DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

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**No. 224**

**for the sitting period 15–25 September 2008**

**26 September 2008**

## DELEGATED LEGISLATION

A motion by Senator Barnett to disallow an item in the table of Medicare benefits raised the question of whether such a small part of a statutory instrument may be disallowed. The *Legislative Instruments Act 2003* provides that the Senate may disallow a "provision" of an instrument. The principle followed is that a provision is any part of an instrument that may be disallowed without preventing the operation of other parts of the instrument, although, unlike the previous relevant legislation, the Act has not been judicially construed (see *Odgers' Australian Senate Practice*, 12th ed., pp 332-3).

The disallowance motion was expected to be debated at length, but as part of a compromise between supporters and opponents of the motion put in place on 15 and 16 September, Senator Barnett withdrew his notice of motion following a reference to the Finance and Public Administration Committee concerning the administration of the item in question. Because the notice of motion was given for the last available day for resolving it, and it was desired to put the compromise in place before leaving it to the last day, the notice of motion was brought on early by Senator Barnett by leave and then notice of intention to withdraw it given under standing order 78. A senator cannot be made to bring on earlier a motion of which a senator has given notice (see *Odgers*, 12th ed., pp 176-7).

The government unsuccessfully sought on 16 September the approval of the Senate, in accordance with the relevant provisions of the Legislative Instruments Act, to remake a Health Insurance (Dental Services) Determination which was disallowed on 19 June.

The Act refers to the rescission of a disallowance motion for this purpose, but such a motion is not regarded as a rescission motion within the terms of the Senate's procedures, because it has prospective effect only, and therefore does not require the special notice specified by standing order 87 (see *Odgers*, 12th ed., p. 182).

The Regulations and Ordinances Committee tabled on 18 September its voluminous correspondence with ministers, indicating the intensity of its scrutiny of legislative instruments. A statement by the chair on 22 September indicated that the committee would examine the use and interpretation of the term "misbehaviour" as a ground for removal of statutory office holders. In various legislation the term has been used in a different way from its use in section 72 of the Constitution.

**COMMITTEE REFERENCES**

The Community Affairs Committee received a reference on 15 September on expenditure on Indigenous affairs and social services in the Northern Territory. It was pointed out that this reference has the potential to overlap with the inquiry by the Select Committee on Regional and Remote Indigenous Communities appointed earlier this year. Standing order 25(13) enjoins legislative and general purpose standing committees not to inquire into matters under examination by a select committee, so that technically it would be up to the Community Affairs Committee to see that duplication does not occur.

The Community Affairs committee also received, on 18 September, a reference to follow up the implementation of its recommendations in reports dating back to 2001 and 2004 on child migration and children in care. These reports have been particularly the subject of concern about claimed government inaction.

**COMMITTEE REPORTS**

The Rural and Regional Affairs and Transport Committee presented on 18 September a report on the Civil Aviation Safety Authority, continuing a long campaign by that committee to improve the governance and administration of that body in the cause of air safety.

The Select Committee on State Government Financial Management presented its report on 18 September. The report contained a great deal of data, but, unsurprisingly, senators were divided on the soundness of state government finances. The final report of this committee means that there are now four of the six select committees appointed earlier this year still in operation.

## LEGISLATION

The government moved on 17 September a motion on notice to have the luxury car tax package of bills read a second time, the second reading having been rejected on 4 September. It was expected that the bill would pass because of compromise between the government and the minor parties and independents, but a lengthy debate ensued. The bills were eventually passed with several amendments (moved as requests, see below) reflecting the compromise on 23 September.

The Tax Laws Amendment (Medicare Levy Surcharge Thresholds) Bill was negatived at the second reading on 24 September, the government having failed to persuade Senator Fielding to support the changes in the Medicare threshold.

The government had more success, however, with legislation to remove the exemption of certain fuel condensate from excise; the relevant package of bills was passed on 25 September in spite of the resistance of the Opposition, with amendments (again moved as requests) by the government and a reference moved by Senator Xenophon to the Economics Committee.

The Trade Practices Legislation Amendment Bill was passed on 16 September with amendments moved by the Opposition and Senator Xenophon. Senator Xenophon also succeeded in having a reference to the Economics Committee on issues raised by the bill passed as an amendment to the motion for the second reading.

## BILLS IMPOSING TAXATION

The luxury car tax package of bills and legislation relating to the tax on fuel condensate raised questions relating to the interpretation of section 53 of the Constitution and the occasions on which amendments moved to bills in the Senate should be moved as requests in accordance with that section.

The packages of bills increasing the tax on luxury cars and extending excise charges to certain condensate consist of bills which impose the taxation and bills which are said to "facilitate" the imposition of the taxation (the government drafters at first argued that extending the excise tariff to the condensate was not an imposition of taxation, but subsequently changed their view).

The second paragraph of section 53 provides that the Senate may not amend a bill imposing taxation, while the third paragraph provides that the Senate may not amend a bill so as to increase any proposed charge or burden on the people.

As was pointed out in the foundation Senate debate on the interpretation of section 53 in 1903, the third paragraph cannot have any application to taxation bills, because if a taxation bill contains a **proposed** charge or burden which might be increased by a Senate amendment, it must be a bill imposing taxation, which cannot be amended at all. (See *Odgers' Australian Senate Practice*, 12th ed., pp 280-4, 287-90 and 297-300)

Contrary to this necessary conclusion, the government drafters have occasionally argued that a bill which does not impose taxation may be the subject of an amendment which would increase the taxation payable, and that such an amendment should therefore be moved as a request under the third paragraph of section 53. This claim was advanced in relation to the condensate package of bills.

An examination of both packages of bills and the proposed government amendments to them indicates that the provisions in the bills which supposedly do not impose taxation are integral to the imposition of taxation in the other bills. It was therefore decided to treat all the bills in the packages as bills imposing taxation, and all amendments to them as requests. This effectively deals with the government drafters' claims that the government amendments to the supposed non-imposition bills would increase the taxation payable.

This conclusion may also be applicable to other packages of bills where some bills in the package impose the taxation while others "facilitate" the imposition of the taxation.

**OPPOSITION PENSION INCREASE BILL**

The Opposition announced that it would introduce a bill to increase age pensions, with the intention of putting pressure on the government to respond to widespread publicity about the inadequacy of the pension. A question was raised whether such a bill could be initiated in the Senate.

On the hitherto accepted interpretation of section 53 of the Constitution, there is no barrier to the introduction of such a bill in the Senate.

That section provides, in part:

> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate.

A bill to increase the rate of age pensions does not need to contain an appropriation of money. Age pensions, and other entitlements under the Social Security Act 1991, are automatically paid under a special appropriation of indefinite duration and unlimited amount in section 242 of the Social Security (Administration) Act 1999. Any increase

in pensions is paid for under that appropriation without any necessity for any further appropriation to be made.

Bills which involve increased expenditure from appropriations which have already been made, or will be made in the future, have been commonly introduced in the Senate since 1901. The right of the Senate to initiate such bills was expounded in a ruling by President Givens in 1921. He stated that, even by that early stage, such bills had "frequently" been initiated in the Senate.

Many government bills have fallen into that category, including several in recent times which have had the effect of increasing expenditure under a standing appropriation, as well as others relying on other appropriations.

The bill was passed against the resistance of the government on 22 September. There are several precedents for the Senate passing a private senator's bill against the wishes of the government, notably a bill to override Northern Territory laws about mandatory sentencing of juveniles in 2000. Another such bill, to prevent the construction of the Franklin Dam in Tasmania, was passed by the Senate in 1982, and it was pointed out at the time that the legislation would render the Commonwealth liable for millions of dollars in compensation for acquisition of property.

In spite of the considerations outlined above, the government chose to suppress the bill in the House of Representatives on the basis of a claim that it was "unconstitutional", supported by a statement by the Speaker. Debate on the matter was "gagged".

Attached are the advices that were provided to senators, and released by them, on the constitutional question.

**WAR POWERS BILL**

This is the shorthand title commonly given to a bill to provide for parliamentary approval of overseas service by members of the Defence Force, first introduced by the Australian Democrats in 1985 and in a modified version by Senator Bartlett earlier this year. Senator Ludlam of the Australian Greens introduced on 17 September a bill identical to Senator Bartlett's bill. Senator Ludlam could have chosen simply to have put his name on Senator Bartlett's bill, but introducing it afresh has the advantage of reiterating the issue.

## ORDERS FOR DOCUMENTS

The government declined on 15 September to produce two documents in response to Senate orders, relating to a paper on emissions-intensive companies and a report on a strategic review of climate change policies. In relation to the first document it was said not to exist, but that there was an unauthorised release of some internal notes, while the second document was said to be prepared for the purpose of Cabinet deliberations and was withheld on that basis. In response, Senator Milne suggested that the government was following the path of its predecessors of instinctively withholding information, and pointed out that the government had said that it wanted to encourage public debate on climate change, and that withholding information would not do so. It appears, however, that no further action will be taken in relation to the withholding of the documents.

Another report by the Auditor-General on the operation of the Senate's order for lists of departmental and agency contracts was presented on 25 September.

A report of the Commonwealth Ombudsman on controlled operations ("stings") by law enforcement agencies was presented on 17 September in accordance with a past amendment made by the Senate requiring production of such reports.

## PROCEDURE COMMITTEE REPORT

The Procedure Committee presented a report on 17 September, the major element of which is a proposal by Senator Ferguson to restructure question time to make it a more effective instrument of government accountability. Senator Ferguson proposes that the current system of questions without notice, with one supplementary question allowed to the questioner, be replaced by a system of primary questions on notice with up to six supplementary questions allocated amongst the questioner and other senators. The Procedure Committee did not endorse this proposal, but reported it for consideration by senators. The proposal was debated on 17 and 18 September, with an amendment by Senator Fielding indicating his disagreement with the proposal. The Procedure Committee indicated that it would consider the proposal further after the senators had been consulted.

The committee's report also referred to proposals relating to reference of bills to committees, without recommending any changes to existing procedures; recommended the abolition, as a temporary trial, of the provisions in standing order 72 for questions to senators other than ministers and to chairs of committees; recommended a minor clarifying amendment to standing order 25 about deputy chairs of committees; and suggested that senators should make more use of their ability to limit the time for which leave is granted to make statements.

The amendment of standing order 25 was adopted on 18 September, but the recommendation about questions to chairs of committees and senators other than ministers was referred back to the committee for further consideration.

## PRIVILEGES COMMITTEE REPORT

The Privileges Committee presented a report on 24 September recommending the publication of a response by members of the Exclusive Brethren group to remarks made about the group in the Senate. This is the second occasion on which the committee has accepted that members of the group may legitimately respond to remarks made about the group even though those members were not identified by name. The Senate duly published the response.

## *ODGERS' AUSTRALIAN SENATE PRACTICE*, 12TH ED., 2008

The twelfth edition of *Odgers' Australian Senate Practice* has been published and was tabled in the Senate on 25 September.

## OCCASIONAL NOTE

Attached to this bulletin is an occasional note updating developments in a court case in the United States on executive privilege.

## 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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AUSTRALIAN SENATE

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15 September 2008

Senator the Hon N. Minchin
Leader of the Opposition in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Minchin

**PRIVATE SENATOR'S BILL – AGE PENSIONS**

You have asked for a note on whether a bill to increase the rate of age pensions may be introduced into the Senate.

There is no barrier to the introduction of such a bill in the Senate.

Section 53 of the Constitution provides, in part:

> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate.

A bill to increase the rate of age pensions does not need to contain an appropriation of money. Age pensions, and other entitlements under the *Social Security Act 1991*, are automatically paid under a special appropriation of indefinite duration and unlimited amount in section 242 of the *Social Security (Administration) Act 1999*. Any increase in pensions is paid for under that appropriation without any necessity for any further appropriation to be made.

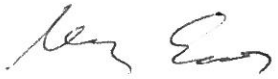
Bills which involve increased expenditure from appropriations which have already been made, or will be made in the future, are commonly introduced in the Senate. Such bills have originated in the Senate since 1901. The right of the Senate to initiate such bills was expounded in a ruling by President Givens in 1921. He stated that, even by that early stage, such bills had "frequently" been initiated in the Senate.

Many government bills have fallen into that category. To choose one example from 2007, the National Health Amendment (Pharmaceutical Benefits) Bill 2007, initiated in the Senate, extended pharmaceutical benefits in respect of prescriptions issued by optometrists. The explanatory memorandum accompanying the bill noted that money had already been appropriated to cover the additional costs to the Pharmaceutical Benefits Scheme. Because the bill did not appropriate the extra money required for its

operation, it was not an appropriation bill and therefore could be initiated in the Senate. There are several other examples of such government bills in recent times.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely



(Harry Evans)

AUSTRALIAN SENATE

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24 September 2008

Senator Bob Brown
Leader of the Australian Greens
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Brown

**URGENT RELIEF FOR SINGLE AGE PENSIONERS BILL**

This note is further to the advice already provided on this bill.

When the bill was received in the House of Representatives, the government did not allow the bill to be considered, on the basis of its alleged constitutional defectiveness.

A statement by the Speaker, referring to bills which increase payments from standing appropriations, claimed that "the practice has been that such bills originate in the House", while a motion moved by the government stated that such a bill "should be introduced in the House of Representatives" and that "it is not in accordance with the constitutional provisions ..... as they have been applied in the House for such a measure to have originated in the Senate".

Unfortunately, debate on this motion was "gagged", so there was no explanation or analysis of it. The House was not allowed to debate a matter supposedly affecting its own powers.

It appears that these statements draw a distinction between bills which result in expenditure from a standing appropriation and bills which otherwise result in expenditure from appropriations made elsewhere.

My note of 15 September 2008 referred to bills "which involve increased expenditure from appropriations which have already been made, or will be made in the future", and which "are commonly introduced in the Senate". Bills involving expenditure from standing appropriations fall into that category, but so do other bills involving increased expenditure. There is no difference in principle between those types of bills in this category, and no basis for distinguishing bills increasing expenditure from standing appropriations from bills involving expenditure from other appropriations. If a bill causing expenditure from standing appropriations is to be treated as a bill

appropriating money within the meaning of section 53 of the Constitution, bills involving expenditure from other appropriations would have to be treated in the same way. Once section 53 is regarded as rubbery and is extended beyond bills which actually appropriate money, there is no end to how far it will extend.

For example, late last year there was a bill passed which had been initiated in the Senate, the Aviation Legislation Amendment (2007 Measures No. 1) Bill 2007, and which, according to the explanatory memorandum, involved increased expenditure of $3 million per year. This was not from a standing appropriation, but from money regularly appropriated for the Civil Aviation Safety Authority, but on the rubbery extension of section 53, this bill, and many others, would be caught.

Leaving that issue aside, there is no shortage of examples of government bills exactly the same in principle as the Urgent Relief for Single Age Pensioners Bill which were initiated in the Senate.

My note of 15 September referred to the National Health Amendment (Pharmaceutical Benefits) Bill 2007. An attempt has been made to distinguish this bill, seemingly on the basis that it might not necessarily have led to increased expenditure. The fact is that that bill created an entitlement to pharmaceutical benefits which did not exist before, in respect of prescriptions issued by optometrists, and authorised expenditure to fund that entitlement from the standing appropriation in the principal Act. It falls squarely within the category now said to be impermissible for initiation in the Senate.

Further examples may be cited. The Health and Ageing Legislation Amendment Bill 2003 also created new entitlements payable from standing appropriations under the principal legislation, in respect of pharmacists operating from premises previously not approved, and medical practitioners previously not recognised as specialists. Both entitlements increased expenditure out of the standing appropriations.

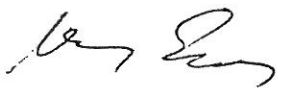
The Social Security Legislation Amendment (Concession Cards) Bill 2000 was not only initiated in the Senate but amended in the Senate to extend entitlements under the legislation, in relation to foster care children issued with their own health care card. Again, the new entitlement was funded from the standing appropriation.

Multiplying past examples demonstrates that either government advisers were negligent about the bills which could be initiated in the Senate according to the doctrine now expounded, or the doctrine was raised to cover the situation in relation to the current bill. I suggest that the latter is the case.

A great many red herrings have been dragged across the path by the material presented in the House of Representatives. One relates to a proposal by the Senate Procedure Committee in 1996 that section 53 be reinterpreted so as to classify the kinds of bills under discussion here as appropriation bills able to be initiated only in the House of Representatives. That proposal was contingent on clauses being included in such bills explicitly acknowledging that they appropriate money. This proposal was not accepted at the time, and indeed was not considered. It cannot now be raised to support an ad hoc unilateral reinterpretation of section 53 while ignoring an essential part of the proposal.

Reference to the ability of the Houses to agree on an interpretation of section 53 raises a final point. Contrary to suggestions which have been made, it is well established, by the words of the High Court itself, that section 53 is non-judiciable and cannot be the subject of interpretation and adjudication by the Court. It is for the Houses themselves to interpret and apply the section. It is unfortunate that the House of Representatives is not given the freedom to consider any such agreement.

Yours sincerely



(Harry Evans)

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# OCCASIONAL NOTES

## EXECUTIVE PRIVILEGE

The Occasional Note attached to *Procedural Information Bulletin* No. 220 referred to a case involving executive privilege which had come before the courts in the United States through the medium of a suit by the Judiciary Committee of the House of Representatives to enforce its subpoenas against administration officials who had refused to appear on the basis of a claim of executive privilege. The administration claim of an absolute immunity of such officials, and a submission that the courts lacked jurisdiction in the matter, suggested that a judgment of major constitutional significance could result, with some persuasive implications for Australia.

In a preliminary judgment delivered on 31 July 2008, a District Court referred to past decisions upholding the general power of the Houses to compel evidence, held that the courts have jurisdiction to enforce congressional subpoenas, and rejected the claim of absolute immunity of administration officials. (The latter aspect of the judgment could have implications for claims sometimes made in Australia that ministerial staff have some kind of immunity from inquiry by the legislature.) The defendants were ordered to hand over to the committee documents demanded by the subpoena, except those for which a specific claim of privilege is made. The court at this stage has not passed judgment on any specific claims of immunity relating to the particular information concerned, but has invited the parties to settle such claims by negotiation, as in the past.

The administration indicated that it will appeal against the judgment. The District Court refused to grant a stay of its order requiring the officers to appear, but this refusal was itself the subject of an appeal to the Court of Appeals.

Further developments in the case are awaited.