

Procedural Information Bulletin No. 99

For the sitting period 22 August to 31 August 1995

PARLIAMENTARY PRIVILEGE — SCOPE OF PROTECTION

A matter of privilege raised by Senator O'Chee was referred to the Privileges Committee on 23 August. In making his determination that the matter should have precedence on 22 August, the President issued a statement of reasons drawing attention to the significant issues raised by the matter. The essence of the matter is an allegation that legal proceedings have been threatened against certain persons in respect of their provision of information to Senator O'Chee, which information he used in the course of proceedings in the Senate. This raises two significant questions: whether the immunity of proceedings in Parliament from impeachment or question in courts and other tribunals extends to the provision of information to senators for the purposes of proceedings in the Senate; and whether the Senate may treat as a contempt any interference with such provision of information to senators. The answer to the first question does not necessarily determine the answer to the second. It will be for the Privileges Committee to consider these issues in the course of its inquiry into the facts of the case.

The first issue is the same as that raised in relation to the Western Australian royal commission on the Easton petition. A strong case can be made out that at least some of the matters under inquiry by the commission, such as discussions between members about the presentation of the petition, are so closely connected to the proceedings in Parliament in relation to the petition that the immunity of those proceedings from question before another tribunal extends to those matters. This is a question of law which has not yet been brought before the courts as a substantive issue.

AUDIT BILLS AND PARLIAMENTARY PRIVILEGE

One of the Senate's amendments to the Auditor-General Bill 1994 to which the government in the House of Representatives has disagreed (see Bulletin No. 95, p. 2) is designed to ensure that the prohibition in clause 34 of that bill on the release of certain information by the Auditor-General would not prevent the Auditor-General from responding to a request for information by the Senate. On several recent occasions the Auditor-General has responded to resolutions of the Senate for reports on particular matters. The government maintains that clause 34 of the bill as it stands *does* restrict the powers of the Senate to obtain information and would be, in effect, a restriction on the powers and immunities of the two Houses. This is a development of the doctrine of necessary implied limits on parliamentary powers and immunities which was first developed by the

government's legal advisers in relation to statutory secrecy provisions (see *Odgers' Australian Senate Practice*, 7th ed, pp 43-7, printed version).

The issue has been thoroughly explored by the Scrutiny of Bills Committee, particularly in its 12th Report, which was presented on 23 August. The Committee has pointed out that, given that the government did not initially draw to the attention of the Parliament that clause 34 would operate and was intended to operate as a restriction on parliamentary powers and immunities, the Senate is in the situation of being asked to pass legislation which may affect parliamentary powers and immunities without the Parliament ever being made aware of that effect. The report reveals, in the latest turn of the affair, that the government's advisers are also of the opinion that it may not be within the power of the Parliament to enact a general provision declaring that statutory provisions do not affect parliamentary powers and immunities unless they explicitly say so; the Parliament, as it were, may not be able to help itself in enacting provisions which impliedly take away its powers and immunities. These views have been rejected by the committee's legal adviser, and advice provided to senators is that the High Court would be highly unlikely to accept such opinions. The matter will not be resolved until the Senate comes to consider the government's rejection of its amendments to the bill.

LAND FUND — SELECT COMMITTEE

Earlier this year the Prime Minister, the Leader of the Government in the Senate, Senator Gareth Evans, and the Minister for Primary Industries and Energy, Senator Collins, were censured by the Senate for making misleading statements about the allocation of Aboriginal land funds under the Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act (see Bulletin No. 97, p. 4). It was alleged that the ministers made public statements about the funds at variance with a secret agreement with ATSIC.

On 30 August 1995 the Federal Court set aside the decision of ATSIC in relation to grants of land funds, and in so doing rejected the notion that the grants could be in accordance with an understanding with the government. The court noted the public statements by the Prime Minister as to the allocation of funds, and held that ATSIC's decision was so unreasonable that no reasonable decision-maker could come to it.

In consequence of this development, the Senate on 31 August passed a motion moved by Senator Chamarette to establish a select committee into the process which led to ATSIC's decision. The terms of reference of the committee, which were amended on the motion of Senator Harradine, also require the committee to investigate whether there was a secret agreement between the government and ATSIC.

REFERENCE OF BILL BY AMENDMENT

Yet another method for referring a bill to a committee was employed on 23 August in relation to the First Corporate Law Simplification Bill 1995. Bills are frequently referred to committees by way

of second reading amendments, but the amendment usually replaces the words for the second reading with a reference to a committee, so that the bill is referred, in effect, before the second reading, or approval in principle. On this occasion the words were added to the motion, so that the bill was given a second reading and then referred to the committee.

This bill was due to be passed on the last day of the previous sittings, but its passage was delayed by events at that time (see Bulletin No. 98, p. 2). It was stated in debate on 23 August that it has emerged that there are possibly serious difficulties with the bill, and that it should be subjected to further committee examination.

OTHER COMMITTEE REFERENCES

The matter of the payment by the government of the Minister for Health's legal costs in attempting to restrain the Western Australian royal commission on the Easton petition was referred to the Legal and Constitutional References Committee on 28 August. The government had tabled on 23 August an opinion by the Solicitor-General supporting the legality of the decision, having previously refused to respond to an order for the production of advice (see Bulletin No. 98, p. 1), and the Opposition tabled on 31 August an advice disputing the Solicitor-General's opinion.

Another unusual reference was made to the Legal and Constitutional References Committee on 31 August. The committee was asked to consider whether there ought to be an independent inquiry into the conduct by the Commonwealth of a particular case before the Federal Court. It was stated in debate that there was evidence of serious problems with the conduct of the case which may have affected its outcome and the rights of litigants.

TAXATION LEGISLATION

At the beginning of the committee stage on the Migration Legislation Amendment Bill (No. 5) 1994 and associated bills the Chairman of Committees, Senator Reid, pointed out that two of the bills would probably be regarded, on the view taken by the majority of the Senate during the dispute over the 1993 taxation legislation, as bills imposing taxation, but the government, acting on the view which it then took that a bill which increases taxation is not a bill imposing taxation, treated the bills as amendable and moved amendments to them. (See Bulletins Nos 77, pp 2-4; 78, pp 1-2; 84, p. 2; 85, pp 2-3; 98, pp 2-3; *Odgers Australian Senate Practice*, 7th edition, pp 295-98, printed version.)

OTHER LEGISLATION AMENDED

The highly controversial Racial Hatred Bill was considered on 24 August and amended by the Senate by striking out the provisions for criminal penalties for incitement to racial hatred. The government accepted the amendments in the House of Representatives.

The Social Security Legislation Amendment Bill (No. 1) 1995 and the Social Security (Non-Budget Measures) Legislation Amendment Bill 1995 were extensively amended on 29 and 30 August, with a large number of clauses struck out. Requests for amendments were also made to the bills.

The Migration Legislation Amendment Bill (No. 5) 1995 and the Migration Legislation Amendment Bill (No. 3) 1994 [No. 2] were passed with extensive amendments on 30 August. By passing the latter bill, which was rejected last year and reintroduced by the government after a three month interval, the Senate avoided providing the government with a "trigger" for a double dissolution under section 57 of the Constitution, and it appears now to be too late for any such "trigger" to occur, as a double dissolution cannot occur within six months of the expiry of the House of Representatives.

CENSURE MOTIONS AND QUESTION TIME

On 30 August the Leader of the Government in the Senate, Senator Gareth Evans, was censured by the Senate for his remarks concerning the Western Australian royal commissioner and the counsel assisting the commission. The censure motion was moved during question time, and, contrary to previous similar occasions, question time was not resumed after the censure motion was resolved, as had occurred on 16 February 1988 and 9 December 1991. On the following day, however, question time was extended by a vote of the majority of the Senate to make up for the loss of question time on the previous day.

ORDERS FOR PRODUCTION OF DOCUMENTS

The Auditor-General produced on 22 August a report on the ANL shipping line in response to orders of the Senate of 22 September and 8 December 1994.

On several days during the sitting period the government tabled indexed lists of departmental files in response to the order of the Senate requiring such lists to be produced.

COMMITTEE REPORTS

The following committee reports were presented during the period:

Date tabled	Committee	Title
23.08.95	Scrutiny of Bills	12th Report and Alert Digest No. 11 of 1995
28.08.95	Selection of Bills	Report No. 8 of 1995
28.08.95	Appropriations and Staffing	Annual Report 1994-95

Date tabled	Committee	Title
30.08.95	Scrutiny of Bills	13th Report and Alert Digest No. 12 of 1995
30.08.95	Community Affairs Legislation	Child Care Legislation Amendment Bill 1995
30.08.95	Corporations and Securities	First Corporate Law Simplification Bill 1995 – Schedule 4: Items 1-4
31.08.95	Employment, Education and Training Legislation	Report on Annual Reports