

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

hl.pro.prob.16619

No. 232

for the estimates hearings 25 May–5 June 2009

5 June 2009

The budget estimates hearings gave rise to matters of interest too numerous to list, and the following is a brief summary.

PROCEDURAL ISSUES: PUBLIC INTEREST IMMUNITY CLAIMS

The major item of procedural interest was the extent to which the Senate's order of 13 May 2009 on public interest immunity claims (see Bulletin no. 231 pp 1-2 and attachments) improved the estimates process.

As with all estimates hearings, the questions which gave rise to difficulties amounted to only a very small percentage of the proceedings, and the vast majority of questions were answered, with a great amount of otherwise unavailable information disclosed.

A preliminary conclusion is that there is some distance to go before departments and agencies understand the principles of the order. (A considerable effort was made immediately after 13 May to advise them about it.)

Ministers and officers repeatedly invoked the mantra that advice to government is never disclosed. This is demonstrably false, as it is contradicted by all the occasions on which such advice has been disclosed. At least one department repeated the statement that legal advice to government is never disclosed, apparently oblivious to all the legal advice that has been disclosed in the past. The claim that advice is never disclosed was made by at least three senior Senate ministers and, remarkably, by the Secretary of the Treasury, Dr Ken Henry, who must surely remember that at the last estimates hearings he answered questions about advice he and the Governor of the Reserve Bank gave to the government about dealing with the global financial crisis. What seems to be really meant by these statements is that advice is disclosed when the government chooses to do so. When asked whether he was making a

public interest immunity claim in accordance with the Senate's order, Dr Henry stated that he was not. This seems to be the beginning of an argument by the government that, over and above public interest immunity claims, they have a discretion to refuse information without raising any public interest ground. In other words, information can be kept secret regardless of whether there is any public interest reason for doing so, a claim with no basis in law or parliamentary practice. It is this kind of unlimited discretionary claim that the order is designed to overcome.

In numerous cases recognisable grounds for public interest immunity claims were stated or implied, but usually they were not fully articulated. The grounds stated or implied included: prejudice to the Commonwealth's position in Commonwealth/state negotiations and to federal relations; national security; prejudice to police investigations; prejudice to legal proceedings; commercial confidentiality; Cabinet deliberations; and privacy of individuals. In some cases the justification for these grounds was very dubious; for example, questions relating only to dates of submissions to Cabinet or of Cabinet decisions, which have been answered in many other cases, were claimed to go to Cabinet deliberations.

In several cases grounds for secrecy were raised which have not been regarded as acceptable in the past, including old favourites such as "budget processes". On one occasion a minister stated that officers may not be asked to clarify factual statements by ministers. One officer stated that information could not be provided until a minister had released it. In one case privacy was claimed for officers' remuneration, in violation of the well-established principle that the remuneration of persons paid from public funds must be disclosed.

In a few other cases no grounds were given for claims of confidentiality of information.

In some cases the senators asking the questions did not press them or ask for public interest grounds to be properly articulated. This is a course which is always open to senators under the order, but it is also open to other senators to press the questions or insist on properly articulated grounds. In most other cases, the questions were taken on notice. It will therefore be necessary to examine the answers to the relevant questions on notice as they come in to determine whether requests for information have been dealt with in accordance with the order.

As was pointed out in the advice to senators when the order was passed, the basic principle underlying the order is the same as that underlying the Freedom of Information Act and the government's guidelines for public service witnesses: information should be secret only where there is a public interest-related ground, of which there are well-known categories, for maintaining the secrecy. This also appears to be the foundation of the current government's emphasis on transparency and openness. The difficulty in securing observance of the order is the lack of understanding of that principle.

OTHER PROCEDURAL ISSUES

The changes in the format of the Portfolio Budget Statements, particularly the identification of expenditure by programs, proved helpful.

Other procedural issues included:

- (1) The attendance of chief executives at the hearing was again in issue in several instances. The failure of the Managing Director of Australia Post to attend caused some annoyance. (ECA 25/5) The hearings confirmed the observation that departments encounter less difficulty when chief executives are present. Departments and agencies are aware of the estimates hearings schedule months in advance.
- (2) Consideration of the new regime whereby the Audit Office scrutinises government advertising campaigns brought out the point that the high cost threshold of \$250,000 means that Internet campaigns escape that scrutiny. (FPA 26/5)
- (3) The principle that it is the minister's right to answer any question and to add to answers by officers was upheld by one chair. (LCA 26/5)
- (4) For the first time, the Australian Submarine Corporation Pty Ltd, a Commonwealth-owned company, was represented and answered questions about the submarine program. (FPA 27/5)
- (5) The possibility of a separate appropriation bill for the High Court was discussed. (LCA 27/5)
- (6) There was further confusion about the rule that officers are not asked for opinions on matters of policy, which does not mean that officers cannot be asked about matters related to policy. (particularly FADT 2/6)
- (7) Annoyance was expressed about the provision by the Defence Department of lengthy statements and documents to the committee without an opportunity for the committee to examine them before the hearings. (FADT 3/6)
- (8) There was a lengthy wrangle about whether an independent statutory authority (the Australian Building and Construction Commissioner) could be asked for "expert opinion" on the basis that such an independent authority is not in the same category as public servants. The commissioner declined to answer the questions and the issue was not resolved. (EEWR 2/6)

OTHER ISSUES

Other significant issues raised during the hearings included:

- (1) The Governor-General's trip to Africa and her role in promoting government policy. (FPA 25/5)
- (2) AQIS moving to cost recovery and its impact on rural industries. (RRAT 26/5)
- (3) The SIEV 36 incident (the explosion of the boat containing asylum seekers). (LCA 26/5)
- (4) The economic crisis and the stimulus packages. (particularly FPA 27/5)
- (5) Infrastructure Australia's operations and nation building expenditure. (RRAT 27/5)
- (6) The alleged use of bribes by agents of Note Printing Australia, a subsidiary of the Reserve Bank, to sell technology overseas. (LCA 26/5)
- (7) The proposed merger of the Federal Court and the Federal Magistrates Court and constitutional difficulties. (LCA 25/5)
- (8) The audit of settlement grants in the Department of Immigration and Citizenship and alleged political interference. (LCA 28/5)
- (9) The inability of the Defence Department to give the total cost of acquisitions proposed in the Defence White Paper. (FADT 3/6)
- (10) Evidence about the lobbying activities of the Defence Minister's brother, which led to the minister's resignation. (FADT 3/6)
- (11) The inability of the Department of Education, Employment and Workplace Relations to assess the effect of Youth Allowance changes on recipients. (EEWR 4/6)

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Inquiries: Clerk's Office
(02) 6277 3364