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INTRODUCTION

The last four weeks of the sittings were full of significant procedural developments, and although these are referred to briefly, this bulletin is accordingly a long one.

By far the most significant development occurred after the Senate rose. This was the ruling on parliamentary privilege given by Mr Justice Cantor in the Supreme Court of New South Wales.

PARLIAMENTARY PRIVILEGE: REASONS OF MR JUSTICE CANTOR

Previous bulletins have referred to the appearance of counsel representing the President in committal proceedings relating to Mr Justice Murphy and Judge Foord to draw the attention of the court to the limitations imposed by the law of parliamentary privilege on the use in court proceedings of parliamentary evidence.

During the last weeks of the sittings a great deal of consideration was given to the method by which this should be done in the trials of the two judges, since it would be undesirable to have counsel appearing in the same way in a trial with a jury present.

On 29 May, on the motion of the Minister Representing the Attorney-General, the Senate agreed to a resolution directing the President to instruct counsel to appear at the beginning of the trials to make submissions on the matter, and then to withdraw.

Counsel representing the President duly appeared and made submissions at a pre-trial hearing at the beginning of the proceedings against Mr Justice Murphy. This hearing resulted in the ruling of Mr Justice Cantor, which will now be discussed in some detail.

Previous bulletins expounded the principle that the immunity contained in article9 of the Bill of Rights not only prevents parliamentary proceedings or words spoken in

the course thereof being the subject of civil or criminal action, but also prevents those proceedings being referred to before the courts in such a way that they are questioned in a wide sense. It was stated that what has been said in the course of parliamentary proceedings may not be commented upon, used to draw inferences or conclusions, analysed or made the basis of cross-examination or submission. The authorities for these propositions consist of a number of cases in which the meaning of article 9 has been explored, principally *Church of Scientology of California v. Johnson-Smith* (1972) 1 QB 522, *R. v. Secretary of State for Trade and others*, *ex parte Anderson Strathclyde plc*, (1983) 2 All ER 233, and *Comalco Ltd v. Australian Broadcasting Corporation* (1983) 50 ACTR 1.

It is true that these conclusions are drawn largely from submissions made by the British Attorney-General in the first case and from obiter dicta, but those submissions and dicta were regarded as correct and authoritative. It was thought to be quite clear that the immunity contained in article 9 would prevent the cross-examination of witnesses in court proceedings on evidence given before parliamentary committees, and this conclusion was supported in debate in the Senate by the Minister Representing the Attorney-General and the Deputy Leader of the Opposition on 16 April 1985 (Hansard pp. 1026-1030).

In the proceedings in the Supreme Court of New South Wales on 3 and 4 June 1985, counsel representing the President of the Senate submitted that the court should not allow cross-examination of witnesses on the basis of evidence given before Senate committees, and that, to avoid the necessity for counsel representing the President to appear to take objection to questions or submissions, the judge should, of this own motion, enforce the restriction imposed by article 9. Mr Justice Cantor declined to perform this task, and on Wednesday 5 June gave his reasons. Copies of these reasons are available from the Procedure Office (ext. 7254) for staff who wish to read them.

Mr Justice Cantor does not accept that article 9 has the effect expounded above. He holds the witnesses may be questioned as to what they said before a Senate committee, as this does not necessarily amount to a breach of article 9. In reaching this conclusion he has determined that for there to be a breach of article 9 there is "a need for there to be some adverse effect flowing from the cross-examination", and that the adverse effect must be "upon the freedom of speech or upon debates in Parliament or upon proceedings in Parliament". The judge has therefore set up a new test of whether reference to parliamentary proceedings is in breach of article 9, the test being whether there is an adverse effect upon freedom of speech or debates or proceedings.

The judge added that "I am of the view that the revelation in a Court of Law of what was said in a House of Parliament does not necessarily impeach or question what was said in Parliament". This is not a new conclusion: it has never been the situation that the mere "revelation" of proceedings in Parliament is in breach of article 9. The

cases make clear that evidence of parliamentary proceedings may be admitted to establish facts material to a case, such as the fact that a certain statement was made at a certain time. This reference to "revelation" of proceedings suggests that the judge thought the interpretation of article 9 advanced by counsel for the President to be far more restrictive than in truth it is, a suggestion supported by other matters discussed below.

In order to maintain his conclusion the judge has dismissed much of what was said in previous cases as obiter, and has gone back to the wording of article 9 to seek its true meaning. In support of his test of adverse consequences he refers to the synonyms and connotations of the word "impeach". He has not given the same attention to the verb "question", the dictionary meanings of which include "ask questions of, interrogate, subject to examination" (OED). In order to reconcile his test with the cases he indicates a belief that in the cases where evidence of proceedings in Parliament was held not to be admissible there was likely to be an adverse effect upon freedom of speech or debates or proceedings. He has not attempted this reconciliation in greater detail, since it is by no means clear that, in cases such as *Scientology* and *Anderson Strathclyde*, the element of adverse effect which he requires was in fact present. An exposition of the adverse effect likely in those cases would have clarified greatly his concept of adverse effect. He also refers to "an adverse effect upon the institution (sic) of Parliament" which, as a restatement of the test, seems to widen it.

In establishing his new test, the judge obviously felt the need to overcome a number of difficulties. One is a difficulty which he detects in the "widest possible construction" which he says was urged by counsel for the President, that is that it would embrace "any critical comment or discussion outside Parliament of what took place in Parliament", such as occurs in the press. Since such critical comment and discussion constantly occurs, he regards this as a fatal weakness of the wide interpretation. This question of a possible application of article 9 to public comment was raised by the judge during submissions, and in response counsel for the President suggested that the proper view was that article 9 had no application to public discussion, that the expression "place out of Parliament" probably referred to other tribunals or bodies of the state, and that in any case since the article referred explicitly to courts the possible wider application was not a matter which should trouble the judge. Thus it was not submitted that the wide interpretation of article 9 was a potential prohibition on public discussion; this is a conclusion which the judge has drawn in spite of submissions to the contrary.

Another major difficulty, which the judge refers to at some length, is the difficulty of the judge intervening in the proceedings to prevent questions or submissions contrary to article 9. This difficulty, however, is not removed or avoided because, as the final paragraph of the judge's reasons make clear, there is still under his test the possibility of questions or submissions in breach of article 9, and it would be necessary for the judge to intervene to prevent them. Indeed, as he seems to concede,

his test is likely to make a task of a judge in determining when to prevent questions or submissions more difficult. In response to this residual difficulty, he seems to contemplate that it is necessary for him to undertake a balancing role, and to determine "whether the harm likely to be done to the administration of criminal justice in this trial would far outweigh any harm which might be one to the institutions (sic) of the Senate". This reference to a requirement to balance conflicting interests would seem to indicate that, according to the judge's new interpretation of article 9, examination of parliamentary proceedings might be admitted even if it is in clear breach of article 9 where the interests of the court proceedings so require. If this reading is correct the article would be reduced from an important constitutional prohibition to a subordinate principle which may be overridden.

This balancing seems to be the method by which the judge overcomes the other remaining difficulty, that of fairness to the accused in criminal proceedings. It is clear that if cross-examination of witnesses on their previous evidence and submissions relating thereto are to be restricted, there is always some possibility of unfairness to an accused. Since the test proposed by the judge might lessen but would not remove this possibility, in that some questioning or submissions could still be objectionable, the judge seems to imply that by the process of balancing article 9 may be put aside entirely in criminal proceedings.

In deciding to allow cross-examination of witnesses on their parliamentary evidence, of necessity the judge concludes that there is no inherent adverse effect in such a process. In submissions put by counsel representing the President such inherent adverse effects were postulated. The judge has referred to only one of these, namely the possible discouragement given to future witnesses in parliamentary proceedings. This he dismisses as "somewhat strained and artificial". He has not, however, referred to the other inherent adverse effect *on the witness*, namely that an attack upon the credit or credibility of a witness by the use of his previous evidence and a comparison of past and present evidence to form a basis of a submission as to inconsistency or unreliability necessarily involves inflicting upon a witness a process which may well be damaging to the witness, and which would not have been inflicted had the witness not given evidence in the parliamentary proceedings. In other words, a witness may well be made to suffer, however slightly, for giving evidence to the Parliament, and this is precisely what article 9 is designed to prevent.

Apart from seemingly repudiating the very rationale of the immunity, the judge's new test seems to be difficult of application. It is vague. What is meant by an adverse effect, and how is it to be recognised? It would seem to involve a court in some assessment of the impact of the giving of particular evidence upon parliamentary proceedings, an assessment which a court is ill-equipped to make. The references by the judge to the "revelation" of matters occurring in parliamentary proceedings and to the balancing process merely add greater vagueness. It would have been less

confusing for the judge to follow the conventional view of the effect of article 9, whatever decision he made as to the particular proceedings before him.

The judge's reasons refer only to the examination of evidence given in a parliamentary committee by a witness. There is nothing to indicate, however, that they are intended to be confined to witnesses, and in terms they apply with equal force to members of Parliament. Thus if this reasoning is followed members may well find themselves being cross-examined in court proceedings on their speeches in Parliament, hitherto an unthinkable occurrence. In the process, proposed by the judge, of balancing the conflicting interests, members, and their Houses, may be made to suffer "adverse effects" because of their parliamentary speeches if the interests of court proceedings so require. Whether the Parliament will tolerate such a degree of judicial intrusion into its proceedings remains to be seen.

SENATE AMENDMENTS TO BILLS

The Senate amended a number of bills during the last four weeks of sitting. Some of the amendments, notably those made to the Automotive Industry Authority Bill, the Customs and Excise Legislation Amendment Bill and the National Crime Authority (Miscellaneous Amendments) Bill, were accepted by the Government. Some of the amendments, including those to the first-named bill, represented further successes for the Scrutiny of Bills Committee.

Some Senate amendments, however, did not meet with such acceptance. Amendments made to the three packages of bills dealing with wheat marketing, dried fruits marketing and the restructuring of the dairy industry were not accepted by the Government in the House of Representatives, and led to serious disagreement between the Houses, with the Senate insisting upon its amendments. Due to this disagreement, the three packages were not passed. As the wheat marketing bills had been introduced in the Senate, the Government's rejection of the Senate's amendment took the form of the House of Representatives making an amendment to which the Senate disagreed. In accordance with the standing orders the Senate appointed a Committee for Reasons to draw up the reasons for disagreeing to the House of Representatives amendment.

It is by now well known that the House of Representatives was recalled, after having adjourned for the winter long adjournment, to accept a Senate amendment which inserted a "sunset clause" in the Repatriation Legislation Amendment Bill.

"Sunset clauses" are now frequently moved as amendments in the Senate. On 22 May Senator Peter Rae established a precedent by moving to insert "sunrise clauses" in the sales tax package of bills. The amendment would have provided that certain provisions of the bills would come into effect on a date fixed by the Parliament in another Act. This was intended to provide time for a review by a Senate committee

of the legislation, and to ensure that the Government would take notice of the results of the review. The amendments were not accepted, but no doubt will reappear in proceedings on other bills.

REGULATIONS AND ORDINANCES COMMITTEE

The Regulations and Ordinances Committee reported to the Senate that it had received a number of undertakings from Ministers to amend regulations and ordinances, and notices of motion for disallowance were withdrawn when the undertakings were accepted. In one case a notice was withdrawn on the last possible day following a last-minute concession by a Minister.

SCRUTINY OF BILLS COMMITTEE

The Scrutiny of Bills Committee deals with a considerable number of private senators' bills as well as with Government Bills, and the former are not spared its criticism. On 13 May Senator Harradine moved a motion for a resolution to give certain instructions to the Committee because he claimed that the Committee had dealt unfairly with a bill which he had introduced. The motion was not supported by any other senator.

REFERENCE OF BILLS TO COMMITTEES

On 10 May Senator Chaney gave notice of his motion for a new system for the reference of bills to standing committees. The motion is rather complex and includes a number of ideas not spelled out in his statement to the Senate on the matter.

DISALLOWANCE OF AN ORDINANCE

The Senate has not disallowed a piece of delegated legislation for some time, but on 16 May an ordinance of the Australian Capital Territory having to do with trading hours was disallowed on the motion of Senator Vigor. The motion did not spring from the Regulations and Ordinances Committee, but had to do with the policy of the ordinance.

CONSTITUTIONAL CONVENTION

On 22 May the Senate successfully amended the motion providing for the representation of the Federal Parliament at the Constitutional Convention, to increase the representation of the Senate.

FINANCE AND GOVERNMENT OPERATIONS COMMITTEE

One of the most significant reports of the period of sittings was that of the Finance and Government Operations Committee on changes in the presentation of the appropriations and departmental explanatory notes. The Committee made a thorough examination of changes proposed to reflect program budgeting. The report should be examined by all staff, particularly those who work with estimates committees.

ANNUAL REPORTS

The standing committees are now making greater use of inquiries into annual reports, and a number of reports thereon have been presented. It is hoped that this trend will continue, as it provides a means of generating valuable and interesting committee work.

PRIVILEGES COMMITTEE REPORT

On 23 May the Privileges Committee presented its report on the penalty, if any, to be imposed in respect of the unauthorised disclosure by the *National Times* of in camera evidence given before the Select Committee on the Conduct of a Judge. Due to press publicity the Committee's recommendation of a "good behaviour bond" will be well known. A motion for the adoption of the report had not been dealt with at the end of the sittings.

COMMITTEE REPORTS DURING THE LONG ADJOURNMENT

A number of committees moved motions for resolutions authorising them to present their reports while the Senate is not sitting, indicating an expectation of a high level of committee activity during the long adjournment.