

Procedural Information Bulletin No. 77

For the sitting period 17 August to 7 September 1993

RESIGNATION OF SENATOR BEFORE SWEARING IN

When the newly-elected Senators whose terms began on 1 July were sworn in on 17 August, only five Senators were sworn in for Tasmania, because Senator Tate, who had been re-elected to a new term, had resigned on 5 July, and the vacancy was notified to the Senate. Senator Tate's replacement, Senator Denman, was appointed by the Tasmanian Parliament some days later and was sworn in on 30 August.

The resignation of Senator Tate before his swearing in did not affect the procedure for his replacement. Had he resigned before the commencement of his new term, however, this would have given rise to interesting questions. Presumably he would have had to lodge a sort of "double resignation", making it clear that he was resigning his place in respect of his term ending on 30 June and also in respect of his new term commencing on 1 July.

The vacancy did not affect the election of the President. The President, Senator Sibraa, was re-elected unopposed, and a new Deputy President, Senator Crichton-Browne, was also elected unopposed. The Opposition provided a pair for the vacancy.

DEADLINE FOR INTRODUCTION OF BILLS

A motion by Senator Chamarette to impose a new kind of deadline for the receipt of bills from the House of Representatives caused considerable debate.

Since 1986 the Senate has imposed a deadline for the receipt by the Senate of bills from the House of Representatives in respect of each period of sittings, and bills received after the deadline have been automatically adjourned to the following period of sittings. The deadline was not imposed for the budget sittings in 1992, seemingly because of the effect it was having on the House of Representatives. In recent times the government has responded to the deadline by rushing legislation through the House, introducing a large volume of legislation into the Senate just

before the deadline, and adjourning the House early and bringing it back after some weeks to consider amendments made by the Senate (see *Bulletin* No. 73, p.4).

Senator Chamarette's motion proposed to attempt to deal with this problem by imposing a "double deadline". Bills would be automatically adjourned to the next period of sittings on their receipt in the Senate if they had not met a first deadline for introduction into the House of Representatives and a second deadline for introduction into the Senate. This was designed to give the House a guaranteed time to consider legislation.

Senator Chamarette's motion was passed on 18 August, with an amendment by Senator Harradine to delete a reference to bills described as urgent bills or budget bills being exempted from the deadline (the Senate has often exempted particular bills from the deadline, and Senator Harradine's amendment leaves the reference to exemptions so that it applies to all bills). An amendment by the Leader of the Democrats, Senator Kernot, to impose a more complex set of deadlines and to require the government to produce a detailed statement of its legislative program, was supported by the government but was not agreed to.

TAXATION LEGISLATION

The form of the government's major taxation legislation arising from the budget led to claims that it breached section 55 of the Constitution.

Section 55 requires that laws imposing taxation deal only with the imposition of taxation and only with one subject of taxation. Over many years government drafters, taking clues from judgments of the High Court under section 55, have drawn a distinction between bills imposing taxation, bills dealing with the imposition of taxation (for example, setting taxation rates) and bills dealing with taxation generally (for example, providing for assessment and collection machinery). Only the bills actually imposing taxation have been regarded as subject to the restrictions of section 55. This means that there are some bills which, by affecting assessment and rates of taxation, have the effect of increasing the incidence of taxation, but which are regarded as technically not imposing taxation, although the government drafters have not been consistent in their classification of such bills. This has also meant that bills technically not imposing taxation can be amended in the Senate by way of direct amendment, rather than requests to the House of Representatives for amendment, under section 53 of the Constitution. The separation of bills imposing taxation and bills setting rates of taxation has been accepted in the past, and has been supported, in effect, in the Senate, because it allowed the Senate to make amendments instead of requests for amendments. (The difference between amendments and requests is purely procedural, but amendments are procedurally less troublesome.)

The sales tax legislation, for example, has always consisted of acts which impose the sales tax and acts which, in effect, set the rates of tax for various categories of goods, and bills amending the latter have been treated as amendable in the Senate.

The Taxation (Deficit Reduction) Bill 1993, however, draws attention to a significant consequence of this technical classification of bills: provisions which affect the levels of various taxes can be combined into one bill without breaching section 55, if the views of the government drafters are correct. The bill increases the rates of taxes by this means, but it is classified by the government drafters as a bill which technically does not impose taxation.

If a bill such as this were to be enacted and were challenged in the High Court, it is possible that the Court would reject the technical and seemingly paradoxical classification of bills relied upon by the government drafters, and find that bills of this sort are bills imposing taxation and therefore subject to the limits of section 55.

Because of the political significance of the changes contained in this bill, it was immediately questioned. Senator Hill, the Leader of the Opposition in the Senate, tabled on 30 August two legal opinions to the effect that the bill would impose taxation and would violate section 55 if enacted. On the following day the Leader of the Government in the Senate, Senator Evans, tabled an Attorney-General's Department opinion, in anticipation of an order for the production of documents of which Senator Hill had given notice, which expounded the government's advisers' views on the classification of taxation measures. Senator Hill tabled on 2 September a supplementary opinion criticising the government opinion. Questions relating to sections 53 and 55 of the Constitution and the bill were referred to the Legal and Constitutional Affairs Committee on the motion of Senator Hill on 31 August. On 1 September, also on the motion of Senator Hill, the Senate passed an order for the production of documents, requiring the tabling of advice to the government on the matter. Senator Hill's motion was amended to exclude drafting instructions provided to the government drafters. Documents were tabled in response to the order on the following day. Matters relating to the fringe benefits tax provisions of the bill were referred to the Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure on 6 September.

To add to the controversy about taxation, it was revealed that a proposed diesel fuel rebate charge, which had first been stated in Estimates Committee E to be an administrative fee, would also be a new tax imposed by taxation legislation. Documents relating to the tax were tabled by the government on 6 September. This led to claims that the estimates committee and the Senate had been misled about the nature of the tax.

ORDERS FOR PRODUCTION OF DOCUMENTS

Extensive use was made of orders for the production of documents as a means of gaining information about matters of political controversy.

Orders for the production of documents were used in relation to:

- forward estimates projections of revenue (18 August, documents tabled 19 August)
- an alleged scheme to sell access to ministers (19 August, documents tabled 6 September)
- marketing of disability reform package (1 September, documents tabled same day)
- advice provided to the government on taxation legislation (1 September, documents tabled 2 September, see above)
- the diesel fuel rebate tax (the motion for the order was not passed, but documents were tabled on 6 September)
- economic model used by the Treasury (6 September, documents tabled 7 September).

In one case, that of the economic model, a Senator expressed dissatisfaction with the information provided and indicated that further action may be taken.

COMMITTEES

The relatively long winter adjournment resulted in committees using the procedure of presenting their reports to the President, so that the reports were published during the adjournment and were tabled on the first day of sitting. Attached to this *Bulletin* are lists of committee reports presented during the long adjournment and during the sittings so far.

When the report of the Finance and Public Administration Committee on the Medway Bank matter was presented on 1 September, an amendment to the motion to take note of the report was passed to refer the matter back to the Committee for further investigation, and to require the Committee to hold a public hearing (the Committee had reported on the basis of documentary evidence).

An amendment to the motion to take note of the report was also used on 1 September on the occasion of the report by the Community Affairs Committee on the treatment as income of unrealised capital gains and losses on listed securities, to express a view about legislation relating to that matter (see Legislation Amended, below).

The second report of the Legal and Constitutional Affairs Committee on its cost of justice reference, presented on 1 September, contained some interesting observations about the role of Parliament and the executive government.

Another select committee, on public interest whistleblowing, was established on the motion of Senator Newman on 2 September.

The Finance and Public Administration Committee again employed, on 6 September, the device of having the Senate authorise a public hearing for the purpose of putting questions on the technical application of tax laws to officers of the Taxation Office.

The report of the Select Committee on Matters Arising from Pay Television Tendering Processes, presented on 7 September, with a dissenting report, contained interesting material about ministerial responsibility, and led to an extensive debate on that subject.

The estimates committees began their first round of hearings under the new procedures. The hearing of Estimates Committee F in relation to the Senate Department on 26 August was the occasion of a discussion of the role of parliamentary officers and advisers generally.

PRIVILEGE

The Legal and Constitutional Affairs Committee raised a matter of privilege, which was ruled on by the President on 18 August, in relation to an advertisement which, the Committee was advised, could amount to an interference with the conduct of the Committee's inquiry and a false or misleading report of its proceedings. The matter was referred to the Privileges Committee on 30 August.

Correspondence was tabled by the President on 19 August which indicates that a person is being sued for defamation apparently in respect of a document submitted to a parliamentary committee. No action was taken by the Senate in relation to the matter, although it was indicated by the correspondence that the defendant had been advised that the publication of the document to the committee was covered by parliamentary privilege. Presumably the defendant will raise this defence.

LEGISLATION AMENDED

The Social Security Legislation Amendment Bill 1993 was amended on 7 September to carry out the government's undertaking to change the law relating to the

treatment of capital gains and losses on listed securities as income (see the reference to the report of the Community Affairs Committee under Committees, above).