTRALIA—APPOINTMENT—Documents relating to the nomination and appointment of Mr Robert Gerard to the Board of the Reserve Bank of Australia.

HEALTH—BETTER OUTCOMES IN MENTAL HEALTH INITIATIVE—Report from the review of the Better Outcomes in Mental Health Initiative.

HEALTH—REGULATION OF NON-PRESCRIPTION MEDICINAL PRODUCTS—Report provided by Deloitte Touche Tohmatsu relating to the regulation of non-prescription medicinal products.

IMMIGRATION—457 VISA PROGRAM—Report prepared by the Department of Immigration and Multicultural Affairs relating to T&R Pastoral and its employment of workers on subclass 457 visas.

IMMIGRATION—SIEV X—Documents detailing passengers purported to have boarded the vessel known as SIEV X.

LAW AND JUSTICE—AUSTRALIAN WHEAT BOARD—The Organisation for Economic Co-operation and Development foreign bribery survey response by AWB Limited.

LAW AND JUSTICE—BORDER RATIONALISATION TASKFORCE—Report of the Border Rationalisation Taskforce prepared in 1998.

SCIENCE AND TECHNOLOGY—COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION—Documents relating to the research and development work to be undertaken by the CSIRO.

SCIENCE AND TECHNOLOGY—COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION—SHEEP STUDY—Documents relating to a sheep study conducted by the CSIRO on the effect of transgenic peas on the immune response of sheep.

TAXATION—INFRASTRUCTURE BORROWINGS TAX OFFSET SCHEME—Documents held by the Department of Transport and Regional Services relating to taxation deductions under the Infrastructure Borrowings Tax Offset Scheme.

hl.pap.15186
20 October 2006

OCCASIONAL NOTES

PARLIAMENTARY PRIVILEGE – TASMANIAN CASE

An interesting case involving the law of parliamentary privilege in Tasmania recently arose.

Like New South Wales, but unlike all other Australian jurisdictions, Tasmania has no constitutional or statutory provision equivalent to section 49 of the federal Constitution conferring powers, privileges and immunities on the two Houses of the Tasmanian Parliament. For the possession of the immunity of parliamentary proceedings from impeachment or question in another place, the Bill of Rights, article 9 immunity, the Tasmanian Houses rely on the common law. As in New South Wales, the courts have held that the Houses possess such an immunity as a matter of common law, on the basis that it is inherent in a legislature.[1] It appears that the immunity is to all intents and purposes identical to the Bill of Rights, article 9 immunity adhering to the federal Houses by virtue of section 49 of the Constitution.

Unlike their New South Wales equivalents, however, the Tasmanian Houses have a statutory power to require the attendance of witnesses and the production of documents and to punish defaults as contempts, as well as other categories of contempts. (The New South Wales Houses rely on the common law also for their powers to compel evidence and to punish defaults, and the Supreme Court has found that they have such a power, also inherent in a legislature. The power is restricted in one way in which the section 49 power of the federal Houses is not, and the exact boundaries of the New South Wales power have not been delineated.[2])

The Tasmanian government has a contractual relationship with a firm called Tasmanian Compliance Corporation. An audit of the firm was performed by the consulting firm KPMG, and an audit report presented to the Tasmanian government. A committee of the Legislative Council of Tasmania is conducting a related inquiry, and asked for a copy of the KPMG report. The Premier declined to produce the report on the basis of advice of the State Solicitor-General, which, according to press reports, was to the effect that the Premier would not be protected by parliamentary privilege in handing over the report and the committee would likewise not be protected in dealing with it.

The Solicitor-General's advice has not been made public, so the basis of his opinion is not known, except for press reports. His reported opinion has been regarded as extraordinary by all other authorities who have been invited to comment. The President of the Senate conveyed to the President of the Legislative Council the advice of the Clerk of the Senate, which was contrary to the Solicitor-General's opinion.

As has been noted, the principle given statutory expression in article 9 of the Bill of Rights 1688, whereby proceedings in Parliament may not be impeached or questioned in any court

or other place, applies to the Tasmanian Houses and their committees. This has been confirmed in judgments which have never been questioned.

The giving of evidence to a parliamentary committee, including by presenting a document to a committee, is clearly part of proceedings in Parliament in all jurisdictions in which the article 9 principle applies. It is equally clear that, in all those jurisdictions, a person cannot be sued or prosecuted because of their participation in parliamentary proceedings.

The Parliamentary Privilege Act 1858 (as amended) of Tasmania provides in sections 1 and 3 that a House and a committee empowered to do so may require persons to produce documents, and non-compliance with such a requirement may be summarily punished by a House. The committee in question has been so empowered by the Legislative Council. By a common law principle, long ago explicitly applied to parliamentary committees, a person who complies with a direction to give evidence to a body with the lawful power to compel compliance may not be held liable in legal proceedings for giving that evidence.[3]

In addition, the Defamation Act 2005 of Tasmania provides for a defence of absolute privilege to an action for defamation in respect of evidence provided to a parliamentary committee. Section 27 of the Act refers to a publication in the course of proceedings of a parliamentary body, which explicitly includes the submission of a document to a committee. That statutory provision merely confirms, in relation to defamation law, one effect of the parliamentary privilege attaching to the submission of a document to a parliamentary committee.

The *general publication* of a document in the course of the proceedings of a committee is also protected, but it is a committee, not the person who presents a document to it, which is responsible for any such publication.

Press reports mentioned as a possible basis of the Solicitor-General's opinion a notion that Legislative Council committees were not properly established in the past. In the absence of any further information, no sense could be made of this point.

The press reports also suggested, however, that what the corporation may actually be threatening is to sue the auditor, KPMG, for its preparation of the audit report.

While the act of presenting a document to a parliamentary committee is protected by parliamentary privilege, and, if the committee publishes the document, every subsequent publication of that document is also protected by parliamentary privilege, the protection of parliamentary privilege does not extend retrospectively, as it were, to the preparation of a document which was not prepared for the purpose of proceedings in parliament. This principle was made clear by a recent judgment in the ACT Supreme Court.[4]

It is therefore theoretically possible for the corporation to sue KPMG for the preparation of the report. As the report was an audit report and was apparently prepared for the purpose of advising government on the proper conduct of public administration, a different privilege would almost certainly protect KPMG against any such suit.

The Solicitor-General was said to have relied also on a Queensland case. In that case, the Queensland court (in a judgment regarded as erroneous by the Queensland Parliament) declined to strike out a reference in a pleading to the republication in the course of parliamentary proceedings of a document the subject of a defamation action. The judgment appeared to give some comfort to the also erroneous notion that a plaintiff in a defamation action could claim subsequent publication in parliamentary proceedings as an aggravation of an original publication, but the court did not hold to that effect.[5] If that is what the Solicitor-General and the corporation are getting at, the judgment is an extremely weak reed for them to rely upon.

There was also reference to a New Zealand defamation case. That judgment concerned the question of whether, in a defamation action for statements made outside the protected parliamentary forum, related statements in the parliamentary forum may be referred to to elucidate the meaning of the unprotected statements.[6] This has nothing to do with the protection attaching to the presentation of a document to a House or a committee, or the receipt and publication of such a document by a House or a committee. A person who repeats part of the content of a tabled document outside the parliamentary forum is not protected by parliamentary privilege, but may have some other form of privilege. This has always been the situation in all comparable jurisdictions. This does not mean that the Premier or the Legislative Council or its committee can be in any way liable for the tabling and receipt of the document.

The crisis appeared to have ended when the Legislative Council committee issued a summons to the Premier to produce the document, and he agreed to do so. Subsequently he agreed to table the report in the Legislative Council, which happened to be sitting in Launceston as a regional sittings experiment. The inhabitants of that city were thereby provided with a live demonstration of parliamentary accountability.

So far no legal proceedings have been initiated. There may be further developments in the case, and perhaps the advice of the Solicitor-General will be disclosed.

---

1 *R. v Turnbull* 1958 Tas SR 80.

2 *Egan v Willis and Cahill* 1996 40 NSWLR 560, 1998 158 ALR 527; *Egan v Chadwick* 1999 46 NSWLR 563. The court held that documents revealing cabinet deliberations are immune from production. That restriction could not apply under section 49.

3 *R. v Wainscot* 1899 1 WAR 77.

4 *Szwarcbord v Gallop* 2002 167 FLR 262.

5 *Erglis v Buckley* 2004 2 QD R 599.

6 *Buchanan v Jennings* 2002 3 NZLR 145.