

Procedural Digest 1992

The following information about procedural developments and items of procedural interest is adapted from the Department of the Senate's *Procedural Information Bulletin*. Details of legislation and other matters considered by the Senate, including committee reports, may be found in *Business of the Senate 1 January 1992 — 31 December 1992*, available from the Senate Table Office. Items are arranged in alphabetical order.

Amendments and requests

Local Government (Financial Assistance) Amendment Bill 1992 .

So supportive was the government of an Opposition amendment to the Local Government (Financial Assistance) Amendment Bill 1992 that the Minister for Justice, Senator Tate, moved the amendment. On 25 June the House of Representatives returned the bill with a claim that this amendment should have been a request in that, contrary to the relevant paragraph of section 53 of the

Constitution, it increased a 'proposed charge or burden on the people'. Although the amendment changed a sum of money to a greater sum, the effect was to increase a maximum figure within which the responsible minister may determine a figure which is then used to calculate an amount which may be a grant to a state, and the stated intention was that such a grant be in substitution for another grant so that no increase in actual expenditure would be involved. The view which has been taken in the Senate is that an amendment does not have to take the form of a request unless it necessarily and directly involves an increase in expenditure. Because there was not time to dispute the matter, Senator Tate moved a motion to turn the amendment into a request, the motion including the words 'while not conceding that Senate Amendment No. 2 should have been a request'. The request was duly made to the House, the requested amendment made, and the bill returned again to the Senate for final agreement. Opposition senators having expressed the view that a request was not required, and Senator Tate having expressed a wish for further consideration of the matter, it was arranged that a paper be prepared on the matters in issue during the long adjournment.

On 18 August the President tabled another paper on the interpretation and application of the relevant constitutional provision (an earlier paper was tabled in 1989). The paper responded to a request in the House of Representatives for a further explanation in relation to the matter, and set out the reasons for the difficulties which had arisen in recent times. The paper suggested that the Parliament had been neglectful of proper parliamentary control of expenditure by agreeing to unlimited and indefinite appropriations and to provisions which conferred wide discretions on ministers and other officials, set out suggested principles which should be used to determine questions arising under the provision, and suggested that the interpretation and application of the provision in the past had been confused and inconsistent. A further paper, commenting upon a House of Representatives paper on the subject, was tabled on 26 November. Copies of the papers are available from the Table Office.

Appropriation bills

The items of expenditure in the main appropriation bills which estimates committees were unable to examine due to shortage of time were referred to two standing committees on the initiative of the Opposition on 25 November. As was pointed out in debate, this procedure, in effect, anticipates the recommendation of the Procedure

Committee whereby follow-up hearings of estimates committees would be held as a substitute for committee of the whole proceedings on appropriation bills.

Statements of expenditure under the Advances to the Presiding Officers were considered in committee of the whole on 26 November in the same way as statements relating to the Advance to the Minister for Finance. It is intended that these statements be dealt with in this way as a regular practice.

Extra appropriation bills

An extra appropriation bill was introduced on 30 March and immediately proceeded with. This bill was designed to appropriate to some government programs some of the money which would have been appropriated by the ordinary appropriation bills, and the reason for introducing the bill was that these programs were expected to run out of money before the ordinary appropriation bills were passed. It is believed that this is the first time that a government has undertaken this procedure.

The estimates of expenditure contained in the extra bill had been referred to the estimates committees on 26 March, but notwithstanding that step the Opposition vigorously attacked the government in relation to the extra bill when it was debated and finally passed on 30 March. The Opposition succeeded in having the Senate agree to a second reading amendment condemning the government over the introduction of the bill, but was not successful in moves to have the bill itself referred to the estimates committees or to three of the standing committees. Had the bill been referred to the estimates committees this would have been an unprecedented step, because estimates committees normally consider the particulars of proposed expenditure contained in appropriation bills rather than the bills themselves.

Additional appropriation bills were introduced on 30 November to move some funds provided for employment-generating projects to different projects; the particulars of expenditure contained in the bills were tabled on 24 November. The Opposition initiated a reference of the bills to the relevant estimates committees, but the motion was amended to refer them to Estimates Committee B only. An attempt to have the Senate direct that officers of the Treasury and the Department of Finance attend the hearings of the committee to discuss the general strategy of the bills was unsuccessful on 3 December. Estimates Committee B duly presented its report on 8 December, and the bills were considered on the following day. The Chairman of Committees was obliged to make another ruling about the scope of debate in committee of the whole, which led to some further disputation.

Postponements and amendments

An unusual motion to postpone consideration of part of the appropriation bills was passed in committee of the whole on 28 May. Consideration of the question for the adoption of the report of Estimates Committee B in respect of the Department of Finance was postponed until 'questions asked of Senator McMullan are answered and relevant documents are produced' in relation to the accommodation of the Australian National Audit Office. The matter under consideration was the propriety of the Audit Office leasing space in a building owned by the Australian Labor Party. Theoretically it was not possible to resume consideration of the postponed question until the questions were answered and the documents produced, but this problem was overcome by a motion, moved by Senator McMullan, that the committee resume consideration of the postponed matter, the view being taken that, the committee of the whole not having reported its resolution to the Senate, it was open to the committee to take that course. That motion having been passed, Senator McMullan then tabled relevant documents, and the postponed question was eventually passed after further questioning based on the documents. The Opposition subsequently gave notice of a

motion to refer to the Standing Committee on Finance and Public Administration the question of the accommodation of the Audit Office.

A request for an amendment was proposed to delete a sum of money from Appropriation Bill (No. 3) 1991/92 associated with the transfer of funding of the John Curtin School of Medical Research. However, it was discovered that the request would not have the intended effect as there was a peculiarity in the way in which the figures were presented (a transfer of funds from a particular item was disguised by other increases in the expenditure proposed for that item and that this was not explained in the Program Performance Statement). Instead of the request, the committee of the whole passed a resolution calling for a change in the Program Performance Statements to reveal more clearly the effects of adjustments to appropriation items. The government accepted the view put by senators that the statements should explain changes in expenditure of that character.

On 18 August the President tabled correspondence from the Minister for Finance and the Department of Finance in response to the Senate's resolution. The department agreed that the guidelines for Program Performance Statements be altered to ensure that changes in expenditure of that sort are fully identified and explained.

Casual vacancies

The President reported on 25 February the vacancy in the Senate caused by the resignation of Senator Vallentine. There was some debate on the failure of Western Australia to fill the vacancy, and later in the day notices of motion criticising the Western Australian government were given. One of these motions, moved by Senator Coulter, was debated and passed at general business time on 5 March.

The background to this matter is a question of interpretation of section 15 of the Constitution, which provides that a vacancy is to be filled by the Houses of the state Parliament, but may be temporarily filled by the state Governor if the Parliament is not in session. In the past the state of Western Australia has interpreted this to mean that the Governor may make an appointment if the Houses are not sitting even though the Parliament has not been prorogued and is therefore technically in session. Other states have adhered to the strict construction of the section and their Governors have not made appointments to vacancies unless their Parliaments have been prorogued. This interpretation is undoubtedly technically correct, and on this occasion the Western Australian government determined to adhere to that interpretation. It was pointed out, however, that the Western Australian Houses were sitting when the vacancy was notified and therefore could have made the appointment, and the criticism of the Western Australian government was directed to its failure to bring about this procedure.

Senator Vallentine's replacement, Senator Christabel Chamarette, having been appointed by the Houses of the Western Australian Parliament on 12 March, appeared and was sworn in on 24 March. One of her first actions in the Senate was to give notice of a motion referring to the filling of casual vacancies.

The President tabled on 28 April a letter from the Premier of Western Australia responding to the resolution passed by the Senate on 5 March criticising the Western Australian government for the delay in filling the vacancy caused by the resignation of Senator Vallentine. The Premier's letter suggested that the Senate was misinformed and that the problem was caused by an anomaly in the Constitution. Senator Chamarette, however, again pointed out that the vacancy could have been filled by the Western Australian Houses when the vacancy was notified to them.

When the resignation of Senator Olsen was announced on 4 May, Senator Chamarette again drew attention to her notice of motion relating to the filling of casual vacancies and suggested that the Senate give early attention to it.

On the motion of Senator Chamarette, a further resolution on casual vacancies was passed on 3 June. This resolution is a very significant expression of the Senate's view on the filling of casual vacancies. It expresses the belief that casual vacancies should be filled as expeditiously as possible so that no state is without its full representation for any time longer than is necessary, recognises the problem which may arise when the Houses of the state Parliaments are adjourned but not prorogued, which, on a strict reading of section 15 of the Constitution, prevents the state Governors making appointments, and suggests to the state Parliaments that their Houses adopt procedures whereby they are recalled to fill vacancies if they are adjourned but not prorogued when the vacancies are notified. Such a procedure is already in effect in Queensland. The resolution has been communicated to the Presiding Officers of all the state Houses and, on the suggestion of Senator Chamarette, to the Premier of Western Australia.

Senator Olsen's replacement, Senator Alan Ferguson, having been appointed by the South Australian Houses on 26 May, was sworn in on 1 June. As with other recent swearings-in, only a faxed copy of the certificate of appointment was available at the time, but the original certificate was tabled later in the day.

Code of conduct

As an outcome of the Marshall Islands affair (see p. 123), a motion was passed on 25 June, moved by the Australian Democrats, calling for the development by the beginning of 1993 of a code of conduct for senators, members and ministers. The motion was supported by the government, but opposed by the Opposition, who attempted to substitute, by way of amendment, a select committee to inquire into the whole affair.

Committee Proceedings and Reports

Discussion and background papers

A discussion paper and a background paper prepared by the Legal and Constitutional Affairs Committee in relation to its reference on the cost of justice were tabled on 26 February, having been presented to the President during the long adjournment under the procedures relating to the presentation of reports in that circumstance. The view has been taken that, as committees have the power to report from time to time, it is open to a committee to treat a background paper or a discussion paper in all respects as if it were a report. The committee presented a further discussion paper in relation to this reference on 5 March. The Select Committee on Superannuation has also adopted the practice of publishing issues papers relating to its inquiry.

Committee seminars

The Select Committee on Superannuation presented on 12 November a report of a seminar on superannuation. The holding of seminars as part of committee inquiries appears to be a fruitful method of augmenting the conventional methods of committee inquiry.

Delegated legislation

Amendment and approval

The Senate on 15 October added to the growing category of delegated legislation which is subject to amendment and approval by both Houses of the Parliament. An Opposition amendment to the Disability Discrimination Bill 1992 applied this form of

parliamentary control to standards made under the bill. Under the bill as introduced those standards were to be contained in regulations, which would have been subject to disallowance only. There is now a considerable body of delegated legislation subject to amendment or approval. The Regulations and Ordinances Committee maintains a list of delegated legislation subject to the various methods of parliamentary control.

Disallowance of instrument

An instrument relating to Defence Force superannuation benefits was disallowed on 9 September on the motion of Senator Newman, the Minister for Defence, Senator Ray, not resisting the disallowance motion. Senator Newman stated in debate that certain defects in the instrument which caused unfairness to beneficiaries had been admitted only after she had obtained independent advice on the effects of the instrument. The Minister indicated that the problem with the instrument had arisen from the complexities of the subject matter.

Disallowance motion

On 24 March the Chairman of the Regulations and Ordinances Committee, pursuant to standing order 78, gave notice of her intention to withdraw a disallowance motion in relation to certain regulations under the Freedom of Information Act. The committee had decided to accept for its purposes an explanation by the responsible minister of certain provisions in the regulations relating to the life of conclusive certificates declaring that certain documents are exempt from disclosure under the Act. The Opposition, however, did not accept the minister's explanation and, under the procedures contained in the standing order, the notice of motion was transferred to Senator Bishop's name and was passed later in the same day, so that the regulations were disallowed. That day was the last day for resolving the notice of motion.

The use of these procedures to transform a committee notice of motion into an Opposition notice of motion has occurred previously, and regulations have previously been disallowed in that way. This situation arises because there are sometimes policy considerations in addition to the considerations arising under the Committee's principles of scrutiny.

Political broadcasts regulations

During debate on 26 and 27 February on a motion to disallow regulations under the Political Broadcasts and Political Disclosures Act, attention was drawn to the extraordinary series of errors made in the processes of proclaiming the Act and making the regulations. The proclamation to commence the Act was not gazetted until the day after the day of commencement, and the proclamation was therefore probably void. A new proclamation was made and gazetted on the following day. Regulations containing the original intended commencement date were then repealed and new regulations substituted, but it was realised that these new regulations were void because of the prohibition in the Acts Interpretation Act against the remaking of regulations which have not been tabled or which are the subject of an unresolved disallowance motion. A third set of regulations was then made amending the original set. The possibility was raised, however, that none of these regulations were in force because of technical defects. The motion for the disallowance of the regulations was negatived. On 5 March unusual notices of motion were given by the Opposition to disallow the regulations which were not covered by the original disallowance motion. These notices were expressed to be for a future day, namely the day on which the responsible minister tables the advice received by the government in relation to the regulations. The minister had earlier declined to table that advice.

On 1 April the Regulations and Ordinances Committee made a special report, by way of a statement by the chairman, on the regulations. The statement indicates that, due

to the various errors in the making of the regulations, there is considerable doubt as to which if any of the various regulations are in force. The Committee did not express a concluded view, but noted the possibility that none of the regulations were in force, and indicated that only a court could determine the question.

The notices of motion given by Senator Parer to disallow the regulations remained on the Notice Paper for 15 sitting days until 26 May, and the regulations were then deemed to be disallowed under section 48(5) of the Acts Interpretation Act. The notices were given for the day on which the government tabled the advice it had received on the validity of the regulations, and that advice not having been tabled, the notices were never called on.

On the last day of the autumn sittings the government was obliged to move a motion to authorise the remaking of regulations which had been deemed to be disallowed. Because regulations the same in substance as disallowed regulations cannot be remade within six months without the approval of the disallowing House, and because the government could not take the risk of a state or territory election occurring within the next six months, the motion was moved to allow new regulations to be made during that period. The motion was passed, with the support of the Australian Democrats. The Opposition attempted, by way of amendment, to make the authorisation of the remaking of the regulations dependent on the tabling of the government's advice on the validity of the original regulations, but the Minister for Administrative Services, Senator Bolkus, again declined to table the advice, saying that it was given orally. (See also *High Court Judgments*, below.)

Regulations disallowed

Regulations under the Family Law Act and the Administrative Appeals Tribunal Act were disallowed on 3 March. The regulations had increased fees payable in respect of proceedings under those acts. Motions to disallow regulations relating to fees under the Federal Court Act and the Judiciary Act were not carried.

Unusual disallowance provision

By way of an amendment made in the Senate, an unusual disallowance provision was inserted in the *Superannuation Guarantee (Administration) Act 1992*, which was passed in the Autumn sittings. The relevant provision provided for a prescribed figure, known as the superannuation charge percentage, to be altered by regulation subject to disallowance up to a specified date. This provision had the effect of altering the normal period of disallowance provided by the Acts Interpretation Act for other regulations. A motion to disallow the regulations was moved but negatived on 8 December.

Estimates committees

In a report presented on 24 March the Procedure Committee recommended the adoption of the new procedures suggested by the Committee in a discussion paper presented on 19 December 1991. The essence of these proposals is that supplementary meetings of estimates committees to deal with specific notified matters would take the place of committee of the whole consideration of the appropriation bills. Senator McMullan gave notice of a motion on 25 March to adopt the new procedures, but consideration of the motion was postponed till the first sitting day in 1993, as was the consideration of the Procedure Committee's report.

Meeting *in camera*

Estimates committees are required to hold all their hearings of evidence in public session, and all documents presented to the committees are made public. On 4 November a motion was moved, following a special report by the committee, to

authorise Estimates Committee D to meet *in camera* to take evidence concerning allegations of misuse of the printing facilities of the Department of Social Security. The Department had indicated an unwillingness to give the evidence in public session because this might prejudice police investigations and subsequent action.

The motion to authorise the committee to meet *in camera* was opposed and adjourned, senators expressing a reluctance to set a precedent for estimates committees meeting *in camera*. On 10 November a motion was agreed to refer the matter to the Standing Committee on Community Affairs. Standing committees, unlike estimates committees, are empowered to hear evidence *in camera*, and the standing committee is able to accede to the request to do so if the committee considers that course appropriate.

High Court judgments

Political broadcasting: portion of Act declared invalid.

The political broadcasts segment of the *Political Broadcasts and Political Disclosures Act 1991*, which was passed by the Senate after very protracted and difficult proceedings in December 1991, was found by the High Court to be invalid on 28 August 1992.

Qualification of senators.

The judgment of the High Court in the case of Mr Cleary, given on 25 November, provided significant guidance on the interpretation of section 44 of the Constitution relating to the disqualifications of members of both Houses. Senator Kernot introduced, on 24 November, a Constitution Alteration Bill to remodel section 44 along lines recommended by various bodies, including the Legal and Constitutional Affairs Committee, over a number of years.

On 17 December the President, in response to a question, made a statement relating to the membership by senators of statutory bodies in the light of the interpretation of section 44.

Legislation

Amendments

Procedurally interesting and significant amendments to legislation during the year included the following items.

* A feature of amendments made to legislation in the Senate in recent times has been the insertion into bills of provisions to subject various types of ministerial determinations and instruments to disallowance or approval by either House. As a result, such provisions are rapidly multiplying. Examples of these occurred with the Taxation Laws Amendment Bill (No.2) 1992 on 17 June and the Health, Housing and Community Services Legislation Amendment Bill 1992 on 22 June. An interesting example occurred on 25 June in relation to the Territories Law Reform Bill 1992, which dealt with the application of the laws of Western Australia to the territories of Christmas Island and Cocos (Keeling) Islands, and into which the Senate inserted a rather elaborate provision which would allow either House of the Parliament to disallow, in effect, the application of any particular law of Western Australia to the Territories.

* Senator Harradine was successful in proposing on 25 November to the Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992 an unusual amendment whereby codes of practice applying to television stations could be amended by both Houses of Parliament. The amendment included provisions to ensure that proposed amendments would be dealt with by each House. On the

following day the Senate agreed to substitute amendments proposed by the government in the House of Representatives which retained the provision for amendment by both Houses but removed the provisions to ensure that proposed amendments are dealt with.

* Among the amendments to the Transport and Communications Legislation Amendment Bill (No.3) were provisions to restore the so-called "election blackout", the prohibition on the broadcasting of political advertisements in the three days before polling day in an election, which, having been in force since 1942, had been removed by the ill-fated political broadcasts legislation held to be invalid by the High Court.

Bills negated in committee

Forest conservation and development. The Forest Conservation and Development Bill 1991 was negated in committee of the whole on 4 May, the committee of the whole rejecting the question that the bill as amended be agreed to. This was the second occasion on which a bill had been rejected in this way, the earlier precedent occurring in 1981. In this circumstance the Chairman of Committees reports to the Senate that the bill has been negated in committee and the report of the committee is then adopted. Normally the rejection of a bill occurs on the motions for the second or third reading.

Industrial relations. Due to the absence of some government senators in the early hours of the morning of 16 December, one of the questions necessary for the passage of the Industrial Relations Amendment Bill (No. 2) 1992 in committee of the whole, the question that the bill as amended be agreed to, was negated. This is the third occasion on which a bill has been negated in committee. The resolution of the committee was reported and the report adopted. The Manager of Government Business then immediately, by way of a motion to suspend standing orders, moved for the bill to be recommitted. The bill was recommitted, agreed to in the committee, reported and read a third time. An amendment to recommit the bill on the motion for the adoption of the committee report under standing order 121 could have been used; this was not done partly because it was initially thought that the recommittal of the bill would be left until the following sitting, and there was some doubt about the propriety of using that procedure when a bill is negated in committee of the whole. Arguably when a bill is negated in committee of the whole it should be revived only by a motion on notice, and the recommittal amendment procedure should be used only for reconsideration of a bill actually reported out of committee of the whole.

No cut-off date set for legislation

A very large volume of business was compressed into the last weeks of sittings for the year, and even with the extended sittings and hours not all of the business was reached. It is not clear whether this was partly due to the failure of the Senate, for the first time since 1986 to set a deadline for the receipt of bills from the House of Representatives; the House having risen on 26 November, was recalled on 16 and 17 December to deal with legislation passed and amended by the Senate.

Error in schedule of amendments

After the two Houses rose for the winter long adjournment on 25 June, it was discovered that the schedule of amendments made by the Senate to the Superannuation Guarantee (Administration) Bill 1992 forwarded to the House of Representatives contained four amendments which had not in fact been agreed to by the Senate. The bill was one of those dealt with during the end-of-sittings rush when the House of Representatives is recalled to deal with Senate amendments. The House had agreed to the amendments made by the Senate.

The question of how to deal with this problem was complicated by the fact that the bill contained a commencement date of 1 July, and if it were brought into operation after that date it would be purportedly retrospective but without any explicit retrospective commencement provision.

There were two legally safe options for dealing with the problem. The incorrect documentation could have been altered and the bill proceed as actually amended by the Senate. This option could have been adopted on the basis that the Houses were clear as to what they intended to do, and it would have been legally safe because the courts accept the records of the Houses of their proceedings and do not review the operation of the internal procedures of the Houses. The government was persuaded not to adopt this option, probably largely because it would involve conceding that the House merely endorses the Senate's amendments without making a positive decision actually to approve each amendment. The bill was therefore not sent for royal assent before 1 July. (In agreeing with other senators that this course could have been followed, Senator Harradine suggested in debate that it would have to be abandoned if any member of the House of Representatives could honestly state that he or she knew what was in the schedule of amendments, a possibility which he regarded as remote!)

The other legally safe option was to have the error corrected by action by the two Houses when they returned, and the bill amended to make it clear that it was intended to operate retrospectively. The resulting statute could then not be challenged on the basis that it purported to operate retrospectively without any explicit retrospective commencement provision.

The commencement date having passed, however, the government apparently realised that the second option involved the bill being reconsidered in the Senate and the danger that it would be further amended or perhaps even not carried. In order to avoid this danger, it was suggested that the President should forward a substitute schedule of amendments to the House without consulting the Senate. This the President declined to do, on the basis that the Senate should be consulted as to the remedial action to be taken, particularly as the bill would operate retrospectively. On 18 August, therefore, the President reported to the Senate the problem and his refusal to adopt the course of seeking to correct it without first consulting the Senate.

Instead of moving that the bill be returned to the Senate for further consideration, however, the government, apparently still anxious to avoid the possibility of further amendments to the bill, moved that a corrected schedule of amendments be forwarded to the House. This motion was agreed to, but only after senators had pointed out the danger that it posed to the bill because the bill would not contain an explicit retrospective provision. The House then agreed to the corrected schedule of amendments and the bill proceeded. The further consideration of the content of the bill by the Senate was thereby avoided but at the risk involved in the commencement provision remaining unchanged.

Government bills: increase in number first introduced in Senate

A notable feature of the year was the large number of government bills first introduced in the Senate. In the course of 1992 some 43 government bills first introduced in the Senate were passed by both Houses, far exceeding the number of private Senators' bills introduced during the year (12 such bills were introduced and five draft bills were tabled; there were, however, 44 private Senators' bills on the Notice Paper at the beginning of the year).

Marshall Islands Affair: Production of Documents

The disputation over what came to be called the 'Marshall Islands affair' produced a number of precedents and matters of procedural interest.

The Minister for Transport and Communications, Senator Richardson, was censured by the Senate on 7 May for allegedly misleading the Senate, attempting to interfere in the justice system of the Marshall Islands, and failing to declare an interest as a minister.

The reaction of the government to the raising of these matters was to place again before the Senate a motion for the registration of senators' interests. Such a proposal was debated in 1983, 1986 and 1987 but was not brought to a decision.

On May 26 the President made a statement in which he gave an account of his contact with Mr Greg Symons and the subsequent action he took to introduce Mr Symons to an officer in the Australian Embassy in Washington. Consideration of the President's statement was provided for by an unusual motion, moved by leave, that the statement be called on at the conclusion of question time as if it were an order of the day. The statement was duly called on for consideration after question time, and the Leader of the Opposition moved a motion expressing 'grave concern that the President of the Senate failed to exercise due care in requesting the Australian Embassy in Washington to assist Mr Symons'. After fairly lengthy debate this motion was negatived. Significant elements of the President's statement were that Mr Symons had produced to the President letters from the Marshall Islands government indicating that Mr Symons was authorised to act on behalf of that government, and the President's letter to the Washington Embassy was a letter of introduction based on those credentials.

A significant part of question time on that and subsequent days was devoted to the Marshall Islands matter, the Minister for Foreign Affairs and Trade, Senator Evans, tabling a number of relevant documents in the course of question time on the first two days. On 2 June, after another debate on the matter, the Senate passed a resolution calling on the government to establish a judicial inquiry into government involvement with Mr Symons, and there was speculation that, if the government did not establish such an inquiry, a Senate committee of inquiry might be appointed.

In response to requests for the tabling of all documents relating to the matter, Senator Evans appeared to suggest in some of his answers that he would not provide information which would not be made available under the Freedom of Information Act. On 3 June, after several such responses, a motion was moved by the Opposition and carried repudiating 'the claim repeated by the Minister for Foreign Affairs and Trade that the exemption provisions of the Freedom of Information Act provide grounds for not producing documents to a House of the Parliament'. In response to this motion Senator Evans explained that he did not intend to imply that the Freedom of Information Act is in any way applicable to the production of documents to a House by a minister, but that he was merely adopting a shorthand expression to indicate that in examining the documents he would have regard to criteria similar to those contained in the Act. The motion also called upon him to produce by noon on the following day all relevant documents. Although this was not a formal order for the production of documents, it was regarded as having the same practical effect, and before noon on the following day Senator Evans tabled a substantial collection of documents. Some questions were asked based on those documents during question time on that day, and Senator Evans tabled further documents during question time.

The Procedure Committee, to which was referred the matter of the minister's references to the Freedom of Information Act, reported that the use of that Act as some

kind of checklist of grounds on which ministers could decline to table documents did not absolve ministers of their responsibilities to the Parliament.

Motions for suspension of standing orders

On 16 November the Leader of the Opposition in the Senate moved a motion pursuant to contingent notice to suspend standing orders to enable him to move to alter the routine of business. This motion was unsuccessful, and he immediately attempted to move another motion to suspend standing orders using the same contingent notice. The President then ruled that no more than one motion to suspend standing orders using the contingent notice may be moved on any one occasion. The contingent notice, which is an 'all-purpose' contingent notice designed to achieve the suspension of standing orders to allow a motion to rearrange business at any time when there is no other business before the chair, is expressed to have effect when the Senate is between items of business. The effect of the President's ruling, therefore, is that only one attempt to suspend standing orders pursuant to the contingent notice can be made on each such occasion. The ruling is designed to prevent obstruction of business by the moving of successive motions to suspend standing orders.

After some discussion of the ruling, during which senators expressed concern that the ruling could be unduly restrictive of their rights, the President agreed, with the concurrence of the Senate, to allow Senator Hill to move a second motion for the suspension of standing orders, on the basis that no further such motions would be moved, and also agreed to refer the problem underlying his ruling to the Procedure Committee.

Motions to take note of answers. See *Question time*

Orders for production of documents

An order for the production of a document to a standing committee was passed on 5 November on the motion of Senator Knowles. Normally orders for the production of documents require them to be laid before the Senate. Senator Knowles' successful motion required that a report to the government on Medicare fraud be provided to the Standing Committee on Community Affairs.

On 9 November the committee reported that the document had not been produced to the committee. The Minister for Health, Housing and Community Services had indicated an unwillingness to produce the document because he did not wish it to be made public. (The presentation of a document to a committee does not automatically make it public, but the committee is able to authorise the publication of the document.) The Minister representing the Minister for Health, Housing and Community Services in the Senate, Senator Tate, moved by leave a motion to the effect that the document be provided to the committee but that the committee not publish the document until after 11 December. This motion, representing a compromise on the issue, was agreed to.

Normally orders for the production of documents passed by the Senate are directed to ministers, but they can also be directed to statutory authorities, private organisations or any other persons or bodies in the jurisdiction. An unusual order was agreed to on the motion of Senator Harradine on 16 December. It called for the production by the Auditor-General of certain financial statements in relation to postal services. The statements are required to be produced by the first sitting day in 1993. It is believed that this is the first occasion of an order for the production of documents directed to an independent statutory authority.

Presiding officers

The Parliamentary Presiding Officers Amendment Bill 1992, introduced by the Deputy-President and Chairman of Committees, Senator Colston, was passed by the Senate on 8 October. The statute which it amends provides for the exercise of statutory powers of the Presiding Officers, and the bill takes account of the change in the title of the Deputy-President. The bill was amended in the House of Representatives when the House decided to make a similar change in the title of its Chairman of Committees, and the House amendments were agreed to on 26 November and the bill proceeded to royal assent. Senator Colston thus became the first member of either House to have two of his bills put onto the statute books.

Privilege

Alleged Interference with witnesses

Community Affairs. The Standing Committee on Community Affairs presented on 2 April a report indicating that some of its witnesses in relation to its inquiry into pharmaceutical restructuring measures may have been subject to attempted intimidation in respect of their evidence. The committee asked that the matter be referred to the Privileges Committee. Under standing order 81 the President determined that a motion to refer the matter to the Privileges Committee should have precedence over all other business, and such a motion was immediately moved and passed, which is permitted under the standing order when the Senate is about to adjourn for more than a week.

On 9 September the Privileges Committee reported that the persons who made the allegations suggesting that witnesses had been subjected to threats of legal action had not been willing to place any further evidence before the Committee. The Committee therefore did not conclude that there had been any interference with witnesses, but included in its report a warning about persons making claims in relation to the serious matter of interference with witnesses which they are not prepared to substantiate. Apart from that warning, the Committee's report will be useful for future reference as an analysis of questions relating to interference with witnesses. On 17 December the Senate passed a resolution endorsing the findings of the Committee.

Corporations and Securities. On 14 September the Joint Committee on Corporations and Securities reported on a case of an officer of a statutory body, the Australian Securities Commission, who had been charged with an offence under the Public Service Act for making submissions to the joint committee at variance with the submissions of the Commission. The joint committee pointed out that this prima facie constituted the contempt of improper interference with witnesses and the criminal offence of interference with witnesses under the *Parliamentary Privileges Act 1987*. As the charge was withdrawn as soon as the joint committee drew the matter to the attention of the Chairman of the Commission, the committee did not recommend that any further action be taken by the Senate, but it would still be open for any senator to raise the matter as a question of contempt. The joint committee also inquired into other matters in issue between the Commission and the officer concerned to assure itself that there were no other actions by the Commission which could constitute interference with a witness.

On October 8 the Deputy-President, presiding in the absence of the President, reported that two senators had raised the matter with him as a matter of privilege under standing order 81, and ruled that a motion to refer the matter to the Privileges Committee could have precedence over other business. The matter was duly referred to the Privileges Committee on the motion of Senator Spindler on the following sitting day.

The letters to the Deputy-President by the senators and the material tabled in conjunction with his ruling indicate that there may be additional evidence relating to the matter which was not known to the joint committee.

Interference with witness and misleading evidence

On 25 June the Privileges Committee presented its report on the National Crime Authority Committee case, which was referred to it in November 1990. The essence of this case is that members of the National Crime Authority engaged in certain activities in relation to one of their number, the result of which was that he was not to give evidence before the Parliamentary Joint Committee on the National Crime Authority without the approval of the Authority. When asked before that committee whether that member had been restricted in the evidence he could give to the committee, a member and an officer of the Authority answered that he had not.

The Privileges Committee found that the activities of the Authority had the effect of restricting the member concerned in the evidence he could give to the parliamentary joint committee, and that the answers given in evidence before that committee misled the committee. It was found that the members of the Authority believed that they were acting lawfully but had avoided facing the nature of their actions by resorting to legalistic rationalisation. The Privileges Committee determined that it should not make a formal finding that a contempt had been committed, but recommended that the Senate should warn persons dealing with parliamentary committees that they should direct their attention to the real effects of their actions and should not take refuge in such rationalisations. The committee also recommended that the law relating to the National Crime Authority and the parliamentary joint committee should be clarified, and suggested to the Senate that if these two actions were taken this would be a productive outcome of the case. On December 17 the Senate passed a resolution endorsing the findings of the Committee.

Publication of a document

At question time on 12 October, Senator Bishop asked the Leader of the Government in the Senate a question concerning the Australian Taxation Office's investigation of alleged tax avoidance by a state member of Parliament. Having asked the question, Senator Bishop handed to Senator Button an envelope containing the name of the person concerned.

This gives rise to a question of whether Senator Bishop's publication of the name to Senator Button is covered by parliamentary privilege.

Although the procedures of the Senate do not provide for the sort of action taken by Senator Bishop, it is quite common for information to be made available to ministers in conjunction with the asking of questions or to senators in conjunction with the answering of questions, without that information forming part of the questions or answers and therefore part of the primary proceedings in parliament. The provision of information in this way is probably covered by the definition of proceedings in parliament in section 16 of the *Parliamentary Privileges Act 1987*, which includes 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'. In this case, the publication of the name was in itself meaningless except in the context of the question, which of course could not be used in any legal action.

Senators also frequently make information available to ministers without reference to any proceedings in parliament. Such provision of information, however, is usually privileged under the common law interest and duty immunity, which covers, amongst

other things, asking a person in a relevant position of authority to investigate an allegation.

Procedure committee

The Procedure Committee reported on 30 April on proposed changes to standing orders 61 relating to the consideration of government documents and 27 relating to the right of senators to attend meetings of committees of which they are not members. The Committee did not recommend the procedure suggested by Senator Kernot for deferring consideration till the following day of documents presented after 12 noon, but recommended an alternative procedure. The Committee pointed out that the change to the standing orders proposed by Senator Harradine to extend the right of non-members to attend committee meetings to all committees would probably not be effective in relation to joint committees.

The Procedure Committee presented on 15 October a report including a discussion of the grounds on which ministers may seek to withhold documents required by either House of the Parliament. This was a matter which arose out of the Marshall Islands affair.

Question time

Disputes about the conduct of question time led to a number of significant developments during the year.

Extension of question time

On the last day of the autumn sittings, the Opposition successfully moved a motion, for which the Opposition Leader has on the Notice Paper a special contingent notice of motion to suspend standing orders, to extend question time, after complaints about long and irrelevant answers by ministers (it should be noted that ministers also complain, about long questions, points of order and supplementary questions).

Time limitations on questions and answers

On the initiative of the Opposition, a special order was agreed to on 14 September to limit the asking of questions to one minute and the answering of questions to two minutes during question time. This action was taken after Opposition complaints about the length of some ministers' answers, and a general discontent with the conduct of question time. The order was expressed to apply only to the remainder of that week. The operation of the order during the week resulted in a significant increase in the number of questions asked and answered, but also caused an increase in the number of supplementary questions.

On 6 October these procedures were again adopted for the following two weeks but with an amendment moved by the Australian Democrats to extend the time for answers to questions to four minutes. They were adopted again for the first two sitting weeks of November and on November 24 these procedures, together with those concerning motions to take note of answers after question time, were renewed as sessional orders.

Motions to take note of answers

The Opposition is making increasing use of the device of moving by leave after question time motions to take note of answers given by ministers. On 26 March, for example, four such motions were moved after question time. On 31 March there was a short debate on this procedure, after three such motions had been moved, the Leader of the Government expressing concern about the use of the procedure, and the

Leader of the Opposition indicating that the practice was being used because of Opposition dissatisfaction with answers by ministers at question time. On 2 April the meeting of the Senate was prolonged beyond the scheduled adjournment time, which was at 12 noon to allow estimates committees to meet, by follow-up debate on answers to questions. On that occasion, however, the debate which took up most of the time was actually initiated by a minister. The Senate had to negative the question for the adjournment to conclude necessary items, principally the presentation of committee reports, before finally adjourning to allow the estimates committees to meet.

The government began to show impatience with the increasing use by Opposition senators of this procedure of moving by leave after question time motions to take note of answers which can then be debated without limitation of time. At first tolerating these motions, ministers began on 17 June to refuse leave to move them. The result of this, however, was several motions to suspend standing orders to enable motions to take note of answers to be moved, and the merits of the answers then being debated on the suspension motions. A return to granting leave was tried, and then there was a return to refusing leave. Finally, on the last day of the autumn sittings, the Manager of Government Business resorted to moving his own special motion which allowed senators to move motions to take note of answers but to speak only for limited times.

On 14 September an attempt was made by the government to limit the time spent on motions to take note of answers to questions, by making the granting of leave for moving such motions conditional on the senator seeking the leave speaking for only two minutes. This condition was refused, and leave to move a motion was refused, but this resulted in a motion to suspend standing orders, on which senators can speak for five minutes and there is a total time limit of 30 minutes. After one such suspension motion was disposed of, leave was granted to move three further motions to take note of answers.

On the following day the Manager of Government Business moved a special motion to limit debate on motions to take note of answers to two minutes per speaker and a total of 30 minutes. This motion was agreed to, with an amendment to extend the speaking time to four minutes, on 16 September. This motion also was expressed to operate for the remainder of the week. It appears to have had the effect of increasing the number of motions to take note of answers, three such motions being moved on 16 September and five on 17 September. These procedures were agreed to again for the two sitting weeks in October and the first two sitting weeks of November. On November 24 these procedures, together with those concerning time limits to questions and answers at question time were renewed as sessional orders.

In its report presented on 15 October, the Procedure Committee, noting the experimental nature of the procedures concerning the length of questions and answers, and motions to take note of answers after question time, made no recommendations on them but undertook to keep them under review. The Opposition circulated a paper on the effect of the orders on the conduct of question time.

Overdue and unanswered questions

On 16 June Senator Watson made use of the procedure relating to questions on notice unanswered for 30 days to have passed an order for the production of documents, whereby the overdue answers were to be tabled on the following day. The answers were duly tabled, and, perhaps inspired by this success, a senator then used the procedure to require an explanation of the failure to answer a question which was not technically a question on notice but a question to which an answer had been promised during question time.

The order of the Senate relating to unanswered questions on notice was subject to interpretation by the Chair on two occasions on which, a senator having asked for an explanation of failure to answer a question, an answer was produced by a minister. The Deputy President ruled that where an answer is produced following such a request it is not open to a senator to move the motions otherwise authorised by the order. The rulings were given on 2 and 8 December, and on the second occasion the Deputy President explained that the rationale of the order is to encourage ministers to answer questions, and once a question is answered the procedure in the order no longer operates in relation to the question.

Tabling of answers to questions

On 16 June, a senator took the unusual step of tabling by leave answers to questions which he had received, and then by leave moving a motion to take note of the answers and debating them.

Suspension of sitting over three days

The sitting of the Senate which began at 10 a.m. on Thursday, 12 November continued until 6.11 a.m. on Friday, 13 November, due to protracted consideration of the appropriation bills in committee of the whole. A motion was then carried to suspend the sitting of the Senate until 2 p.m. on Monday, 16 November. When the Senate assembled on Monday the sitting continued, which meant that the consideration of business was resumed at the place in the routine of business where it was left off, and consideration of the appropriation bills proceeded, after an unsuccessful attempt by the Leader of the Opposition in the Senate to suspend standing orders to have a question time. The sitting continued until 12.41 a.m. on Tuesday, 17 November. A motion to suspend the sitting until 9.30 a.m. that morning was then carried. When the sitting resumed, the Leader of the Opposition in the Senate was successful in having a motion carried to provide for question time, but apart from that the consideration of the appropriation bills continued until concluded that afternoon.

This device of extending a sitting over more than one day by means of suspensions of the sitting was used in the Senate in the past but has not been resorted to for many years. The advantage of suspending the sitting instead of adjourning is that the Senate can continue with government business without interruption by other items in the routine of business, such as question time. If used excessively by a determined majority, the procedure could be severely restrictive of the rights of individual senators. On this occasion it was rationalised by the need to pass the appropriation bills and the fact that the Senate was not originally scheduled to sit on the extra days, so that no scheduled sitting days were lost so far as other business was concerned.

The extension of one sitting over three days raised the question of the effect of statutory provisions for the tabling of delegated legislation. Those provisions require delegated legislation to be tabled in the Senate within a specified number of sitting days, usually 15 sitting days, and legislation which is not tabled within the specified time ceases to have effect. It has not been determined whether a sitting extending over more than one day is one sitting day for the purposes of those statutory provisions. On this occasion departments were warned that to avoid any doubts about the valid tabling of delegated legislation they should assume that 16 and 17 November were separate sitting days for that purpose.