Procedural Information Bulletin No. 13

For the sitting period 8 to 17 April 1986

DEATH OF SENATOR MISSEN

On 8 April Mr President reported to the Senate the loss of one of its most active and prominent senators with the death of Senator Missen. Many senators paid tribute to Senator Missen in the condolence debate that followed, and the Senate adjourned for the remainder of the day as a mark of respect.

PARLIAMENTARY PRIVILEGE: JUDGEMENT OF HUNT J.

On 9 April Mr President informed the Senate that, after consultation with the Minister representing the Attorney-General, and the Deputy Leaders of the Opposition and the Australian Democrats, he had instructed counsel to seek leave to appear in the Supreme Court of New South Wales prior to the commencement of the new trial of Mr Justice Murphy to submit that the Court should not allow the cross-examination of witnesses or the accused in the trial upon statements made by them to Senate committees, on the grounds that this would be contrary to the immunity contained in article 9 of the Bill of Rights and adhering to the Houses of the Australian Parliament under section 49 of the Constitution

Previous bulletins referred to submissions made in the same Court last year before the first trial of Mr Justice Murphy. Following those submissions a judgment was made by Mr Justice Cantor to the effect that witnesses and the accused could be cross-examined on evidence given before Senate committees. That judgment was the subject of a statement by Mr President on 11 September 1985 and of debate in the Senate on that day. Subsequently in the trial witnesses and the accused were cross-examined as to the truth of their evidence given to Senate committees and submissions were made on the basis of that cross-examination.

On 8 April Mr Justice Hunt gave a judgment on the submissions made on behalf of the Senate. The judgments of the two judges are based on entirely different reasons. Mr Justice Cantor concluded that the test of a violation of article 9 is whether there is any adverse effect on parliamentary proceedings, and that the protection of parliamentary proceedings must be "balanced" against the requirements of court

proceedings. He reasoned that this approach was consistent with the British and Australian judgments on which the President's submission relied. Mr Justice Hunt's judgment expressly repudiated the law expounded in the earlier judgments, and held that article 9 prevented only parliamentary proceedings being the actual subject of criminal and civil action, but allowed the use of parliamentary proceedings as evidence of an offence, to impeach the evidence of witnesses or the accused or to support a cause of action.

Mr President did not make any detailed comment upon the judgment, but drew the attention of the Senate to two parts of the judgment where the judge seemed not to have correctly stated what was submitted to him by counsel acting on the President's instructions. The judgment stated that it was submitted that even to ask a witness whether or not he had made a particular statement to a parliamentary committee would be to impeach or question that statement. Mr President pointed out that no such submission was made. The written submissions made on Mr President's instructions accepted that evidence of parliamentary proceedings may be used to prove material facts so long as there is no questioning or impeaching of the proceedings. This could well involve the type of question referred to by the judge, but is to be distinguished from the examination of a witness or the accused for the purpose of impeaching his evidence. The judgment implied that the submissions relied upon the supposed rule that evidence of proceedings in Parliament may not be given in court without the approval of the House concerned. This also was not submitted by counsel acting on Mr President's instructions, and in fact the written submissions were at pains to draw a distinction between this so-called rule, which was really only a practice, and the principle contained in article 9.

Mr President also pointed out that in the first trial evidence given before Senate committees in camera and not published by the committees or the Senate was used to cross-examine witnesses and the accused. The judgment did not address itself specifically to the unauthorised use of in camera evidence, and presumably would allow any such use of in camera evidence.

Mr President presented to the Senate a copy of the written submissions which were made on his instructions and a copy of Mr Justice Hunt's judgment. He stated that he would be considering the judgment, consulting with Madam Speaker and honourable senators and deliberating upon what action should be taken in relation to the judgment. Copies of the documents are available for interested staff from the Records Office.

AMENDMENT OF URGENCY MOTION

A previous bulletin referred to the presence on the Notice Paper of contingent notices of motion to allow the suspension of the standing orders to enable an urgency motion to be amended, and to the first instance of such a motion being amended.

The suspension of the standing orders to enable such an amendment to be moved does not suspend the requirements which apply to amendments generally, particularly the requirement of relevance. An amendment to an urgency motion must be strictly relevant to the motion, and a case could be made out for more rigorous enforcement of the relevancy rule, because without the suspension of standing orders an amendment may not be moved at all, indicating the Senate's belief that normally an urgency motion should not be subject to amendment.

On 14 April the standing orders were suspended to enable the Opposition to move an amendment to an urgency motion proposed by the Australian Democrats on housing policy. A point of order having been taken by Senator Chipp on the relevance of the amendment, the President drew attention to the requirement for relevance and ruled that two paragraphs of the amendment were not relevant and therefore not in order. The amendment was then put and carried without those paragraphs.

Unless the requirement for relevance is strictly enforced, it would be possible to amend an urgency motion so as to have it deal with a different subject, or different matters in relation to a subject, thereby defeating the purpose of the urgency motion and matter of public importance procedure.

CUT-OFF DATE FOR GOVERNMENT BILLS

On 14 April the Senate passed Senator Macklin's motion to provide that any Government Bills introduced into the Senate or received from the House of Representatives after 30 May will automatically be adjourned to the first sitting day in August. This motion is an attempt to defeat the end-of-sittings logjam whereby the Senate finds itself with only 1 or 2 weeks of sitting, the House of Representatives having risen, and a large backlog of bills to deal with.

The motion was amended on the motion of the Leader of the Opposition to provide that bills introduced after 30 May may be referred to standing committees for examination during the winter long adjournment by motion without notice.

During the debate on the motion the Manager of Government Business announced that the Government did not intend to bring Bills into the Senate after 30 May, and in the House of Representatives members were advised that the House would sit an extra week in an attempt to get all of the Government legislation through the House by that date.

PROCEEDINGS ON BILLS

On 11 April unusual forms of amendments were moved to the Builders Labourers' Federation (Cancellation of Registration Consequential Provisions) Bill 1986. The Bill contained a number of conditions for the reregistration of the Builders Labourers' Federation, one of the conditions being the expiration of a period of 3 years after the cancellation of the registration. The Opposition wished to amend this provision to make the required period 10 years and the Democrats wished to make it 5 years.

Normally, such amendments would be moved by leaving out the relevant words and inserting the words to be substituted, in this case the words being those referring to the required number of years. The question for leaving out the relevant words is put first, and if this question is negatived no further motion to leave out the same words can be moved. It was clear that the Opposition and the Democrats would vote to leave out the relevant words, that being the first part of the Opposition amendment, but that the Democrats would vote against the insertion of the Opposition's words to specify the period of 10 years. The Democrats could have moved their amendment as an amendment to the words proposed to be inserted by the Opposition amendment, but the Opposition and the Government would have voted against the Democrats' amendment, and the Democrats would then have voted against the second part of the Opposition amendment. This raised the possibility of there being no agreement as to the words to be inserted, and of the majority of the Senate, which was in favour of inserting a longer period than that contained in the Bill, being frustrated.

To avoid this situation the Opposition, on advice, moved as a separate amendment to leave out the whole paragraph relating to the period of time for reregistration. It was not possible for the Opposition to move a separate amendment simply leaving out the relevant words, because this would not be a meaningful amendment. The whole paragraph was duly omitted, and the Opposition then moved to insert a new paragraph containing the period of time which it preferred. This amendment was defeated, and the Democrats then moved to insert a paragraph containing their preferred period of time. This was carried, and so the Bill was amended. By these means the majority were able to amend the Bill without relying on any suspension of standing orders or leave being granted to overcome the rules concerning amendments.

A previous bulletin referred to the fact that there is only one amendment which may be moved to the motion for the third reading of a Bill: the motion that the Bill be read a third time this day 6 months, which kills the Bill. The question was raised whether it is possible to move an amendment to refer a Bill to a standing committee after the committee of the whole stage. The motion for the adoption of the report of the committee of the whole is open to a relevant amendment, and it was determined that an amendment to refer a Bill to a committee would be a relevant amendment. Such an amendment was moved for the first time on 11 April to the motion for the

adoption of the report on the Trade Practices (Transfer of Market Dominance) Bill 1986. The amendment was not agreed to.

The Veterans' Entitlements Bill 1985 was the subject of unprecedented procedures in the Senate on 16 April. The Bill was returned to the House of Representatives last year with amendments and requests for amendments, and the Senate had voted to press its requests. The Government wished to suggest alternative amendments to the Bill as a compromise, but could not actually amend the Bill in the House of Representatives because the only matters before that House were the Senate requests. The House of Representatives therefore passed a motion to refuse the Senate's requests but to return the Bill to the Senate with a message setting out alternative amendments and requests which would be acceptable to the House. In the Senate the standing orders were suspended to enable the Senate to consider the Bill again in committee of the whole together with the suggested amendments and requests. The amendments and requests suggested by the House were then passed. Further amendments, relating to matters not covered by the amendments and requests suggested by the Government, were moved by the Opposition and the Democrats, but not agreed to. The Bill was then returned to the House of Representatives, which agreed to the amendments and made the requested amendments, thereby allowing the Bill to proceed for assent.

It was necessary to amend the Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Bill 1985 consequential upon the amendments made to the main Bill. The former, however, had been passed by both Houses, and in order to have it amended it was necessary to adopt the procedure, allowed by section 58 of the Constitution, of the Bill being returned to the House of Representatives by the Governor-General with recommendations for amendments. These amendments were duly made.

By these unusual means the compromise reached on the Bills was put into effect.

The Trade Practices Revision Bill 1986, the Bill which replaced the bulk of the provisions in the Trade Practices Amendment Bill 1985, was considered and amended by the Senate on 17 April.

DISALLOWANCE BY EFFLUXION OF TIME

A previous bulletin referred to the first instance in the Senate of delegated legislation being disallowed because of the statutory time for disposing of a disallowance motion having expired without the motion being resolved.

Two further instances of this occurred during the period under review. A notice given by the Chairman of the Regulations and Ordinances Committee to disallow certain health insurance regulations was not disposed of by 10 April 1986, when the

regulations were deemed to be disallowed pursuant to the statutory provision. The Committee explained the circumstances in its 79th Report. The regulations authorised the Department of Social Security to receive otherwise confidential information from the records of the Health Insurance Commission, and the Committee regarded this as an undue invasion of the right to medical privacy in the absence of definition of the nature of the information to be released and the circumstances in which it could be made available. The responsible Minister was unable to meet the Committee's strong objections to the regulations, and by agreement the notice of motion was not dealt with on the last available day, the Government thereby accepting disallowance of the regulations. The Committee's report was debated on 17 April.

Also on 17 April, a section of the A.C.T. Health Authority Ordinance 1985 was disallowed because a notice of motion given by Senator Vigor was not disposed of at the end of the statutory period. It appears that this notice of motion also was not resolved by agreement, the Government accepting the disallowance of the section.

GOVERNOR-GENERAL'S MESSAGES

The first sentence of section 53 of the Constitution provides:

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

Section 56 of the Constitution provides:

> "A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

It is clear that a Bill which may not be initiated in the Senate would require a Governor-General's message to be passed by the House of Representatives. In the past where there has been dispute about whether an amendment moved in the Senate infringes the rule contained in the third paragraph of section 53:

> "The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people",

the Government has sought to establish that the amendment should take the form of request by advising that a Governor-General's message would be necessary if the amendment were passed by the House of Representatives.

On 16 April Senator Macklin, in debate on the Trade Practices Revision Bill, pointed out that a message had been brought into the House of Representatives in connection with the Bill and claimed that this was part of a strategy to persuade the Australian Democrats that it was "a money Bill". The Trade Practices Revision Bill does not contain any appropriation of money, nor does the Trade Practices Act which it amends; the money necessary for expenditure under the Trade Practices Act is appropriated by the annual appropriation Bills. There is a clause in the Bill which enlarges the category of proceedings in respect of which, under the principal Act, financial assistance may be granted by the Attorney General. The funds necessary for this assistance are not appropriated by the Bill or the Act, but are contained in Appropriation Bill No. 1, and when the relevant section of the principal Act was passed no message was produced. It seems clear, therefore, that a message should not have been brought into the House of Representatives in respect of the Bill. In response to Senator Macklin, Senator Evans said that the introduction of the message represented an "abundance of caution" on the part of the Office of Parliamentary Counsel.

COMMITTEE REPORT

On 9 April the Regulations and Ordinances Committee presented its 78th Report, which was unusual in that it drew the Senate's attention to a piece of delegation legislation, and while not recommending the disallowance of the legislation, recommended that any changes to the provisions contained in it should be made by Act of Parliament. The legislation in question was the Artificial Conception Ordinance 1985, which made provision for legal questions involved in artificial conception. The report was debated and the debate adjourned.