DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

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No. 207

for the estimates hearings 30 October—3 November 2006
and sitting period 6—9 November 2006

10 November 2006

ESTIMATES HEARINGS

The supplementary budget estimates hearings were held over the usual four days. Under standing order 26(10) and (12) questions are confined to matters of which senators have given notice, but as usual many matters were notified, and the annual reports of departments and agencies were open for questioning.

PROCEDURAL POINTS

The following issues of procedural interest arose (abbreviations in brackets indicate the relevant committee):

(1) A citizen's complaint that evidence given by the secretary of the Department of Employment and Workplace Relations at a previous estimates hearing was not accurate was put to the secretary and answered in the hearings, an example of a committee investigating a possible privilege matter in estimates hearings. (EWRE)

(2) Advice was sought before the hearings about the propriety of questions on provisions of bills currently before committees. The following advice was given by the Clerk:

> Under a resolution passed by the Senate in 1999 (adopting a report of the Procedure Committee), the Senate delineated the scope of questions at estimates hearings as "any questions going to the operations or financial positions of departments and agencies". While this is a very wide ambit, I do not think that it extends to questions about provisions of bills, for example, questions about the meaning, purpose, intention or effect of clauses in bills. Questions about departmental operations connected with bills would be relevant, for example, whether a department engaged consultants to assist in the preparation of a bill, at what cost it was prepared, and how it is to be administered.

> Where a bill is before a Senate committee, this means that the Senate has given that committee the task of conducting an inquiry specifically into that bill. This indicates an intention that any inquiry into the provisions of the bill be conducted at hearings and meetings of the committee specifically designated for that inquiry, and not pursued at estimates hearings which interested senators might not be able to attend and for which there is usually no notification of such specific subject matters of inquiries.

There was an exchange in the hearings about questions on a bill, although the questions were clearly directed to departmental operations in relation to a bill. (LCA)

(3) In the hearing relating to the Senate Department there was an exchange about advice on parliamentary privilege provided by the Clerk to the President and forwarded to the President of the Tasmanian Legislative Council, in relation to the privilege attaching to the tabling of documents. The advice itself was not questioned but some senators appeared to consider that there was a problem in the President forwarding the advice. The advices were presented to the committee. (FPA)

(4) The Australian Competition and Consumer Commission and other agencies declined to answer questions about Telstra on the basis that the answers might affect the integrity of the sale. (For Telstra's non-appearance, see Bulletin No. 206, p. 4.) The Committee has agreed to meet again on 27 November after the sale has been conducted to deal with such questions. As the supplementary estimates hearings are not subject to reporting dates, there is nothing preventing a committee extending its hearings in this way. There were bipartisan expressions of disapproval of deferral of questions on this ground and indications that it was not to be a precedent. (ECO)

(5) The SBS refused to table legal advice on the basis of legal professional privilege, but when it was pointed out that the advice was to SBS and it could therefore waive the privilege, the ground shifted to commercial confidentiality. The Senate's resolution about claims of commercial confidentiality refers only to agencies governed by ministers, and requires ministers to make any such claim, but the principle has been followed that the governing body of an independent statutory authority should make the claim. (ECITA)

(6) There were several other refusals to produce information without public interest immunity grounds being properly raised. (primarily FPA)

(7) There were criticisms of departments and agencies for tardiness in answering questions on notice, but less than usual in the recent past. There appears to be a growing reluctance to answer questions about when questions on notice were sent to ministers'

offices. At least one agency partly declined, partly took on notice such a question. (FPA)

(8) The question of whether evidence should be given about the activities of previous governments arose in the context of questions about Mufti Halali's permanent residency; the questions were taken on notice, so the point of principle remains to be resolved. (LCA)

(9) The Australian Federal Police raised the possibility of prejudice to police investigations in the context of revelations about further investigations of United Nations Iraq sanction breaches. (LCA)

(10) There was an interesting discussion about the relationship between the Director of Public Prosecutions and agencies which conduct investigations into possible criminal offences, and how the DPP receives briefs from agencies. (LCA)

(11) The government maintained its ban on answering questions relating to matters before the Cole Commission on the Iraq wheat bribery affair, but an interesting addition to the matter was made by the Wheat Export Authority, which indicated that its officers had seen the draft Cole report and were bound by a requirement of confidentiality (such a requirement imposed by Royal Commission is of course not legally binding in a parliamentary committee inquiry, but the committee did not press the matter). (RRAT)

(12) It was revealed that payments of up to $2 billion are being made to support companies, mainly in the car industry, without disclosure of the amounts. There was a refusal to reveal the amounts going to particular companies because of confidentiality agreements. There were bipartisan expressions of concern about the propriety of this situation. (ECO)

(13) The matter of the dismissed Department of Foreign Affairs and Trade officer and the proceedings against him was again raised, but again without any resolution, as the matter is still pending (see Bulletin No. 202, pp 3-4). (FADT)

(14) In spite of the distinction drawn in Privilege Resolution 1(16) and the chairs' opening statements between opinions on matters of policy and other questions about policy, departments and agencies are still confused about the distinction, and some attempted to avoid any questions relating to policy. (ECO)

(15) One committee, by unanimous consent, allowed senators to raise matters of which notice had not been given under standing order 26(10). Committees probably do not

have the power to suspend the Senate's rule in this way, but as it supported the rights of senators to ask questions it was not objected to. (FADT)

(16) It was revealed that not only the government drafters gave assistance to Senator Patterson for the drafting of her stem cell research bill, but the Department of Family and Community Services and Indigenous Affairs engaged a consultant to assist with the bill, and that consultant was the one who compiled the Prime Minister's response to the Lockhart report. (CA)

(17) The indigenous policy officer who appeared anonymously on the ABC program *Lateline* in relation to the problems in indigenous communities failed to appear before the committee because, it was stated, of the stressfulness of the occasion, but other officers answered relevant questions. (CA)

(18) The Senate's permanent order for the production of indexed lists of files proved its usefulness when it revealed the existence of a file on civilian casualties in Iraq, and this led to further probing on this contentious subject. Earlier questioning and allegations about the government's lack of interest in the figures may have led to the creation of the file. There have been suggestions that departments and agencies have responded to the order for the indexed lists by giving files opaque titles. (FPA)

(19) The Australian Electoral Commission was unable to find evidence of possible breaches of electoral law referred to it following the inquiry into the regional partnerships and sustainable regions programs, and made reference to the inability, because of parliamentary privilege, to use evidence provided to the committee. (The committee evidence cannot be used directly in any legal proceedings, but there is nothing to prevent investigative bodies seeking independent evidence of matters referred to in the parliamentary evidence.) (FPA)

(20) Legal advice about the sale of Medibank Private was refused, even though the government has tabled other advice on the subject (see Bulletin No. 205, p. 2). (FPA)

(21) References were made to the lateness of annual reports. The Centrelink annual report was tabled on the date of the agency's appearance. (several committees)

(22) There is still uncertainty amongst senators about the rules now applying to occupancy of the chair in the chairperson's absence. If the Deputy Chair is present, he or she must occupy the chair in the Chair's absence. The provision allowing the appointment of a temporary Chair applies only where both the Chair and the Deputy Chair are absent.

MATTERS RAISED AND REVELATIONS

The following significant matters were raised or revealed during the hearings:

(1) There is a huge increase in government advertising costs, occurring, as was pointed out, before the election year has even started. The Department of Prime Minister and Cabinet had to make a correction after neglecting to mention the matter in its annual report. (FPA)

(2) Conditions imposed on some visa holders under 457 visas, and investigations of breaches of the conditions applying to the issue of such visas, were extensively questioned. (LCA)

(3) Further possible breaches of United Nations Iraq sanctions are under investigation by the Australian Federal Police. (LCA)

(4) Questions were asked about the response to the recommendations of a committee report on the regional partnerships program and the tightening of guidelines for the grants. (RRAT)

(5) Centrelink has awarded a contract worth $480,000, for a consultancy on ethics advice, to a former public servant, without going to tender. (FPA) Similarly, AusAid engaged as a consultant, on terms which attracted questioning, one of its former officers, within a short time after that officer's departure. (FADT)

(6) Questions about the proposed sale of Medibank Private were answered without any grounds for refusal being raised, by contrast with the Telstra case. (CA)

(7) Services to indigenous communities were the subject of robust bipartisan criticism. (CA)

(8) Evidence about funds devoted to renewable energy research had to be corrected by CSIRO in the light of answers given to questions in the House of Representatives. (EWRE)

(9) The ABC and SBS were again the subject of questions by Coalition senators about alleged bias, but on this occasion the ABC board was also criticised by Opposition senators for allegedly censoring programs at the behest of Coalition senators and the government. (ECITA)

(10) The Office of the Employment Advocate was subject to hostile questioning for reducing the collection of statistics about the effects of AWAs. (EWRE)

(11) The Iraq war was again the subject of questioning, with attention given to whether the government has received appropriate updates on the situation in Iraq from the Office of National Assessments. (FPA)

(12) Construction of the new Defence headquarters is about to begin, five years after it was announced, and with a five-fold increase in the original estimated cost of $200 million.

SENATE SITTINGS

LEGISLATION

All of the legislative time of the period was intended to be devoted to Senator Patterson's bill on stem cell research, the Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006, but the allocation of this time and the extension of the sitting hours proved unnecessary, and the bill was passed on the second day.

The Community Affairs Committee reported on the bill out of sittings; it did not make the prescribed reporting date, and had to present an interim report followed by a final report, both of which were tabled on the first day of the sittings. This is the only course open to a committee which is unable to achieve the prescribed reporting date, and when the Senate is not sitting there is no possibility of the committee being given any other direction.

The bill was the subject of a "free" or "conscience" vote. On this occasion the statement that such a vote is granted by the Prime Minister was repeated by six senators, including two non-government senators. It is only a matter of time before it is confidently stated that the long-standing practice is for a "free" or "conscience" vote to be granted by the Prime Minister.

Leave was granted for Senator Patterson to speak from the front bench during the committee stage of the bill, so that she could have access to the advisors' benches on the government side. The bill was passed at the second reading by 34 votes to 31, various amendments from various senators were agreed to and others rejected, and then the bill passed the third reading by 34 votes to 32.

As the final form of the bill represents the compromises necessary to achieve this bare majority, supporters of the bill will be hoping that it is not amended in the House of Representatives, as its return to the Senate could put its passage in jeopardy.

Amendments moved by the Australian Greens were agreed to by the government on 9 November in consideration of the Child Support Legislation Amendment (Reform of the Child Support Scheme—New Formula and Other Measures) Bill 2006, and the novelty of the occasion was noted. The amendments were said to be approved by the author of the report which recommended changes to the child support scheme.

This bill illustrates the fondness of the government drafters in recent times for long bill titles. They have at least the advantage of identifying the subject matter of bills which would otherwise have indistinguishable titles.

REFERENCE OF BILLS TO COMMITTEES

Two government amendments were made on 8 November to the Crimes Amendment (Bail and Sentencing) Bill 2006 to reflect recommendations of the Legal and Constitutional Affairs Committee, another success for that committee. The bill, designed to prevent reference to customary indigenous law in making bail and sentencing decisions, was opposed by the non-government parties, and three Democrat amendments, also said to arise from the committee's inquiry, were rejected.

The government continues to restrict the times for inquiries by committees into bills. The motion to adopt the Selection of Bills Committee report on 8 November was again the subject of a government amendment to prescribe a reporting date on which the committee could not agree, and an amendment by the Democrats to extend the date was rejected.

REFERENCES TO COMMITTEES

Similarly, the government continues to control references to committees.

A proposed reference on aviation safety was again rejected on 8 November. A reference on water and security of agriculture was rejected on 9 November, despite current concerns about that subject.

FORMAL MOTIONS

The formal motions procedure, under standing order 66, whereby motions are given precedence and put and determined without debate if no senator objects, has assumed even greater significance in the political process in the current numbers situation in the Senate. They are used to put senators to the test on their opinions, and to require parties to take positions on matters of controversy. For example, motions were put forward on the detention of David Hicks and US military commissions after Senator Joyce made statements about the

propriety of Hicks' continued imprisonment and proposed trial. Senator Joyce put forward his own motion, which he amended by notice in writing under standing order 77 to achieve the support of his Coalition colleagues, and other motions on the subject were voted down.

STATE OF ACCOUNTABILITY REPORT

The estimates hearings continue their valuable function of disclosing information not otherwise available and compelling explanations of government administration, in spite of some refusals to answer without articulation of recognised public interest immunity grounds.

Committee inquiries are still being kept out of controversial areas.

The system for inquiries into bills continues to achieve some successes, in spite of the imposition of severe time limits.

OCCASIONAL NOTE

Attached to this bulletin is an occasional note, updating the occasional note attached to Bulletin no. 206 in relation to a parliamentary privilege case in Tasmania, and referring to an interesting case in the United States about a mistake in a bill.

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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OCCASIONAL NOTES

PARLIAMENTARY PRIVILEGE – TASMANIAN CASE - UPDATE

The state Solicitor-General's advice on which the Tasmanian government relied has still not been disclosed, but there have been some further revelations.

The Solicitor-General apparently referred to a judgment in the Supreme Court of the Northern Territory in 1971 in which it was held that the old Legislative Council of the Northern Territory, established under the superseded *Northern Territory (Administration) Act 1910*, did not possess general inquiry powers. How this finding can be applied to the Parliament of the State of Tasmania, with its statutory inquiry powers, remains a mystery.

There was also a reference in debate in the Legislative Council to the *Egan* judgments in New South Wales and some doubt about the power under the common law doctrine prevailing in that state of a House to require the production of "documents of a private nature". This raises a completely different question of whether the KPMG report could possibly be a document "of a private nature". Even if the power to subpoena "private" documents is doubtful in New South Wales (and that is a leap too far on the *Egan* judgments), the application of the supposed doubt to Tasmania, where the law is different, remains to be established.

Principals of TCC have now been charged with conspiracy. It may be that the government did not wish to reveal the KPMG report because of possible prejudice to the criminal trial. This ground for not disclosing the report, however, was not mentioned in all the debate on the subject.

The Hobart Mercury obtained a copy of the KPMG report under the state freedom of information laws, apparently with the figures deleted but with KPMG's adverse comments on TCC included. The newspaper stated:

> The KPMG report findings, obtained under FoI, can be published by this newspaper since the same report has been tabled in the Legislative Council committee inquiring into the TCC and building accreditation in Tasmania.

It appears that the Legislative Council committee has not published the KPMG report, and therefore the publication of it by the newspaper is not protected by parliamentary privilege, but any risk to the newspaper would now appear to be negligible.

MISTAKE IN A BILL

The courts in the United States have been called upon to deal with a case involving a mistake made in a bill passed by the two Houses of Congress.

Earlier this year the two Houses passed, and the President signed, a bill which cut expenditure on certain government programs by $US39 billion. Included in the bill was a provision relating to the time for which Medicare will cover the cost of hiring some kinds of medical equipment. After very complicated proceedings on the bill, including a conference between the Houses, the Senate determined that the relevant period should be 13 months. A mistake was made and the text of the bill as sent to the House included the figure of 36 months, and the House approved of the bill with this figure included. The error was detected, and the figure was corrected before the bill was signed by the President. The Senate subsequently passed a resolution declaring that its legislative intention was reflected in the figure of 13 months. The difference in the figures would have involved additional expenditure of $US2 billion.

A group of Democratic Party members of the Congress brought a suit claiming that the law as passed was not valid because it had not been passed by the two Houses in accordance with the Constitution.

A federal District Court recently dismissed the suit, on two grounds.

First, the plaintiffs lacked standing to bring the suit, because they were not able to establish "personal injury fairly traceable to the defendants' allegedly unlawful conduct and likely to be redressed by the requested relief". (The defendants were the President and other office-holders involved in certifying the bill.)

Second, the court relied on the well-established principle that the courts cannot go behind the certification of the presiding officers of the two Houses and the signature of the President determining the text of the law as certified to be the text as duly enacted; that signed text is presumed to be the duly-made law.

In so holding, the court followed a judgment of the Supreme Court in 1892. In expounding the "enrolled bill rule", the Supreme Court made, and quoted from earlier judgments, some interesting and colourful observations about the legislative process and the records of legislatures:

> … the framers of the constitution, in exacting the keeping of the journals, did not design to create records that were to be the ultimate and conclusive evidence of the conformity of legislative action to the constitutional provisions relating to the enactment of laws. In the nature of things it was observed these journals must have been constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of

> a numerous assembly. … Can any one deny that, if the laws of the state are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its very foundation? … It is scarcely too much to say that the legal existence of almost every legisaltive [sic] act would be at the mercy of all persons having access to these journals; for it is obvious that any law can be invalidated by the interpolation of a few lines or the obliteration of one name and the substitution of another in its stead. I cannot consent to expose the state legislature to the hazards of such probable error or facile fraud.
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> … Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should, at any and all times, be liable to be put in issue and impeached by the journals, loose papers of the legislature, and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable.
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> … Every other view subordinates the legislature, and disregards that coequal position in our system of the three departments of government. If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation, and multiplying a hundred-fold the alleged uncertainty of the law.
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> … Legislative journals are made amid the confusion of a dispatch of business, and therefore much more likely to contain errors than the certificates of the presiding officers to be untrue. (*Field v. Clark*, 143 U.S. 649)

It is not known at this stage whether any other cases will be brought or whether any appeal will be lodged against the District Court's judgment.