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Bills Digest

No. 165 2000–01

Governor-General Legislation Amendment Bill 2001

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2001

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Governor-General Legislation Amendment Bill 2001

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18 June 2001

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Governor-General Legislation Amendment Bill 2001

Date Introduced: 6 June 2001

House: House of Representatives

Portfolio: Prime Minister

Commencement: Royal Assent

Purpose

The Bill has four main purposes:

- to set the salary for the incoming Governor-General
- to remove the exemption from income tax which currently applies to the Governor-General and State Governors (but not so as to affect present incumbents)
- to adjust the statutory formula by which the Governor-General's superannuation contribution surcharge is calculated, to ensure overall liability does not exceed the 15% maximum
- to provide Governors-General (and their widowed spouses) with the option to commute part of their retirement pension to meet any surcharge assessments received after retirement or death.

Background

Legislation Dealing with the Office of Governor-General

The office of Governor-General was created by the Commonwealth Constitution at Federation. The Governor-General is the Queen's representative in the Commonwealth of Australia. The office of Governor-General has a range of powers and functions conferred on it by the Constitution, most notably the executive power of the Commonwealth. Convention, rather than constitutional text, dictates that the Governor-General acts on the

advice of his or her Australian Ministers in the exercise of these powers (other than in the exceptional circumstances covered by the so-called 'reserve powers').

Before 1974 the office of Governor-General was regulated only by the Constitution. Section 3 of the Constitution says that the Governor-General should be paid an annual salary of 'ten thousand pounds' until the Parliament otherwise provides. In April 1974 the incumbent was, accordingly being paid $20 000 in Australian decimal currency. At that time Parliament enacted the *Governor-General Act 1974* (the Principal Act). For the first time since Federation the salary was increased by Parliament, to $30 000.

There was until then no legislative pension scheme for retired Governors-General or their widowed spouses. As Prime Minister Whitlam told the House of Representatives:

> Consequently, in a number of cases, it has been necessary for the Government to make ex gratia payments to former Governors-General or to their widows.[1]

The 1974 legislation introduced a pension scheme whereby a retired Governor-General was entitled to a pension equivalent to that paid to a retired Chief Justice of the High Court (ie 60% of a Chief Justice's salary). A widowed spouse of a Governor-General was entitled to a pension rate five-eighths of that payable to a Governor-General. The pension was reduced by the amount of any other government pension payable to the recipient.

Apart from appropriating the necessary money from Consolidated Revenue, that was the sum total of the Principal Act when first passed by Parliament in 1974.

The legislation has been amended a number of times since. It now includes provision for the office of Official Secretary to the Governor-General, its staffing and remuneration, and a requirement that it furnish annual reports to Parliament. Some of the most detailed provisions in what is still a relatively brief Act relate to the pension entitlements of retired Governors-General and their spouses. Those provisions have become more complex with the recent introduction of the superannuation contributions surcharge.

The Superannuation Contributions Surcharge and the Office of Governor-General

In 1997 Parliament passed a package of legislation to implement the superannuation contributions surcharge.

The superannuation contributions surcharge on higher income earners is a tax on certain (basically employer) contributions to a superannuation account. It was introduced from 20 August 1996, originally as a result of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*. The scheme was extended to apply to a variety of personnel, including the Governor-General, by the *Superannuation Legislation Amendment (Superannuation Contributions Tax) Act 1997*.

It applies to individuals whose adjusted[2] taxable income exceeds a threshold, which in 2000-2001 is set at $81 493. The surcharge on contributions starts at one per cent and shades in at an additional one per cent for every $1000 up to a maximum of 15%.

Like many public sector schemes, the superannuation scheme for Governors-General is what is known as an unfunded defined benefit scheme. This can be contrasted with an accumulation fund or undefined benefit scheme, which tends to be the norm in the private sector. In an accumulation fund, the final entitlement of a retiree depends on the success of the fund in investing employer and employee contributions, as payments are made to the person's account year by year.

The Governor-General's scheme is a *defined benefit* scheme because the Principal Act fixes the final amount of pension payable, according to a statutory formula. It is an *unfunded* scheme because it has no assets to meet benefit payments—year by year paper entries are made in the Governor-General's superannuation account but no funds are actually transferred. Instead, the scheme is financed by the Commonwealth out of the Consolidated Revenue Fund at the time benefits become payable.

As a consequence of these differences, the surcharge scheme operates differently for members of accumulation funds and unfunded defined benefit schemes respectively.

A member of an accumulation fund receives notice of a surcharge assessment each financial year that they exceed the threshold. The legal obligation to pay the surcharge, however, falls on the superannuation fund which makes a consequential deduction from the member's account after paying the Tax Office.

By contrast, in the public sector schemes, the Commonwealth does not, year by year, make an actual employer contribution proportionate to the defined benefit. The calculation, therefore, of surchargeable contributions must be done on a notional basis based on actuarial advice. Instead of the scheme trustee[3] making annual payments of surcharge to the Tax Office, a 'phantom' debit account is set up for a member.[4] Notional debits are entered in the account according to a statutory formula and when the member takes their benefit upon retirement, the accrued surcharge liability is deducted by the trustee and sent to the Tax Office. The pension entitlement is adjusted downwards accordingly,[5] using what is called a 'conversion factor'.[6]

The Bill proposes changes to the statutory formula to prevent the liability of the Governor-General or widowed spouse from exceeding the maximum 15% surcharge.

Post-retirement Surcharge Assessments and the Option to Commute

In an accumulation fund, after leaving the scheme (eg due to retirement) an individual may receive a surcharge assessment, usually for the financial year in which they retired. In this instance, because they have left the scheme, the legal obligation to pay no longer attaches to the superannuation fund. Instead it falls on the retiree personally. Accordingly:

> Changes were made in 1999 to the *Income Tax Assessment Act 1936* (Tax Act) and the regulations under the *Superannuation Industry (Supervision) Act 1993* to ensure that schemes would continue to comply with the general superannuation supervisory requirements where a pension is commuted to meet any post-retirement surcharge assessment.[7]

In other words, the law was changed to pave the way for retirees to 'cash out' a lump sum from their pension schemes and pay off a surcharge assessment which they received after retirement. The alternative they face is to meet the assessment from their own existing resources.

Parliament currently has before it a Bill to extend to public sector schemes the same option for commutation of a pension, sufficient to meet these post-retirement surcharge assessments.[8]

Now, the Bill dealt with in this Digest proposes to extend the same option to retired Governors-General and their widowed spouses, with a consequent reduction in the pension payable.

Income Tax Exemption and the Governor-General

The Governor-General and State Governors currently enjoy an exemption from income tax for their official salary and for income derived from overseas.[9] According to the Government the salary exemption has applied since at least 1922 and the overseas income exemption since 1936.[10]

The Government believes that the exemption is no longer appropriate for two main reasons:

- it was introduced at a time when vice-regal appointees customarily came from the United Kingdom and were treated, for tax purposes, the same 'as non-diplomatic representatives of foreign governments or organisations'[11] and
- the Governor-General is the Queen's representative and, since 1993, the Queen has been paying income tax in the United Kingdom.

The Bill will increase the salary of the incoming Governor-General to offset the newly imposed liability to income tax.

The Salary of the Governor-General

As noted above, the Constitution provided for the Governor-General to be paid ten thousand pounds until Parliament legislated otherwise. In 1974 the salary was increased to $30 000. More recently, in 1989, Parliament provided that the Hon Bill Hayden be paid $95 000 tax-free (his parliamentary pension was suspended for the duration of his term).

In 1996 the tax-free salary for his replacement, Sir William Deane, was increased by 42% to $135 000 (but then reduced to $58 000 to take account of his High Court pension). According to the Government, the Bill provides for a similar percentage increase for the incoming Governor-General, once the change in tax treatment is taken into account.[12]

The conventional benchmark against which the vice-regal salary is fixed is the amount paid to the Chief Justice of the High Court. The Governor-General, at $310 000 will begin considerably ahead of the Chief Justice ($276 800). But the latter salary is subject to annual review. At the end of what the Government calls his 'notional five year term', the Government estimates that the incoming Governor-General will be receiving a sum significantly less than the Chief Justice.[13]

The Next Governor-General

On 22 April 2001 the Prime Minister announced that the Most Reverend Peter Hollingworth will be sworn in as the next Governor-General on 29 June 2001. At the time of the announcement he held the position of Archbishop of Brisbane. His personal qualities and achievements were widely praised in the media.[14] A controversy emerged, however, about the relationship between church and state.[15] The debate related not to Archbishop Hollingworth himself but to the fact that he will maintain his status as an ordained minister of the Anglican Church while acting as the Head of State's representative in Australia.[16]

The Constitution contains a provision dealing with church and state. Section 116 of the Constitution states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This has been described as reflecting a broader secular principle of state neutrality as between the churches.[17] It is notable, however, that section 116 is confined to 'laws' (in its first three limbs), and then only to Commonwealth not State laws, and it has been given a relatively restricted interpretation by the High Court.[18]

Main Provisions

All references are to items in Schedule 1 unless stated otherwise.

Salary

Item 1 increases the Governor-General's annual salary from $58 000 to $310 000. This will have no effect on the salary of the incumbent, Sir William Deane: **item 2**. The Constitution forbids Parliament from altering the Governor-General's salary during the currency of his or her term.[19]

Superannuation

Items 3, 5, 6 and **8** ensure the terms used in the Principal Act are consistent with the superannuation surcharge legislation. **Item 4** consolidates into a single definition two existing features of the Governor-General's basic rate of pension:

- a rate which is 60 per cent of the salary of the Chief Justice of the High Court at the time
- reductions to take account of any government pensions already payable.

The Bill offers retired Governors-General or their widowed spouses the option of commuting part of their pension to meet surcharge liabilities incurred after leaving office, in **item 13**. If the option is taken up, a downward adjustment will be made in the pension payable: **new subsections 4(6)** and **4(3B)**. **Item 7** is a consequential change.

The other major measure on superannuation involves adjustments to the statutory formula to ensure that liability for the surcharge does not exceed the statutory maximum of 15 per cent of contributions. To do so it has to take account of two variables:

- surcharge assessments may be issued at various times
- the pension payable may need to be reduced because a surcharge liability has been met by the trustee on behalf of the retired Governor-General or widowed spouse.

Items 9-12 adjust the Principal Act to achieve the objective of capping liability at 15 per cent while taking account of the variety of circumstances which these two variables may create.

The superannuation contributions surcharge took effect from 20 August 1996. **Item 14** clarifies that the amendments contained in Schedule 1 do not apply to a person holding the office of Governor-General before that date.

Taxation

Item 3 in **Schedule 2** removes the exemption from income tax for Governors-General and State Governors. **Items 1** and **2** make consequential amendments to the *Income Tax Assessment Act 1936*.

Item 4 makes clear that this change will not apply to Sir William Deane or any State Governor in office when Sir William is replaced on 29 June 2001.

Endnotes

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1 House of Representatives, *Debates*, 9 April 1974, p. 1248.

2 The adjusted taxable income includes the surchargeable contributions made to a superannuation fund and reportable fringe benefits.

3 For the purposes of the Governor-General's scheme, the trustee is the Secretary of the Department of Prime Minister and Cabinet (or delegate): *Governor-General Act 1974*, section 5A.

4 *Governor-General Act 1974*, section 2A (definition of 'surcharge debt account') and *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, section 16.

5 *Governor-General Act 1974*, paragraph 4(3)(b).

6 *Governor-General Act 1974*, subsection 4(3C).

7 Explanatory Memorandum to the Superannuation Legislation Amendment (Post-retirement Commutations) Bill 2000, p 2. It appears that the amendments were made by item 1 of Schedule 4 to the *Superannuation Contributions and Termination Payments Legislation Amendment Act 1999* and Schedule 1 to the Superannuation Industry (Supervision) Amendment Regulations 1998 (No. 8).

8 Superannuation Legislation Amendment (Post-retirement Commutations) Bill 2000.

9 *Income Tax Assessment Act 1997*, section 51–15.

10 The Hon Peter Reith, House of Representatives, *Debates*, Second Reading Speech, 6 June 2001, p. 26189 (proof copy).

11 ibid.

12 ibid.

13 ibid.

14 eg *The Weekend Australian*, 28 April 2001, Gerard Henderson, 'Blurring the line between church and state', *The Courier-Mail*, 25 April 2001, 'Have faith in Howard's choice', *The West Australian*, 24 April 2001, Kelly Burke, 'Church divided over point of political power', *Sydney Morning Herald*, 24 April 2001, Paul Sheehan, 'Prime Minister's first choice proved unattainable but his second was unbeatable', *Sydney Morning Herald*, 24 April 2001, Chris

McGillion, 'Line between religion and politics blurs', *The Sydney Morning Herald*, 23 April 2001.

15 James Murray, 'Misguided move by both PM and priest', *The Australian*, 25 April 2001; Gerard Henderson, 'Blurring the line between church and state', *The Courier-Mail*, 25 April 2001; Sophie Douez, 'Church leaders raise questions over new G-G', *The Age*, 24 April 2001; Kelly Burke, 'Church divided over point of political power', *Sydney Morning Herald*, 24 April 2001; Cheryl Saunders, 'The separation of church and state narrows', *Sydney Morning Herald*, 24 April 2001; Michael Hogan, 'Separation of church and state?', *The Drawing Board: An Australian Review of Public Affairs*, 16 May 2001, Chris McGillion, 'Line between religion and politics blurs', *The Sydney Morning Herald*, 23 April 2001.

16 Archbishop Hollingworth was reported to have said in the latest edition of his diocesan newspaper: 'I will create a small chapel at Yarralumla for private devotions and regularly celebrate the Eucharist discreetly in a local church or churches…On Sundays when worshipping in Christian churches I will probably wear clerical street attire where it is appropriate.' 'New G-G plans small chapel at Yarralumla', *Canberra Times*, 13 June 2001.

17 Professor Cheryl Saunders recently wrote: 'Australia's constitutional arrangements are squarely in the Western tradition, which has long assumed the importance of the neutrality of the state in religious affairs. Typically, neutrality is secured through separation of the two, in various ways and at varying degrees. Over the course of the 20th century, separation of church and state has come to mean at least that the church should not have a systemic role in government and that the state should not prefer, or be seen to prefer, one form of religion over another.' 'The separation of church and state narrows', *Sydney Morning Herald*, 24 April 2001.

However, while accepting the notion that Australia observes a principle of state neutrality, another commentator has recently noted: 'From the appointment of Rev. Samuel Marsden as one of the first magistrates in colonial New South Wales, to the adoption of explicit policies of state aid for denominational schools during the 1960s, to [the use of religious based services in the Job Network and the appointment of Archbishop Hollingworth], Australia as had a very consistent tradition of cooperation between church and state.' Michael Hogan, 'Separation of church and state?', *The Drawing Board: An Australian Review of Public Affairs*, 16 May 2001.

18 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 2nd edition, Federation Press, Sydney, 1998, pp. 1005–1016.

19 Section 3 of the Constitution: 'The salary of a Governor-General shall not be altered during his continuance in office.'