

## Procedural Information Bulletin No. 53

*For the sitting period 6 to 15 November 1990*

### DELEGATED LEGISLATION: ATSIK ELECTION RULES

The Aboriginal and Torres Strait Islander Commission Act, which was so extensively amended during its passage through the Senate last year, provides for the making of rules for the election of regional councils from which the Commission itself is to be elected, and also provides for the making of special rules for the election and composition of the Torres Strait Islands regional council. These rules are disallowable instruments, that is, they are subject to the same provisions relating to tabling and disallowance as regulations and other forms of delegated legislation.

Shortly before the sittings began, it was discovered that the rules had not been tabled in the Senate, and had therefore ceased to have effect. This discovery was made on the eve of the election for the regional councils and of the statutory deadline for holding the elections. The Act provides that elections are to be held under the rules in force at the time when the elections are called, and at that time the period for tabling in the Senate had not expired, so that, fortuitously, as a justice of the Federal Court found in declining to grant an injunction halting the elections, the elections were able to proceed notwithstanding that the rules were no longer in force. The rules relating to the Torres Strait Island regional council, however, provide for the composition of that council as well as rules for its election. Those rules were made later than the general election rules, and if the view were taken that the rules were made on the day on which they were gazetted rather than on the day on which they were signed by the minister, there was still one sitting day for tabling them in the Senate, because the time for tabling runs from the day of making. Most disallowable instruments are regarded as having been made on the day on which they are signed by the rule-making authority, but the wording of the relevant statutory provision is such that it is possible to take a view that the day of gazettal is the day of making. Such a view was taken by an Attorney-General's Department opinion and, acting on that opinion, the responsible department had the rules tabled in the Senate on 6 November.

These events were the subject of considerable controversy in the Senate. Having been refused leave to move a motion to take note of the rules tabled on 6 November, Senator Boswell successfully moved suspension of standing orders to enable him to

do so, and there ensued a debate on the administrative failures involved. Senator Tambling on the same day gave notice of a motion for an order requiring the tabling of documents relating to the failure to table the election rules. This motion, amended on the motion of the Australian Democrats, was passed on 7 November, and the documents were tabled on the required day, on 13 November.

The election rules were controversial partly because of the question of franchise. While the Act provides for voting by Aboriginals and Torres Strait Islanders on the Commonwealth electoral roll, it also allows the rules to extend the franchise to other persons. This provision was not used when the rules were made. In the Federal Court judgment the justice observed that at one stage the minister appeared to be unaware that the franchise could be extended by means of the rules. The rules are still to be challenged before the full Federal Court.

This episode draws attention to two growing problems with delegated legislation: the proliferation of different types of statutory instruments subject to disallowance, and the lack of any central control over the making of these instruments, which result in some difficulty in knowing what delegated legislation exists, and also in errors on the part of departments which are inexperienced in dealing with delegated legislation.

#### DELEGATED LEGISLATION: INSTRUMENTS SUBJECT TO AMENDMENT AND APPROVAL

Under amendments made in 1989 to the Aged or Disabled Persons Homes Act and the National Health Act, a number of statutory instruments subject to amendment and approval are to be made, particularly charters of the rights and responsibilities of residents of approved hostels and nursing homes, forms of agreement between proprietors of those establishments and residents, and principles governing the exercise of certain ministerial powers.

The relevant statutory provisions, which were inserted as a result of amendments made in the Senate, provide that these instruments come into effect if no notice of motion to amend them is given in either House within 15 sitting days after they are tabled, but if any such notice of motion is given both Houses must approve the instruments in the same form to bring them into effect.

By the end of the sitting period, notice had been given of a large number of amendments to the various instruments. It is likely that the instruments will be considered in committee of the whole to facilitate the consideration of amendments, and that any action on the instruments in the House of Representatives will await the consideration in the Senate, so that the House can approve the instruments as amended by the Senate.

## CONSIDERATION OF BILLS BY COMMITTEES

The Privacy Amendment Bill, a complex and controversial piece of legislation, was reported by the Standing Committee on Legal and Constitutional Affairs on 22 October, and the committee recommended a considerable number of amendments put forward by senators of all parties.

The bill was dealt with on 12 November, by means of agreement and somewhat unusual procedures. A motion that the report of the standing committee be adopted was agreed to, thereby amending the bill as recommended by the standing committee, but before the adoption of that motion the chairman of the committee, by leave, moved a large number of modifications to those amendments. The Leader of the Opposition, Senator Hill, then, by leave, moved a series of further amendments, some of which were also adopted. The bill as extensively amended was then passed.

These procedures allowed a large number of amendments to be dealt with expeditiously in the Senate. As the Leader of the Opposition observed, if the bill had not been considered in the standing committee it would have taken much longer to deal with in the Senate. This bill therefore provides a very good example of the potential value and success of the new procedures for referring bills to committees.

The Selection of Bills Committee on 8 November recommended the referral to a standing committee of a bill, the Excise Tariff Amendment Bill, which had not been recommended for referral in a previous report. The Selection of Bills Committee changed its mind concerning this bill because of comments on it by the Scrutiny of Bills Committee.

A further report of the Selection of Bills Committee on 15 November recommended the referral to standing committees of a number of bills. These included the Data-matching (Assistance and Tax) Bill, which provides for matching by departments of data held on clients, a controversial subject. This bill was referred to the Standing Committee on Legal and Constitutional Affairs before the second reading, and the committee heard evidence on it on 16 November.

The Standing Committee on Legal and Constitutional Affairs was granted on 6 November an extension of time to report on certain social security provisions, and successfully sought a further extension on 14 November. This committee has received the largest workload from the new system. The Standing Committee on Community Affairs was granted on 6 November an extension of time to report on parts of one of the bills referred to the Legal and Constitutional Affairs Committee, and reported on those provisions on 12 November, and also on another bill.

## PRIVILEGE

The President determined on 8 November that a matter of privilege raised by the Leader of the Opposition should have precedence over other business, and the matter was referred to the Committee of Privileges on 12 November. The Privileges Committee is asked to determine whether material contained in a dissenting report attached to a report of the Joint Committee on the National Crime Authority discloses that there was improper interference with a witness before that committee and that false or misleading evidence was given before the committee. These questions relate to instructions given by the National Crime Authority to a former officer of the Authority.

The Committee of Privileges presented on 8 November its report on an allegation that evidence given by the Navy before an Estimates Committee in relation to asbestos in Navy ships was misleading. The Committee of Privileges found that no contempt had been committed; naval personnel who had given evidence to the Estimates Committee were unaware of the existence of certain material which had not been disclosed to the Estimates Committee. The findings of the report were endorsed by the Senate on 14 November.

Senator Crichton-Browne introduced on 8 November a bill to amend the National Crime Authority Act to make it clear that the secrecy provisions of that Act do not prevent the Authority giving any evidence to the Joint Committee. The contention that the secrecy provisions affect the giving of evidence before the Committee was made in an opinion of the Solicitor-General. The material accompanying the bill, including advice provided to the Joint Committee, contends that the Solicitor-General's opinion is clearly contrary to the law of parliamentary privilege and the provisions of the *Parliamentary Privileges Act 1987*.

## UNPROCLAIMED LEGISLATION

The statement on unproclaimed legislation which, by order of the Senate of 29 November 1988, is required to be tabled twice each year, was presented on 15 November, and was debated, senators indicating their continuing concern about delays in the commencement by proclamation of some legislation, and their resolve to keep the matter under scrutiny.

## APPROPRIATION BILLS

The consideration of the appropriation bills in committee of the whole commenced during the period, and will provide the first real test of the new procedures for dealing with appropriation bills reported by Estimates Committees.

On 12 November the Deputy-President, Senator Colston, pointed out that some of the reservations attached to the Estimates Committees' reports were not strictly in accordance with the new procedures, whereby debate in committee of the whole is to

be confined to specific matters recommended by the reports, or by reservations attached to the reports, for further examination by the Senate. Senator Colston stated that he intended to accept the reservations as allowing debate on matters where the intention of the senator was clear, but he also pointed out that some of the reservations did not focus on specific matters, and he indicated that the Procedure Committee would consider the relevant procedures. This statement was the subject of some debate, indicating that some senators still expect to debate matters extensively in committee of the whole notwithstanding consideration of those matters in Estimates Committees.

### CUT-OFF DATE FOR BILLS

The order setting the Senate's deadline for the receipt from the House of Representatives of bills to be passed before the end of the year was agreed to on 6 November. The deadline was set as 16 November. Hitherto the deadline has always been a sitting day, and House messages forwarding bills for concurrence have been reported to the Senate before the expiration of the deadline day. The President indicated on 15 November that the Senate's order would be interpreted so that bills in respect of which the messages were received by the Clerk on 16 November would be regarded as having been received before the deadline, notwithstanding that the messages had not actually been reported to the Senate. This interpretation did not meet with any disagreement.

### PRIVATE SENATORS' BILLS PASSED

A bill introduced by Senator Watson, relating to an apparent anomaly in the substantiation requirements of the Income Tax Assessment Act, was passed by the Senate on 8 November.

A bill introduced by Senator Walters, to subject to parliamentary disallowance any proposals by the Bureau of Statistics for compulsory surveys, was passed on 15 November. As this bill had been passed in a previous session, it was passed through all stages with special expedition.

### VIDEO RECORDINGS OF SENATE PROCEEDINGS

The order of the Senate of 31 May 1990 authorising the televising of Senate proceedings allows television stations to use video recordings of Senate proceedings for the purpose of reporting those proceedings, but does not allow any other use of video recordings. On 14 November the President made a statement indicating that, until the Procedure Committee has considered and reported on the matter, video recordings of Senate proceedings will not be made available to other persons for other

purposes. This decision followed discussion of the matter in Estimates Committee A and a number of requests for the use of the video recordings.

## COMMITTEE REPORTS

Estimates Committee A, its consideration of the estimates referred to it having been considerably prolonged, reported on 7 November. When consideration of the appropriation bills began, the appropriations covered by Estimates Committee A, including those of the parliamentary departments, were postponed.

The government on 7 November presented its response to the reports of the Standing Committee on Environment, Recreation and the Arts on the use of drugs in sport, and the response was immediately debated.

An amendment moved by Senator Patterson to a motion to take note of the report of the Standing Committee on Employment, Education and Training on higher education was passed on 7 November. The amendment deplored the attack made by the responsible minister on the committee and on witnesses who appeared before it. On 15 November the government response to the report was tabled and there ensued a further debate on the matter.

The government's response to the report by the President on committee reports not responded to by the government within the prescribed time was tabled on 15 November and was immediately debated.

The Joint Select Committee on Migration Regulations on 8 November took the unusual step of tabling a copy of a letter from the chairman of the committee to the responsible minister, relating to the topical matter of change of status on the basis of marriage, and that document was also immediately debated.

## COMMITTEE REFERENCES

On the motion of Senator Boswell, the Industry, Science and Technology Committee was given on 7 November a detailed reference relating to anti-dumping and countervailing measures, a matter which has been the subject of some controversy in relation to certain imports.

The chairman of the Standing Committee on Employment, Education and Training on 8 November moved, without notice by leave, a reference to the committee relating to adult and community education, and the motion was agreed to.

The Select Committee on Health Legislation and Health Insurance was granted on 14 November an extension of time to report. The committee is now to report on or before 20 December 1990.