

National Liquor News – July 2009

What are Parliaments for these days?

A little-known part of the spirit industry's campaign against the RTD tax hike was a legal challenge in the Federal Court to the Australian Tax Office's continuing to collect the higher tax after the Senate voted the tax down on the evening of 18 March.

The case was supported by most DSICA members that had RTD portfolios. The case was arguing that since the Senate had rejected the tax, the ATO had no legal justification to keep collecting the tax, hence the ATO should stop doing so, and the tax on RTDs should go back to its pre-April 2008 rate, plus a couple of CPI adjustments.

After all, the Senate had rejected the Bill validating the tax, and that is one of Parliament's key roles – approve or disapprove taxes. No taxation without representation. The United States' revolution against Britain had been started on that point.

The legal niceties are convoluted. The excise increase is published in the Gazette, an official publication of regulations, etc, and the excise payer is liable for the higher rate from that point on. Then the Government must table in Parliament within five sitting days an excise tariff proposal. An excise tariff proposal is simply a Minister telling Parliament that the Government intends to increase the rate of tax on a good or service. No vote is taken, and the Government does not have to introduce a Bill on that day.

The 1901 Excise Act, Section 114, gives the ATO protection from legal challenges for 12 months from the date that an excise tariff proposal is presented to Parliament, so the Government has 12 months to pass the legislation. This is a common sense and logical arrangement, because it allows the Government to increase an excise tax without people rushing out to buy huge amounts at the lower rate. However, it is unlikely that the parliamentarians in 1901 thought that the taxes should continue to be collected if the Parliament had rejected the validating legislation. In reality, Australian Governments do not lose excise bills, or had not until this RTD tax.

In this case, the ATO realised that the laws around excise tariff proposal gives them legal protection for 12 months– irrespective if the validating legislation is defeated – and kept the tax in place. In fact, the same day that the Federal Court's judgement was handed down, the Minister for Health and the Treasurer held a joint press conference announcing their intention to reintroduce another Bill in the Budget making the tax legal and permanent, plus another Bill to hang onto the money invalidly collected over the past year. Perhaps the Ministers were worried that the Federal Court would agree with DSICA argument, and tell the ATO to stop collecting the extra tax.

In the end, the Federal Court judge decided that the 1901 Excise Act legislation gave the ATO complete legal cover for 12 months, irrespective if the Senate had voted the tax Bill up, down or sideways. DSICA appealed that decision, which was also lost, but no reasoning has yet been given to the parties.

So what is the purpose of Parliament? In this sorry case, it eventually voted to validate the tax collected up to 13 May because Senators did not want to give money back to the distillers (ignoring

we paid only part of the taxes) and there was no practical way to refund consumers. So the Government got its money, and the Senate's rejection of the Bill became meaningless.

I will leave you with one last thought: as Governments can impose an increase in excise taxes – and that can apply to any good or service – for 12 months, and keep it in effect even after the tax Bill is defeated, then any excisable industry can be singled out. The revenue might not even need to be repaid, as few Parliamentarians could stomach the money going back to a few industry players as a windfall, rather than to consumers. If the revenue is refunded, no interest would be paid.

Then the tax can be reintroduced the next year, and for another 12 months.