DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

hl.pro.prob.15593

No. 215

for the sitting period 7—17 August 2007

20 August 2007

ESTIMATES HEARINGS: ANSWERS TO QUESTIONS ON NOTICE

Some readers of newspapers may be under the impression that Senate estimates hearings operate all year around, as revelations appear in answers to questions placed on notice during the budget hearings and the answers are published. Statistics supplied to senators, however, reveal that over two-thirds of all questions placed on notice during those hearings were not answered by the deadlines set by the committees. There is a suspicion on the part of some senators that some ministers and departments will delay answering questions, knowing that there will probably be no estimates hearings later this year because of the election, and hoping that they will thereby escape answering questions at all. The Department of Employment and Workplace Relations still has a large number of unanswered questions from the 2006 hearings. Departments and agencies are advised to continue answering questions during election periods, and no doubt unanswered questions will be followed up eventually.

COMMITTEE REPORTS

Committees presented 20 reports on legislation during the winter long adjournment and the following two weeks of sittings. Several of the reports recommended amendments to bills. Most of the bills were not dealt with by the end of those sitting weeks, supporting the contention that unreasonably tight deadlines are placing undue pressure on the committees examining the bills. The Environment, Communications, Information Technology and the Arts Committee's report on the Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007 contained an Opposition minority report on the "procedural failings of the inquiry".

Committee reports on other subjects are now relatively rare. The Employment, Workplace Relations and Education Committee presented a report on workforce problems in the transport industry on 9 August. The Rural and Regional Affairs and Transport Committee

presented on 16 August its report on the controversial proposed Queensland Traveston Dam, an example of inquiry into a matter largely of state responsibility. All parties represented on the committee were more or less critical of the proposed dam.

LEGISLATION

The consideration of legislation began favourably, with the government adopting on 7 August amendments recommended by the Legal and Constitutional Affairs Committee in relation to the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill, which contained controversial provisions for warrantless searches. One of the committee's amendments restricted the scope of such searches.

Most of the time devoted to legislation during the period was spent on the Northern Territory emergency package, a range of complex measures proposed by the government to deal with conditions in indigenous communities in the territory, and the equally complex water bills to implement the government's plan for the Murray-Darling Basin. Both bills were rushed through the House of Representatives, but the Senate was able to spend more time on them.

The Northern Territory package was referred to the Legal and Constitutional Affairs Committee for a one-day inquiry by way of a government amendment to a Democrat motion of 8 August. There was much criticism of the curtailment of the inquiry. The committee presented a comprehensive report by a herculean effort on 13 August. The report recommended some administrative measures in relation to the legislation, and contained additional comments by the Opposition and dissents by the Greens and Democrats. The Scrutiny of Bills Committee tabled an Alert Digest on the bills on the same day, containing many comments. In the proceedings on the bills the government undertook to adopt the committee's recommendations, but rejected all proposed amendments. Two of the bills were appropriation bills, one purportedly for the ordinary annual services of the government. It was not explained how urgent appropriations for an emergency situation in the Northern Territory could possibly be for ordinary annual services. Both bills were treated as amendable bills (see *Odgers*, Supplement, p. 284 after para. 1; see also below, under Appropriations and Staffing Committee).

The water bills were referred to the Environment, Communications, Information Technology and the Arts Committee by a Selection of Bills Committee report, also for a very restricted inquiry. The committee's report, also produced by a remarkable effort, and presented on 14 August, contained reservations but no major dissent. The Scrutiny of Bills Committee presented a Digest on the bill on 15 August, containing several comments. In proceedings on these bills, only the Greens moved amendments, all of which were rejected.

The treatment of these bills demonstrates that the Senate is now often unable to give detailed consideration to matters raised by the Scrutiny of Bills Committee when the government is determined to push bills through. The government's responses to some of the committee's comments on the Northern Territory emergency bills were presented during the debate on the bills. The committee raised substantial problems with those bills, particularly the presence of "Henry VIII clauses". There was considerable discussion about the bills using the expression "reasonable compensation" for compulsory acquisition of property instead of the constitutional expression "just terms". The reasons for this terminology were not fully explained, and raised suspicions about the government's motives.

SELECTION OF BILLS COMMITTEE

In debate on a Selection of Bills Committee report on 16 August, the non-government parties complained that the government was ignoring the convention that bills are referred to committees for inquiry if any party wishes them to be referred. The occasion of this dispute was the refusal by the government to allow two non-government bills to go to committees. Several bills were referred for inquiries during the three-week adjournment.

APPROPRIATIONS AND STAFFING COMMITTEE

The annual report of the Appropriations and Staffing Committee presented on 13 August contained further documentation on the question of the ordinary annual services, showing that the government is keeping to its position that expenditure on existing outcomes is expenditure on ordinary annual services, but the committee has been advised not to accept this position.

REGULATIONS AND ORDINANCES COMMITTEE

The Regulations and Ordinances Committee, in accordance with its recent practice, tabled on 9 August a volume of its correspondence with ministers, indicating the very detailed scrutiny by the committee of hundreds of statutory instruments.

PRIVILEGES COMMITTEE

The Privileges Committee presented on 7 August its 50th report in the right-of-reply series, recommending that a person referred to in the Senate be granted a right of reply. As with the previous 49 reports in that series, the Senate accepted the committee's recommendation. This means that the right of reply has been exercised on average 2½ times per year since the right of reply procedure was adopted in 1988.

PRESIDENT'S RESIGNATION

The President, Senator Calvert, having announced his intention to resign as President and as a senator, resigned as President on 14 August. Senator Ferguson was elected President on the same day. As the Greens nominated a candidate, it was necessary to hold a ballot for the election. Under section 17 of the Constitution, the President resigns to the Governor-General. In accordance with the usual custom, after the election the new President was presented to the Governor-General, who attended in Parliament House for that purpose. Under standing order 27(3) the new President automatically ceased to be a member of committees other than those of which the President is an ex officio member.

ACCOUNTABILITY REPORT

Committees undoubtedly have been placed under heavy pressure in dealing with bills, and the scrutiny of bills has been less thorough than in the past. The Northern Territory emergency bills and the water bills, judging by major pieces of past legislation, such as the Native Title bills, would have attracted between twice and five times the amount of scrutiny in the past.

ODGERS' AUSTRALIAN SENATE PRACTICE, SUPPLEMENT

The cumulative Supplement to the 11th edition of *Odgers' Australian Senate Practice*, updated to 30 June 2007, has been issued in electronic and printed form.

OCCASIONAL NOTE

Attached to this bulletin is an occasional note on a development in the law of parliamentary privilege involving Australia/United States cooperation.

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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hl.pro.15583
20 August 2007

OCCASIONAL NOTES

PARLIAMENTARY PRIVILEGE: AUSTRALIAN SENATE/US HOUSE OF REPRESENTATIVES COLLABORATION

The Australian Senate has succeeded in bringing about a significant development in the law of parliamentary privilege by a fruitful collaboration with the House of Representatives–not the Australian House of Representatives but the US House of Representatives.

In 2000 a senator's office was raided by Australian Federal Police investigating alleged misuse of entitlements, and documents, printed and electronic, in the office were seized. The senator challenged the legality of the seizure of the material, and the Senate supported his challenge in part, on the basis of parliamentary privilege. The Senate's submission was to the effect that the immunity of proceedings in Parliament from impeachment or question in the courts, as explicated in section 16 of the *Parliamentary Privileges Act 1987*, means that a senator should not be compelled by legal process to produce documents closely connected with the senator's participation in parliamentary proceedings. The rationale of this interpretation is that senators would be impeded in their free participation in parliamentary proceedings if the documents connected with those proceedings could be seized by law enforcement agencies, even where the documents could not be subsequently used in legal proceedings.

In presenting this submission, the Senate had only one real legal precedent to appeal to. This consisted of a judgment of the US Court of Appeals in 1995 which held that a member of Congress could not be compelled by the discovery of documents process to reveal documents associated with the member's legislative activities. The court held that compelling members to produce such documents would have a chilling effect on their information gathering and their legislative functions, and that the discovery process could not be used for a wide-ranging search of members' documents. (*Brown and Williamson Tobacco Corp v Williams* 1995 62 F 3d 408)

This judgment was persuasive in influencing two justices of the Queensland Court of Appeal in 1997 to hold that a senator could not be compelled by discovery to produce documents prepared for the purpose of parliamentary proceedings. (*O'Chee v Rowley* 1997 150 ALR 199)

The difficulty was that these judgments dealt with the discovery process, not with seizures under search warrant, and there was no certainty that the courts would apply the same principle in the case of such seizures. On the contrary, it was quite possible that the courts would draw a distinction between legal processes such as discovery and the execution of search warrants, which allows the executive government to seize materials to gain evidence for a prosecution but does not determine whether the evidence can subsequently be admitted before a court.

In the challenge brought by the senator, a justice of the Federal Court held that the question was one for the Senate and the executive and not for the court, as search warrants are an executive process. This judgment has been much criticised and is not likely to be followed in the future. The judgment produced the desired result, however, because the court ordered that the seized documents be delivered to the Senate. The Senate was then able to arrange for a neutral third party to examine the documents and to return those protected from seizure, according to the view taken by the Senate, to the senator. (*Crane v Gething* 2000 169 ALR 727)

A similar procedure was used in 2002 following the seizure under warrant of documents from the office of another senator. In that case, the state police accepted that some documents are immune from seizure by virtue of parliamentary privilege, and agreed to the process for the neutral "filtering" of the documents.

The Commonwealth government also accepted the parliamentary privilege argument of the Senate, and agreed to a procedure whereby, in all cases of future searches under warrant of the premises of senators and members, there would be a neutral "filtering" of the seized documents.

In 2006 the congressional office of a member of the US House of Representatives was searched and documents seized under warrant by federal law enforcement agencies investigating alleged corruption. This is believed to be the first occasion of a search of a congressional office, and the congressman's challenge to the search provided the first occasion for the courts to consider whether the legislative immunity protected legislative documents from such seizure. The principal agency behind the search, the Department of Justice, accepted that some legislative materials would be immune from seizure, and had put in place its own "filtering" process to ensure that legislative material was not seized. The congressman challenged the search on the basis that any seizure in a member's office is unconstitutional on separation of powers grounds. The House of Representatives did not support that claim, but maintained that the congressman should have been allowed to "filter" immune material before non-immune material was seized.

In making this submission, the House of Representatives drew upon the Australian Senate's precedents, and particularly the agreements entered into by the Senate and the police in relation to the conduct of searches. The precedents of the New South Wales Legislative Council, which has successfully asserted the immunity, were also referred to. Relevant material was provided by the Senate Department to the House counsel via researchers in the Congressional Research Service of the Library of Congress, who have considerable expertise in this area. Submissions were also made to the court by former members of Congress, one of whom specifically recommended the Australian procedures.

In a judgment delivered on 3 August 2007, the Court of Appeals held that the search and seizure violated the legislative immunity, that the congressman should have been allowed to claim immunity for particular documents before they were seized, and that that claim should have been determined by the court so that immune documents would not fall into the hands of the law enforcement agencies. The court thereby came to a position identical to that argued by the Australian Senate in its submissions to the Australian Federal Court in 2000. (*US v Rayburn House Office Building, Room 2113*, 2007, not yet reported)

This judgment will be persuasive if the question again comes before the Australian courts. That is not likely to happen, however, because of the agreement of our law enforcement agencies to the "filtering" process whereby documents claimed to be immune are withheld from seizure pending the determination of a claim. The only gap in the Australian law is that, due to the Federal Court's judgment, it is not clear whether the courts should be making that determination or whether the Senate itself should do so, as in the past cases. It appears that, for the time being, the government is content to have the Senate making that determination through a neutral third party in future cases.

This development provides an instructive example of collaboration between two Houses in different jurisdictions and in different legal systems, to bring about results in both jurisdictions favourable to the independence and integrity of the legislature.